

## **CIVIL PROCEDURE**

### **PRACTICE QUESTIONS<sup>1</sup>**

The following hypotheticals are intended to help you review some of the material we covered this semester. They are in the same format as most of the exam questions will be. There may also be some multiple choice questions on the exam. If so, I will send sample multiple choice questions to you before the exam.

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#### **QUESTION 1**

Dave was born and raised in Waco, Texas. After high school there, Dave went to college in New York. During his senior year, he met and married Judy, who was attending the same college. Judy was born and raised in Chicago. Judy and Dave intended to move to Chicago after graduation, and to make their home and raise a family there. (Their families weren't surprised; when leaving home for college, each had said that he/she could never stay in New York forever.) Shortly before graduation, though, Dave was offered a deal that seemed too good to be true. He would market widgets manufactured by Widget Corporation ("Widget"). He would have to remain in New York to do it, and would market the widgets in New York and northern New Jersey. He and Judy decided to stay in New York for a year to make as much money as possible, and then go to Chicago. Judy and Dave rented an apartment in Brooklyn, which is in the Eastern District of New York. Dave's office for his New York work with Widget is in Manhattan, which is in the Southern District of New York. His office for his New Jersey work with Widget in Patterson, which is in the District of New Jersey.

Widget holds the federal patent to manufacture the Widget widget. Under its contract with Dave, the widgets were to be sold at \$120 apiece, of which Dave was to receive a commission of \$20, remitting \$100 to Widget's headquarters in Springfield, Illinois. Widget manufactures the widgets in Buffalo (which is in the Western District of New York), from which the widgets are shipped to twenty states in the east and upper Midwest. Widget is incorporated in Illinois.

After ten months under the deal with Dave, Widget becomes convinced that Dave is keeping much of the money he is supposed to be remitting to it for sales made in Manhattan and Patterson. Widget sues Dave in state court in Buffalo, seeking \$100,000. Dave is properly served under New York law at home in Brooklyn. Because Widget is

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<sup>1</sup> These questions were originally drafted by Prof. Freer and are used with his permission. I have tweaked and added to them to reflect our class.

such a big player in the economy of Buffalo, Dave's lawyer decides that Dave would be better off in federal court. Dave's lawyer files a timely notice of removal in the federal district court, Western District of New York. The notice states that removal is based upon diversity of citizenship and federal question jurisdiction.

(a) You are a law clerk to the federal judge assigned to the case. She asks you whether the court has subject matter jurisdiction. What do you tell her? Explain.

(b) Does Dave have a reasonable argument that the federal court for the Western District of New York lacks either personal jurisdiction or venue over him? Explain.

(c) Regardless of your conclusion in Part A, assume that the court concludes there is federal subject matter jurisdiction. Dave moves to transfer the case to the District of New Jersey. How should the court rule? Explain.

## QUESTION 2

Davis owns and operates an automobile dealership, Davis Motors, in Danbury, Connecticut, where he has lived all his life. The business is not a corporation; Davis runs the business personally. Davis runs advertisements on Danbury television and radio stations, which broadcast to area within a 100-mile radius of Danbury, which includes the greater Poughkeepsie, New York and Deerfield, Massachusetts area. Davis Motors is located adjacent to an interstate highway which links Poughkeepsie and Danbury, and Davis displays large advertising signs visible to traffic going in both directions on the highway.

Davis Motors' business consists of two components. First, it sells new and used automobiles. The new cars are Chevrolets, and the luxurious Elitemobile, which is manufactured in Italy by the Italian engineer Tomase Arturo. Davis is one of only four American distributors of the Elitemobile. Arturo manufactures the Elitemobiles very slowly, essentially installing the engine and components, as well as the wooden dash and leather upholstery by hand. They sell for \$200,000 apiece. Each year, Davis Motors sells \$5,000,000 worth of Chevrolets and \$800,000 worth of Elitemobiles. In addition, Davis Motors sells used cars of all makes, totaling about \$1,020,000 per year. Of all sales, 85 percent are made to Connecticut residents (most of whom live in and around Danbury); 5 percent are made to New York residents; and 10 percent are made to Massachusetts residents.

