

## MIDTERM: CIVIL PROCEDURE

Tuesday, Oct. 6, 2020—2.0 hours

Professor Ira Steven Nathenson, St. Thomas University School of Law

**Read the instructions carefully. When time is called, all work must cease.**

**Time and length.** This document is seven (7) pages long. The examination has been written as a 75-minute exam, but I am giving you two (2.0) hours to complete it. You may not write anything on, or erase anything from, any examination materials after time runs out.

**Open book.** The examination is open book. You may use, for example, your book, notes, outline, any handouts, and your Statutory supplement. You may not, however, seek or provide any assistance from or to any other person.

**AGN.** Indicate your 4-digit AGN number on this exam as indicated by the instructions you have received from the Registrar. Do not put your real name or any other personally identifying information on the examination except for your AGN.

**Do not contact me.** Do not contact me with any questions about the examination until scores have been released as that may constitute a breach of exam anonymity. If you have any questions or concerns, please contact Dean Hernandez.

**Time and scoring.** The suggested times below add up to 75 minutes. For this first exam, however, I will give you two (2.0) hours.

- *Essay question (one question, 45 minutes total):* I suggest you spend approximately (i.e., at least) 45 minutes on the essay question. Write your answer using **Exam4**. You may not exceed the 2000-word limitation, which should be more than enough words to answer the essay question. Since Exam4 counts all words towards the limitation, I suggest that you do not include your outline in the exam submission. You would be better advised outlining on paper or outlining on computer and then turning your outline into your essay answer.
- *Multiple-choice (10 questions, 30 minutes total):* Answer the questions using **Remark**. Do not enter your multiple-choice answers into Exam4, you will waste words and your multiple-choice answers will not get any credit.

### **Further instructions for multiple-choice questions.**

- You must use **Remark** for your multiple choice. If you enter your multiple choice using Exam4, you will not receive credit.
- If more than one multiple-choice answer seems to be correct, then choose the best answer.
- The multiple-choice questions use the facts from the essay fact pattern and in some cases, build upon or vary those facts.
- I strongly suggest that you finish the essay question first, before turning to the multiple-choice questions. This is because although the multiple-choice questions are based upon the essay fact pattern, no facts added or changed in the multiple-choice questions may be used for the essay.

**Further instructions for essay questions.**

- *Exam4*. You must use **Exam4**.
- *Writing*. Legibility, proper writing, and organization are expected and are part of your score.
- *How to address essays*.
  - Read the call of the question and facts carefully—twice—before you outline and write.
  - Raise, discuss, and decide all issues reasonably raised by the call of the question, whether or not they are dispositive, and whether or not resolution of one issue makes discussion of other issues technically unnecessary. However, do not engage in negative issue-spotting, which is discussing: 1) issues or parties falling outside of the call of the question, or 2) tangential issues that, although technically falling within the call of the question, are nonetheless frivolous.
  - If you believe you have discovered an error in any essay question, then expressly identify the error in your written answer and resolve it in a reasonable manner.
  - If (and only if) you believe that it is absolutely necessary to assume additional facts, then state what those facts would be and how they would affect your analysis.

***THIS EXAM IS CONFIDENTIAL***

**As a St. Thomas Law student, you are bound by the St. Thomas University School of Law Code of Academic Integrity. In addition, you may not discuss this examination with any classmates who have not yet completed this exam. Any breach will be considered to be a serious violation of the Code of Academic Integrity and will be addressed accordingly.**

### **ESSAY QUESTION**

Suggested essay time: 45 minutes.

Atticus Dog was born in Antwerp, Belgium to Belgian parents. Although Atticus Dog was a proud Belgian, he and his family moved to Miami Beach, FL in 2010. A few years later, Atticus decided to seek U.S. citizenship, and in 2015, Atticus became a lawful permanent resident of the United States. While living in Miami, Atticus established a security-protection business in his own name as an individual sole proprietor. Atticus' slogan was "Vigilant Atticus: Dogged Protector!" Atticus had many clients in South Florida, and he made a very good living. Atticus was vigilant. Atticus was dogged. Atticus was a very good boy.

In early 2020, for \$10,000, Atticus hired Luci Rabbit to take his photograph and to create a website for Atticus' security business. Luci had been born in Paris, France, and moved to Pittsburgh, PA in 2008. As a photographer, she loved beautiful places, and in 2010, purchased a condo in Miami Beach that she went to during the cold Pittsburgh winters. Luci obtained her lawful permanent resident status in 2013, and in 2019, became a United States citizen. As Luci would say, "Vive la France! Vive les États Unis! Bravo Steelers! Et je déteste vraiment les chiens!" (That's French for "Long live France! Long live the United States! Go Steelers! And I really hate dogs!") Pursuant to their contract, Luci flew to Miami, took a photograph of Atticus at Atticus' place of business in Florida, and then flew back to Pittsburgh to process the photo and create a website for Atticus.

