

**CHICAGO-KENT COLLEGE OF LAW
FINAL EXAMINATION IN CIVIL PROCEDURE**

INSTRUCTIONS

1. This examination consists of 7 pages. Please check to make certain you have the complete examination.
2. Read these instructions carefully and read each question carefully. As you answer each question, make use of any statutory or regulatory material that is pertinent. Think each problem through before you write and treat every appropriate issue in each question. Be direct and concise.
3. Answers will be graded upon the reasons given as well as the conclusions drawn. If more than one reason is pertinent to an answer, state every reason.
4. While you have been permitted to bring materials into the examination room, answering the questions appropriately will put time pressure on you. You should not do extensive research during the examination. Credit will be weighted according to the time allocations shown. Manage your time accordingly.
5. You may decide, in answering one or more questions, that a complete answer would require legal research. If this is so, you should identify the specific issue that you would research. If you have a mastery of the basic concepts, you will be able to frame research issues very narrowly and precisely.
6. It also may be that more factual information is required to answer a question. If this is the case, you should say what factual information is required and why you need it. A mastery of the underlying concepts will permit you to frame any factual inquiries very narrowly and link them precisely to the legal issue involved.
7. Organization and clarity are very important. A shorter answer that is well organized and evidences a clear understanding of basic concepts and their interrelationships is better than a long answer with disconnected fragments of information.
8. Do not write outside the margins of your bluebook pages, but write clearly. If it's not legible, it will not get credit.
9. Write your examination number on your bluebook(s) and on each page or the computer equivalent of this examination. Do not use your name.
10. When you have finished the examination place it inside your bluebook(s) and deposit them in the appropriate box in the examination room, or follow applicable instructions for computerized exams.

MATERIALS WHICH MAY BE TAKEN INTO THE EXAMINATION ROOM

Any material including any outlines whether commercially prepared or not, whether accessible by computer or not. No communication by e-mail, cell phone, voice-over-IP, or any form of instant- or text-messaging is permitted during the exam.

GOOD LUCK!

QUESTION I

Cory Mullins recently earned a helicopter rating on his private pilot's license. He makes arrangements with his former college classmate, Bennett Thomas, to land the helicopter on a vacant field near Bennett's house in a residential neighborhood of a Midwestern state to give Bennett a ride in the helicopter. The neighborhood has been troubled recently by an influx of deer. Cory and Bennett visit the site, take measurements, and walk the ground to make sure that it is safe for an off-airport helicopter operation. When they make their inspection, they see no deer. On the appointed day, Cory rents a Robinson R22 (a small two-place helicopter) for a one-week period, preflights it carefully, and makes sure it has adequate fuel. He flies to the field, performs the requisite high- and low reconnaissance during which he sees no obstacles, persons, or deer, and lands safely. Bennett runs out of his house, applauds the good approach and landing, and greets Cory, ready for his helicopter ride.

Unbeknownst to either of them, a herd of 15 deer are bedded down in the woods near the landing site. Frightened by the sound of the helicopter landing, they panic and stampede out of the woods toward a dwelling owned by Sandra Collins. Five of them jump through the plate-glass window of the house overlooking the woods, smashing it, and rampage through the house. One of the deer demolishes a valuable chandelier. Another jumps on the bed where Sandra's five-year-old daughter is sleeping, terrifying her and causing her to detest her heretofore favorite movie, "Bambi," and to have nightmares for years.

Neither the Midwestern state nor any relevant municipality has any statutes, ordinances, administrative regulations, or established common-law doctrines pertaining to aircraft operations. The only relevant federal regulations are the following Federal Aviation Regulations ("FARs"):

"14 CFR § 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

14 CFR § 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters, powered parachutes, and weight-shift-control aircraft. If the operation is conducted without hazard to persons or property on the surface—

(1) A helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section, provided each person operating the helicopter complies with any routes or altitudes specifically prescribed for helicopters by the FAA; and

(2) A powered parachute or weight-shift-control aircraft may be operated at less than the minimums prescribed in paragraph (c) of this section.

The FAA has not prescribed any routes or altitudes for helicopters in the area.

Federal law does not explicitly provide a private right of action to sue for violation of FARs.

