Civil Procedure

Professor Sachs

Final Exam, Fall 2011

Please answer each of the following six questions. You're free to use any paper or electronic materials you have brought with you, but not the Internet.

Make sure that you read each question carefully, and *take a few minutes to outline each answer before beginning to write*. If you just dive in, you'll get lost halfway through. Organize your answers clearly, so as to facilitate grading.

Each question is worth a specified number of points out of 100. As I emailed you, there are no word limits, but brevity is appreciated. Citations to individual rules or statutes are helpful, but complete chapter-and-verse isn't necessary so long as you state the substance correctly. The same is true for relevant cases.

I've suggested a certain number of minutes for each question. The recommendations build in fifteen minutes to read through the whole thing first, and five minutes for proofreading at the end. Answers will be graded on your understanding and analysis, as well as on clarity of exposition.

The exam as a whole will be graded on a curve, in compliance with Duke's large-class grading policies. Also, please make sure not to include your name, so that exams can be graded anonymously.

Good luck!

Question 1. *(40 pts., ≈90 min.)*

Ms. Gertrude Unglück lives in Jamestown, N.Y. In February 2010, she bought a new wood-cleaning product, Sneed's Orange Oil, from her local Walmart. She used it on her IKEA wood table, but it left a distinct stain. She returned it to the Walmart and went back to her old cleaning product, Murphy's Oil Soap. That March, while returning to Walmart for a new bottle, she twisted her ankle by slipping on some Murphy's Oil Soap spilled by a careless Walmart employee.

That September, Unglück went back to the Walmart and tried a new cleaning product, Mr. Sparkle™. After taking the bottle home, Unglück diluted the product with water to make it last longer. An explosion occurred, and Unglück was badly burned. After repeated surgeries at her local hospital, she was moved to a temporary care facility in nearby Erie, Pa., until she had fully recovered. She is expected to be well enough to leave by early 2012.

Subsequent investigation revealed the following:

A. Sneed's Orange Oil is manufactured by Sneed's Inc., a Pennsylvania corporation based in Reading, Pa. Murphy's Oil Soap is made by the Colgate-Palmolive Company. Colgate is incorporated in Delaware and has substantial facilities in all 50 states, with its principal executive offices in Framingham, Massachusetts.

B. The fluid in Mr. Sparkle™ is jointly manufactured by two Japanese corporations, Matsumura Fishworks and Tamaribuchi Heavy Manufacturing Concern. Both operate primarily in Japan, but they operate an English-language website advertising Mr. Sparkle™ to American customers, showing the iconic Mr. Sparkle™ cartoon character in front of a variety of recognizable landmarks, such as the Statue of Liberty, Seattle's Space Needle, Independence Hall in Philadelphia, and the St. Louis Arch. Tamaribuchi also sells a sizable number of machine tools every year to industrial customers in Massachusetts, New York, and Pennsylvania.

C. The manufacturers of Mr. Sparkle™ have an exclusive contract with SparkleCorp of America, incorporated and based in Ohio, to distribute their product throughout the eastern United States. (The product is not sold at all west of the Mississippi.) The majority of SparkleCorp's sales are to stores in New York and Pennsylvania—particularly to Walmart, a Delaware corporation based in Arkansas.

D. The Mr. Sparkle™ bottle was designed and produced by the Industrial Design Collective, a Delaware corporation with no fixed headquarters. The nine members of the Collective work independently, but they meet regularly at a coffee shop in Brooklyn to go over designs and discuss their business dealings. Designs are then sent from a post office box

in Brooklyn to the Collective's manufacturing plant in Cleveland, Ohio, which employs over 250 employees and represents the Collective's only physical facility.

E. Mr. Sparkle™ is bottled at the Collective's Cleveland plant and then turned over to SparkleCorp for distribution. The front of the bottle states that Mr. Sparkle "is perfectly safe" and "will banish dirt to the land of wind and ghosts." Underneath those sentences is a highly prominent warning label. ("WARNING: MR. SPARKLE™ IS A VERY POWERFUL CLEANING FLUID. DO NOT DILUTE MR. SPARKLE™ WITH WATER OR YOU WILL BE BADLY BURNED. DO NOT TAUNT MR. SPARKLE™.")

