

CALIFORNIA

BAR

EXAM

Intensive Testing Day #1
THREE ANSWERS

TITLE: PAUL - DANCO – OWEN
SUBJECT: CIVIL PROCEDURE
FILE: CIVP94F.ANS
CORRECTED: 4-11-97

QUESTION ONE

I. PAUL'S REQUEST FOR A JURY TRIAL

Paul sued Danco in federal court. Apparently subject matter jurisdiction was based on diversity and a claim for more than \$50,000. Paul made a timely request for a jury trial, but it was denied.

A. Right to jury trial on legal claims

The Seventh Amendment provides that in suits at common law, the right to trial by jury shall be preserved. FRCP 38(a) provides that trial by jury as provided in the Seventh Amendment shall be preserved. FRCP 38(b) explains when the demand for jury trial must be made (within 10 days of the pleading on the issue to be tried by jury).

Here, according to the facts, the demand for a jury trial was timely. Moreover, a tort claim for damages to real property is a suit which was well known to the common law. Therefore, pursuant to FRCP 38(a), Paul had a right to a trial by jury on the issue of damages to Blackacre.

B. Legal claims must be tried before equitable claims

Paul also seeks an injunction against Danco. A petition for an injunction is clearly a suit traditionally heard in a court of equity, not law. When the legal and equitable claims have common facts which are in dispute, the legal claim must be heard first so that these facts will be determined by the jury, followed by a trial of the equity claim, by a judge. At the hearing on the equity claim, collateral estoppel will apply to the fact(s) determined by the jury. *Beacon Theaters*. Requiring that the jury trial on the facts be conducted first advances the public policy of favoring jury determination of facts.

If the equitable issues were first tried by judge, before the trial of the legal issues, one of the parties will probably be collaterally estopped to deny some fact which was determined by the judge, and to the extent this occurs, one party will be denied a right to have this fact determined by a jury, in violation of the Seventh Amendment.

C. Federal Rules of Civil Procedure must be used in federal court

There is not a significant *Eire* problem. *Hanna* provides that the Supremacy clause applies to the Federal Rules of Civil Procedure, because they are federal statutes. Thus, if there is a federal rule on point, it must be applied.

Here, there is a federal rule on the right to a jury trial. The federal rule must be used. It is not a question of whether or not the federal rule is procedural or substantive. It is a question of the Supremacy clause. If there is a federal rule on point, it must be applied. If the federal court wanted to avoid using a federal rule, it would do so by narrowly interpreting the federal rules so that the federal rule did not cover the issue. By doing so, the court can then adopt the state rule if it wishes to do so.

Paul's request for a jury trial should not have been denied on the legal issue of damages to Blackacre. The court was incorrect in denying Paul's request for a jury trial.

II. DANCO MOTION FOR SUMMARY JUDGMENT AGAINST Owen

In response to Paul's suit against Danco for damages to Blackacre, Danco denied that Blackacre was damaged, and claimed that Paul was not the owner. The court concluded that Paul could not recover damages because he had no interest in Blackacre, and because Blackacre was not damaged.

Later, Owen, the true owner of Blackacre, sued Danco in federal court, claiming damage to Blackacre from the same conduct involved in Paul's suit. Danco moved for summary judgment against Owen. The motion was denied.

The court was correct. Danco was not entitled to summary judgment based on either collateral estoppel or res judicata.

Summary judgment will be granted where there are no triable issues of fact, and the moving party is entitled to judgment as a matter of law. Danco will claim that the court has already decided that Blackacre was not damaged; that Owen is collaterally estopped to deny this; and that if Danco was not negligent it is entitled to judgment as a matter of law.

A. Collateral Estoppel

Collateral estoppel prevents a party from relitigating an issue which he or she has already lost at a previous trial. It applies where (1) the party against whom the doctrine is applied was a party to the prior litigation, (2) the issue was identical to an issue in a present suit, (3) the issue was litigated, (4) the decision was essential to outcome of the prior case, (5) the decision is now final and on the merits.

Collateral estoppel is not applicable against Owen for several reasons:

1. The decision that Blackacre was not damaged was *not essential to the outcome of the Paul v. Danco* suit. Since the court decided that Paul had no interest in Blackacre, Paul could not recover for damages to Blackacre. The decision that Blackacre was not damaged was not necessary to the outcome of the case. Thus, collateral estoppel does not apply against Owen.

2. *Owen was not a party to the prior litigation.* He was not notified of the litigation. Paul will not be bound by litigation in which he did not even have an opportunity to participate.