On March 7, 2020, Atticus was horrified when he "googled" himself and saw the new website. It showed Atticus crying and looking sad. The photo and website made Atticus look ridiculous, and in Atticus' line of work, a person cannot afford to be made to look ridiculous! Atticus did not remember having cried when Luci took his photograph, so Atticus concluded that Luci must have "photoshopped" the photos she took of him to make Atticus look pathetic. Many of Atticus' clients saw the website. Subsequently, many of his clients concluded that Atticus had lost his courage, and cancelled their security contracts with Atticus. This time, Atticus cried for real.

On March 13, 2020, Atticus filed a lawsuit in the United States District Court for the Western District of Pennsylvania (where Pittsburgh is located). He sought: 1) return of the \$10,000 he paid Luci for the contract; 2) one billion dollars for defamation and trade libel; 3) two billion dollars for intentional infliction of emotional distress; and 4) many more dollars for tortious interference by Luci with Atticus' business relations with his former clients. A few weeks later, Atticus was able to find some joy and lick his wounds, as he and his family were sworn in on April 1, 2020 as United States citizens (wearing masks, of course, and maintaining proper social distancing).

On May 15, 2020, Luci was personally served with the summons and complaint while eating some healthy greens and sipping cool water from her favorite drinking bottle at her condo in Miami Beach, FL. Luci immediately moved to dismiss as noted below.

**QUESTION:** You are the clerk for the District Judge handling the case. Luci has filed a motion to dismiss arguing that subject-matter jurisdiction is lacking under 28 U.S.C. § 1332. Discuss whether the court has subject-matter jurisdiction under this provision.

## **MULTIPLE-CHOICE QUESTIONS**

Suggested total time for 10 multiple-choice questions: 30 minutes.

Read these rules carefully before proceeding:

- *Choose the best answer:* If more than one multiple-choice answer seems to be correct, then choose the best answer.
- *Changes/ additions:* Each multiple-choice question *uses, adds, or changes* facts from the essay fact pattern.
- *Each multiple-choice question stands on its own:* Unless expressly provided otherwise, a fact added or changed from the essay for one multiple-choice question applies to that question only and not to any other question.
- *Finish the essay first:* You may not use any additional or changed multiple-choice facts in answering the essay question, so you are advised to finish the essay question before turning to the multiple-choice questions.
- *Long-arm statute:* Unless a question states to the contrary, assume that the Pennsylvania long-arm statute states: “A court of this state may exercise personal jurisdiction to the full extent permitted by the Constitution of the United States.”

**Note – correct answers are highlighted in blue, and incorrect answers in red.**  
**At the bottom of each question is a breakdown of what answers were chosen by students from the two sections together. Since you have the exam, you should be able to score yourself.**

1. Is Luci subject to personal jurisdiction?

- A. Yes, because satisfying any state’s long-arm statute authorizes the exercise of personal jurisdiction.

**Incorrect, because it overstates the law. A state long arm might be satisfied but still inconsistent with due process. Also note the categorical term “any,” which assumes an absolute statement of law.**

- B. No, because Luci was not served personally in the forum state.

**Incorrect, because there is PJ in PA through domicile. Also, personal service is not absolutely required for PJ.**

- C. Yes, because her home is in Pennsylvania.

**Correct – Most chose. Luci is domiciled in PA, which provides either a traditional form of PJ, or satisfies general jurisdiction.**

- D. No, because many of the contacts that gave rise to Atticus’ claim arose in Florida.

**Incorrect, because a person can have contacts with multiple states. Luci’s contacts with Florida do not prevent PJ in PA.**

A	B	C	D
6.56	4.92	88.52	0.00

2. Suppose the lawsuit was filed in Florida federal court rather than Pennsylvania federal court. Further assume that the Florida long-arm statute is limited to “tortious acts in the state of Florida.” What is Atticus’ best argument that Luci is subject to personal jurisdiction in Florida?

A. Luci was personally served with process in Miami Beach, so the long-arm statute does not need to be met.

Correct – in-state personal service is a long-standing form of PJ that predates the 1945 case of *International Shoe* (and the long-arms that were created in response to *Shoe*). Thus, even though the long-arm is arguably not met (since Luci edited the photo and created the website back in PA), the long-arm is very arguably inapplicable in this context.

B. The tortious injury was felt by Atticus in Florida.

Incorrect because it is not the best answer. A few courts have read similar long-arms to include the place of tortious *injury*, but most courts today would likely read “tortious *acts* in the state of Florida” to mean *tortious acts by the defendant* that occur in Florida. Since the photo and website were processed in PA and not Florida, the argument that the tortious *acts* took place in FL is weak.

C. The long-arm statute is strong evidence that the state of Florida has a compelling interest in preventing torts from harming Florida residents.

Incorrect. The long-arm would be evidence of Florida’s interest but is not relevant to determining whether the long-arm is satisfied (or even required) under these facts.

