

**L6101, Section 2
Civil Procedure
Professor Michael Dorf
Fall 2006**

Final Examination

Time Allotted for Exam: 24 hours

Type of Exam: Take-home exam

Additional exam-specific instructions:

This examination consists of one developing factual scenario and four questions (one of which has two parts). You must answer all parts of all questions. Your exam answers should be double-spaced and may not exceed 2,500 words in total length. Questions 1, 2 and 4 are each worth 20%, while question 3 is worth 40%. You should apportion your answers accordingly. That means that your answers to each of questions 1, 2 and 4 should not exceed approximately 500 words, and your answer to question 3 should not exceed approximately 1,000 words. However, the only enforced limit is for the total number of words for the entire exam. You must provide a word count at the end of the exam. Answers that exceed the word limit will be severely penalized. Answers that understate the word count will be severely penalized and potentially subject to disciplinary proceedings. Include headings and footnotes (if any) in your word count (although footnotes are discouraged).

Your answers must be entirely your own work. You may not in any way consult with any person. Subject to this restriction, you may use any materials you like. Research is permitted, but it is no substitute for analysis. All you really need to write excellent answers are your casebook and supplemental assigned readings, your Rules book, your class notes, any outline you may have prepared, and your wits. Quality and depth of analysis, rather than regurgitation, will be rewarded. I am not interested in your ability to cut and paste material from your outline or elsewhere into your answers. References to cases, statutes and rules need not be in any special format.

Be sure that your answers respond to the questions. Do not re-state the problem at length in your answer. Mention the facts where relevant to your analysis. If your resolution of a threshold question means that it is not necessary to answer some other important question or questions, say so, but if the answer to the threshold question is at all debatable, also say how the other question or questions should be resolved. If you are asked to draw a conclusion, do so, but do not fail to consider counter-arguments. If your answer depends upon essential information not set forth in the question, state what that information is, and how it affects your answer.

For purposes of this exam, Kent is a Midwestern state of the United States. Appeals from the federal district courts for Kent go to the (fictional) Twelfth Circuit Court of Appeals. Naturally, the Twelfth Circuit follows all applicable precedents of the U.S. Supreme Court as to federal law, but treats decisions of other circuits as persuasive precedent only. Good luck.

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The following facts pertain to all questions.

YourOtherLife (“YOL”) is an online virtual environment that combines elements of massively multiplayer computer fantasy games such as Everquest with online social networks such as MySpace and Friendster. Subscribers pay either a \$35 annual fee or a \$100 one-time lifetime membership fee to the owner of YOL, the Shminden Corporation, a publicly traded company that is incorporated in Delaware and has its principal U.S. place of business in California. Shminden has 645 full-time employees and independent contractors, mostly software engineers, but also marketing, customer service and other personnel. 225 of Shminden’s employees and contractors work at its Los Altos, California campus, with the balance scattered throughout the United States and the world. The only product Shminden makes is YOL. Shminden was founded as a closely held corporation in March 2002 by Cal Tech sophomore Gary Shminden, and went public in February 2004. As of December 1, 2006, Shminden had 1.8 million subscribers and revenues for the prior fiscal year (September to September) of \$73 million. (In addition to charging subscriptions, Shminden also receives money for advertising within YOL.) It turned its first profit (\$ 8 million) in fiscal year 2005, and based largely on its explosive growth, it has a market capitalization of \$2.3 billion.

Subscribers to YOL (“YOLers”) create fictional representatives of themselves (called “avatars”) to interact with other YOLers in social settings and to do battle in hunting parties against the monsters that inhabit the “wild spaces” of YOL. As YOLers become more experienced in battle, they accumulate ever-greater powers, enabling them to battle ever-more-powerful monsters. Should a YOLer’s avatar die in battle, the subscriber need not pay any additional fees to have his or her avatar “reincarnated,” but must start over in accumulating powers. YOL charges a fee to change avatars. According to one industry analyst, YOL’s success can be attributed to “its satisfaction of a primal urge that modern life does not address. You go out and hunt, and then you come back to the virtual campfire to tell stories to the other members of your tribe.”

