

Examination Number \_\_\_\_\_

UNIVERSITY OF MISSOURI -- SCHOOL OF LAW

Professor Carl H. Esbeck

Fall Semester 2012

Civil Procedure I, 5010L -- Section 1

Directions to Part I -- Essay  
(1 hour and 20 minutes)

Place your examination number in the upper right-hand corner of this examination. When finished, return these essay examination questions and submit your essay answers.

Answer only the questions asked. Do not raise or answer questions not asked.

Arrange your answers including subparts in sequential order. That is, put your answer to Question 1 first, then your answer to Question 2, and etc. If you want to skip over a question and come back to it later, leave a page or two blank and begin the next question.

You are encouraged to use your laptop to complete Part I.

If you do not use your laptop, write your answer in the bluebook provided. Use a pen with blue or black ink. Write on only one side of each page. Do not write in the left-hand margin. Do not tear pages out of the bluebook.

You may bring with you into the examination room your casebook, TWEN downloads, 2012 federal rules supplement, and your own classroom notes (not borrowed notes).

You may also bring a course outline provided it is entirely your own work product. Copying from the outline of others or paraphrasing the work of another is not permitted. Your outline is subject to being collected at the end of the examination. This would be done only to ensure that the outline you use is entirely your own work product. It is an Honor Code violation to have any other materials with you during the examination.

\* \* \* Part I begins on the Next Page \* \* \*

**PART I -- ESSAY (1 hour and 20 minutes)**

**Question One (20 minutes):** Paul is a resident of Wilmington, Delaware. Donna is a resident of St. Louis, Missouri. Donna has a patent on genetically produced seed corn that makes the corn crop drought resistant. For one million dollars plus five percent (5%) of sales, Donna licenses the patent to Paul for five years to produce the corn seed and sell it to farmers in the United States. Three years into the licensure agreement a dispute arises. Paul claims that he is to pay only 5% of sales after expenses. Donna claims that she is to receive 5% of gross sales.

Paul sues Donna in a state trial court in St. Louis, Missouri, requesting a declaratory judgment that Donna is violating the license agreement by demanding too much money.

**Subpart (A):** Donna timely files a motion to dismiss for lack of subject matter jurisdiction, referencing 28 U.S.C. § 1338(a). Paul opposes the motion arguing that the dispute is not about patent infringement. Rather, Paul claims that this is a breach of contract action over which the state court has jurisdiction. How should the court rule on Donna's motion to dismiss? Explain.

**Subpart (B):** Assume that the state court denies the motion to dismiss addressed in Subpart (A). [Do not be concerned any longer with the correctness of that ruling.] Donna now timely files an Answer and Counterclaim. In her Answer, Donna denies that she is to be paid only 5% of sales after expenses. Donna's Counterclaim alleges that Paul is infringing her patent in that Paul is adapting the genetic technology to soybean seeds. She requests an injunction against Paul's continued work on soybeans.

One week later, Donna timely removes the entire lawsuit (both Complaint and Counterclaim) to the federal district court for Eastern Missouri per 28 U.S.C. §§ 1441, 1446. Three days later, Paul timely moves per 28 U.S.C. § 1447(c) to remand the entire lawsuit back to state court. Paul argues that there is no federal subject matter jurisdiction. Donna argues to the contrary.

How should the federal court rule on Paul's motion to remand the Complaint and Counterclaim? Explain.

**Question Two (5 minutes):** Is the rule of *Ashcroft v. Iqbal* (2009), substantive or procedural for *Erie* purposes? Explain.

**Question Three (10 minutes):** Suppose the case of *Zielinski v. Philadelphia Piers, Inc.*, casebook p. 433, arose today. Could the plaintiff get around the statute of limitations problem by moving to amend his pleading? Do you need to know any additional facts? Explain.

**Question Four (45 minutes):** Patrick buys a residential lot in a new housing development in Kansas City, Missouri, on which to build his dream house. Patrick contracts with Grande Home Builders, Inc., to build his house for \$500,000. Grande engages several subcontractors, including Firm Foundations, Ltd. After the house is fully constructed, Grande discovers that the

concrete foundation poured by Firm is severely cracked in several locations. The defective foundation renders the house uninhabitable because of water leakage and mold. Grande estimates the cost of repairing the foundation to be \$200,000. Meanwhile, Firm has gone out of business and is being liquidated. Firm's value after paying debts is only \$30,000, which would limit the amount in controversy in the event of a legal claim against it.

Grande has a liability insurance policy in the amount of one million dollars issued by Liberty Insurance Company, a large multinational corporation. The policy covers the legal liability of Grande incurred as a result of its work on residential housing.

Patrick is a citizen of Kansas City, Missouri. Grande is incorporated in Delaware with its principal place of business in Overland Park, Kansas. Firm Foundations is incorporated in Nebraska with its principal place of business in Omaha, Nebraska. Liberty Insurance is incorporated in Delaware with its principal place of business in St. Louis, Missouri.

Patrick has paid Grande \$450,000 under the contract. Patrick refuses to pay the balance of \$50,000 until Grande repairs the house's foundation. Grande refuses. Patrick then sues Grande in federal district court in Western Missouri alleging breach of contract and requesting specific performance or, in the alternative, damages of \$200,000.

**Subpart (A):** Patrick also sues Firm Foundations, in this same lawsuit, for negligent workmanship. Is this permitted? Explain.

Assume the claim in Subpart (A) is permitted by the court. [Do not be concerned any longer with the correctness of that ruling.]

**Subpart (B):** Grande would like to sue Patrick, in this same lawsuit, for the remaining \$50,000 due under the contract. Is this permitted? Explain.

**Subpart (C):** Grande would like to sue Firm Foundations, in this same lawsuit, for indemnification on Patrick's claim against Grande and on a breach of contract action for \$10,000 stemming from an unrelated construction job. Is this permitted? Explain.

Assume that Grande now sues Liberty Insurance Co., in this same lawsuit, for a declaration that Grande's liability is covered under the insurance policy issued by Liberty. Assume this is an indemnity claim permitted by Missouri law. Liberty denies liability.

**Subpart (D):** Liberty Insurance believes that Patrick and Grande have colluded to commit fraud in that the foundation is not badly cracked. Accordingly, Liberty wants to sue, in this same lawsuit, both Patrick and Grande for fraud. Is this permitted? Explain.

\* \* \* END OF PART I \* \* \*

**Turn in both these examination Questions and your Answers. After a 10 minute break, all students will begin Part II together.**