The second component of Davis Motors' business is mechanic service and sales of repair parts. This service is provided to the general public, and generates gross revenues of \$3,500,000 per year. Of the customers for this service, 75 percent are Connecticut residents, 10 percent are Massachusetts residents, and 15 percent are residents of various other states.

Paula is a citizen of New York, residing in Poughkeepsie. She is an executive for a restaurant supply service which does business in New York, Connecticut, and

Massachusetts. While her home is Poughkeepsie, she spends three weeks per month on the road, visiting customers in the three states. Paula visited Davis Motors on September 5 of this year, and met with Davis. She explained her business and her need for a comfortable car. Davis told her that the Elitemobile would be “just right” for someone of her executive standing. She agreed. She asked Davis whether his company could arrange financing. Such an arrangement was made on the spot, after Paula had filled out a credit application listing her employer, salary, home address, and the nature of her occupation.

Paula drove the new car home to Poughkeepsie that night. Two weeks later, however, she noticed that it idled at a high speed and she smelled gas fumes. Paula drove the car back to Davis Motors and complained. Davis assured Paula that the service department would fix what seemed to be a carburetor problem at no charge. After an hour in the shop, Davis returned the car to Paula, and announced that it was fixed. Paula thanked Davis, told him she was “heading back home to Poughkeepsie” and got in the car. After leaving Davis Motors, though, Paula decided to make a quick trip over to Deerfield to see a customer. On the outskirts of Deerfield, she stopped at a diner for a cup of coffee. While in the diner, she looked out the window, admiring her beautiful car. Suddenly, it burst into flames, and was destroyed totally. Gas apparently leaked from the carburetor onto hot engine parts, causing an explosion.

Because Paula’s lawyer is convinced that Massachusetts juries are more generous than others, she files suit on Paula’s behalf in federal district court for the District of Massachusetts. (The entire state of Massachusetts is one federal district.) Paula is the sole plaintiff. The defendants are Davis and Tomase Arturo. The case sets forth a products liability claim and seeks damages of \$200,000. Davis is served with process by registered mail, as permitted by the Massachusetts long-arm statute. That statute provides for in personam jurisdiction “over any nonresident individual who commits a tortious act within Massachusetts or over any nonresident individual who commits a tortious act outside Massachusetts which causes injury to person or property within Massachusetts, provided that the nonresident either:

- (1) regularly does or solicits business in Massachusetts; or
- (2) expects or should reasonably expect the act to have consequences in Massachusetts and derives substantial revenue from interstate or international commerce.”

In addition, the statute requires that the claim against the nonresident “arise from the nonresident’s activity within Massachusetts.”

Massachusetts also has the traditional statute allowing in personam jurisdiction over one served with process in state, which is the jurisdictional basis Paula asserts for Tomase Arturo. Paula learns that Tomase Arturo is flying from Italy to Boston for an international car show. Paula asks her brother Joe, a 20-year-old college hockey star, to serve process on Arturo when he walks out of the Boston airport. He procures the

process, and drives to Boston with Paula. There, the two wait for Arturo to exit the airport. Paula recognizes Arturo and yells to her brother “that’s they guy -- give him the papers.” Her brother approaches Arturo and holds the papers out toward the bewildered traveler, and then the brother freezes; he neither moves nor speaks. Finally, Paula grabs the papers from her brother’s hand and thrusts them into Arturo’s hands. She yells at Arturo “you’ve been sued for your lousy car, ya bum!” Arturo smiles and waves, since he cannot speak English.

Both Davis and Arturo move to dismiss for lack of personal jurisdiction. In the same motion, Arturo also moves to dismiss for insufficient service of process. How should the court rule? Explain.

