Simulated MBE Civil Procedure
Practice Questions
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Note to Bar Exam Candidates

Beginning in February 2015, the Multistate Bar Examination will include Civil Procedure questions. Until the National Conference of Bar Examiners releases practice exams with actual Civil Procedure questions that we can use to update our offerings, we will provide free access to these 50 practice questions for purchasers of select Wolters Kluwer bar exam materials. The questions simulate MBE style and provide in-depth explanations for each choice, explaining not only why the correct choice is correct, but also why the others are wrong.

You can also find 10 sample questions provided by the National Conference of Bar Examiners at http://www.ncbex.org/assets/media_files/MBE/MBE-Civil-Procedure-SampleTest-Questions.pdf.

Best of luck on the MBE and on the rest of the bar exam.
Primary Topics of Questions

Jurisdiction Over the Parties or Their Property - 2, 3, 5, 8, 20, 21
Providing Notice and an Opportunity to Be Heard - 9, 12, 30, 33
Jurisdiction Over the Subject Matter of the Action—the Court’s Competency - 4, 10, 11, 14, 16, 17, 18, 20
Venue, Transfer, and Forum Non Conveniens - 13, 22, 43
Ascertaining the Applicable Law - 1
Pleading - 24, 25, 32, 34, 35, 36
Joinder of Claims and Parties and Class Actions - 15, 21, 27, 29, 37, 40, 41
Pretrial Devices for Obtaining Information - 19, 23, 25, 28, 31, 38
Adjudication Without Trial or by Special Proceeding - 42, 44, 46
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Appellate Review - 26, 39
The Binding Effect of Prior Decisions: Res Judicata and Collateral Estoppel - 7, 48, 49
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Question 1

Plaintiff, a Texas corporation that manufactures office supplies, purchased wood pulp from Defendant, an Illinois corporation that is headquartered in Indiana. The sales contract requires Defendant to deliver the pulp to Plaintiff's factory in Texas on or before May 1. Defendant delivers the pulp 45 days late, and Plaintiff sues Defendant in federal district court in Illinois, invoking diversity jurisdiction. The complaint alleges breach of contract and seeks damages in excess of $75,000. Defendant moves to dismiss the complaint for failure to state a claim. Defendant argues that the judge is required to apply Illinois law to the case, and that the Illinois Contract Delivery Act (ICDA) provides, "Every supply contract is deemed to permit the vendor to deliver goods up to 60 days after the date specified in the contract." Plaintiff opposes the motion and argues that applying the ICDA to the dispute gives Defendant the unfair advantage of allowing it to benefit from the law of its state of citizenship.

Is the federal district court required to apply the ICDA to the dispute?

(A) No, because a federal court sitting in diversity is required to devise a common law rule of decision to ensure litigant equality and fair administration of the law.

(B) Yes, because Illinois is the state of Defendant’s incorporation, so its law governs the interpretation of any contract to which the company is a party.

(C) Yes, if the highest court of Illinois has held that the ICDA applies to a supply contract of the sort involved in this dispute.

(D) Yes, if an Illinois state court would apply the ICDA to an analogous contract dispute.

Question 2

Plaintiff is a construction company. It is incorporated in Idaho and operates in that state and in Colorado. Defendant is an Internet-based company that is incorporated in Delaware. The complaint alleges that Defendant defrauded Plaintiff in violation of a federal statute called the Internet Commercial Fraud Act (ICFA). Section 1 of the ICFA creates a federal private right of action for anyone defrauded in a commercial transaction conducted over the Internet. Section 2 of the statute authorizes service in an ICFA action “on the defendant wherever the defendant may be found in the United States.” The complaint, filed in district court in Idaho, asserts that an employee in Plaintiff’s Idaho office purchased a computer on line from Defendant; that Defendant knew the computer was defective; and that Defendant shipped the computer to Plaintiff’s Colorado office. The Colorado long-arm statute allows nationwide service of process upon, and personal jurisdiction over, any defendant who “voluntarily and knowingly ships any
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item of tangible personal property into this state.” After Plaintiff files the suit, Plaintiff’s sole
effort to make service on the Defendant is to have the summons and complaint handed to the
CEO of Defendant while the CEO is visiting California to attend a technology conference.
Defendant has never sold a computer to a California resident.

Has Plaintiff established personal jurisdiction over Defendant?

(A) Yes, because the statute and the Federal Rules of Civil Procedure, taken together,
authorize the service that occurred here, and the Idaho federal court’s exercise of
jurisdiction would not offend due process.

(B) Yes, because service in federal-question suits may be made anywhere in the U.S.
where the defendant may be found, and in this case the Defendant could be found
wherever the CEO was at the moment of service.

(C) Yes, because a federal court will exercise personal jurisdiction where service and
personal jurisdiction would be allowed by the long-arm of the state where the
federal court sits, and the Colorado long-arm would apply to these facts.

(D) No, because the Defendant does not have minimum contacts with Idaho, and the
exercise of personal jurisdiction over the Defendant in the Idaho federal courts
would violate the Defendant’s due process rights.

Question 3

Plaintiff, a Connecticut partnership, files suit in federal district court in New York against
Defendant, a New Jersey corporation. The complaint alleges that Defendant has violated a
federal antitrust statute. The antitrust statute allows a private party to bring a civil damage suit
against violators of the statute. The statute also provides that in any such suit, nationwide
service-of-process may be made against, and personal jurisdiction exercised over, any
defendant found within the United States.

If the court is asked by Defendant to decide whether the exercise of in personam jurisdiction
against Defendant satisfies constitutional requirements, the court should do this by deciding
whether:

(A) Defendant has minimum contacts with the state of New York, as required by the Due
Process Clause of the Fifth Amendment to the United States Constitution.

(B) Defendant has minimum contacts with the United States, as required by the Fifth
Amendment to the United States Constitution.
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(C) Defendant has minimum contacts with the state of New York, as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution

(D) Defendant has minimum contacts with the United States, as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Question 4

Plaintiff, a West Virginia citizen, works in Texas for Defendant, a company that distributes farm equipment and is incorporated in New Mexico. Plaintiff was injured at work while loading boxes into a storage facility. He sues Defendant in a state court in West Virginia. The complaint alleges negligent infliction of harm and seeks damages in excess of $75,000. Defendant removes the action to a federal district court in West Virginia and also answers the complaint.

If Plaintiff opposes removal to a federal court in West Virginia, which factor is most relevant to whether the court should remand the action back to state court?

(A) Defendant conducts its day-to-day operations and maintains its inventory in West Virginia.

(B) Defendant’s corporate officers direct, control, and coordinate the company’s activities from an office in Texas.

(C) Plaintiff is a citizen of West Virginia.

(D) Defendant’s answer alleges that Plaintiff was not wearing required safety equipment on the day of his accident and raises an affirmative defense of contributory negligence based on a federal statute, “The Safe Workplace Act,” which provides, “No employer shall be liable under this act if the employee is contributorily negligent for his injury.”