B. Res Judicata

Res judicata prevents a party from suing more than once for the same claim. Under the federal rules, all claims and counterclaims between two parties arising from the same transaction or occurrence must be brought in one suit. A claim cannot be split into several suits. The claim is said to be already litigated, or Res Judicata.

Here, Res Judicata will not apply against Owen because Owen was not a party to the suit between Paul and Danco. Danco is not entitled to summary judgment.

III. DANCO'S MOTION FOR SUMMARY JUDGMENT AGAINST PAUL

Danco motion for summary judgment against Paul is based on Danco claim that Paul should have included his claim for damages to Whiteacre in the same suit in which Danco sued for damages to Blackacre. Danco will claim that both damages arose, if at all, out of the same transaction or occurrence. Paul himself claims that both properties were damaged by the same conduct of Danco.

Paul will claim that each parcel of land damaged by Danco can sue separately since the damages to each parcel is separate. But this interpretation of the rule does not advance the public policy of the rule. The public policy is that all claims of the plaintiff and defendant arising from a single transaction should be brought in one lawsuit. It promotes judicial efficiency and splitting a cause of action is more likely to produce piecemeal and unfair results. A plaintiff does not have a separate claim for each horse, cow, car, etc which was damaged. Likewise, plaintiff Paul has only one claim against Danco. Res Judicata applies to Paul's second claim even though it is for a different parcel of land owned by Paul.

The court probably erred in denying Danco motion for summary judgment against Paul.

WORD COUNT: 1175

TITLE: CANCO - PEA – AGENCY
SUBJECT: CONSTITUTIONAL LAW
FILE: CONL88F.OUT

QUESTION TWO

TEACHING NOTE:

This answer is in outline form to better highlight the issues presented. END

I. CANCO CONTENDS THE STATUTE VIOLATES THE COMMERCE CLAUSE

A. The Commerce Clause delegates to Congress plenary power to regulate interstate commerce (ISC).

B. ISC is any activity which has an appreciable economic effect on more than one state. (Affectation Doctrine).

C. Pursuant to the Supremacy Clause, federal regulation of ISC prevails over state regulation.

D. But under the Cooley doctrine, states may regulate local activities of ISC, even though such regulation has some impact on the national economy, so long as the state law does not discriminate against ISC, and is not void because of preemption. The Court applies a balancing test which weighs the federal interest in the free flow of ISC against the state interest in the health, safety, welfare and morals of its citizens.

E. This statute does not discriminate against ISC and the area has not been preempted by federal law.

F. The Court will find that a state statute is void because it violates the Commerce Clause if the benefits received by the state under the statute are insufficient to justify the impairment of ISC caused by operation of the statute.

G. Here, operation of the statute will severely impair ISC.

1. Canco can no longer ship its food products to State Y. (You should explain why this is so - because State Y prohibits drug testing).

2. ISC is further impaired, applying the "aggregate" theory of Filbert, because no other food packaging companies in State Y will be able to ship to State X.

3. Additionally, food packers in many other states will not ship to State X because many will find the drug testing program too onerous and will not comply with it.

4. The "aggregate" impact on ISC is substantial. As a consequence, the State X statute will be void unless justified by a sufficiently important state interest.

H. In analyzing the state interest, the Court considers:

1. The importance of the state interest. Health and safety are viewed as more important than mere economic interest.

2. The likelihood that the state will achieve its purpose by the operation of the state statute.

3. And, the alternatives available to the state.

I. Here:

1. The importance of the state interest is unclear because the state does not identify the interest which the state statute allegedly serves.

a. The state may contend that the statute protects the health and safety of the public which consumes the food. But there is no evidence in the facts given that the drug testing program will make the food supply safer.

b. The state may claim that the statute protects the state interest in the welfare and morals of its citizens, by reducing the use of illegal drugs. This interest will be viewed as important.

2. The likelihood that the state will achieve its purpose seems slight. The operation of the statute will surely reduce the use of illegal drugs to some extent in the food processing industry. But there is no evidence that this industry is a significant source of a drug problem. As a consequence the impact of the drug testing program on the use of illegal drugs seems slight at best.

a. A program, such as this one, which has minimal impact on the use of illegal drugs does not justify the substantial impairment on ISC.

3. The state has alternatives which do not burden ISC to the extent shown above.

a. To protect against unsafe food, the state can simply inspect better. There is no protection of the food chain which results from this law which cannot be achieved by inspection.

J. Thus, since the state statute has a substantial negative impact on the free flow of ISC which is not justified by benefits to the state, the Court would find the statute is void for violation of the so-called "Dormant" Commerce Clause.