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### QUESTION 3

Kentucky Acres is a subdivision in a rural area outside Lexington, Kentucky. It consists of 30 one-acre lots, each of which sold in 1980 for \$100,000. Upscale houses have been built on all but Lot 30. Pamela has record title to Lots 1 and 30. She lives in the house on Lot 1. She is holding Lot 30 for investment. Lot 30 is at the rear of the subdivision, about three miles from Lot 1. Cecil claims to own Lot 30 by adverse possession. Pamela disputes Cecil’s claim. Not far from the subdivision, Coalco has opened a new coal mine. As part of mining operations, Coalco occasionally explodes dynamite to open new areas of coal. After one particularly large blast, Pamela noticed damage to her house on Lot 1 and to the ground itself on both Lots 1 and 30. The damage to the ground is potentially disastrous because it may threaten even further the integrity of the house on Lot 1 and make it impossible to build at all on Lot 30.

Cecil sued Coalco in a proper state court in Kentucky. He alleged that he is the lawful owner of Lot 30 and that Coalco’s negligent blasting decreased the value of the lot by \$180,000. He sued for damages in that amount. The case went to trial; the jury concluded that Coalco was negligent and that the negligence caused damage of \$150,000 to Lot 30. Nonetheless, its verdict was for Coalco, since it also concluded that Cecil failed to show that he owned the land by adverse possession. The court entered judgment for Coalco on the basis of the verdict.

Thereafter, Pamela sued Coalco, seeking damages of \$200,000 for the loss in market value of Lot 30 caused by Coalco’s allegedly negligent blasting. After Coalco answered, Pamela and Coalco each filed motions for summary judgment.

1. Pamela asserted that she was entitled to issue preclusion on the issues that (1) Coalco’s blasting was negligent and caused \$150,000 worth of damage to Lot 30; and (2) that she, not Cecil, was the lawful owner of Lot 30. How should the court rule on Pamela’s motion?
2. Coalco asserted that it was entitled to judgment “under principles of res judicata.” How should the court rule on Coalco’s motion?

3. Assume that the court (correctly or incorrectly) denied both motions, after which Pamela, thoroughly disgusted with the judicial system, refused to litigate further. The court, after issuing an order to show cause (to which Pamela did not respond), dismissed Pamela's case for failure to prosecute. The following week, Pamela filed suit in the same court against Coalco, seeking damages for the harm done to her house and to the ground on Lot 1 by Coalco's allegedly negligent blasting. Should Coalco succeed in an assertion that this case should be dismissed based on claim preclusion?

#### QUESTION 4

Legislators in Massachusetts were concerned about a rise in "strategic lawsuits against public participation," also known as SLAPP suits. SLAPP suits are actions filed to intimidate defendants from commenting on matters of public concern. Plaintiffs who file SLAPP suits hope that the suits will distract the defendants and cause the defendants to stop their public speech.

In response to this concern, the Massachusetts legislature enacted Anti-SLAPP legislation. The statute provides that in any civil litigation arising out of speech on a matter of public concern, the defendant may file an Anti-SLAPP motion. Once this motion is filed, the plaintiff must come forward with affidavits or other admissible evidence to show that it is more probable than not that it will prevail on the merits of the claim. Unless the plaintiff can show that it is more probable than not that it will prevail on the merits, the judge will dismiss the suit. The Anti-SLAPP motion is decided by a judge, not a jury. If the plaintiff's suit survives the Anti-SLAPP motion and the case goes to trial, the case will be heard by a jury if either the plaintiff or the defendant requests a jury. The standard at trial will be the usual civil standard that the plaintiff must prove that its allegations are more probable than not.

Dave is a former employee of Pestco, Inc. A company that manufactures insecticide. Pestco is trying to get a state permit to open a factory in Woburn, Massachusetts. Dave writes several letters to local newspapers asserting that the proposed factory may release harmful chemicals into a neighboring river.

Dave is a citizen of Massachusetts. Pestco is a Delaware Corporation with its principal place of business in New York.

Pestco files suit against Dave in federal court in Massachusetts, asserting state-law claims for defamation and seeking \$2 million in damages. Pestco alleges jurisdiction based on diversity of citizenship.

After Dave files an answer and some discovery takes place, Dave files an Anti-SLAPP motion, asserting that the suit must be dismissed because Pestco cannot show that it is more probable than not that it will prevail on the merits. It is undisputed that if the

suit were in state court, Dave could file an Anti-SLAPP motion and Pestco would have to show that it is more probable than not that it would prevail on the merits.