Question 5

Plaintiff, an Indiana corporation, sues Defendant, an individual, in Georgia state court. Defendant is served at his home in Atlanta, Georgia. The suit, based on Texas law, seeks money damages. The suit contends that Defendant breached a contract to convey a piece of Texas real estate to Plaintiff, thereby depriving Plaintiff of the benefit of his bargain. The contract was negotiated in person in Illinois by Plaintiff’s CEO and Defendant, and was signed by Defendant in New York. Defendant timely moves to dismiss the suit for lack of personal jurisdiction. Georgia’s statute governing jurisdiction permits the exercise of jurisdiction to the full extent allowed under the United States Constitution.

Should the court grant defendant’s motion?
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(A) Yes, because the cause of action does not arise out of or relate to defendant’s contacts within Georgia, the forum state.

(B) Yes, because when a claim arises out of breach of a contract to convey real estate, only the state in which the real estate is located has jurisdiction.

(C) No, because the state in which a defendant resides may exercise general jurisdiction regardless of the nature of the cause of action.

(D) No, because the plaintiff and defendant are citizens of different states, permitting the court to exercise diversity jurisdiction over the suit.

Question 6

Plaintiff buys a sweater from Defendant, who runs a mail-order clothing business. After wearing the sweater, Plaintiff develops rashes and later suffers neurological damage. She sues Defendant in federal district court alleging that the sweater was treated with chemicals that caused her injury. Defendant serves Plaintiff with a Request for a Physical Examination, and Plaintiff refuses to comply. Defendant moves to compel discovery.

How should the district court resolve the discovery dispute and why?

(A) The district court should grant the discovery request because a physical examination is relevant to the claims and defenses in the action.

(B) The district court should deny the discovery request because conditioning Plaintiff’s right to bring suit upon her submission to a court-ordered physical examination violates her right to bodily integrity.

(C) The district court should deny the discovery request because Defendant did not move for such discovery and show good cause.

(D) The district court should grant the request and treat Plaintiff’s refusal to appear for an examination as a contempt of court.

Question 7

Plaintiff purchased a used car from Defendant. At the time of the sale, Plaintiff did not know that the car had defective brakes. While driving the car, Plaintiff crashed into a taxi that was going faster than the speed limit. Plaintiff sues Defendant in federal district court in Pennsylvania for personal injury, damage to property, and misrepresentation, and wins on all counts. Plaintiff then sues Taxi Driver in a separate action in federal district court in New York for personal injury and property damage. Taxi Driver raises the affirmative defense of claim
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preclusion, citing the judgment of the Pennsylvania federal court, and moves for summary judgment on that basis.

Which statement provides the best explanation of how the New York federal court should resolve the motion?

(A) The federal court should grant the motion because Plaintiff was required to sue all parties involved in the accident in the Pennsylvania action.

(B) The federal court should grant the motion under the transactional test for claim preclusion.

(C) The court should deny the motion because Taxi Driver was not a party to the Pennsylvania action.

(D) The court should deny the motion because the judgment of the Pennsylvania court is not final until all appeals are concluded.

Question 8

Plaintiff is an individual who lives in California. While on holiday in New York, he buys an antique map from Defendant, an art dealer with a sales office in New York. The map turns out to be a counterfeit, and Plaintiff sues Defendant in federal court in California. The action alleges breach of contract, misrepresentation, and fraud and seeks $1 million in damages. Defendant has never set foot in California but he owns a storage facility in that state valued at $25,000. Plaintiff bases jurisdiction on a California statute that provides: “The courts of this state have authority, consistent with the Due Process Clause of the Fourteenth Amendment, to exercise jurisdiction on a quasi in rem basis.” Plaintiff serves Defendant in the California action by attaching the storage facility. Defendant moves to dismiss the action for lack of personal jurisdiction.

How should the district court resolve the motion?

(A) The court should grant the motion unless Plaintiff first made reasonable efforts to serve a summons on Defendant before attaching the property.

(B) The court should deny the motion because Plaintiff satisfied the clear requirements of the state quasi in rem statute.

(C) The court should grant the motion because a federal statute does not authorize quasi in rem jurisdiction and the lawsuit was filed in federal court.
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(D) The court should grant the motion because the attached assets are not related to Plaintiff's claim against Defendant.

Question 9

Plaintiff lives in New York and bought hiking equipment from Defendant, a company that is incorporated in Alaska. The company does mail-order and Internet sales, and Plaintiff selected his purchase after looking at Defendant's catalogue and talking with a sales agent by telephone. Defendant does 20 percent of its annual sales with customers who live in New York, but it has no employees or agents physically located in that state. The hiking equipment turns out to be defective, and Plaintiff sues Defendant in New York state court. Plaintiff serves Defendant under a New York statute that provides: “Service may be made upon a nonresident company that is registered to do business in this state by plaintiff's hand-delivery of the summons and complaint to the New York Secretary of State at its official address in Albany, New York.”

Defendant does not contest that it is registered to do business in the state. Under what circumstances will service under the state statute be constitutionally sufficient?

(A) Service is constitutionally sufficient upon Plaintiff’s hand-delivery of the summons and complaint to the state official.

(B) Service is constitutionally sufficient if Defendant also receives notice by mail.

(C) Service by any method other than in-hand delivery is per se unconstitutional because defendant's address is known to plaintiff.

(D) Service is constitutionally sufficient if accompanied by notice published in a newspaper distributed in Alaska where Defendant is incorporated.

Question 10

Husband, Wife, and Child, all citizens of New York, ate a can of soup that turned out to be contaminated. Each suffered food poisoning that resulted in permanent neurological damage. Defendant, a food company in California, processed and distributed the can of soup. Husband, Wife, and Child sue Defendant in a federal district court in New York. Defendant moves to dismiss the complaint alleging lack of subject-matter jurisdiction. He concedes that the parties are citizens of diverse states, but argues that the complaint does not meet the amount-in-controversy test.

How should the court resolve the motion?
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(A) The court should grant the motion if the complaint alleges that each family member suffered $40,000 in personal damages.

(B) The court should deny the motion if the complaint alleges that each family member suffered $40,000 in personal damages.

(C) The court should grant the motion if the complaint alleges that Husband suffered $40,000 in personal damages and $40,000 for loss of consortium; Wife suffered $40,000 in personal damages and $40,000 for loss of consortium; and Child suffered $40,000 in personal damages and $40,000 for emotional distress.

(D) The court should grant the motion if the complaint alleges that each family member suffered $40,000 in personal damages, but permit amendment of the complaint to allege supplemental jurisdiction over all claims.

Question 11

Plaintiff is a residential home owner in Texas. He orders a garden hose for $100 by telephone from a catalogue distributed by Defendant, a garden-supply company that is incorporated and headquartered in Texas. The garden hose turns out to have a defective nozzle, and while Plaintiff is watering his garden a flood develops and his garden is ruined. Plaintiff is angry and posts disparaging comments about the company on an on-line discussion board. Plaintiff also sues Defendant in Texas state court to recover the purchase price plus damages, for a total of $5,000. Defendant files a counterclaim under a federal statute entitled the “Federal Trade Libel Law” (the FTL), which provides: “Any false or disparaging statement made about a business that conducts on-line or sales by mail shall be per se actionable for $10,000 for each day in which said statement is accessible on-line or in print by the public.” Defendant’s counterclaim alleges that Plaintiff’s disparaging statement appeared on-line for ten days and the company seeks $100,000 in damages. Defendant then removes the action to federal court, and Plaintiff seeks to remand.