YOL runs either through a browser or as a stand-alone program on any computer that is connected to the internet. When a new user initially signs up as a subscriber, he or she must click the “I Agree” button to a long string of text that includes the following:

...

3. Social interactions between avatars of different subscribers must be civil. Subscribers who persistently use profanity or inappropriate sexual language, or who otherwise fail to respect the rights of other subscribers to an enjoyable experience of YOL are subject to termination in the sole discretion of the Shminden Corporation.

...

18. The law of California shall govern any and all disputes arising out of or relating to this agreement.

...

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25. As a YOL customer you have a right to complete satisfaction. Should any aspect of this contract fail to provide you with complete satisfaction, you may cancel your annual subscription at any time for a pro-rated refund based on your renewal date, or you may cancel a lifetime subscription at any time for a refund of 50% of your lifetime subscription fee. These refunds shall be deemed liquidated damages and are the exclusive remedy for any alleged breach of contract. Notwithstanding any other provision of law, no consequential damages may be awarded for any injury allegedly arising out of this contract.

....

Peter Padilla and Paula Padilla are siblings domiciled in Kent. They both became lifetime subscribers to YOL in May 2004. The Padilla siblings had an initially satisfactory experience with YOL, but in August 2004, their avatars, called Barneydude and Barneygal respectively, and bearing a more-than-coincidental resemblance to the incredibly annoying children's character "Barney," were repeatedly attacked and killed by an avatar called MonsterKiller666. The first time this happened was when Barneydude, Barneygal and MonsterKiller666 were part of the same hunting party, attempting to kill a Great Roe.* During the battle, arrows from the crossbow of MonsterKiller666 "accidentally" killed Barneydude and Barneygal. The Padillas then reincarnated Barneydude and Barneygal. On their very next hunt, these avatars met with the same fate, once again from supposedly friendly fire by MonsterKiller666. After the Padillas reincarnated Barneydude and Barneygal yet again, they decided to join a different hunting party but they found, to their dismay, that as soon as they joined a hunting party, MonsterKiller666 joined it as well. En route to a dragon's lair, MonsterKiller666 "slipped," and nudged both Barneydude and Barneygal into a pit of fire.

On their fourth hunt together, Peter Padilla (as Barneydude) had the following YOL online chat with MonsterKiller666:

Barneydude: why u kil my avtr and my sistrs avtr?

MonsterKiller666: Barney is evil. Kill kill kill!

Barneydude: u make YOL no fun 4 us.

MonsterKiller666: Boo hoo.

Barneydude: So u stop?

* A Great Roe has the head of a lion and the body of a lion, but not the same lion.

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MonsterKiller666: y shd i?

Barneydude: Im not Barney! Im Pete Padilla from Kent City, Kent. Barneygal is my twin sistr, Paula Padilla, also from Kent City.

MonsterKiller666: what your soc sec numbrs?

Barneydude: Pleeez just stop!

MonsterKiller666: BARNEY MUST DIE DIE DIE. KILL KILL KILL. LOL. ☹

MonsterKiller666 then turned off the chat function. During the hunt that ensued, Monsterkiller666 threw a heat-seeking poison-tipped boomerang at a three-headed devil, but it “missed,” killing Barneydude and Barneygal.

The next day, August 11, 2004, Peter Padilla contacted the helpdesk at YOL and, after explaining the foregoing, had the following exchange:

YOL Help: If you and your sister pick new avatars with different names, MonsterKiller won’t be able to track you. I can even waive the \$10 avatar-changing fee.

Peter Padilla: But I like my avatar. Isn’t MonsterKiller666 violating the respect rule? Why don’t you kick him off YOL?

YOL Help: I can write up a ticket to start an investigation about that, but it could take up to a month. In the meantime, you’re better off just switching avatars. Just follow this link and you can do it for free http://www.yourotherlife.com/avatar-change/coupon_395DHX.php I’ll email a link to your sister also.

Peter Padilla: ok thanx

That day, the Padilla twins followed the links and created new avatars, which they called Donny04 and Marie04, respectively, and whose appearances were based on the insipid sibling pop duo Donny and Marie. The Padillas used Donny04 and Marie04 for three weeks, but Peter found the experience very unsatisfying, and Paula became increasingly concerned about Peter’s mental health. As she would later testify at her deposition, “Peter was decompensating. It’s like he REALLY WAS Barneydude. He was having a break with reality. I was very scared.”

