

CIVIL PROCEDURE
Mr. Martin
December 12, 2005

FINAL 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. Questions will be weighted in accordance with the amount of time suggested for each question. If there are individual parts within a question, each part within the question will be weighted equally unless you are told otherwise.

Please write legibly, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your social security number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your social security number is on each one, and insert all others into the first one.

The Federal Rules of Civil Procedure apply to all questions.

You may assume, if relevant, that any American state has a long-arm statute identical to that of Illinois which is printed at pages 723 and 725-6 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

ALL BLUE BOOKS MUST BE RETURNED AT THE END OF THE EXAMINATION.
LABEL ANY SCRAP BLUE BOOK WITH THE WORD "SCRAP."

Leo Tard was an operating engineer on the Big Dig project in Boston. He was injured when the cab of the crane which he was operating became disengaged from its pedestal mounts and toppled forty feet to the ground. Leo's employer, Big Steel Erection Co. ("Big Steel") promptly reported the accident to its workers' compensation insurer, Old Faithful Insurance Co. ("Old Faithful"). Also promptly, Old Faithful sent an investigator to the scene of the accident. Two days after it occurred the investigator interviewed Harry, Mary, Booth and Ruth, all fellow-employees of Leo, who had been on the scene and had witnessed the accident. On the basis of these interviews, the investigator prepared written statements for the signature of each interviewee. Harry, Mary, Booth and Ruth signed these statements and turned them over to the investigator.

The investigator also interviewed Leo in his hospital bed and prepared a similar written statement which Leo signed and turned over to the investigator. Leo received, and continues to receive from Old Faithful, the workers' compensation benefit to which he is entitled under state law (known as "wage continuation"). He has not returned to work. Many people who are seriously injured at work think that their workers' compensation awards are inadequate. Leo was one. In the hopes of securing substantial money damages Leo sued the crane's manufacturer, American Skyhook Co. ("Skyhook"), claiming to be

QUESTION ONE
 (suggested time: forty-five minutes)

to Old Faithful's investigator.

1. Leo seeks production of the signed statement which he gave

to the appropriate federal Rule counts as twenty per cent.

brief explanation counts as forty per cent. Your correct citation

ALLOW or DENY, counts as forty per cent of each sub-question. Your

which supports your answer and explanation. Your one-word answer,

with a brief explanation. In each case, cite the federal Rule

DENY the motion to compel? Answer each question "ALLOW" or "DENY"

In each of the following instances, should the Judge ALLOW or

action.

Skyhook in an attempt to secure the disclosures without court

the certification by Leo's lawyer that she has conferred with

All necessary conditions for the motions are satisfied, including

brought appropriate motions to compel discovery under Rule 37(a).

Skyhook has refused to furnish the information. Leo has therefore

certain information from Skyhook. In each case detailed below,

By means of appropriate discovery requests, Leo demanded

to Skyhook its entire investigative file on Leo's accident.

At the request of Skyhook's lawyer, Old Faithful turned over

diversity grounds.

Suit was filed in federal district court in Massachusetts on

after the accident occurred before he started suit against Skyhook.

of the pedestal mounts for the crane. Leo waited almost two years

Leo's complaint alleged, was caused by Skyhook's defective design

totally and permanently disabled on account of the accident which,

investigator photographed Leo shovelling snow, painting his house, and dancing the cha-cha. Skyhook will use the photographs at trial to disprove or impeach Leo's claim that he is totally and

6. After Leo filed suit against Skyhook, Skyhook hired a private investigator to conduct surveillance of Leo. The Skyhook.

communications that have taken place between Old Faithful and payments to Leo. Leo asks for production of all written so that Old Faithful can terminate its workers' compensation Skyhook to disprove Leo's claim of total and permanent disability says that Old Faithful believes Leo to be malingering. He urges to Skyhook's lawyer. In the letter Old Faithful's general counsel accompanied by a cover letter from Old Faithful's general counsel 5. The file which Old Faithful sent to Skyhook was photographs.

crane has since been repaired. Leo seeks production of these accident scene showing the crane in its damaged condition. The 4. Old Faithful's investigator took photographs of the United States and their whereabouts is not known.

3. Leo seeks production of the signed statements which Booth and Ruth gave to Old Faithful's investigator. Booth and Ruth have moved on to other major construction projects elsewhere in the directed to Skyhook, that the statements be released to Leo.