Should the federal district court remand the action?

(A) The district court should not remand the action because it has power to hear Defendant’s counterclaim.

(B) The district court should not remand the action because it may exercise diversity jurisdiction over the entire case.

(C) The district court should remand the action.
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(D) The district court should remand Plaintiff’s state-law claim but retain jurisdiction over Defendant’s federal counterclaim.

Question 12

Plaintiff, an environmental activist, is concerned that lakeshore development will destroy vegetation that fish need to spawn. She brings a lawsuit based on a federal statute, the “Fish Protection Act,” that provides, “Recognizing that overdeveloped shorelines are harmful to fish, homeowners are encouraged to maintain a 30-foot strip of natural vegetation between beach and lawn.” The lawsuit seeks to halt shoreline development that does not maintain the recommended 30-foot buffer, and seeks preliminary injunctive relief. Defendant, the owner of undeveloped shoreline property, opposes the motion.

Which statement best expresses how the federal court should decide the motion?

(A) The court should grant the motion, because damages will never be able to repair the injury that the environment will suffer if the fish cannot spawn due to Defendant’s illegal development of his property.

(B) The court should grant the motion, because otherwise Defendant will develop the land without the necessary buffer and the public interest will be hurt.

(C) The court should deny the motion, because money damages will be sufficient to remedy a violation of the Fish Protection Act.

(D) The court should deny the motion because Plaintiff is unlikely to succeed on the merits.

Question 13

Purchaser is an individual who lives in New Jersey. He enters into a contract with Seller, a company that is incorporated in Delaware. The contract has a provision that states: “Goods purchased under this contract shall be delivered from Seller’s warehouse in New Jersey to Purchaser’s factory in Texas.” Seller fails to deliver the goods on time, and Purchaser sues in federal court on the basis of diversity jurisdiction. The suit is filed in the Southern District of New Jersey, the same district in which Seller’s warehouse is located. After discovery, Purchaser moves for a change of venue to the Western District of Texas, which is where Purchaser’s factory is located. Litigating in the Western District of Texas would be more convenient for both parties.
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How should the district court resolve the motion?

(A) Grant the motion, assuming that Seller could initially have been served with process in the Western District of Texas.

(B) Deny the motion, because Purchaser, having chosen the action’s original venue, cannot request to transfer the action.

(C) Deny the motion, because changes of venue, even in the federal system, may not cross state boundaries when the court is exercising diversity jurisdiction.

(D) Dismiss the action, because the initial venue choice was in the wrong district.

**Question 14**

Plaintiff is president of Company, which is incorporated and headquartered in Delaware. Company hires Partnership, a two-partner company, to redesign its computer system. The system is hacked, and Company sues Partnership in federal district court, seeking damages in excess of $75,000. Partnership’s members are citizens of Texas and New York, and Partnership does not challenge subject-matter jurisdiction. During discovery, and after the time to make threshold objections has passed, Partnership learns that Plaintiff has reincorporated in Texas during the course of the lawsuit.

Defendant moves to dismiss the action for lack of subject-matter jurisdiction. Assuming proper briefing, how should the court resolve the motion?

(A) The court should deny the motion as untimely.

(B) The court should dismiss the action and sanction Plaintiff for having withheld information pertinent to jurisdiction that goes to the integrity of the action.

(C) The court should deny the motion.

(D) The court should remand the matter to state court.

**Question 15**

Plaintiff is an insurance company that is incorporated in Texas and has its corporate headquarters in Delaware. It provides insurance coverage for automobile accidents. Plaintiff receives claims from seven different individuals who were involved in different car accidents with Driver. The face value of Driver’s insurance policy with Plaintiff is $1 million. Four of the
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claimants are citizens of New Jersey; two of the beneficiaries are citizens of New York; and the seventh is a citizen of Delaware. Plaintiff files a statutory interpleader action in federal district court to determine which of the claimants, if any, should receive payment under Driver’s insurance policy and how much each should receive.

Should the court dismiss the action for lack of subject-matter jurisdiction?

(A) Yes, because complete diversity does not exist between Plaintiff and the claimants.

(B) No, because two or more claimants are citizens of different states and the amount in controversy exceeds the statutory amount.

(C) Yes, because although diversity-of-citizenship is present, the amount in controversy is less than $5 million, the statutory amount for high-stakes, multi-state disputes.

(D) Yes, because the competing claims do not have a common origin or arise out of the same transaction.

Question 16

Husband and Wife, American citizens, were married in Tennessee and then moved, together with their two children, to West Virginia. After a number of years, Husband relocated to Virginia where he works, insures his car, and votes. He has decided to end his marriage and has sued Wife for divorce in federal district court in West Virginia, seeking joint custody of the children and a court order that each parent will contribute $25,000 per year for the next ten years to support the children.

Wife moves to dismiss the action for lack of subject-matter jurisdiction. How should the court resolve the motion?

(A) The court should deny the motion because diversity jurisdiction is present.

(B) The court should remand the action to a state court in West Virginia.

(C) The court should sua sponte transfer the action to a family court in West Virginia.

(D) The court should decline to exercise jurisdiction.
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Question 17

Plaintiff is a New York corporation that rents stage equipment for use in theatrical performances. Defendant is a small theater group that entered into a rental agreement with Plaintiff. Defendant is incorporated in New York and its main theater is in that state. Defendant’s latest show is a box office failure. Defendant is unable to pay Plaintiff the annual rental fee, and Plaintiff wants to compel payment. Plaintiff assigns its interest in the rental agreement for one dollar to Lawyer, an individual who lives and works in New Jersey. By separate agreement, Lawyer agrees to pay Plaintiff 95 percent of all recovery received “as a bonus.” Under New York law, an assignment is legal “when made for valid consideration, even if only for a peppercorn.” Lawyer then sues Defendant in federal district court in New York alleging breach of the rental agreement.

Defendant moves to dismiss the action for lack of diversity jurisdiction. Assuming the amount-in-controversy is satisfied, how should the district court resolve the motion?

(A) The court should grant the motion because diversity jurisdiction is not available to a Defendant who is a citizen of the state in which the federal court sits.

(B) The court should deny the motion, because Plaintiff and Lawyer are citizens of different states and the assignment is legal under state law.

(C) The court should grant the motion, because diversity of citizenship is not present despite the assignment of Plaintiff’s claim to Lawyer.

(D) The court should deny the motion, because Defendant and Lawyer are citizens of different states and Lawyer will vigorously litigate the interests of Plaintiff, who is the real party in interest.