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On September 2, 2004, Peter Padilla once again contacted the YOL Helpdesk. After the YOL customer service representative was brought up to speed on the case, the following exchange ensued:

Peter Padilla: Has MonsterKiller666 been kicked off YOL yet?

YOL Help: No, the file says we're not going to do that.

Peter Padilla: But it's a clear violation.

YOL Help: You're probably right, but we can't prove that he isn't killing your avatar by accident. You're better off just playing as Donny and Marie.

Peter Padilla: NOOOOOOOOO. I HAVE TO BE BARNEYDUDE. PAULA HAS TO BE BARNEYGAL.

YOL Help: Is there perhaps some other avatar that you and your sister might want to try? I can waive the changing fee again.

Peter Padilla: NO WAY. THIS IS SO UNFAIR.

YOL Help: Would you like to receive the \$50 cancellation payments?

Peter Padilla: NO! I WANT TO BE BARNEYDUDE. IT'S MY OTHER LIFE. MY OTHER MOTHER F'IN LIFE.

YOL Help: Hold on. Let me get a supervisor.

YOL Help: Mr. Padilla, my supervisor says that in light of the special circumstances, we can give each of you a full refund, not just the \$50.

Peter Padilla: WHAT PART OF "I WANT TO BE BARNEYDUDE" DIDN'T YOU UNDERSTAND?

YOL Help: I understand your concern, but we have to take account of the interests of all our customers. Would you like the refund?

Peter Padilla: NO. I WANT YOU TO HONOR YOUR CONTRACT. GOOD DAY SIR.

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YOL Help: Well I've offered you either free new avatars or a full refund. I'll send you urls for both of those options via email. I'm not sure what else I can do.

Peter Padilla: I SAID GOOD DAY!

[connection terminated]

The Padillas continued to use the Donny04 and Marie04 avatars for another month, but during that period Peter Padilla's mental health deteriorated still further. On October 3, 2004, following the advice of his psychotherapist, Peter Padilla used his free coupon to create a new avatar, which he called Barneydude2. Paula used her coupon to create Barneygal2. However, when, later that day, they logged on to YOL as Barneydude2 and Barneygal2, they found that once again, MonsterKiller666 joined their hunting party and killed their avatars (this time by "accidentally" trampling Barneydude2 and Barneygal2 with a team of giant horses). Following this incident, Peter Padilla experienced sleeplessness, anxiety, and depression. He was unable to concentrate at work and as a result, on November 12, 2004, he was fired. (Peter Padilla had been a travel agent.) He was voluntarily committed to the psychiatric ward of Kent Memorial Hospital in December 2004, and was discharged in February 2006. Since then, Peter Padilla has continued to suffer from moderate depression and anxiety, for which he takes medication and receives outpatient therapy on a weekly basis. He has not been able to find work since his discharge. His sister Paula supports him financially. Neither of the Padilla twins has used his or her YOL account since October 3, 2004.

On March 2, 2006, the Padilla siblings filed a lawsuit in federal court in the District of Kent, naming as defendants the Shminden Corporation and "John Doe, aka 'MonsterKiller666.'" The asserted basis for subject matter jurisdiction was diversity and supplemental jurisdiction. The complaint asserted the following claims:

Peter Padilla v. John Doe: one count of intentional infliction of emotional distress with damages amounting to \$1,000,000.

Peter Padilla v. Shminden Corp: one count of intentional or reckless infliction of emotional distress; in the alternative, one count of negligent infliction of emotional distress; one count of breach of contract. Damages of \$1,000,000 were sought.

Paula Padilla v. John Doe: one count of intentional infliction of emotional distress for damages of \$20,000.

The summons and complaint, along with a request for waiver of service of process, were mailed to Shminden headquarters on March 3, 2006, and the waiver was signed and returned by Shminden, through counsel, on March 8, 2006. On March 13, 2006, Shminden filed a pre-answer motion seeking to dismiss for failure to state a claim.

