CIVIL PROCEDURE
Mr. Martin
Fall 2013 Exam ID no._____

MIDTERM EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. The three questions will be given equal weight and you should spend equal amounts of time on each. The Federal Rules of Civil Procedure apply to all questions. Please write legibly and leave a margin on the left-hand side of the page. Use only your examination identification number to identify your blue book and this white exam paper. Your exam ID number is the last six digits of your social security number followed by the numerals "59." Thus, if your social security number is 123-45-6789, you exam ID number will be 45678959. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), be sure that your exam ID number is on each one, and insert all others into the first one.

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QUESTION ONE

Review Rules 13(a), 13(b), 13(h), 14(a), 18(a) and 20(a). Then answer each of the following questions "YES" or "NO." After each "yes" or "no" answer, cite the relevant federal rule section and subsection. Your one-word answer, "yes," or "no," counts as 50% in each of the following questions. Your correct citation to the relevant federal rule section and subsection counts as 50%. Example: "YES. Rule 13(a)."

Podsnap purchased a new Ford Devastator sport-utility vehicle ("SUV") from Dogberry's Auto Sales. Dogberry's Auto Sales is a sole proprietorship owned by Dogberry. Podsnap made a small down payment. Podsnap and his wife Pauline signed a note for the balance of the purchase price payable to Dogberry in monthly installments. The SUV proved to be defective, in Podsnap's view and Podsnap stopped making payments on the note. Podsnap sued Dogberry for breach of warranty.

1. Can Dogberry counterclaim against Podsnap for the unpaid balance on the note?

2. Must Dogberry counterclaim against Podsnap for the unpaid balance on the note, or lose this claim?

3. If Dogberry wants to counterclaim against Podsnap for the unpaid balance on the note, can Dogberry join Pauline as a co-defendant on the counterclaim?

4. Can Dogberry join the Ford Motor Co. as a third-party defendant, claiming that Ford is liable to indemnify Dogberry for any damages that Dogberry must pay to Podsnap because the SUV's defects, if any, existed when the SUV left Ford's factory?

5. If Dogberry joins Ford as a third-party defendant, can Dogberry also join a claim against Ford for Ford's failure to reimburse Dogberry for warranty work on cars other than Podsnap's?

6. If Dogberry joins Ford as a third-party defendant, can Ford set up as a defense that Dogberry improperly prepared the SUV for delivery to Podsnap, and this was the cause of the defect?

7. If Dogberry joins Ford as a third-party defendant, can Ford set up as a defense that Podsnap abused the car by allowing the cooling system to run dry and failing to maintain the oil level?

QUESTION TWO

THIS QUESTION TWO HAS SIX PARTS. PLEASE ANSWER EACH PART IN A SEPARATE, NUMBERED, PARAGRAPH. IN EACH OF YOUR SIX ANSWERS, CITE THE RELEVANT FEDERAL RULE

Prudence Juris was seriously injured when a section of the new apartment building in which she lived collapsed. She commenced an action in a federal district court against Owner, the owner of the building; Builder, its builder; and Steelco, the supplier of structural steel for the building. She claims to have suffered physical injury, property damage, and a nervous breakdown. Diversity is satisfied.

Prudence requested production from Builder of the following documents: (1) the signed statement which she, Prudence, gave to an investigator hired by Builder's lawyer; (2) the signed statement given by Neighbor, Prudence's neighbor in the building, to the investigator; and (3) Builder's lawyer's notes of an interview with Witless, an eyewitness to the building collapse, who has moved away and is now of parts unknown. Builder objected to each request. Motions by Prudence to compel

production, duly certified in accordance with Rule 37(a)(1), are before the judge. How should the judge rule? Why?

(4) Owner gave notice that it intended to take the deposition of Dr. Destructo, a psychiatrist who treated Prudence after her nervous breakdown. Prudence moved, with proper certification, for a protective order to prevent the deposition from being taken. How should the judge rule on the motion? Why?

(5) Prudence submitted an interrogatory to Steelco demanding detailed information about all claims against it at any time during the previous twenty years. What motion might Steelco make seeking to forestall disclosure?

(6) How should the judge rule in response?

QUESTION THREE

University of Maryland basketball superstar Len Bias was drafted by the Boston Celtics in the first round of the National Basketball Association draft on June 17, 1986. Two days later he died. It is undisputed that the cause of his death was cocaine intoxication.