Question 18

Plaintiff is a widow whose husband was killed in an accident while working for Defendant, a construction company. Plaintiff is a citizen of Missouri. Defendant is incorporated and has its principal place of business in Idaho. Plaintiff brings a diversity action against Defendant in federal district court in Missouri alleging negligence and seeking $100,000 in damages. Defendant files a third-party claim against Distributor, seeking $100,000 in damages and alleging that if Defendant is liable to Plaintiff, Distributor is liable to Defendant for having leased the equipment that allegedly caused the accident. Distributor is incorporated in Missouri. Plaintiff seeks to amend her complaint to assert a tort claim against Distributor and to seek a $100,000 in damages from that party.
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Defendant and Distributor each move to dismiss the claims against them based on subject-matter jurisdiction objections. Defendant moves to dismiss Plaintiff’s negligence claim; Distributor moves to dismiss Defendant’s third-party claim; and Distributor also moves to dismiss Plaintiff’s tort claim. How should the court resolve the motions?

(A) Grant all motions.

(B) Grant Distributor’s motion against Defendant and Plaintiff.

(C) Grant Distributor’s motion against Plaintiff.

(D) Grant Defendant’s motion.

Question 19

Plaintiff works for Defendant, an individual who supervises a rare books store owned by Company. Plaintiff holds a master’s degree in foreign languages and accepted the position because she assumed it would lead to professional advancement. Believing she has been passed over for a promotion because of her race and gender, Plaintiff sues both Defendant and Company in federal district court alleging discrimination. The complaint survives a motion to dismiss. Plaintiff wants to depose Defendant to ask questions about the company’s promotion practices. Defendant does not live in the judicial district in which the court hearing the case is located.

Can Plaintiff depose the witness?

(A) Yes, but will need leave of court to do so.

(B) Yes, but must first procure issuance of a subpoena.

(C) Yes, but must provide reasonable written notice of the time and place of the deposition.

(D) Yes, but the deposition can take place only in the district in which the defendant resides.

Question 20

Plaintiff was born in New York and has lived there her entire life. For the last twenty years she worked as a data-entry operator for Employer, a New York corporation. Her work evaluations have consistently been excellent. Employer recently announced that it is outsourcing its data-
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entry operations, and that Plaintiff either will be fired or transferred to a lower-paying job. Plaintiff believes that she is being discriminated against because of her age and brings a lawsuit against Employer and its Manager, an individual who also lives and works in New York. The complaint contains two claims. The first claim is against Employer and arises under the federal Age Bias Act (ABA Act), which provides, “No employer shall discriminate on the basis of age.” The second claim is against Manager and alleges breach of her employment contract which provides, “No employee shall be terminated other than for inability to perform the job.”

Plaintiff filed her lawsuit in a federal district court in New York. Manager has moved to dismiss the action for lack of subject-matter jurisdiction. How should the court resolve the motion?

(A) The court should deny the motion because it can exercise federal “arising under” jurisdiction over the ABA claim.

(B) The court should deny the motion because it can exercise federal diversity jurisdiction over Manager.

(C) The court should deny the motion and in its discretion exercise supplemental jurisdiction over the contract claim against Manager.

(D) The court should grant the motion because it cannot exercise supplemental jurisdiction over a pendent party.

Question 21

Plaintiff owns and operates a retail store in Vermont. It licenses software from Defendant, a New York company that specializes in security technology. Despite the software, hackers broke into Plaintiff’s financial system. Plaintiff sued Defendant in a state court in Delaware for breach of contract, choosing that forum because of its unusually long statute of limitations. Plaintiff loses on the merits; the state court holds that Plaintiff was contributorily negligent for its injuries because it did not properly install the software. Plaintiff then filed a second lawsuit against Defendant, largely repeating the breach-of-contract claim that was dismissed in the first lawsuit, but this time filing the lawsuit in a federal district court in Delaware. Defendant answers the complaint raising the affirmative defense of claim preclusion and asserts a counterclaim that the filing of multiple lawsuits has caused Defendant to suffer wrongful injury to reputation, and alleges special damages of lost business in excess of $75,000.

Other than filing the pair of lawsuits, Plaintiff has no contacts with Delaware. It moves to dismiss the counterclaim for lack of personal jurisdiction, arguing that no summons was served with the counterclaim. How should the court decide the motion?
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(A) It should deny the motion because a compulsory counterclaim does not require an independent basis of jurisdiction.

(B) It should grant the motion because a permissive counterclaim requires an independent basis of jurisdiction.

(C) It should grant the motion for lack of service of process.

(D) It should deny the motion because Plaintiff has effectively consented to suit.

Question 22

Plaintiff, a company that manufactures pencils, is organized under the laws of China and has its operating plant and management office in that country. It buys wood pulp from Defendant, a Delaware corporation. The sales contract provides that “the laws of China will govern any dispute that might arise between the parties pertinent to this agreement.” Defendant is late in delivering the wood pulp, and Plaintiff sues Defendant in Delaware federal district court. Plaintiff has no office or agents in the United States, and the contract was negotiated and executed through the Internet.

Defendant moves to dismiss the action under the doctrine of forum non conveniens on the ground that the case should be heard in a court in China. How should the court resolve the motion?

(A) The court should grant the motion because the requirements of 28 U.S.C. § 1404 are met.

(B) The court should deny the motion if a court in China will apply law less favorable to Plaintiff than will the Delaware district court.

(C) The court should grant the motion if it determines that China is an appropriate alternative forum for the lawsuit.

(D) The court has a duty to first establish that it has jurisdiction before deciding the motion to dismiss.

Question 23

Plaintiff heads a company that sells photography equipment. Defendant, the owner of a film school, buys five hundred cameras from Plaintiff. Defendant receives the cameras but refuses to pay, insisting that the goods do not meet industry standards. Plaintiff sues Defendant in federal district court for breach of contract, invoking the court’s diversity jurisdiction. Plaintiff knows from publicly available sources that Defendant has purchased film, studio lighting, and
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camera rigs from other vendors and knows the names of the companies. Through discovery, Plaintiff wants to find out if Defendant also defaulted on those contracts.

Which statement best describes whether Plaintiff may get discovery about these other transactions?

(A) Plaintiff may depose an agent designated by each vendor and ask about its contract with Defendant.

(B) Plaintiff can propound interrogatories to each vendor and inquire about its contract with Defendant.

(C) Plaintiff must show good cause to discover information about these other contracts.

(D) Plaintiff will receive a copy of these other contracts as a part of automatic initial disclosure.

Question 24

Plaintiff owns a luncheonette called the Healthy Home. Defendant runs a company that sells “organic” baked goods. Plaintiff entered into a contract with Defendant for the weekly delivery of “organic” oatmeal cookies. It turns out that the “organic” cookies are really repackaged highly-processed cookies that Defendant buys in bulk from a foreign wholesale company.

Plaintiff sues Defendant in federal court, alleging diversity jurisdiction. The complaint includes a proper jurisdictional statement and adequately makes a demand for judgment. It further alleges: (1) Defendant entered into a contract with Plaintiff to weekly deliver thirty pounds of “organic” oatmeal cookies. (2) Defendant instead fraudulently delivered non-organic cookies. (3) Defendant engaged in fraud.

