

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

INSTRUCTIONS

1. This examination consists of 9 pages. Please check to make certain you have the complete examination, including all four appendices (A-D).
2. Read these instructions carefully, read each question, and read the appendices carefully. As you answer each question, make use of any materials in the appendices that are 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

Chad Monroe is a guitar player, singer, and songwriter in the rock band “Plain White Sneakers.” He also is an avid skateboarder. Last September, Plain White Sneakers received word that they had been selected to make a cameo appearance as a band on the television program “If I Can Dream” in the episode to be recorded on 15 October. Their agent informed them that Chad’s guitar riffs, rich baritone voice, and strikingly good looks and bassist Patty Rockford’s pretty face and backup vocals were what the television show producers especially liked. All the band members were excited. On Thursday, 13 October, Chad decided to celebrate by going skateboarding in the nearly 70-degree weather. He asked Patty to accompany him, even though she did not skateboard.

With Patty in tow, Chad did a slide, followed by a grind, on the railing of the Monroe Street bridge across the Chicago River, and then, coming off the railing, did an ollie, followed by kickflip. As he made an otherwise perfect landing on the pedestrian sidewalk, the forward truck (the metal device that attaches the wheels to the deck of the skateboard) detached, causing the leading edge of the skateboard to hit the surface of the sidewalk, propelling Chad forward into an awkward summersault at the end of which he landed on Patty. He skinned his face severely and broke several bones in his left wrist and two fingers on his left hand. Patty suffered a sprained right wrist and two black eyes, and was quite hoarse from screaming before the ambulance arrived.

The producer of the television show was horrified when he saw both of them. “Your singing voice now sounds like a frog,” he said to Patty, “and neither of you can play your instruments. A band that can’t play might be okay, but one without pretty faces is a no-go,” he said. Despite their protests that they would perform just fine, he cancelled their appearance, substituting a group of small, cute, dogs who bark in harmonic chords.

The skateboard, an “Economy Trick” model, was designed and manufactured by “Plan C,” which historically served markets only in Southern California. With its existence threatened by trademark infringement litigation, it embarked on an aggressive cost-cutting campaign in its manufacturing plant and recruited an individual promoter named B.T. Varnum and told him it would give him a 50% commission on every skateboard he could sell. “I don’t care where you sell them; smoke out customers everywhere,” the Plan C CEO told Varnum. Varnum put up a website labeled “Minute-by-Minute Thuckers Borne,” advertising Plan C boards. Special discounts were offered to Midwest musicians with items of clothing in the name of their band. Chad purchased his board through the website, paying through PayPal.

Plan C is incorporated in California and has its principal place of business there. Varnum is homeless. He last slept on a friend’s couch in Las Vegas, NV, before he left for Afghanistan, where he is now selling carpets. Chad and Patty are citizens of Illinois.

- A. (30 minutes) Chad has retained you to sue Plan C for negligent design and manufacture of his skateboard, and for marketing an inherently dangerous product without adequate warnings, in violation of the federal Consumer Product Protection Act. He wants you to

sue in federal court in Illinois. What are your prospects for obtaining personal jurisdiction in such a court over Plan C?

- B. (10 minutes) After you file a complaint pleading personal jurisdiction, what else must you do get the court to assert it?
- C. (30 minutes) Patty wants to join the lawsuit as a plaintiff and to file a cross claim against Chad for battery. Her theory is that his advanced acrobatic skills are such that he could have landed on someone else, but instead deliberately landed on her. Does the federal court have subject matter jurisdiction over her claim against Chad? Why or why not?
- D. (15 minutes) Can Chad obtain engineering drawings and engineering test results for the “Economy Trick” board and its trucks? If he can, draft an appropriate mandatory request satisfying the requirements of the pertinent rule and identify the rule.
- E. (15 minutes) What source of law must the federal court apply to the negligent design and manufacture claim: federal common law, California common law, or Illinois common law? Why?

QUESTION II

Susan Pilcross is a recently-admitted member of the Florida bar. She has decided that the best route to professional fulfillment is to specialize in defending those threatened by foreclosure of their mortgages by banks and other financial institutions that lack the requisite paperwork, including proof that they own the mortgage on which they are trying to foreclose. She already has developed a good client base. While attending law school in California, she befriended Tyler Harris, an aspiring actor, who has determined that his income from waiting tables and modeling is insufficient to sustain him until he gets cast in a blockbuster movie. In a 1 October 2010 email exchange with Susan, he agreed to do paralegal work for Susan as an independent contractor, and she agreed to pay him \$15 per hour. On 2 October, she FDXed Tyler the complete case files for her 12 clients so that he could scan them into electronic form and analyze the documentation for deficiencies. She instructed him on what to look for. On 3 October, he sent her a cellphone text message promising to complete the work by 21 October. She has not heard from him in three weeks following 21 October. He is unresponsive to emails, and when she calls his cellphone she gets a message that his voicemail box is full. She suspects, based on earlier emails, that he has gotten involved in a movie project and has more or less abandoned his work for her. Desperate, she retains you, a member of both the California and Florida bars, to represent her in a breach of contract action against Tyler. She wants to get her files back and to recover damages sufficient to enable her to pay the costs of scanning the files and of retaining a more reliable paralegal.

- A. (30 minutes) She has already filed a complaint in the Ninth Judicial Circuit Court—the Florida trial court of general jurisdiction covering Orange County, where she practices law. Florida is a fact-pleading jurisdiction. Fla.R.Civ.P. 1.110 says in pertinent part:

"(b) Claims for Relief. A pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . a short and plain statement of the

ultimate facts showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader deems himself or herself entitled."

"(f) Separate statements. All averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances."