2. Leo seeks production of the signed statements which Harry and Mary gave to Old Faithful's investigator. Harry and Mary are still working for Big Steel. Each has requested, by a writing

citizen and resident of New Hampshire who was driving towards New
 One of the cars was owned and operated by Peter Plaintiff, a

occurred within the territorial limits of Vermont).
 near the Vermont riverbank. (In other words, the collision
 Vermont. One night, a three-car collision occurred on the bridge
 spanning the river between Stratford, New Hampshire, and Maidstone,
 boundary between the two states. There is a two-lane bridge
 Connecticut River. The middle of the river constitutes the
 The states of New Hampshire and Vermont are separated by the

QUESTION TWO
 (suggested time: one hour)

his air fare, hotel and meals.
 the deposition even though promised an advance of money to cover
 now retired and living in Arizona, refuses to come to Boston for
 crane. Leo's lawyer calls for this deposition in Boston. Dente,
 who when an employee of Skyhook designed the pedestal mounts of the
 9. Leo seeks to take the deposition of Al Dente, an engineer,
 called to testify at trial.
 its defense of Leo's lawsuit, whether or not the expert will be
 and address, every expert that it has consulted in connection with
 8. By an interrogatory Leo asks Skyhook to identify, by name
 cranes during the period January 1, 1985, through the present date.
 possession relating to any and all accidents involving Skyhook
 7. Leo seeks production of all records in Skyhook's
 surveillance photographs of him taken by the private investigator.
 permanently disabled. Leo seeks production of any and all

GO ON TO THE NEXT PAGE

Each party moves to dismiss all claims against him or her on each of the three grounds set out in Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(3). How should the federal court judge rule on each motion? Why?

Part A.
(forty per cent of this question)

Hampshire. He was returning home from a business meeting in Vermont. Another of the cars was owned and operated by Deirdre Defendant, a citizen and resident of Vermont who was also driving towards New Hampshire. She was on her way to visit her aunt in New Hampshire. The third car was owned and operated by Terry Thirparty, a citizen and resident of New Hampshire who was driving towards Vermont. He was going to Vermont for a ski vacation. All three drivers were severely injured. Each suffered damages that Peter Plaintiff brought a diversity action against Deirdre Defendant in federal district court in New Hampshire, alleging that Deirdre's negligence had caused Peter's injuries. Deirdre brought a third-party complaint against Terry Thirparty, alleging that under New Hampshire law Deirdre was entitled to contribution (on account of Terry's alleged negligence) if Deirdre should be held liable to Peter. Terry then filed a claim against Peter, as permitted by Rule 14(a), alleging that Peter's negligence had caused Terry's injuries.

exceed \$75,000.

After the completion of discovery, the case is tried to a jury. The jury returns a special verdict in which it finds that the accident was caused exclusively by Terry's negligence. Judgment is entered and no appeal is taken. Because Peter had filed no claim directly against Terry, Peter recovers no damages from Terry. Because Deirdre's claim against Terry was for contribution only, Deirdre recovers no damages from Terry. Afterwards, Peter and Deirdre jointly bring suit against Terry in a New Hampshire state court, seeking to recover damages for the personal injuries that they sustained in the accident. Terry moves to dismiss the state court action, asserting that Peter's and Deirdre's claims are barred by the judgment in the earlier federal

Part C.
(forty per cent of this question)

Assume that all motions to dismiss are denied. The case proceeds to discovery. The New Hampshire Financial Privacy Act, a statute passed by the New Hampshire legislature, protects anyone from having to disclose to private parties certain financial information including information about his or her insurance coverage. For this reason Deirdre did not disclose her automobile liability insurance policy in her initial disclosure as is required by Rule 26(a)(1)(D). Peter brings a motion to compel discovery before the federal district court judge, seeking an order that requires Deirdre to disclose her automobile liability policy. How should the judge rule on this motion? Why?

Part B.
(twenty per cent of this question)

refrigerator each year in the hopes of stimulating repeat sales. vacation lodges. Polar introduced a "new, improved" model of bought small refrigerators for use in local hunting, fishing and Georgia, Florida, South Carolina and Mississippi. The customers, through stores that sold hunting and fishing equipment in Alabama, southern states which it had developed by marketing refrigerators Polar was a profitable company that had a good reputation in end of a year of production which it could not sell.

article said that Polar usually had refrigerators left over at the Polar Co., a manufacturer of small refrigerators in Alabama. The Buster had seen an article in a national trade magazine about

they would enjoy buying refrigerators in winter too. decorations in January and winter boots in April. He thought that liked to shop for out-of-season bargains such as Christmas January through March. He observed that his fellow Maine citizens make a lot of money selling refrigerators during the months of that he thought might turn a profit. Buster decided that he might equipment exclusively. He had an idea for a new line of business the largest retail store in Maine selling hunting and fishing Buster Klaxon, a citizen of Maine, was a businessman who owned

QUESTION THREE
(suggested time: forty-five minutes)

should the judge decide these motions? Why? established in the earlier case and cannot be re-litigated. How question of Terry's liability, asserting that Terry's liability was court action. Peter and Deirdre move for summary judgment on the

At the end of the year in December, unsold refrigerators of the old model were disposed of for their scrap metal value alone.