Defendant moves to dismiss the complaint for failing to state a claim. How should the court resolve the motion?

(A) The court should grant the motion because the complaint fails to allege special matters.

(B) The court should deny the motion because Defendant has not shown that Plaintiff can prove no set of facts in support of the fraud claim.
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(C) The court should deny the motion because Defendant was required to move for judgment on the pleadings.

(D) The court should grant the motion because the complaint improperly joins a contract claim with a tort claim.

Question 25

Company is the manufacturer of off-road recreational vehicles. Driver owns a vehicle manufactured by Company. Driver was injured while driving the vehicle on the highway. Driver claims that the vehicle accelerated when it was supposed to brake, and as a result it rolled into a ditch. A State Trooper was called and arrived at the scene of the accident. Plaintiff has informed Company that he intends to file a federal action, based on diversity jurisdiction, for injuries caused by the car’s alleged product-design defects. Company wants to find out what the State Trooper knows about the accident and whether Driver behaved in any erratic or unusual way, and has filed a verified petition with the federal district court in the district in which the accident occurred to depose the State Trooper.

Does the Company have a right to depose the State Trooper?

(A) No, a party may not take discovery from a nonparty before the commencement of a federal lawsuit.

(B) No, a party may take discovery before a suit is commenced but only if the request is accompanied by a draft complaint against the party from whom discovery is sought.

(C) Yes, a party may take discovery of material that is relevant to claims and defenses.

(D) No, a party may not take discovery before the commencement of a federal lawsuit absent a special need to preserve testimony that is not present on these facts.

Question 26

Defendant, the manufacturer of automobile tires, entered into a long-term sales contract with Plaintiff, a company that distributes used cars. Plaintiff is dissatisfied with the quality of Defendant’s tires and files a diversity action in federal court against Defendant and Defendant's Director. The complaint alleges three claims: breach of warranty, strict liability, and breach of contract. The court grants Plaintiff’s motion for partial summary judgment on the contract claim against both opposing parties in favor of Plaintiff, but orders trial on the two remaining claims. Defendant and Director seek to appeal the grant of partial summary judgment, and
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Plaintiff gives its consent to the motion, hoping that by quickly resolving the issue of liability, the parties can reach a settlement on the amount of damages and avoid a trial.

Does the appeals court have jurisdiction to hear the appeal?

(A) Yes, the appeals court has jurisdiction to hear the appeal because the grant of partial summary judgment is a final judgment.

(B) Yes, the appeals court has jurisdiction to hear the appeal because the grant of partial summary judgment, although an interlocutory order, may be immediately appealed in the discretion of the court.

(C) No, the appeals court does not have jurisdiction to hear the appeal because the grant of partial summary judgment is an interlocutory order.

(D) No, the appeals court does not have jurisdiction to hear the appeal because the parties did not file their consent to the appeal within ten days of the court’s entry of its order.

Question 27

Plaintiff and Partner are co-owners of stock in Defendant’s company. The stock has a face value of $200,000. Plaintiff and Partner are both citizens of New York. Defendant is incorporated in New Jersey where it also has its corporate headquarters. Plaintiff has sued Defendant in federal court, alleging diversity jurisdiction, to compel the company to issue the stock certificate in Plaintiff’s name alone.

Defendant moves to dismiss the action for lack of subject-matter jurisdiction arguing that Partner is a required party who was not joined. What is Plaintiff’s best argument in opposition to the motion?

(A) Plaintiff should argue that nonjoinder of a party is not a ground for dismissing an action for lack of subject-matter jurisdiction.

(B) Plaintiff should argue that the case should not be dismissed because supplemental jurisdiction may be exercised over Partner.

(C) Plaintiff should argue that the case should not be dismissed because diversity jurisdiction may be exercised over Partner.
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(D) Plaintiff should argue that the case should go forward in equity and good conscience.

Question 28

Defendant is a cattle rancher and owns 1000 acres of grazing land in Montana. Plaintiff owns a strawberry farm that is adjacent to Defendant’s land but across the state line. Over the last five years, Defendant’s cattle frequently have wandered onto Plaintiff’s land, destroying portions of Plaintiff’s strawberry patches during the growing season and interfering with Plaintiff’s ability to bring its produce to market. Plaintiff suits Defendant for trespass in federal district court, alleging diversity jurisdiction. During discovery, Defendant demands the right “to survey Plaintiff’s property and to inspect the quality of the strawberries that Plaintiff harvests, upon such time as may be convenient to Plaintiff.”

Plaintiff opposes the request, stating that “Defendant may inspect the land but may not survey the land.” Should the court grant the request?

(A) No, because Defendant has not demonstrated good cause for the request.

(B) No, because Defendant may not inspect the land for the purpose of surveying it.

(C) Yes, because Defendant’s request is relevant.

(D) Yes, because Defendant’s request is relevant and Plaintiff must pay a fair share of the surveyor fee.

Question 29

Plaintiff is an insurance company incorporated in Delaware. It provides insurance coverage to Defendant. Defendant owns an inter-state bus company that is incorporated and headquartered in California. A Driver who works for Defendant crashes into a car on an inter-state highway. More than a dozen individuals, both drivers and passengers, are seriously injured and three people eventually die from their injuries. Defendant is insured for claims up to $1 million for accidents that occur in the course of Driver’s employment. Driver has no personal insurance. Ten of the injured parties sue Defendant and Driver, and their claims, consolidated in a federal district court in California, seek more than $10 million. Plaintiff files a statutory interpleader action in federal court in Delaware.

Under what circumstance must the court dismiss the interpleader action?
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(A) The district court must dismiss if complete diversity does not exist between Plaintiff and all the claimants.

(B) The district court must dismiss if the individual claims, aggregated together, do not exceed $75,000 in value.

(C) The district court must dismiss if Plaintiff fails to deposit the stake into court or refuses to pay a bond.

(D) The district court must dismiss if the claims to be resolved are not identical.

Question 30

Plaintiff and Defendant are friends attending their high school reunion. Plaintiff lives in California; Defendant lives in New York. At the end of the evening they get into a heated argument and Defendant punches Plaintiff in the face. The next day, Plaintiff sues Defendant in federal court on the basis of diversity jurisdiction, alleging assault and intentional infliction of emotional distress and seeking $1 million in damages. Simultaneous with the filing of the complaint, Plaintiff moves ex parte to attach Defendant’s three-bedroom house. Defendant later moves to vacate the attachment as a violation of his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

How is the court likely to decide the motion?

(A) The court will likely deny the motion if the law of the state in which the federal court sits permits prejudgment attachment of real estate.

(B) The court will likely deny the motion because the Due Process Clause does not govern private litigants.

(C) The court will likely grant the motion because it is per se unconstitutional to attach property ex parte without the posting of a bond.

(D) The court will likely grant the motion absent a showing by Plaintiff of exigent circumstances.