The draft complaint she has filed is attached as Appendix A. Does this complaint satisfy the applicable pleading rules? Why or why not? If you conclude that it is deficient, what changes would you make? You may either redraft the complaint (omitting the caption) or describe the specific changes you would make. Assume that Florida law applies to the breach-of-contract claim.

- B. (10 minutes) The common law rule on venue is that a non-resident may be sued anywhere so long as the court has jurisdiction over his person. The only potentially relevant Florida venue statute provides:

"Fla. Stat. Ann. § 47.011. Where actions may be begun

"Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located. This section shall not apply to actions against nonresidents."

Is venue good in the court in which Susan filed the complaint as set forth in Subquestion (A)? Why or why not? Do not, in your answer to this question, analyze personal jurisdiction. Confine yourself to venue.

- C. (15 minutes) You have decided to dismiss the action in state court and refile it in the United States District Court for the Middle District of Florida, which is located in Orlando, the county seat of Orange County, where Susan practices. Assume that you have filed a complaint for breach of contract satisfying the federal pleading rules, that the federal court has diversity jurisdiction, and that Tyler has consented to the exercise of personal jurisdiction over him. You want to depose Tyler. Can you force him to come to Orlando for his deposition? How? Where else can you compel him to be deposed? How? What if he defies all of your efforts to convene his deposition? What remedies are available to you?
- D. (15 minutes) Tyler filed an answer denying every paragraph of the complaint. The discovery plan approved by the district court allowed 60 days for discovery. Neither side has taken any, and no one has filed any affidavits or any disclosures under Fed.R.Civ.P. 26(a). Tyler moves for summary judgment after discovery is closed. How should the court resolve it? Why?
- E. (10 minutes) The district court denied Tyler's motion for summary judgment. He wants to appeal the denial. Can he do so? Where? Why or why not?

Appendix A

STATE OF FLORIDA
COUNTY OF ORANGE

IN THE NINTH JUDICIAL CIRCUIT
COURT
Civ. No. 10-4774841

SUSAN PILCRESS,
Plaintiff

V.

TYLER HARRIS,
Defendant.

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COMPLAINT

NOW COMES the Plaintiff, by and through the Attorney whose name is affixed hereto and moves this Court for relief. In support thereof, the Plaintiff alleges the following:

This court has subject matter jurisdiction, personal jurisdiction, and venue is proper in this court

The Defendant promised to help the Plaintiff with her foreclosure-defense cases. He is not answering the Plaintiff's emails or telephone calls. He cares more about his acting career than development of the Plaintiff's legal career.

Plaintiff will leave her clients in the lurch if Defendant does not do his work.

WHEREFORE, the Plaintiff prays this Court that it order appropriate relief.

This the _____ day of _____, 2008.

[Attorney signature]
[Attorney name and contact information]

Appendix B

Illinois 735 ILCS 5 Code of Civil Procedure

Sec. 2-208. Personal service outside State. (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State; otherwise it shall have the force and effect of service by publication.

(b) The service of summons shall be made in like manner as service within this State, by any person over 18 years of age not a party to the action. No order of court is required. An affidavit of the server shall be filed stating the time, manner and place of service. The court may consider the affidavit, or any other competent proofs, in determining whether service has been properly made.

(c) No default shall be entered until the expiration of at least 30 days after service. A default judgment entered on such service may be set aside only on a showing which would be timely and sufficient to set aside a default judgment entered on personal service within this State.

(Source: P.A. 82-280.)

(735 ILCS 5/2-209) (from Ch. 110, par. 2-209)

Sec. 2-209. 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, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising 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) Contracting to insure any person, property or risk located within this State at the time of contracting;
- (5) With respect to actions of dissolution of marriage, declaration of invalidity of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;
- (6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, the performance of an act of sexual intercourse within this State during the possible period of

conception;

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

(8) 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;

(9) The failure to support a child, spouse or former spouse who has continued to reside in this State since the person either formerly resided with them in this State or directed them to reside in this State;

(10) 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;

(11) The breach of any fiduciary duty within this State;

(12) The performance of duties as a director or officer of a corporation organized under the laws of this State or having its principal place of business within this State;

(13) The ownership of an interest in any trust administered within this State; or

(14) The exercise of powers granted under the authority of this State as a fiduciary.

(b) A court may exercise jurisdiction in any action arising within or without this State against any person who:

(1) Is a natural person present within this State when served;

(2) Is a natural person domiciled or resident within this State when the cause of action arose, the action was commenced, or process was served;

(3) Is a corporation organized under the laws of this State; or

(4) Is a natural person or corporation doing business within this State.

(c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

Appendix C

The Consumer Product Safety Act, codified in Title 15, United States Code, provides, in material part:

§ 2056. Consumer product safety standards

(a) Types of requirements

The Commission may promulgate consumer product safety standards in accordance with the provisions of section 2058 of this title. A consumer product safety standard shall consist of one or more of any of the following types of requirements:

- (1) Requirements expressed in terms of performance requirements.
- (2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

§ 2072. Suits for damages

(a) Persons injured; costs; amount in controversy

Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, shall recover damages sustained"

Commission Rules

[The Commission has promulgated rules containing safety standards for bicycle helmets, matchbooks, cigarette lighters, and entrapment hazards in bunk beds, among other things, but not for skateboards.]

Appendix D

In Florida, "The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages." *Abbott Laboratories, Inc. v. General Electric Capital*, 765 So.2d 737, 740 (Ct. App. 2000).

To establish a valid contract under Florida law, one must show offer, acceptance, and consideration. *Med-Star Century, Inc. v. Psychiatric Hospitals of Hernando County*, 639 So.2d 636, 637 (Ct. App. 1994).