On June 14, 2011, Unglück filed suit in the U.S. District Court for the Western District of Pennsylvania, in which Erie is located. She named as defendants Sneed's, Walmart, Colgate-Palmolive, Matsumura, Tamaribuchi, SparkleCorp, and the Collective. Unglück alleged that her stain was caused by a defective product sold by Sneed and Walmart; that her slip-and-fall was due to Walmart's negligence; and that her burn injury was caused by the defective product and failure-to-warn of Matsumura, Tamaribuchi, SparkleCorp, the Collective, and Walmart. She sought undivided relief of $1 million.

You are an associate at the law firm of Glannon, Perlman & Raven-Hansen, which is jointly representing all seven defendants. (They have waived any relevant conflicts of interest.) Your investigation of the law has revealed that the statute of limitations in Pennsylvania requires every action to be filed within two years after the claim arises, while the limitation period in New York is only one year. You have also discovered that Pennsylvania applies a comparative-negligence approach in tort (reducing the recovery in proportion to the plaintiff's relative negligence), while under New York law any contributory negligence by the plaintiff is a complete defense to liability. Finally, Pennsylvania applies the *lex loci delicti* choice-of-law approach to tort claims (that is, apply the law of the state of injury), while New York applies the *lex fori* approach (that is, apply the law of the forum state in which the court sits).

The supervising partner prefers to advance all available defenses to the plaintiff's claims by motion if possible, rather than waiting for trial. She also prefers to litigate the various claims separately rather than together. But she doesn't want to file anything that's unlikely to succeed. **What motions should you file (and on behalf of which defendants)? What would those motions say, and what would be their chances of success?**

Question 2. *(20 pts., ≈45 min.)*

You are clerking on the U.S. Court of Appeals for the Federal Circuit. Your judge is on the panel for *Poincaré & Erdős, LLP* v. *Dedekind*, a design patent dispute involving a line of donut-shaped coffee cups.

The proceedings in the district court were complex. After service of the complaint, Dedekind filed a motion to dismiss, asserting legal objections to the venue and the method of service of process. The court postponed the disposition of that motion. Dedekind then filed an answer denying infringement of P&E's patent. In the alternative, his answer asserted that his own use of the patent was permitted by their license agreement (a complicated factual question), that the court lacked personal jurisdiction, and that venue and the service method were improper.

During discovery, P&E refused to produce its own copy of the license agreement in response to a Rule 34 production request. Instead, P&E merely stipulated that Dedekind's copy was accurate. The court denied Dedekind's motion to compel production.

Once discovery ended, Dedekind brought a motion for summary judgment on the grounds of personal jurisdiction, failure to state a claim on which relief could be granted, license of the patent, and collateral estoppel. (P&E, a well-known—indeed, notorious—litigant, had repeatedly lost in previous cases on the issue of whether the patent was valid.) This motion was also postponed. Shortly before trial, Dedekind moved to bifurcate the issues of liability and damages into separate proceedings under Rule 42, but the court refused.

At trial, the parties fully addressed every issue raised in the complaint and answer. The jury found for P&E, assessing damages of $30,000. The court imposed judgment in that amount, and denied all of Dedekind's pending motions. Dedekind then filed a Rule 50 motion for judgment as a matter of law, raising all of the issues above. In addition, he argued that the parties lacked diverse citizenship, because he and Henri Poincaré, the lead partner of the P&E partnership, were from the same state. This motion was denied, with the court noting that Paul Erdős, the other partner, was from a different state and thus satisfied minimal diversity.

Dedekind's Rule 50 motion included an alternative request that the court throw out the verdict and hold a new trial with a new jury. The court denied this alternative request, on the ground that the verdict was supported by a legally sufficient basis in the evidence.