Question 31

Plaintiff, an individual who lives and works in California, was visiting New York. He decided to take a taxi to go across town. While driving on Sixth Avenue, Taxi Driver collided with Defendant’s truck. Defendant is an individual who lives and works in New Jersey and is
Civil Procedure Questions

employed by a trucking company that is incorporated and headquartered in New Jersey. Taxi Driver lives and works in New York. Plaintiff was seriously injured and eventually sued Taxi Driver, Defendant, and Defendant’s employer in federal district court on the basis of diversity jurisdiction.

Will Plaintiff be able to discover the existence of the three defendants’ insurance coverage?

(A) No, because the existence and extent of the defendants’ insurance coverage is not relevant to the trial on the merits.

(B) No, because discovery of the insurance coverage could lead to an inflated verdict and would therefore be unfair to the defendants.

(C) Yes, but only the existence of the insurance coverage and not the monetary limits of the policy.

(D) Yes, because the facts of insurance coverage must be disclosed even without a discovery request.

Question 32

Plaintiff owns a company that manufactures edible decorations used by commercial bakers for holiday cakes. Defendant owns a company that distributes food coloring. Plaintiff enters into a two-year contract with Defendant for the purchase of red and blue food coloring, both of which are essential for cakes baked for the Fourth of July. Defendant is late shipping the food coloring, and as a result Plaintiff loses out on a number of important contracts. Three years later, Plaintiff sues Defendant in federal court for breach of contract. After the requisite jurisdictional allegations, including that the court may exercise diversity jurisdiction, the complaint avers: “Defendant entered into a contract with Plaintiff and Defendant failed to deliver the goods on time.” Defendant enters a general denial.

Five months after filing its answer Defendant moves to amend its complaint by raising the statute of limitations as an affirmative defense. May the court grant the motion?

(A) No, because more than twenty-one days have passed since Defendant’s service of its original answer.

(B) No, because the failure to plead an affirmative defense results in waiver of that defense and cannot be cured by amendment.
Civil Procedure Questions

(C) No, because the defense of the statute of limitations can be raised only by denial, and not by affirmative defense.

(D) Yes, in its discretion and if justice so requires.

Question 33

Plaintiff, a teenager who lives with her parents in New York, receives a telephone solicitation from Defendant, a company incorporated in New Jersey that markets diet aids. Plaintiff is persuaded to purchase a contract for a life-time supply of diet aids, and uses his parent’s charge card to make the purchase. When his parents learn about the deal, they try to rescind the contract, but Defendant refuses to do so. Parents and Plaintiff sue Defendant in federal court alleging fraud in the inducement. They serve Defendant by mailing the summons and complaint to the company’s corporate headquarters in Delaware.

Which statement best describes the legal effect of mailing the service and summons?

(A) Mailing the summons and complaint is complete service.

(B) Mailing the summons and complaint is complete service if accompanied by a “request for waiver of service” and Defendant agrees to the terms of the waiver and the signed form is returned and filed with the court.

(C) Mailing the summons and complaint is complete service if notice is also published in a newspaper that is distributed in the district in which Defendant is located.

(D) Mailing the summons and complaint is complete service if Defendant does not object to the procedure within sixty days of receipt.

Question 34

Defendant, a technology company, hired Plaintiff, a technology specialist, as a part-time employee on an at-will basis. The employment contract provided that Defendant would reimburse Plaintiff for all “reasonable travel expenses in connection with work-related assignments.” After sending Plaintiff on an important assignment to Hong Kong, Defendant refused to reimburse her travel and hotel expenses, and then fired her without explanation. Two years later, Plaintiff filed a diversity action in federal court alleging breach of contract. Eight months after service of the summons and complaint and six months after service of the answer, Plaintiff was granted leave to amend the complaint to add a claim of tortious interference with contractual relations, alleging that Defendant’s actions prevented her from acquiring employment with other companies.
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Defendant moves to dismiss the amended claim as time-barred under the applicable state statute of limitations. What is defendant’s best argument in support of the motion?

(A) The state relation-back rule does not permit relation back.

(B) The tort claim rests on a legal theory different from that of the original claim.

(C) The tort claim arises out of a different pattern of conduct than the original claim.

(D) Plaintiff engaged in undue delay in amending the complaint.

Question 35

Plaintiff runs a family-owned restaurant that features home-baked desserts. Defendant works as a restaurant reviewer for a national newspaper. After eating about a half dozen times at Plaintiff’s restaurant, Defendant published a long and critical review—saying, for example, that “The bread is dry and the pie is even worse.” Plaintiff sues for libel in federal district court on the basis of diversity jurisdiction. Defendant answers the complaint and denies the allegation in the complaint characterizing his statements as “disparaging, offensive, and misleading.” Six months after answering the complaint, Defendant realizes he has failed to raise two defenses: improper venue and insufficient service of process.

What should Defendant do to put the defenses before the court?

(A) Defendant should move to amend the answer to include the two defenses.

(B) Defendant should move to dismiss the lawsuit and set forth the two defenses as the basis for the motion.

(C) Defendant should move for judgment on the pleadings to dismiss the complaint on the basis of the two defenses.

(D) Defendant can no longer put the defenses before the court because they are waived.

Question 36

Plaintiff is driving a car and stops at a red light. Defendant, a taxi driver, crashes into the rear end of Plaintiff’s car. Defendant is employed by Company, which owns Defendant’s taxi. Plaintiff files a diversity action in federal court against Defendant and Company alleging negligence. Paragraph 16 of the complaint alleges, “Defendant was acting in the course of his
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employment when the accident took place.” Before answering the complaint, Company reviews three internal documents: (a) a scheduling book that shows Defendant was not officially assigned to work on the day of the accident; (b) a telephone log that indicates two of the Company’s other drivers called in sick on the day of the accident; and (c) a garage receipt showing that Defendant signed the taxi out of the garage on the day of the accident. Moreover, Company requested an interview with Defendant but Defendant’s counsel refused to make him available for questions.

How should Company plead in response to the allegation of Paragraph 16?

(A) Company should answer, “No response is required because the allegation is conclusory and without factual support.”

(B) Company should answer, “No response is required because the allegation is directed to a different party.”

(C) Company should answer, “Company is without knowledge or information sufficient to form a belief as to the truth of the allegation.”

(D) Company should answer, “No response is required because the allegation is a legal conclusion.”

Question 37

Plaintiff, a data-entry specialist, works for Defendant’s company. She applies for a promotion and is denied; she believes that she was passed over because of her gender and that this problem is widespread throughout the company. She files a class action lawsuit in federal court challenging Defendant’s hiring and promotion policies; the complaint alleges a violation of the federal Fair Employment Act, which bars “discrimination in the terms and conditions of employment on the basis of gender, ethnicity, religion, and race,” and defines the class as “persons not hired or not promoted by Defendant because of gender, ethnicity, religion, or race.” The action seeks damages for every member of the class.

Defendant opposes the motion for class certification. What is Defendant’s best argument in opposition to the motion?

(A) The class is alleged to include only ninety-two clerical and administrative workers and so numerosity is not present.