In April of 1986 Bias had entered into a sports agency management contract with a company called Advantage International Inc. ("Advantage") for the services of a sports agent names Fentress. Prior to his death, Bias and his parents directed Fentress to secure a one-million-dollar life insurance policy on Bias payable to his estate in the event of his death. Advantage did not secure any life insurance policy for Bias.

Bias's estate (the beneficiaries of which are his parents) sued Fentress and Advantage for one million dollars. The estate claims that Fentress represented that the insurance policy had been secured, and that in reliance

on this information Bias and his parents did not procure any other life insurance.

After an appropriate period of discovery, Fentress and Advantage moved for summary judgment. In support of their motion for summary judgment they submitted deposition testimony from two of Bias's Maryland teammates in order to show that Bias was a cocaine user during the period prior to his death. The teammates both described numerous occasions when they saw Bias ingest cocaine. One of them testified that he was introduced to cocaine by Bias and that Bias sometimes supplied others with cocaine.

In response, Bias's estate offered affidavits from each of Bias's parents stating that Bias was not a drug user, and the deposition testimony of Bias's Maryland coach who testified that he knew Bias well for four years and never knew Bias to be a drug user at any time prior to his death. The estate also submitted the results of several drug tests administered to Bias during his college years which showed that, on the occasions on which he was tested, there were no traces in Bias's system of any of the drugs for which he was tested.

Fentress and Advantage also submitted, in support of their motion for summary judgment, affidavits from three experts on the insurance business who stated that every insurance company inquiries about the prior drug use of an applicant for a million-dollar life insurance policy (called a "jumbo" policy) and that no insurance company will issue life insurance, let alone a million-dollar policy, to an applicant who admits to habitually using cocaine.

Fentress and Advantage then argued that Bias's estate had suffered no damages as a result of their failure to secure a million-dollar life insurance policy on Bias, nor as a result of their alleged misrepresentation that a policy had been secured, because neither they nor Bias's parents would have been

able to secure such a policy. Additionally, Fentress and Advantage argued, if Bias had lied about his cocaine use in the process of applying for life insurance, any policy issued would have been voided by the insurance company for fraud.

How should the judge decide Fentress's and Advantage's motion for summary judgment? Why?

END OF EXAMINATION

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CIVIL PROCEDURE
Mr. Martin
Fall 2013

MIDTERM EXAMINATION
COMPLETE ANSWERS

QUESTION ONE

(1). YES. Rule 13(a) [specifically, Rule 13(a)(1)(A)].

(2). YES. Rule 13(a) [specifically, Rule 13(a)(1)(A)].

(3). YES. Rule 13(h); Rule 20(a)(2).

(4). YES. Rule 14(a) [specifically Rule 14(a)(1)].

(5). YES. Rule 18(a).

(6). YES. Rule 14(a) [specifically, Rule 14(a)(2)(A)].

(7). YES. Rule 14(a) [specifically, Rule 14(a)(2)(C)].

QUESTION TWO

1. Rule 26(b)(3)(C). The judge should order Builder to produce the signed statement which she gave to Builder's investigator because a party or other person is entitled to receive, upon request, a copy of that party's or person's own previous statement about the action or its subject matter.

2. Rule 26(b)(3)(A). The judge should not order Builder to produce the signed statement which Neighbor gave to Builder's investigator because it is trial preparation material, a/k/a attorney work product, and no special circumstances exist calling for production. Prudence's lawyer can interview Neighbor for himself or herself.

3. Rule 26(b)(3)(A). Builder's notes are attorney work product. However, there is some authority to the effect that Witless's disappearance is a special circumstance that would warrant production because Prudence's lawyer can't now interview Witless.

4. Rule 26(b)(1) ["unprivileged"]; Rule 26(b)(5)(A). There is a question of privilege, specifically psychotherapist-patient privilege. Note that, in some jurisdictions, this privilege is deemed waived when a plaintiff claims emotional harm as in Davis v. Ross, CB p. 409. Also note that Dr. Destructo is a fact witness not, at this time, identified as an expert witness who will testify for Prudence at the trial.

5. Rule 26(c)(1); Rule 26(b)(2)(C). Steelco could move for a protective order pursuant to Rule 26(c)(1), or could move to limit discovery pursuant to Rule 26(b)(2)(C).

6. Rule 26(b)(1); Rule 26(c)(1). Under the broad relevancy standard of Rule 26(b)(1), information about prior claims is discoverable. However, "all claims" and "twenty years" could be deemed an unduly burdensome request warranting relief, or at least some restriction, by the judge.