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Shminden argued in the memorandum accompanying the motion that the facts alleged, even if true, did not “rise to the level of outrageous conduct necessary to make out a prima facie case of intentional, reckless or negligent infliction of emotional distress, as required by California law.” As to the breach of contract claim, Shminden argued that the contract limited the Padillas to \$50 each for breach, and that Shminden had more than satisfied its obligation by offering \$100 each, an offer it renewed through a Rule 68 Offer of Judgment for \$100 to each plaintiff.

Federal District Judge Alfred Lambert treated Shminden’s motion to dismiss as requiring factual development, and so declined to rule on it until after discovery was complete. During the course of discovery, the Padillas requested, among other things, “all documents relating to the account and identity of the YOL customer who created and operated the avatar known as MonsterKiller666.” This discovery request was made on June 19, 2006. Shminden sought a protective order on June 21, 2006, arguing that the identity of its customers was protected by its privacy policy.

On July 11, 2006, the Shminden Corporation sent a letter to Estella Hamdan by certified mail, enclosing a copy of the summons and complaint. The letter included the following:

Please be advised that you appear to have been sued (under a fictitious name) as a co-defendant in a lawsuit against the Shminden Corporation. Pursuant to our Privacy Policy, the Shminden Corporation will not disclose your identity to the plaintiff or any other entity absent either your express written consent or a court order. A hearing on our motion to protect your identity is scheduled for July 25. Should you wish to waive the protection of the Privacy Policy, please notify us as soon as possible.

Postal records reveal that Hamdan signed for this letter at her home in Anchorage, Alaska on July 14, 2006. She did not reply to it, however, and on July 25, 2006, the hearing took place as scheduled. Because of illness and the demands of a criminal trial, Judge Lambert did not rule on the motion for a protective order until October 5, 2006. He ruled for the Padillas on the ground that “this customer is a defendant in this lawsuit and so the plaintiffs have a pressing need to know his or her identity.” The next day, October 6, 2006, Shminden disclosed to the Padillas that Estella Hamdan is MonsterKiller666, providing Hamdan’s contact information.

On October 7, 2006, the Padillas sought leave to amend the complaint “to change the naming of “John Doe, aka ‘MonsterKiller666’ to Estella Hamdan.” They simultaneously mailed a request for waiver of service, along with a copy of the summons and amended complaint, to Hamdan in Alaska. Hamdan filed a pre-answer motion objecting to personal jurisdiction and venue. According to an affidavit filed along with

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the pre-answer motion, Hamdan has lived in Alaska her whole life, has never been to Kent, and conducts no business in Kent.

Question 1: Assuming the affidavit is uncontradicted, (a) does the district court have personal jurisdiction over Hamdan? (b) Is venue proper?

The following facts pertain to questions 2 through 4.

Assume that the district court denies the motion to dismiss on personal jurisdiction and venue grounds. Hamdan now files an answer that raises a statute of limitations defense. California and Alaska each have a 2-year statute of limitations for intentional infliction of emotional distress claims, while Kent has a 3-year statute of limitations for such claims. Kent law and federal law both generally look to the principles set forth in the Restatement 2d of Conflicts of Law to resolve choice-of-law questions. Section 187 of the Restatement makes a contractual choice-of-law clause generally enforceable in contract cases, while in tort cases, Section 145 points to the “law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.” Section 6 in turn provides:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

Assume that no applicable federal or Kent statutory directive supplements these principles.

Question 2: Which statute of limitations applies to the Padillas’ claims against Hamdan?

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Question 3 (Double Value): Assume for this question only that California's 2-year statute of limitations applies to the Padillas' claims against Hamdan. Note also that California Code of Civil Procedure § 474 and California case law permit relation back when a defendant is sued under a fictitious name and the correct identity is discovered by the plaintiff after the statute of limitations has run. The Kent Code of Civil Procedure permits relation back in the same circumstances that the Federal Rules of Civil Procedure permit it. Are the Padillas' claims against Hamdan time-barred?

Question 4: Assume that Judge Lambert holds the Padillas' claims against Hamdan are not time-barred. Before the judge rules on Shminden's motion to dismiss, now treated as a motion for summary judgment, Hamdan files a motion to dismiss Paula Padilla's claim against her for lack of subject matter jurisdiction. How should Judge Lambert rule on this motion?

END OF EXAM