

**Final Examination
Conflicts of Law**

Professor Hurn

Fall 2007

Directions: This examination is for 3 hours, entirely open book. You may use any written or printed materials you have, but you may not consult any other person about your answers. Answer all questions in one or more bluebooks. Please do not fill your answers with quotations from cases or the Restatement or extracts from your outlines—answer the questions asked. If something appears missing or mistaken, plainly state a corrective assumption and proceed with your answer.

The suggested time allocations are noted for each section. They only add up to two and three quarters hours so there is an extra 15 minutes if you need it.

Unless otherwise stated in the question assume:

- All relevant occurrences are within the United States.
- All US states have long-arm statutes reaching to the full extent permitted under the US Constitution.
- The only potentially relevant treaties are the convention on Reciprocal Enforcement of Arbitral Awards and the Hague Convention on process, which all relevant nations have signed.
- There are no choice of law or forum clauses or arbitration agreements.

Short Answers

(up to 30 minutes— 4+ minutes average for each question)

Each of the following questions calls for a yes-or-no answer, followed by a reason for that answer. I expect the reasons to be very short—a rule of law in a phrase or sentence or two. I will penalize unnecessarily long or irrelevant explanations, so take the time to think about your answer.

1. Plaintiff sued Defendant in State A. Defendant appeared and successfully moved to dismiss for lack of personal jurisdiction. Before the relevant statute of limitations expired Plaintiff brought an action on the same cause of action in State B, the state of Defendant's incorporation. Defendant has moved to dismiss on the grounds of res judicata or direct estoppel. Should the motion be granted? Why or why not?
2. Plaintiff (buyer) sued Defendant (seller) on a consumer contract in State A (where Plaintiff lived and Defendant solicited his business). There was a written contract— on a form Defendant used in all states. The contract included a comprehensive arbitration clause. State A's Consumer Protection Act makes such

clauses void. Defendant has moved for dismissal or stay pending arbitration. Should the motion be granted? Why or why not?

3. The Owners Association (a non-profit corporation) of a large vacation timeshare development in State X brought a class suit in that state against its members, the 5,400 owners of the weekly interests. The Association sought a declaration that unit fees were personal debts of the owners and individual money judgments for unpaid fees. The class was certified according to local rules and a notice was sent to the last known address of all owners informing them that they had a right to appear individually, but would, in any case be bound by the judgment under the law of State X. About twenty owners went together to hire a lawyer and mounted a defense. The Plaintiff won. Individual judgments were entered against all owners in arrears at the time of judgment. A collections firm in State Y sued one of the owners, a resident of Y who inherited her interest before the suit. She (like others) assumed the fees were only a lien against her week and she intended to abandon the rather tacky timeshare. She swears she never received notice of the suit. The Association can't prove otherwise. The collections firm has moved for summary judgment on the basis of res judicata. Should the motion be granted? Why or why not?
4. Plaintiff sued a German pharmaceutical company in a U.S. state court recovering both compensatory damages and an injunction to cease using Plaintiff's misappropriated trade secrets. Jurisdiction was not in dispute. In an action in Germany to secure enforcement, will the German court be likely to enforce the injunction? Why or why not?
5. Same facts as above, but the second jurisdiction is a second U.S. state rather than Germany. This form of injunction would not have been permitted in the second state in this sort of action. Will the second state court enforce the injunction portion? Why or why not?
6. Four years ago Plaintiff was injured at home in State A, which has a three-year statute of limitations on such actions. The Defendant is subject to general jurisdiction in State B, which has a five-year statute of limitation, a borrowing statute, and perfectly traditional law in regard to limitations. Defendant has moved to dismiss on the statute of limitations. Will the motion be granted? Why or why not?
7. Same facts as in question six (State A has a 3 year statute and State B— the forum— has 5 years) except that State B treats the statute of limitations as substantive. Will the motion to dismiss be granted under the circumstances? Why or why not?