QUESTION THREE

Summary Judgment should be granted to the moving party if the moving party shows that there is "no genuine dispute as to an material fact and the movant is entitled to judgment as a matter of law," as stated in Rule 56 and as explained in the Celotex case, CB p. 486.

On summary judgment, evidence should be viewed in the light most favorable to the non-moving party, and reasonable inferences drawn in the non-moving party's favor. Credibility questions are not suitable for resolution on summary judgment, which deprives the non-moving party of its constitutional right to jury trial.

The "insurance non-availability" issue and the "habitual drug user" issue are affirmative defenses on which the defendants (herein collectively called "Advantage") will have the burden of production and proof at trial.

1. Insurance non-availability. Advantage has carried its initial burden of showing that there will be trial evidence tending to show that no insurance company will sell life insurance to a habitual drug user. The burden then shifts to the Bias estate to show that there will be evidence to refute this proposition. The Bias estate doesn't carry its burden on this issue. Therefore there is no genuine issue of material fact in dispute on the issue of insurance non-availability for a habitual drug user.

2. Habitual drug user. But was Bias a habitual drug user? Advantage has carried its initial burden of showing that there will be trial evidence tending to prove that Bias was a drug user. The burden then shifts to the Bias estate to show that there will be evidence to refute this proposition. The Bias estate does/doesn't carry its burden on this issue [your choice, but exam credit given only if you explain your choice]. However, the question remains open: even if Bias used drugs, was he a habitual drug user or just an experimenter?

* * * * *

In the real case from which this question was drawn, summary judgment was granted to Advantage. The grant of summary judgment was upheld on appeal, Bias v. Advantage International, 905 F. 2d 1558 (D.C.Cir. 1990). Professor Stephen Yeazell's casebook on Civil Procedure prints the case as an example of doubtworthy overreaching by federal judges who have been encouraged to overreach by the Celotex case.

CIVPROMIDTERMFALL2013keytoscoring/MARTIN

CIVIL PROCEDURE
Mr. Martin
October 19, 2012 Examination ID no._____

MIDTERM EXAMINATION

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QUESTION ONE

Stanley J. Windpants sues Hector McNutt alleging that McNutt executed a promissory note that is now due, unpaid, and held by Windpants. Answer each of the following questions, which will be weighted equally.

1. McNutt files a motion to dismiss under F.R.Civ.P. Rule 12(b)(6). Explain why this motion will be denied.

2. Explain why denial of the Rule 12(b)(6) motion does not mean that Windpants will prevail at trial.

3. After denial of the motion to dismiss, McNutt files an answer denying all material allegations of the complaint but raising no affirmative defenses. On these pleadings, what factual issues are both (a) relevant and (b) disputed?

4. After filing the answer described in question 3, McNutt admits in discovery that he has not repaid the note and that the note was signed by him. Does Windpants need any other information in order to move for summary judgment under Rule 56? (ANSWER "YES" OR "NO" WITH A BRIEF EXPLANATION.)

5. The facts in questions 3 and 4 above remain unchanged. Can McNutt successfully oppose summary judgment by filing an affidavit in which he claims that he was induced to sign the promissory note by Windpants's false representation that the note was a legally unenforceable promise to donate money to the Salvation Army? (ANSWER "YES" OR "NO" WITH A BRIEF EXPLANATION.)

QUESTION TWO

"Peer review," in the world of medicine, refers to a formalized, rigorous, and candid process for evaluation of a physician's performance by a designated group of the physician's professional peers. Hospitals are required by a federal law, the Peer Review Improvement Act of 1982, to have a peer review committee (sometimes called by another name), the purpose of which is to promote the quality of health care.

Although Congress did not provide for confidentiality in peer review, physicians and hospitals have persuaded the legislatures of nearly all American states that, in order to be effective, peer review requires (1) confidentiality, and (2) immunity from civil discovery. Otherwise, they say, the desirable level of candor will not be achievable and physicians will refuse to serve as peer reviewers. Especially, the hospitals and physicians have argued, peer review data must be shielded from discovery by plaintiffs in medical malpractice actions. American jurisdictions, accepting this rationalization, have accordingly enacted legislation which creates a statutory evidentiary privilege in favor of peer review. Typical is the statute in West Dakota:

> The proceedings and records of a peer review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any malpractice or other civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee.