In response, Pestco argues that an Anti-SLAPP motion cannot be made in federal court. Pestco insists that if Dave wants to move for dismissal, he must make a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and that the appropriate procedures and standards are those applicable under Rule 56.

Write a memo analyzing whether the federal court should apply the Anti-SLAPP statute, thus allowing Dave's motion and dismissing the case if Pestco fails to show that it is more probable than not that it will prevail on the merits.

### QUESTION 5

Joe sued Sam in federal court for personal injuries sustained by Joe when, as a pedestrian, he was struck by Sam's car in the crosswalk of a busy intersection. Joe's complaint alleged that the accident was caused by Sam's negligence in that he failed to keep watch over the road ahead, ran a red light, and hit Joe in the crosswalk. Sam's answer denied that he was at fault and asserted as an affirmative defense that the accident was caused solely by Joe's negligence: the traffic light was red in Joe's direction, Joe had suddenly darted out into the intersection against the light, and that Sam could not avoid hitting him. (Assume that contributory negligence is a complete defense to liability in this state.)

Joe filed a motion for partial summary judgment on the issue of liability. He supported this motion with his own affidavit, which stated that the light was green in his direction and red in Sam's at the time of the accident, and that Sam had run the red light, hitting Joe and injuring him. Sam's opposition to the motion relied on (1) the denial of his own negligence and the allegation of Joe's negligence contained in his answer, and (2) the affidavit of Monica, Sam's girlfriend, who was a passenger in the front seat of his car at the time of the accident. Monica's affidavit stated the light was green in Sam's direction and that Joe had suddenly darted out into the traffic just as Sam's car entered the intersection, so that Sam had no chance to avoid hitting Joe, despite his efforts to do so. With the court's permission, Joe countered Monica's affidavit with one by Natalie, which stated that Monica had told her (over a few beers) that the accident had really been Sam's fault, but that she planned to testify to the contrary "out of loyalty to Sam, to prove my love for him."

1. How should the court have ruled on Joe's motion. Explain.
2. Assume that the court (correctly or incorrectly) denied Joe's motion for summary judgment. At trial, Joe, Monica and Natalie testified to the same matters set forth in their affidavits. There was no other evidence on the issue of liability. At the close of all the evidence, Joe moved under Rule 50(a) for judgment as a matter of law on that issue, asserting that the only issue left for the jury was the amount of damages. The court

denied this motion and submitted the entire case to the jury, which returned a verdict for Sam. Per Rule 50(b), Joe moved his motion for judgment as a matter of law. In the alternative, Joe moved for a new trial.

How should the court have ruled on Joe's motions? Explain.

### QUESTION 6

Alice, Betty and Cecilia, each driving her own car, collide. Each is injured and each car is damaged. Alice is a citizen of Nevada; Betty is a citizen of Colorado; Cecilia is a citizen of Nevada. The collision occurred in Montana. On June 1, Alice sued Betty in federal court in Nevada, purporting to invoke diversity of citizenship jurisdiction. She seeks \$80,000 for personal injuries and \$20,000 for damages to her car. (note: Because there is one plaintiff and one defendant, the claims are aggregated, and the amount in controversy is \$100,000.) Process was served the same day. On June 18, Betty filed and served her answer, in which she denied material allegations of negligence. On June 24, Betty filed a third-party complaint for contribution against Cecilia. Process was served the same day.

1. Is the impleader claim procedurally and jurisdictionally proper?
2. Regardless of your conclusion to 1, Cecilia files a timely answer to the third-party complaint, in which she denies the material allegations. Cecilia also contends that the accident was the fault of either Betty or Alice and that one or both of them are liable to her for her personal injuries and property damage.
  - (a) Can Cecilia assert claims for damages against either Alice or Betty or both of them in the pending case?
  - (b) If she preferred, could she assert claims for damages against either or both of them in a separate case she might file in state court?
3. Notwithstanding your conclusion to 2, assume that Cecilia is allowed to file claims against both Betty and Alice in the pending case. The case goes to trial. Assume that Cecilia made a timely demand for trial by jury. Alice and Betty object to trial by jury. Should the court allow trial by jury? Why?