Assume that Dedekind made no motions or filings other than those listed here. He has appealed on every issue he raised in the district court. **Without knowing any more, which of these issues could potentially be grounds for a successful appeal, and which could not? Why? Are some grounds more likely to succeed than others?**

Question 3. *(10 pts., ≈20 min.)*

Four weeks ago, a complaint was filed in Pennsylvania state court on behalf of "Occupy Scranton." It sought injunctive relief against the City of Scranton's interference with a planned march across the Rockwell Avenue Bridge, claiming that such interference would violate the First Amendment. The court granted summary judgment to the city, holding that the restrictions were valid time, place, and manner regulations because of the traffic dangers present on the Bridge.

"Occupy Scranton" has just filed a new complaint in the U.S. District Court for the Middle District of Pennsylvania, seeking a similar injunction with regard to a planned march through Nay Aug Park. The city has filed a counterclaim, seeking damages under state law for the cost of additional police for several months' worth of previous marches. (It did not raise any counterclaim in the previous suit.) And the city has again moved for summary judgment, this time arguing claim and issue preclusion and challenging the group's capacity for suit. Pennsylvania capacity-for-suit law requires an unincorporated association to have a written charter and an official list of members; "Occupy Scranton" has neither.

Assume that each side makes the best arguments available for its position. **What ruling on the city's summary judgment motion, and why? What ruling on the city's counterclaim, and why?**

Question 4. *(10 pts., ≈20 min.)*

Gerard Kuiper, a famous designer of belts and other accessories, recovered $80,000 in a trademark infringement suit against rival Jan Oort. Oort has now sued his former law firm of Dewey, Cheatham & Howe LLP, alleging malpractice in the Kuiper suit. He has filed Rule 34 production requests seeking copies of the following:

(a) a confidential letter to Oort from firm lead partner Thomas Dewey, assessing Oort's areas of strength and weakness in the case against Kuiper;
(b) a new report prepared by Nexus Insurance Inc., the firm's malpractice insurer, on the scope of potential malpractice liability to Oort;
(c) any documentation of Kuiper's original trademark application that is still in Kuiper's possession; and
(d) any documents created in the last fifteen years reflecting the firm's assets or financial position, to help assess punitive damages.

Which (if any) of these requests should be honored, and why?

Question 5. *(5 pts., ≈10 min.)*

Mr. and Mrs. Gunderson live in Eau Claire, Wisconsin. They have a $120,000 joint account at U.S. Bank, a Delaware corporation based in Minnesota. Under the terms of the account, the money belongs to both Gundersons, and any withdrawals require both of their signatures. Mr. Gunderson tried to withdraw the full amount from the local branch, but the Bank rejected his withdrawal slip, suggesting that Mrs. Gunderson's signature had been forged. He sued the bank in the U.S. District Court for the Western District of Wisconsin, seeking a declaration that he is individually entitled to the funds. The Bank moved to dismiss, arguing that he had not joined Mrs. Gunderson as a defendant. Mrs. Gunderson does not want to have anything to do with the lawsuit (or, for that matter, Mr. Gunderson, from whom she is estranged). **How should the court rule on this motion, and why?**

Question 6. *(15 pts., ≈35 min.)*

Suppose that the Judicial Conference is considering the following amendments to Rule 23:

- Amend (c)(2)(B)(v) to read as follows: "that the court will ~~exclude from the class any member who requests exclusion~~ *include in the class only those members who request inclusion*";
- In (c)(2)(B)(vi), strike "exclusion" and insert "inclusion."
- Amend (c)(3)(B) to read as follows: "for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who ~~have not requested exclusion~~ *have requested inclusion*, and whom the court finds to be class members";
- Amend (e)(4) to read as follows: "(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members*, and a new opportunity to request inclusion to individual class members* who had an earlier opportunity to request exclusion but did not do so."

What would be the legal effects of these changes? What would be their practical effects? Would they be a good idea?

(P.S.: If you think this exam is long, then you should be grateful to my wife, who persuaded me to take out one of the original issue-spotters. She likes flowers and chocolate.)