Buster's plan was to buy the surplus refrigerators at a heavy discount from their normal wholesale price, ship them to Maine, and offer them to his hunting and fishing customers in Maine at a little below the price of competing models.

When Buster approached Polar (by telephone) the company's officers were intrigued. Buster was careful not to explain the details of his plan to Polar. He insisted that he would buy the refrigerators "F.O.B." which meant that he would take title to them at Polar's warehouse in Alabama and arrange his own shipping, so that Polar could not copy his plan and take over the Maine market. Despite Buster's secretive manner Polar decided that, if Buster would pay, even at a reduced price Polar could make money by selling surplus refrigerators which would otherwise be scrapped.

So the deal was made. Polar checked out Buster's credit references, which were good, and agreed to sell him the refrigerators on credit with payment to be made 60 days after shipment from Polar's warehouse. Polar was experienced in making deals without formal written contracts so, except for a few letters that went back and forth, the understanding was oral.

At first the small refrigerators got a good reception in Maine. Customers loved the bargain price. All over Maine and even into New Hampshire word spread that Buster had something special. Problems, however, soon arose. It turned out that Maine citizens liked to use the refrigerators when they did their cold

weather snowmobiling and ice fishing. They wanted a small refrigerator that would keep their beer chilled without freezing it. But the refrigerators were not designed to resist extreme cold. Large numbers of customers returned their refrigerators to Buster's store, demanding refunds and complaining about their frozen beer. Buster complained to Polar that Polar's officers had told him, orally and in writing, that the refrigerators were designed to withstand extremes of temperature. Polar's officers replied that they were talking about hot weather, not cold weather. Polar refused to accept any returns from Buster. Buster stopped writing checks to Polar. The exchanges between Buster and Polar became more and more hostile.

Polar sued Buster in a state court in Alabama for \$100,000 unpaid by Buster to Polar. Polar sued in Alabama for two reasons: (1) it wanted the home field advantage-- specifically it hoped for a jury of satisfied Alabama hunters and fishermen, not a jury of Maine folks who would know about the frozen beer; and (2) Alabama law recognizes and will enforce most oral contracts. Buster was properly served with process from the Alabama state court.

Two days after service of process upon Buster, Buster retained a lawyer in Alabama who immediately filed a motion to dismiss for lack of personal jurisdiction. Alabama's longarm statute is identical to that of Illinois which is printed at pp. 723 and 725-6 of your casebook.

What is the likelihood that Buster's motion to dismiss will be allowed? Explain.

When you go to the clerk's office to check out the case in which the judgment was entered, you find a complaint against Diane for an alleged breach of a commercial lease relating to an earlier restaurant. The landlord sued Diane for back rent and property damage asking for \$35,000 "plus such other and further damages as the court may deem just." The file contains a copy of the summons, the complaint, and a return of service showing that the sheriff personally served Diane with the summons and complaint on June 1, 2000. The summons is in the correct form. There are no responsive pleadings from Diane. The only other documents in the file are the plaintiff's motion for entry of default and accompanying affidavit, the default entered by the clerk on July 15, 2000, an affidavit

ago in the amount of \$35,000.

SBA furnished her. They show a default judgment entered five years ago in the amount of \$35,000. Diane says she knows nothing about any judgment, but she has some papers that the SBA furnished her. They show a default judgment entered five years ago in the amount of \$35,000. Diane says she knows nothing about any judgment, but she has some papers that the SBA furnished her. They show a default judgment entered five years ago in the amount of \$35,000. Diane says she knows nothing about any judgment, but she has some papers that the SBA furnished her. They show a default judgment entered five years ago in the amount of \$35,000.

QUESTION FOUR
 (suggested time: thirty minutes)

END OF EXAMINATION

When you question Diane further, she says that she vaguely remembers some dispute with her landlord which caused her to close her first restaurant precipitously and to move out of the building overnight. She maintains, however, that she paid every penny owed to the landlord and she has the cancelled checks to prove it. She says she thought she didn't need to do anything about the lawsuit because everything had been taken care of. She just put the complaint in a drawer and forgot about it. Further, she says that she never got any notice after she was served that the landlord was going ahead and she certainly got no notice that he intended to enter judgment against her. She retains you to help her clear this up so she can get the loan and go ahead with her new restaurant. What options are open to you? What will you do, and why?

sworn by the plaintiff claiming an actual amount due of \$42,000, and the judgment entered by the judge on July 30, 2000, in the amount of \$35,000.