(B) Plaintiff is not a member of the class she purports to represent.
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(C) The amount in controversy is not alleged to exceed $5 million.

(D) The court lacks personal jurisdiction over the absent class members because they live outside the state in which the federal court hearing the dispute is located.

Question 38

Plaintiff, the mother of three young children, was injured in a motor vehicle accident while crossing the street. The day after the accident, she started a lengthy period of treatment. She later sued Defendant, the driver of the truck that allegedly hit her, and brought her action in federal court invoking diversity jurisdiction. As a part of automatic disclosure, Plaintiff provided the name and contact information of the doctor who examined her in the emergency room and of her treating physician. During discovery, Defendant requested "all medical records referring or relating to Plaintiff's injuries that are alleged to have resulted from the accident described in the complaint in this action." In response, Plaintiff's counsel produced five pages of laboratory test results and a two-page typed report prepared by the emergency-room doctor. Eighteen months later the case went to trial. During the direct examination of Plaintiff's treating physician, the physician relied upon seventy pages of handwritten progress notes made during his sixteen examinations of Plaintiff.

Defendant objects to the testimony and argues that the progress notes should be excluded from use at the trial and that the action should be dismissed. How is the court likely to rule?

(A) The court will likely rule that it cannot exclude the evidence without a motion for sanctions.

(B) The court will likely rule that it cannot exclude the evidence unless Defendant shows that it will be prejudiced by Plaintiff's failure.

(C) The courts will likely rule that it should not exclude the evidence because Plaintiff says she did not know about the notes so the omission was substantially justified.

(D) The court will likely rule that it should consider whether a continuance will cure any prejudice to Defendant and, if not, exclude the evidence.

Question 39

Plaintiff is a bookkeeper who works at Defendant's company. He planned to testify in a federal lawsuit brought against Defendant by the Department of Labor for the company's alleged failure to pay overtime wages to its workers. The day before the scheduled testimony, Plaintiff received a letter from Defendant that stated, "We inform you that as of this day you are
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terminated from employment with our company." In response, Plaintiff sues Defendant in federal court alleging that the termination violated federal law because it interferes with an ongoing federal action. During discovery, Plaintiff propounds an interrogatory to Defendant requesting a copy of all memoranda "referring or relating to communications between Defendant and Defendant’s counsel concerning the decision to terminate Plaintiff’s employment." Defendant refuses to respond to the interrogatory, asserting the attorney-client privilege. Plaintiff moves to compel discovery, and the court orders Defendant to disclose the documents.

Twenty days have passed since the court issued its order. What is Defendant’s best strategy to secure immediate appellate review of the order compelling discovery?

(A) Defendant cannot immediately appeal the disclosure order because it is a nonfinal order.

(B) Defendant can appeal the disclosure order immediately as a matter of right under the collateral order doctrine.

(C) Defendant can appeal the disclosure order immediately as a matter of right if the appeal will materially advance the termination of the litigation.

(D) Defendant can refuse to comply with the disclosure order, face contempt sanctions, and then seek appeal of that order.

Question 40

Plaintiff is a six-year-old child. While playing on the front lawn of his parent’s home, Plaintiff was run over by Motorcyclist. Motorcyclist, a recent college graduate, was visiting his aunt and uncle, who live next door to Plaintiff’s family, and had borrowed the motorcycle without his relatives’ permission or knowledge. Plaintiff’s family intends to file a federal lawsuit alleging that Motorcyclist negligently caused injury to the child.

Which statement best describes who must be joined in the action?

(A) Plaintiff must be joined because he is the real party in interest.

(B) Plaintiff’s guardian or parents must be joined.

(C) Motorcyclist’s insurance carrier must be joined because it is the real party in interest.
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(D) Motorcyclist’s aunt and uncle must be joined because they are joint tortfeasors.

Question 41

Plaintiff is the owner of a construction company that is incorporated and headquartered in Indiana. Defendant is the CEO of a company that distributes asphalt products used in the construction of residential driveways. Plaintiff placed a large order for asphalt with Defendant, and Defendant failed to deliver the product on time. Plaintiff sues Defendant for breach of contract in federal district court, on the basis of diversity jurisdiction. Plaintiff claims that as a result of the delay, it suffered financial losses that exceed $3 million. Defendant seeks to implead Third Party, a trucking company that it usually hires to ship its products, alleging that Third Party "is or may be liable" to Defendant.

Which statement best describes the defenses that Third Party may assert?

(A) Third Party may defend on the ground that it is not directly liable to Plaintiff.

(B) Third Party may defend on the ground that Defendant can seek to implead only after, not before, a judgment is entered in Plaintiff’s suit against Defendant.

(C) Third Party may defend on the ground that the court lacks venue over Defendant.

(D) Third Party may defend on the ground that the statute of limitations has lapsed on Plaintiff’s claim against Defendant.

Question 42

Plaintiff is the owner of a company that rents ski equipment. Defendant is a college student who writes a weekend column in the student newspaper about sports events. Defendant wrote an uncomplimentary article about Plaintiff’s company, stating that the rental equipment “was old, shoddy, and dangerous.” In response, Plaintiff filed a diversity action in federal court against Defendant alleging libel and seeking $300,000 in damages and reasonable attorney’s fees. Defendant failed to appear. Plaintiff submitted an affidavit showing Defendant’s failure and the clerk entered a default.

Can the clerk also enter a default judgment?

(A) No, only the judge can enter the judgment and must make an independent determination of damages.
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(B) Yes, the clerk can enter the judgment if Plaintiff submits an affidavit stating a sum certain for damages.

(C) The entry of default automatically converts into a judgment of default if Defendant fails to object.

(D) Yes, the clerk can enter the judgment after Defendant has been served with written notice of the application at least seven days before a hearing.

Question 43

Plaintiff a privately held money management company that is incorporated in Delaware and has its headquarters in New York City. Plaintiff invests in mortgage-backed securities that are issued by Defendant, a publicly-traded investment bank. Defendant is incorporated in South Dakota and has its headquarters in Connecticut. Six years after the purchase, Plaintiff sues Defendant in federal district court in the Southern District of New York, invoking diversity jurisdiction and alleging that Defendant fraudulently induced the sale by misrepresenting the securities as a triple-A rated investment, when in fact the securities were of an inferior grade. Defendant moves to dismiss the action as time barred; Plaintiff moves to transfer the action to the federal district court in South Dakota in the interest of convenience and justice.

What is the likely result of the motion?

(A) If transfer is granted on plaintiff’s motion, the transferee court will apply the law of the state in which it sits to determine whether the action is time-barred.

(B) If transfer is granted on plaintiff’s motion, the transferee court will apply the law of the state in which the transferor court sits to determine whether the action is time-barred.

(C) If transfer is granted on plaintiff’s motion, the transferee court will apply the law of the state in which the transferee court sits because the initial venue choice was wrong.

(D) Transfer will not be granted because Plaintiff is not permitted to transfer an action having chosen the initial forum.