4. Notwithstanding your conclusion, assume that the case goes to trial before a jury. In its special verdict, the jury finds that all three drivers were negligent. Because the applicable law bars a negligent claimant from recovery, the court enters judgment for Betty on the underlying complaint, for Cecilia on the claim by Betty against Cecilia, and for Alice and Betty on the claims against them by Cecilia. Thereafter, Betty and Alice file a new case in state court against Cecilia, in which Alice seeks \$100,000 for personal injuries and \$80,000 for property damage from the accident and in which Betty seeks \$75,000 property damage from the accident. The state court has personal jurisdiction and has adopted the Federal Rules of Civil Procedure as its rules of procedure. Cecilia moves to dismiss “for res judicata, collateral estoppel, and rule preclusion.” How should the court rule?

### QUESTION 7

Tom Arthur (a citizen of Georgia, residing in Atlanta), returning to the family home, takes a bus trip from Atlanta to Ferrum, Virginia<sup>2</sup>. In the bus station in Ferrum<sup>3</sup>, he finds a packet wrapped in brown paper. The packet has no indication of its owner. Unwrapping it, Tom finds that it seems to contain a set of master audio tapes for unreleased songs by Kenny G. Tom has long considered Kenny G a musical genius, on par with J.S. Bach and Van Morrison.<sup>4</sup> He wants to keep the tapes, and claims them under a finder’s statute. His story is reported in the newspapers, and piques the interest of Sally, a musical agent (and citizen of New York) who claims that she owns the tapes and that they were stolen from her last year. In addition, Kenny G (a citizen of New York) himself learns of the discovery. He tells Entertainment Tonight that while he has no recollection of such tapes, they might be from early studio days before he became a star. If the tapes are really of him, Kenny G says he would be the rightful owner. Kenny G, by the way, says he has never heard of Sally. Under relevant substantive law, if Tom satisfies the finder’s statute, he would have superior claim to Sally and Kenny G.

1. Sally sues Tom in federal district court in Atlanta, invoking diversity of citizenship jurisdiction, claiming that the tapes are worth \$500,000. Tom files and serves his answer. Then, in a timely fashion, Tom has a set of interrogatories served on Sally and a different set served on Kenny G. In these, Tom seeks to learn about the respective claims to ownership. Sally and Kenny G refuse to respond to the interrogatories. After the time for response expires, Tom moves for sanctions against both Sally and Kenny G. What sanctions are available against each?

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<sup>2</sup> This is a real place. I grew up there. Population then: 300-500, depending on how far from the post office you kept counting.

<sup>3</sup> There is no bus station there; the town’s too little. The closest “bus station” is a gas station in the county seat, 10 miles away.

<sup>4</sup> Yeah, right. I’m not the one writing hypos about him. I might add that there’s a LOT of difference between J.S. Bach and Van Morrison; I’d never mention them in the same breath.



2. Assume that the case proceeds. The day before trial is commence, Tom moves to dismiss for failure to join an indispensable party. Sally argues that the motion is without merit. How should the court rule on Tom's motion?
3. Ignore 1 and 2 above. Fearing a claim for the tapes by Kenny G in New York, Tom would like to get all claims of ownership over the tapes resolved in Sally's case in the federal district court in Atlanta, Tom's home. Can Tom accomplish this? How? By the way, Kenny G has never been in the state of Georgia and its jurisdictional statues (both long arm and attachment) do not apply to claims for personal property.
4. Ignore 1-3 above. Kenny G is worried about the outcome of Sally's case against Tom in Atlanta. He's learned that Sally, if she obtains the tapes, plans to donate them to the Iranian national museum in Tehran. Kenny's not real eager to sue the museum in Iran. What he'd really like to do is participate in Sally's case against Tom in Atlanta, and obtain a judgment, binding on both Tom and Sally, that he is the rightful owner of the tapes. Can he do this? How?