II. CANCO AND PEA CONTEND THAT THE STATUTE DENIES EQUAL PROTECTION OF THE LAWS AS IT IS SERIOUSLY "UNDER-INCLUSIVE" IN SCOPE.

A. The Fourteenth Amendment provides that no state shall deprive those subject to its jurisdiction equal protection of the laws.

B. The court has interpreted this to mean that those who are similarly situated with respect to the purpose of a state law must be treated equally.

1. Those who are not similarly situated may be treated differently, but the difference in treatment is scrutinized against one of three standards: rational basis, substantial state

interest, or necessary to a compelling state interest.

C. The Equal Protection Clause is rarely found to be violated because a statute is under-inclusive.

1. A statute is under-inclusive if it burdens those who are the cause of the evil which the state seeks to prevent, while others who are also the source of the evil are not burdened.

2. Such statutes are rarely found to violate equal protection because the state has the right to solve its problems one step at a time.

3. It has been suggested in dictum that a stricter standard of review should be used (rather than rational basis) where a politically powerless group is subject to serious under-inclusive statutes, because the political arm of the government is not held accountable. But this view has not been adopted by a majority of the court.

D. PEA will contend that this statute is seriously under-inclusive because it selects the food packing employees as a group to be burdened by drug testing, whereas the remainder of the population is as much a source of the evil as food packers.

1. But food packers are probably not a politically powerless group. They are large in numbers, represented by a union, and can vote, unless they are primarily aliens.

2. This group is not so politically powerless as to require judicial intervention to protect it from seriously under-inclusive statutes.

3. This contention of PEA will probably fail.

E. Canco will contend that the statute is seriously under-inclusive because the food packing industry is burdened with this drug program, while other industries are as much a source of illegal drug use as the food packing industry.

1. But again, the food packing industry is not insular and politically powerless and the state can solve its problems one step at a time.

2. This contention of Canco will fail. The statute does not deny equal protection for this reason.

F. This claim by Canco will also fail because Equal Protection applies only to those "subject to the jurisdiction" of the state. Canco is not subject to the jurisdiction of State X. But Canco did not make the claim.

G. The statute may violate equal protection for a different reason. This is because involuntary drug testing may violate a right of privacy, discussed in part IV below, and since the right of privacy is fundamental, strict scrutiny should be applied to statutes which impair this right. But this alleged violation of equal protection is not one of the contentions of Canco or PEA.

III. PEA CONTENDS THAT THE STATUTE ABRIDGES THE PRIVILEGE OF ITS MEMBERS AGAINST POSSIBLE SELF-INCRIMINATION.

A. The Fifth Amendment provides that no person shall be compelled to testify against

himself, and this protection is applied to the states through the Due Process Clause of the Fourteenth Amendment.

B. The Court has interpreted this clause to prohibit compelled testimony, but does not prohibit the use of evidence obtained from or about an individual which is not testimonial. For example, blood tests, photographs, fingerprints, hair samples, and skin scrapings have all been found to not violate the Fifth Amendment because they are not testimonial.

C. Urine tests, assuming these would be used, do not seem to be conceptually different. They are not testimonial and their use would not violate the Fifth Amendment.

IV. PEA CONTENDS THAT THE STATUTE INFRINGES THE EMPLOYEES' RIGHT TO PRIVACY PROTECTED BY THE U.S. CONSTITUTION.

A. The right of privacy is a right protected under Substantive Due Process. It is a fundamental right, and the government may not impair this right unless it is necessary to a compelling government interest, and there is no less burdensome alternative.

1. There are two lines of reasoning which explain this right as a part of substantive due process:

a. One is that it is a violation of substantive due process for the government to act beyond the authority given to it. The framers of the constitution did not intend to give the government the power to pry into the personal family life of citizens, and therefore when the government does so it violates substantive due process, unless it is necessary to a compelling government interest, and there is no less burdensome alternative.

b. Another is that due process means fairness. Fairness requires that if the government invades a right which is very important to an individual, the government must have a very important reason for doing so. Otherwise it is basically unfair, and a violation of due process.

B. The only rights which the Court has recognized as within this right of privacy have been rights closely connected with family matters: sex, procreation, abortion, child rearing, right to marry, etc. The court has even excluded the right to engage in homosexual activity, because it is, according to the Court, not traditional family.

C. Here, PEA argues, in effect, that the right of privacy should protect a person against involuntary drug testing. It is unlikely that the present Court will adopt this position. The proposed extension of the right of privacy does not closely relate to the protection of traditional family values. Protection of homosexuality seems closer to protecting traditional family values, particularly in a homosexual marriage, than protection against drug testing.