Diana DeBride, M.D., was a surgeon with staff privileges at St. Simeon Stylites Hospital located in West Dakota. During a laparoscopic procedure, Dr. DeBride inadvertently punctured the iliac artery of a patient, creating a life-threatening emergency. After reviewing the case, the Peer

Review Committee of the hospital recommended that Dr. DeBride's staff privileges be terminated. The hospital administration accordingly terminated her.[1]

Dr. DeBride sued St. Simeon Stylites Hospital and its (all-male) Peer Review Committee under federal and state anti-discrimination laws. Dr. DeBride's complaint alleges that the iliac artery puncture was a known possible complication of the operation, and was a pretext for the real reason for her termination. The real reason, says the complaint, was hostility towards women in medicine and in particular towards female surgeons. Furthermore, says the complaint, the Peer Review Committee has historically discriminated against female surgeons by treating them more harshly and disciplining them more severely than similarly situated male surgeons.

Dr. DeBride sought discovery under Rule 34 of the following documents:

> (1) The Peer Review Committee's complete file on her case including an audiotape of the Committee's meeting on the case at which, she has been told, members of the Committee made disparaging remarks about women as surgeons; and
>
> (2) All Peer Review Committee records related to all reviews of surgeons for any reason during the previous twenty years, records which (she alleges) will substantiate her allegations of gender discrimination.

Citing the West Dakota statute that is quoted above, the defendants sought a protective order under Rule 26(c)(1), demanding that the discovery not be had and claiming that the Peer Review Committee records were

[1] Pursuant to another federal law, this unfavorable action is recorded in a national physician data bank. As a result, Dr. DeBride will have great difficulty finding another position in any hospital in the United States.

privileged against discovery. Dr. DeBride countered with a motion to compel production under Rule 37(a)(3)(A). Both motions, properly certified, are now before the judge in the case. How should the judge rule? Why?

QUESTION THREE

The American Society of Composers, Authors and Publishers (ASCAP) was founded in 1914 in order to protect the rights of owners of musical copyrights. ASCAP is a licensing agent for the compositions of its members. ASCAP sells licenses to music clubs, bars, stores, television stations, and the like, authorizing the performances of any and all of the musical compositions of ASCAP members. This enables the purchaser to avoid the cost of obtaining individual licenses and also provides owners of musical copyrights with a practical method of protecting their rights and collecting their royalties.

It is a violation of copyright in a musical composition to perform that work publicly without a license. Impermissible public performances include playing copyrighted songs on records or CD's in a bar or music club. To enforce the copyright laws against violators, ASCAP employs investigators who enter ASCAP-unlicensed places of public performance in search of violations.[2]

On February 20, 2012, two investigators from ASCAP entered Ruby Tuesday's Club where CD's were being played by a disc jockey. ASCAP sued Ruby Tuesday, owner of the club, for copyright infringement. After discovery, ASCAP moved for summary judgment. ASCAP's motion was accompanied by affidavits of the two investigators, who state that they were

[2] The late Jane Simkin, MSL student killed aboard United Air Lines flight 175 at the World Trade Center on September 11, 2001, was an investigator for ASCAP.

in the club from 8:30 p.m. until 1:35 a.m. on February 20. Between the hours of 10:00 p.m. and 11:00 p.m., they state, they wrote down the titles of the songs that they heard being played. Among these were four songs, the copyrights of which were assigned to ASCAP. Also accompanying ASCAP's motion for summary judgment were certificates of the copyrights of the songs in question and evidence of assignment of rights by the copyright holders to ASCAP.

In her answer, Ruby Tuesday denied that the songs were played at the Club on that night. In her deposition, however, Ruby admitted that she was relying on what she had been told by the disc jockey and that she was generally unaware of what particular songs were being played at Ruby Tuesday's on any given night. Ruby's deposition transcript was submitted with ASCAP's motion for summary judgment.

In opposing the motion for summary judgment, Ruby filed an affidavit which stated that she had been at the club on the night of February 20 and that she personally closed the club that night at 12:00 midnight, as she did every night. The investigators' affidavits, therefore (she stated), must be perjured and unreliable.

The trial court awarded summary judgment to ASCAP, assessing damages at $1,500 per song. As required by the copyright law, the trial court also awarded ASCAP its attorneys' fees. Ruby Tuesday appealed.

(a) Summarize the <u>legal argument</u> (i.e. don't just repeat the facts) for Ruby in the appeals court;

(b) Summarize the legal argument for ASCAP in the appeals court;

(c) Should the appeals court affirm or vacate the grant of summary judgment? Why?

