

**Final Examination
CIVIL PROCEDURE
Professor Cohen
Spring 2005**

INSTRUCTIONS:

1. You have **three (3) hours** for the exam.
2. This is a **closed** book exam.
3. There are 2 sections: the first section is an essay of 2 pages, and the second section is 16 pages of multiple-choice questions.
4. The essays will be worth 40% of the grade, and the multiple choice 60%.
5. You must begin with the essay section of the exam, and remove that section only from your packet. You have up to 75 minutes to complete the essay section. When you have completed this section, please return that section of the exam, including both question and your answer and your notes to the envelope and remove the multiple choice section. Once you have placed the essay section in the envelope, you may not go back to it. You may move on to the multiple choice section before the 75 minutes is up.
6. Correct multiple choice answers are to be marked in the correct space in pencil on the ANSWER SHEET (and NOT with a check or a circle). Both the QUESTION and ANSWER SHEETS are to be given back to the proctor with your exam number on them.
7. Put your correct class section at the top of this page and your answer book.
8. Please write clearly.
9. Succinctness, organization and clarity will count significantly toward the grade as to the essay.
10. Write on every other page to permit instructor comments. Typists please leave wide margins.
11. Good Luck!

Part I: Essay Question

In September of 2001, in the State of Anticipation, a corporation in the oil wholesale industry by the name of Eastern Standard Supply Organization (ESSO) decided to run a

contest in 2001 and every year thereafter, for its retailers and their employees which would have a first prize of one million dollars, and ninety-nine “consolation prizes of \$100,000 each. ESSO had found that, with the rising price of oil it was receiving more and more bad publicity because of what was considered profiteering and harm to the consumer. As well, its retailers were receiving similar bad publicity for exactly the same reasons. ESSO wanted to get its retailers into a “feel good” mode, and it thought the contest would help. ESSO, incorporated in Anticipation, asked each of the retailers, and their employees, to submit a slogan phrase for the corporation, and submit it by midnight on December 1, 2001. On December 15, 2001, ESSO would announce the top 100 finalists, and ESSO would then have a corporation party on December 31, 2001 to which all the finalists would be invited. Then, at the New Years party, it would announce the winner.

The contest went along as scheduled, but at the New Year’s party, ESSO announced that there had been a mistake as to the consolation prizes in that two extra zeros had been put in the announcements, and therefore each of the ninety nine would get \$1,000. Also, ESSO announced the winner, who received the million dollars having submitted the slogan “Oil is Good.” It turned out, after a good deal of investigation by the losers, that the winner, whose name was Thomasina DeLay, was the wife of one of the home office’s vice presidents.

There was a considerable amount of unhappiness amongst the various retailers around the country as a result of the incident. One of them, Paula Plainsberg, a dealer in California, contacted a lawyer, and then invited all the interested retailers amongst the one hundred, to a meeting on March 20, 2002. Three of them showed up. At the meeting it was decided that a law suit would be brought in federal court in California, claiming fraud, seeking to enjoin ESSO from having such contests, and also seeking compensatory and punitive damages.

Both counsel, and Paula were aware that there was a one year statute of limitations as to the suit, but they also knew litigation would be very costly. After considerable efforts to raise the funds to support the suit, the necessary funding was arranged by December 15, 2002, the papers were prepared, and the suit was commenced by filing the complaint on December 30, 2002, with Paula as plaintiff, seeking: 1. to commence the action as a class action, and 2. seeking a jury trial. Unfortunately, in the rush to file, a secretary typed the caption as Plainsberg, on behalf of all others similarly situated, versus ESSON CORP. In fact, there was another corporation whose name was ESSON CORP., and it too was in the oil business. Thus, when the papers went to the process server, the process server, quite naturally, made service on ESSON CORP., service being effected on ESSON on January 30, 2002. The papers went to ESSON’s lawyer, who, after reading them and contacting her home office, determined that there was no basis to the suit since ESSON had never run any contests at all. Nevertheless, ESSON responded by specifically denying all facts, and as well denying that there was a right to jury, that this was a class action, and claiming that the statute of limitations had run. Thereafter, on February 20, 2002, a party was given in Saudi Arabia by OPEC officials for important people in the oil industry. The presidents of both ESSO and ESSON Corp were there, and happened to

chat with each other, at which time, when it was discovered that ESSO had run the contest, the president of ESSON told the other person that a suit had been brought against it as to the contest. Nothing further was done by either of them, and it wasn't until a deposition of ESSON's president held on June 11, 2002 that the plaintiff discovered the error. Upon that discovery, plaintiff sought to amend its complaint, drop ESSON, and change to ESSO, which amendment was granted by the court.

Thereafter, ESSO responded by specifically denying all facts, and as well denying that there was a right to jury, that this was a class action, and claiming that the statute of limitations had run. The trial court denied all of defendants' points, certified the action as a class action, determined that no notice was necessary, and the case went to trial with judgment for plaintiff, who prevailed on appeal. The result was that plaintiff won both damages for the class, and a permanent injunction in 2004.

Thereafter, in 2005, one of the retailers who was one of the 100 finalists, but who decided not to attend the meeting as to the law suit, decided to bring its own law suit in federal court, claiming that the issue of the "fraud" was "res judicata". Suit was brought on a theory of securities fraud, which had a statute of limitations of 5 years, and the defendant responded by claiming that the first court was wrong on the three issues decided therein, and further that res judicata applied to this suit. Further, defendant moved for dismissal based on each of the defenses.

You are a clerk for the Court in the second case. The judge wants a memo as to certain issues. The judge has indicated that each of the issues is of equal importance, and that she wants you to get right to the point, tell her the law, apply it to the issue, and reach a conclusion as succinctly as possible since her caseload is overwhelming. Assume the federal rules apply and discuss, in order:

1. the first case ruling as to the statute of limitations
2. the first case ruling regarding the class;
3. the first case ruling regarding trial by jury
4. the second case ruling regarding res judicata

END OF ESSAY QUESTION