D. PEA should argue that even if drug testing does not violate the right of privacy, it is invasive enough that the state must have a compelling reason to justify such an invasion of personality or personal autonomy. Here, the state has shown no such compelling reason and the statute should be found to violate substantive due process.

E. The statute probably violates the 4th Amendment, by searching without probable cause. But this claim was not made.

Word Count: 1683

TITLE: TOM AT HAPPY HOME
SUBJECT: WILLS & TRUSTS
FILE: WILLS06J.ANS

QUESTION THREE

I. NAN'S RIGHTS IN TOM'S ESTATE

Nan has a right to \$100,000 from Tom's estate based on the 2003 will. The 2004 attempt to make a new will failed.

A. Execution of the 2003 Will

The creation of a will, under California law, requires intent, capacity, and formalities.

1. Intent

Tom intended to create a will. This is shown by several acts:

- a. Tom asked Lilly to "help him execute his typewritten will"
- b. Tom directed Lilly to date "my will"
- c. Tom requested that Lilly and the other attendant sign as witnesses

2. Capacity

Testamentary capacity requires that the testator be 18 years or older, and of sufficiently sound mind to understand what a will does, to know the natural beneficiaries of his/her bounty (close relatives), to understand in general terms what property he/she owns and to understand all of the above in relation to each other. Capacity does not refer to Tom's physical capacity, such as his severe tremors; just his mental capacity.

Tom apparently understood all of the above when he executed the 2003 will. He made a substantial gift of \$100,000 to a relative, Nan. He gave \$900,000 to the Happy Home Convalescent Hospital. This is somewhat unusual, but Tom gave his reason that "Happy Home does such important work for the aged who are disabled." Moreover, he put this money in trust, which shows careful thought about seeing that the money was used wisely. The selection of his "personal attendant" as trustee may raise a doubt about his clear thinking unless his personal attendant was particularly knowledgeable about hospital matters.

Tom's mental capacity to make a will cannot be seriously challenged.

Formalities

The formalities required for the execution of a will are:

- a. Two witnesses, present at the same time, who
- b. Know the document is the testator's will
- c. Witness the testator sign or acknowledge his signature, and
- d. Sign as witnesses.

The testator's signature can be written by another at the testator's direction and in testator's presence.

Here, Lilly and the other attendant were both present at the same time when Lilly signed Tom's name and dated the will in the presence of Tom and at Tom's direction. Both witnesses knew the document was Tom's will because Tom asked Lilly to sign and date "my will." The witnesses "then signed their names as witnesses." The Probate Code does not prevent Lilly from signing for Tom, and also being a witness to the will. The document should also identify Lilly as the person who signed for Tom, although the code itself, at P.C.6110, does not require this..

Thus, the 2003 will was validly executed.

Lilly is both a witness and takes under the will as a trustee. She will not be treated as an interested beneficiary because she takes only as a fiduciary, i.e., as trustee.

B. Execution of the 2004 Will

The 2004 document is not a will because of defects in the execution.

First, the two attendants who signed as witnesses were not present at the same time when Tom signed the 2004 document. The first attendant left the room before the second attendant arrived.

Second, each witness must know he/she is witnessing a will. Here, Tom explained the nature of the document to the first witness, but not to the second.

Third, the 2004 will was not dated. A will does not have to be dated. However, if a will revokes prior wills, it creates a problem if the will is not dated.

The 2004 document is not a will. As a consequence, it did not effectively revoke the 2003 will because express revocation of a will can only be done by a testamentary document.

The 2003 will remains in effect. Therefore Nan has a right to \$100,000.

II. CY PRES DOCTRINE

This doctrine provides that where a charity is the beneficiary of a trust, and the charity can no longer carry out its purpose, a new charity or a new but related purpose may be substituted if the court determines that doing so more nearly carries out the intent of the settler than a resulting trust, which would return the corpus to the testator's heirs.

This is a common law doctrine. It has been adopted by the California courts.

Here, Tom's intent can be inferred from the language of the 2003 will. It reads:

"And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly."

The focus of the language is on the "important work for the aged and disabled," not on which beneficiary, Happy Home or Sunnyside, is to carry out the work.

The defective 2004 will cannot be probated as a will. However, it can be used to help determine Tom's

intent. In that document Tom's language is "I give my entire estate to Happy Home in trust for the continued care of the disabled elderly," Again, this language focuses on the care for the disabled elderly, not on Happy Home.

It seems the PRIMARY PURPOSE of the gift was to advance a purpose, not a particular convalescent hospital.

The court should grant Sunnyside's request under the Cy Pres doctrine.

Word count: 877