Question 44

Plaintiff is a member of the City Council in Clearwater, California. Defendant is a newspaper editor who lives and works in Washington and covers west coast politics. During Plaintiff’s most
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recent electoral campaign, Defendant published an article about Plaintiff that stated, “Plaintiff’s campaign is built on a pack of lies. He says he graduated from law school but he never made it through kindergarten.” Plaintiff files a lawsuit in federal district court in Washington alleging libel. The complaint survives a motion to dismiss and, after discovery, Defendant moves for summary judgment.

What standard will the district court use to determine whether there is a genuine dispute as to any material fact?

(A) The court will determine whether there is sufficient evidence under the preponderance of the evidence standard to establish a genuine dispute that Defendant acted with actual malice.

(B) The court will determine whether there is sufficient evidence under the clear and convincing evidence standard to establish a genuine dispute that Defendant acted with actual malice.

(C) The court will determine whether the allegations of the complaint plausibly show that Defendant acted with actual malice.

(D) The court is barred by the Seventh Amendment from determining Defendant’s state of mind.

Question 45

Plaintiff is a photographer. He lends twenty of his photographs to Defendant, the administrator of a museum, to be featured in an upcoming exhibit. Plaintiff’s contract with Defendant provides, “Museum agrees to return all photographs in a timely way and in the same condition in which they are received.” After the exhibit ends, Defendant packs up the photographs and mistakenly puts the boxed photographs in a recycling bin, where they are compressed beyond recognition. Plaintiff sues Defendant in federal court for breach of contract, alleging diversity jurisdiction, and seeks to recover the market value of his photographs. The evidence presented to the jury shows that none of Plaintiff’s photographs has ever sold for more than $5,000 a print. The jury returns a verdict of $1 million. The judge agrees that Defendant ought to be held liable, but believes that the jury’s award reflects an arithmetic error and that the damages were intended to be $100,000.

After judgment is entered on the jury’s verdict for Plaintiff, Defendant moves for judgment as a matter of law. What is the best way for the judge to proceed?
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(A) The judge should grant the motion.

(B) The judge on her own initiative should conditionally order a new trial unless Plaintiff agrees to a reduction of the damages to an amount set by the court.

(C) The judge on her own initiative should order a new trial on the issue of damages only.

(D) The judge should deny the motion and must accept the jury's damage award as a matter of the Seventh Amendment.

Question 46

Plaintiff is a private gaming company. Defendant is a municipality that licenses gaming companies. Company is a competitor gaming company. Plaintiff sues Defendant and Company for federal antitrust violations alleging that defendants conspired to monopolize trade in the gaming industry. Plaintiff's complaint joins the federal antitrust claim with a state tort claim alleging intentional interference with prospective business advantage. After Defendants answer the complaint, Plaintiff files a notice of dismissal of the state tort claim against Defendant with prejudice. Plaintiff also files a notice of dismissal of the state tort claim against Company, without stating whether the dismissal is with prejudice. The district court orders both claims dismissed with prejudice.

On review, would an appeals court find that the district court abused its discretion when it dismissed the claim against Company with prejudice?

(A) Yes, because the federal rule explicitly states that a voluntary dismissal is without prejudice.

(B) No, because the court had discretion to dismiss the claim with prejudice.

(C) Yes, because once plaintiff filed its notice of dismissal, the court was without jurisdiction.

(D) No, because the dismissal would be reviewed under the "clearly erroneous" and not the "abuse of discretion" standard.

Question 47

Plaintiff, a Delaware corporation, sues Defendant, a New York corporation, in federal court in New York alleging breach of contract. The complaint seeks damages of $60 million. After
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Defendant answers the complaint and while discovery is going forward, Defendant offers to settle the lawsuit for $20 million. Plaintiff does not accept the offer. The case goes to trial and Plaintiff receives a favorable judgment but is awarded only $10,000.

Which statement best describes whether Defendant can recover costs from Plaintiff?

(A) Because Plaintiff refused to accept Defendant’s offer, the court will award Defendant its post-offer costs.

(B) Because Plaintiff refused to accept Defendant’s offer, the court will deny Plaintiff costs.

(C) Because the court’s jurisdiction is based on diversity of citizenship, Defendant can recover costs from Plaintiff only if New York law permits the taxation of such costs on behalf of a losing party who has made an unaccepted offer.

(D) Because the damages awarded are $10,000, the court may impose costs on Plaintiff.

Question 48

Plaintiff sues Defendant in state court in Pennsylvania alleging that Defendant is in breach of its contractual duty to Plaintiff. The Pennsylvania court dismisses the action for Plaintiff’s failure to prosecute. A year later, Plaintiff sues Defendant for breach of the same contract in a federal court in Tennessee, where Defendant is incorporated and has its headquarters.

Assume Defendant raises the affirmative defense of claim preclusion. What is Plaintiff’s best argument to defeat dismissal on that ground?

(A) Under Tennessee law a dismissal for failure to prosecute does not bar a second action against the same defendant on the same claim.

(B) Under Pennsylvania law a dismissal for failure to prosecute does not bar a second action against the same defendant on the same claim.

(C) Under Pennsylvania law the court mistakenly dismissed the action for failure to prosecute.

(D) Under federal common law a dismissal for failure to prosecute does not bar a second lawsuit against the same defendant on the same claim.

Question 49
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Plaintiff owns stock in Company. Plaintiff brings a shareholder derivative action against Company in federal court, alleging that Company issued a false proxy statement. While Plaintiff's action is pending, the federal Securities and Exchange Commission (SEC) sues Company in federal court for violations of the federal securities law, and the SEC's complaint contains the identical allegation about the false proxy statement as Plaintiff's complaint. The SEC's action comes to judgment first, and the district court holds that Company did issue a false proxy statement.

Can Plaintiff preclude Company from relitigating the question of whether it issued a false proxy statement?

(A) No, because Plaintiff was not a party to the SEC's action against Company and so cannot benefit from the judgment in that action.

(B) No, there is a per se bar on the use of preclusion if it abridges a defendant's right to a civil jury under the Seventh Amendment.

(C) Yes, unless Company can show that on balance preclusion ought not to be permitted.

(D) Yes, because the issue decided in the SEC's suit is identical to the issue that Plaintiff is seeking to preclude.

Question 50

Plaintiff brought a breach of contract action against Defendant in federal court on the basis of diversity jurisdiction. The case survived summary judgment, and was tried before a jury. At the close of Plaintiff's case, Defendant proceeded to present three witnesses. The jury found in favor of Plaintiff. Sixty days after entry of judgment, Defendant moves for judgment notwithstanding the verdict.

On what basis can the trial judge grant Defendant's motion?

(A) The trial judge can grant the motion if he agrees that there was insufficient evidence for the jury to find in favor of Plaintiff.

(B) The trial judge cannot grant the motion because Defendant failed to make a motion for judgment as a matter of law before the case was submitted to the jury.

(C) The trial judge cannot grant the motion because Defendant failed to object to the substance of two of the five jury instructions.
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(D) The trial judge can grant the motion because it is timely.
Civil Procedure Answers