Brief Drafting Exercise (up to 15 minutes)

Assume you are drafting a commercial contract between two parties. Please write out in your bluebook an arbitration clause which will have the broadest possible scope.

Essay (up to 2 hours)

Heidi Savage operates a small storefront law office in Portsmouth, NH in which she does a general practice with considerable public interest involvement. She carried malpractice insurance with the Empire State Quibbler's Insurance Co. (ESQ) which is based in New York but licensed to do business in all New England states. She advertised occasionally in the Portsmouth and Kittery, Maine (just across the state line) newspapers, clearly identifying herself as a NH attorney.

She was consulted some time ago by representatives of a large, mixed group of people from both states about forming an organization to work for improved solid waste disposal by various towns on both sides of the state line. She was herself interested, agreeing to work pro bono and to join the Board of Directors of the new non-profit corporation. After a bit of casual research Heidi concluded that incorporation in Maine would be best and suggested they get a Maine lawyer. The group didn't want to do that, and Heidi reluctantly drafted the necessary documents which were filed in Augusta by individual members. Heidi joined the Board. Meetings were held alternately in NH and ME. Things went along well for a while.

Unfortunately Heidi didn't realize how different Maine non-profit law was. Soon the organization was under investigation by the Vermont Attorney General for failure to file various reports, failure to conform to Maine Charitable Solicitation laws, etc. While nothing criminal is alleged, the organization is going through a lot of expense and bad publicity, and a majority of the members are talking of suing Heidi. Furthermore, the Maine Bar is investigating Attorney Savage for unauthorized practice of law. Heidi notified her malpractice carrier. After some preliminary investigation, ESQ replied that their duty to defend and indemnify was limited by the law of all relevant states to "errors and omissions occurring during and in the course of *covered professional activity*" (which was true, so far as it went). They denied coverage as she was insured only for practice as a NH lawyer.

For the following five questions, assume:

New York is

- (1) a governmental interests jurisdiction and
- (2) permits lawyers officed in one state to give opinions and draft documents concerning matters outside their state of licensure so long as they neither appear in the courts nor file the documents themselves.

Maine is

- (1) a Second Restatement jurisdiction and
- (2) considers drafting organizational documents for Maine Corporations and any associated advice to be the practice of law, subject to professional liability for any negligence, whether compensated or not and whether in the capacity of a member or director or not.

New Hampshire is

- (1) largely a Second Restatement jurisdiction with Leflar precedent, especially for Torts,
- (2) permits lawyers officed in one state to give opinions and draft documents concerning matters outside their state of licensure so long as they neither appear in the courts nor file the documents themselves, and
- (3) gives volunteer directors and agents of nonprofit corporations immunity from any type of negligence claim by the corporation or its members.

A. (up to 15 minutes)

Suppose the proper Maine body for punishing unauthorized practice of law summons Ms. Savage and, with no appearance by her, applies Maine law and levies a substantial fine. Is the fine enforceable in New Hampshire?

B. (up to 15 minutes)

Same facts as in A above, but Ms. Savage entered an appearance and lost after a hearing on the merits. What possible effects will the decision have on any subsequent litigation between ESQ and Attorney Savage?

C. (up to 40 minutes)

Suppose Ms. Savage brings a Declaratory Judgment Action in NH Superior Court against the Corporation and all its members to determine her immunity from suit under the New Hampshire rule. What obstacles and arguments is she likely to meet and what responses are available to her.

D. (up to 20 minutes)

Suppose Ms. Savage brings a Declaratory Judgment Action in NH Superior Court against ESQ to determine whether it has a duty to defend and indemnify. What obstacles and arguments is she likely to meet and what responses are available to her.

E. (up to 20 minutes)

Suppose instead, ESQ brings a Declaratory Judgment Action in Maine Superior Court against Ms. Savage to determine whether it has a duty to defend and indemnify. What obstacles and arguments is ESQ likely to meet and what responses are available to it.

END of EXAMINATION