- A. **(20 minutes)** Sandra sues Cory and Bennett in the state trial court of general jurisdiction for the county in which Bennett and Sandra have their houses. She alleges common-law negligence, negligent infliction of emotional distress on behalf of her daughter, and “reckless and wanton operation of an aircraft.” She does not explicitly assert a claim in her complaint based on the FARs. She explicitly alleges her legal theory, negligence per se, premised on violation of the quoted FARs. Cory removes the case to the United States District Court for the relevant federal judicial district, asserting federal question jurisdiction as the basis. Sandra moves to remand. Suppose you represent Cory. What arguments would you make to resist the motion to remand. What are your prospects for success?
- B. **(10 minutes)** Suppose you represent Bennett, and would prefer to litigate in state court. Can you do anything to resist the removal to federal court? What? What support do you have for your position? In your answer to this question, do *not* repeat arguments encompassed by Question A.
- C. On the way to the landing site, Cory’s helicopter suffers a sudden power failure. Cory successfully enters autorotation—the maneuver allowing a helicopter to continue to fly (very briefly) after an engine failure. He quickly picks a shopping center parking lot as the only relatively safe forced landing site, and puts the helicopter down there. Unfortunately, the helicopter lands on a new Mercedes Benz G-Class SUV, worth

\$105,000, crushing it and killing a pet show-pig, named "Wilbur," who was sleeping in the backseat. Both the Benz and the pig are owned by Martha Adams, a citizen of Massachusetts, who is visiting the area to allow the pig to participate in a pig show. Unbeknownst to Cory, Bennett, or Martha, the parking lot is not located in Midwestern State, but just across the state line in Other State. Martha retains you, admitted to practice in Other State, to sue Cory for common-law negligence in the state trial court of general jurisdiction of Other State in and for the judicial circuit where the parking lot is located.

1. **(20 minutes)** Other State has the following statute respecting jurisdiction of its courts:

Sec. 1-101. Act submitting to jurisdiction - Process.

(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person to the jurisdiction of the courts of this State as to any cause of action whether or not it arises from the doing of any of such acts:

(1) The transaction of any business within this State;

(2) The commission of a tortious act within this State;

(3) The ownership, use, or possession of any real estate situated in this State;

(4) The making or performance of any contract or promise substantially connected with this State;

(5) The performance of sexual intercourse within this State which is claimed to have resulted in the conception of a child who resides in this State;

(6) The acquisition of ownership, possession or control of any asset or thing of value present within this State when ownership, possession or control was acquired;

(b) This statute extinguishes all common-law doctrines of jurisdiction or service of process. No other basis for jurisdiction except those provided in this statute may be asserted.

(c) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by mailing a copy of the summons and complaint to the defendant at his or her last known place of residence or business address.

You obtain Cory's address from the FAA's database of licensed pilots, and mail a copy of the summons and complaint to him. What arguments supporting jurisdiction over Cory would you assert, and what counter-arguments would you anticipate? Evaluate your prospects for success.

2. **(20 minutes)** Other state, instead, has the following statute regarding jurisdiction of its courts:

Sec. 1-101. Act submitting to jurisdiction - Process.

- (a) Any person, whether or not a citizen or resident of this State, submits such person to the jurisdiction of the courts of this State by being within this State when he or she is served with a summons and complaint by any sheriff or deputy sheriff of this state.*
- (b) Any person, whether or not a citizen or resident of this State, submits such person to the jurisdiction of the courts of this State by owning property found within this State and attached by writ served by any sheriff or deputy sheriff of this state.*
- (c) Any property located in this state is subject to the jurisdiction of the courts of this State if it is attached at the commencement of the action by any sheriff or deputy sheriff of this state.*
- (d) No other basis of jurisdiction shall be valid.*

To proceed with your lawsuit against Cory, what should you do? After you do it, what jurisdictional arguments would you make, and what counterarguments would you expect? Evaluate your prospects for success. Consider all relevant theories.

3. **(20 minutes)** To facilitate his participation in the litigation, Cory moves to Other State, registers to vote there, and re-registers his automobile there. After she returns to Massachusetts, Martha sends an email to her mother saying, "Except for the tragic death of Wilbur, I really liked Other State. I think I will move there. You still represent Martha. She instructs you to file in federal court in Other State. What is your best theory for subject-matter jurisdiction? What counterarguments would you anticipate? What are your prospects for success? Assume that, for this question only, Cory consents to the exercise of personal jurisdiction.