END OF EXAMINATION

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CIVIL PROCEDURE
Mr. Martin
November 14, 2012

MIDTERM EXAMINATION
COMPLETE ANSWERS

QUESTION ONE

1. The function of pleadings is to give notice to opponents and the court. The complaint gives adequate notice. The claim that a debt is owed, overdue, and unpaid, states a claim for which the law provides a remedy.

2. Trial tests the truth (not just the sufficiency) of the complaint. Windpants will have the burden of proof at trial, and might lose. Also, McNutt may have defenses on which he will prevail.

3. Relevant and disputed issues are: (1) there is a note; (2) it is due; (3) it is unpaid; (4) it was executed by McNutt; and (5) it is held by Windpants.

4. Other information that is needed is that the note is (1) due, and (2) held by Windpants. ALTERNATIVE: Windpants must produce the note. Production of the note will reveal that the note is held by Windpants and if it is due.

5. NO, because this defense was not pleaded in McNutt's answer (Rule 8[c][1]). ALTERNATIVE: YES, but McNutt will have to get permission to amend his answer (Rule 15[a][2]).

QUESTION TWO

The West Dakota statute, uncritically read, would appear to forbid discovery of Peer Review material. Evidentiary privileges, however, contravene the policy of truth-seeking and should therefore be narrowly construed. On the other hand, Rule 26(c)(1) authorizes a protective order to protect a party from "undue burden." Compromise of the peer review process should be taken into account when evaluating the "burden" on the defendants of producing the records sought by Dr. DeBride.

Dr. DeBride can't win her case without the Peer Review information. Therefore this information is not only relevant to her claim, but decisive. And, although there is an important public policy in favor of protecting Peer Review records, there is also an important public policy favoring the correction of sex discrimination in employment. The purpose of the Peer Review statute ("to improve health care") is unrelated to Dr. DeBride' claim.

There is an analogy to attorney work product: a privilege, but not an absolute privilege. Concerns about the confidentiality of records relating to patients and to other surgeons can be addressed by an appropriate stipulation or court order. Possibly, the request for 20 years of records is overbroad. The parties should explore using other means of discovery.

Attention must be paid to the words of the statute. It is clear that the legislature was thinking about malpractice litigation, not sex discrimination litigation. The statute forbids discovery of Peer Review information in any action "arising out of the matters which are the subject of evaluation and review. . ." The "matter" before the Peer Review Committee was the iliac artery puncture, not sex discrimination. The statute refers to actions "against a professional health care provider." Here, Dr. DeBride is the professional health care provider and she's the plaintiff, not the defendant.

How should the judge rule? Your call. About 80% of the students ruled in favor of disclosure to Dr. DeBride.

The question was derived from Virmani v. Novant Health Incorporated, 259 F.3d 284 (4th Cir. 2001).

QUESTION THREE

(a). Ruby's argument. Ruby, the non-moving party, responded with enough evidence to defeat the motion for summary judgment, thus showing a disputed issue of material fact. ASCAP, having the burden of proof at trial, must show that the trier of fact would have to find for it. The affidavit based on Ruby's personal knowledge could be believed by the trier of fact; therefore ASCAP hasn't carried its burden.

Ruby's affidavit raises a question about the credibility of the ASCAP investigators. Credibility can rarely be resolved on summary judgment. Credibility is a jury issue, and Ruby has a Seventh Amendment right to put credibility before a jury. Also, there is the possibility that the whole case is a scam.

(b). ASCAP's argument. ASCAP, the moving party, moved for summary judgment with evidence that (if uncontradicted) would entitled ASCAP to judgment in its favor. The burden then shifts to the non-movant to show evidence to the contrary (Celotex case). Ruby has not done this.

The material question is: were four songs played at Ruby's club on the evening of February 20 in violation of copyrights assigned to ASCAP? Ruby has offered no admissible evidence that the songs weren't played on that night. Her deposition testimony as to what the DJ told her is hearsay. Her affidavit is silent on this issue. And the absence of an affidavit from the DJ is devastating to her case.

Finally, the dispute about when the club closed isn't about a "material" fact because the investigators' affidavits refer to the period 10:00 PM to 11:00 PM when the club was, indisputably, open.

(c). How should the appellate court decide ? Your call. [Note: credit was given for the above points of "argument" regardless whether they appeared in parts (a)-(b) or in part (c)].

The question was derived from Lodge Hall Music, Inc., v. Waco Wrangler Club, Inc., 8312 F.2d 77 (5th Cir. 1987).