QUESTION II

Tad Brownall, a citizen of California, is a director of a high-tech startup, “Prettyface, Inc.,” that makes Facebook facial recognition algorithms available outside Facebook. Prettyface, Inc. is incorporated in California. Anyone who purchases the Prettyface’s \$99 software product can take a picture of someone, scan the picture into a portable phone or computer, and the software will identify the subject of the photo and provide contact information. It has proven very popular as a dating adjunct. Facebook, incorporated in California with its principal place of business there, has sued Prettyface in its corporate personality and Brownall personally for patent infringement in the United States District Court for the Northern District of California. Facebook’s theory for piercing the corporate veil is that Prettyface has been insolvent from the beginning—without sufficient capital to meet its obligations as they become due. Piercing the corporate veil is a corporation-law doctrine that allows corporate directors to be held personally liable for obligations of the corporations of which they are directors. The parties are involved in vigorous discovery.

- A. **(30 minutes)** Brownall has been served with a Fed.R.Civ.P. 34 request for all his email usernames and passwords. He is extremely reluctant to give them up because he has been involved in an extra-marital affair for the five last years and one of his email accounts is secret. He and his lover use the account to exchange salacious messages and photographs by both having the username and password. One of them wishing to send a message to the other writes the message, attaches a picture, video, or document, and saves it as a draft. The other logs in and reads the draft. This avoids leaving a trail to or from other email boxes. Facebook, not getting a response to its Rule 34 production request, has filed a motion to compel. You represent Brownall. What arguments can you make to protect the requested information from disclosure? What responses can you expect? What is the worst that can happen if you lose the motion and still refuse to provide the information for the secret email account?
- B. **(25 minutes)** Worried about Prettyface’s limited assets, and based on your advice as his counsel, Brownall buys an individual directors’ and officers’ liability insurance policy, paying the premium himself. The policy indemnifies Brownall from any money judgment that might arise from litigation against any corporation of which he is a director and officer. The policy has a rider, which you drafted, and the insurer signed, saying “This policy expressly covers any liability the insured may incur resulting from piercing the veil of Prettyface, Inc. based on its insolvency. If Facebook finds out about the insurance policy and rider, it will introduce it to prove Brownall’s knowledge that Prettyface was insolvent at all relevant times. Brownall failed to disclose this policy under Rule 26. He asks you to advise him as to what risks arise from this failure to disclose. What do you tell him?”

- C. **(15 minutes)** Brownall decides that he does not have the stomach to fight Facebook. He, in his personal capacity, negotiates a license for Facebook's patent, which requires him to pay \$ 1 million per month in license fees. He assigns the license to Prettyface, Inc., as he is permitted to do by the license agreement. After the third month, Brownall runs out of money and does not make any further payments. Facebook, which dismissed the patent infringement action with prejudice as part of the license negotiation deal, files a new lawsuit in the United States District Court for the Northern District of California for breach of the license contract. Brownall receives the summons and complaint in an email attachment. He responds by filing an answer denying every allegation in the complaint. Only after he files the answer does he consult you and ask you to represent him. You believe that he has strong arguments that personal jurisdiction and subject matter jurisdiction are lacking, and that he was not served with process through any permissible means. How could you assert these defenses? What objections would you anticipate? Evaluate your probability of success on each defense.
- D. **(20 minutes)** The litigation over the license agreement goes forward. The complaint alleges the existence and terms of the license agreement, and non-payment of the license fee. Brownall denies every material allegation in the complaint. Discovery has focused entirely on whether impossibility of performance is a defense to breach of contract, and is now closed. Brownall's deposition concerns only his financial situation and that of Prettyface, Inc. Brownall files a motion for summary judgment under Fed.R.Civ.P. 56. He attaches the deposition transcript to his motion. Facebook's opposition to the motion attaches it complaint and a memorandum of law addressing the impossibility defense and nothing else. No other materials are provided to the court in conjunction with the summary judgment motion and opposition thereto. Is Brownall entitled to summary judgment on the grounds that Facebook has not shown disputed issues of material fact on the elements of a breach of contract? Why or why not?