D. Luci voluntarily and knowingly entered into a contract with a Florida resident.

Incorrect. Facts about a *contract* do not tell us whether Luci committed a *tortious* act in Florida.

A	B	C	D
65.57	24.59	3.28	6.56

3. In which districts would venue have been appropriate?

A. Southern District of Florida.

True, because substantial events or omissions took place in SDFL, such as the photo shoot. See 1391(b)(2). Atticus also negotiated the contract that led to the claims from there. Not the best answer because B is also correct.

B. Western District of Pennsylvania

True, because substantial events or omissions took place in WDPA, such as the photo processing and website design, as well as Luci negotiating from there. See 1391(b)(2). Plus, Luci is domiciled in the district. See 1391(b)(1), (c)(1). Not the best answer because A is also correct.

C. Southern District of Florida and Western District of Pennsylvania.

Correct because A and B are both correct. Proper venue can lie in one district, multiple districts, and sometimes, no districts at all.

D. Any district in Florida or Pennsylvania.

Incorrect, as districts other than WDPA and SDFL have no relation to the defendant or to the events giving rise to the suit.

A  
1.64

B  
13.11

C

78.69

D  
6.56

4. Suppose Atticus had filed his lawsuit in state court in Pennsylvania. Could Luci remove the case to federal court?

A. No, because Luci is a citizen of Pennsylvania.

Correct, because the in-state defendant rule bars removal when any D is a citizen of the state where the state-court suit is filed, and the sole basis for removal would (as is the case here) be diversity.

B. Yes, because Luci is a citizen of Florida.

Incorrect, because Luci is not a citizen of Florida but a citizen of Pennsylvania. She goes to Florida during the cold Pittsburgh winters, and returns home to her main home and place of business in Pennsylvania. Note, however, that if she were a citizen of Florida, then the in-state defendant rule would not bar removal since she would not be an in-state defendant in PA.

C. No, because a case cannot be removed solely on the basis of diversity jurisdiction.

Incorrect. This misstates the law, which allows removal in any case where there is original jurisdiction, which includes diversity, unless there is a prohibition on removal, such as the in-state defendant rule. But cases involving only out-of-state defendants can normally be removed solely on diversity (barring the one-year rule).

D. Yes, because there is diversity jurisdiction.

Incorrect. The parties are diverse and the AIC is met, but the in-state defendant rule bars removal.

A	B	C	D
65.57	1.64	14.75	16.39

**5.** Assume that Atticus filed his lawsuit in state court in Pennsylvania rather than federal court. Further assume that Luci counterclaimed for copyright infringement based on the additional fact that Atticus reposted the photo Luci took of Atticus to Atticus' Instagram account. Can Atticus remove the lawsuit to federal court?

A. No, because Atticus' well-pleaded complaint does not include a federal question.

Incorrect, because Atticus can remove. See section 1454.

B. Yes, because claims involving federal law permit removal.

Incorrect, because the "because" clause is not true as a categorical statement. Normally a plaintiff cannot remove. Also, not all cases with federal claims can be removed. For example, a case with nondiverse parties where the only federal claim was a federal counterclaim for federal trademark infringement would not be removable at all. Section 1454 is an exception to the general rule.

C. No, because plaintiffs may never remove.

Incorrect, because Atticus can remove under these facts. See section 1454.

**D. Yes, because cases with copyright claims may be removed by any party.**

**Correct. See section 1454, which permits any party (including a plaintiff) to remove a civil action where any party asserts a claim (including a counterclaim) for copyright, patent, or plant variety.**

A	B	C	D
18.03	14.76	14.75	52.46



6. Assume that Atticus obtained U.S. citizenship on Mar. 1, 2020. Further assume that in addition to suing Luci, Atticus joined Shelly Turtle (Pennsylvania citizen) as a second defendant. Assume that Shelly helped Luci process the photo of Atticus using Photoshop. Atticus seeks only \$10,000 against Shelly arising from the money he paid for the photo shoot and website. Does the federal court have subject-matter jurisdiction over the lawsuit?

A. No, because the amount in controversy sought against Shelly is too low.

Incorrect because it is not the best answer. The low AIC prevents diversity jurisdiction from existing over the claim against Shelly, but the better student will continue the analysis and consider whether supplemental jurisdiction is appropriate. Here, the claims against Luci and Shelly arise from a CNOF, so 1367(a) grants supplemental jurisdiction. However, 1367(b) divests that grant because Atticus' claim against Shelly is a claim by a plaintiff against a Rule 20 defendant, and the sole basis for original jurisdiction against Luci is diversity.

B. No, because the claim against Shelly is a claim against a defendant joined under FRCP 20.

Correct. See explanation for A. No diversity over claim against Shelly, but it is related to the claim against Luci, so 1367(a) grants supplemental jurisdiction. But 1367(b) takes it away for reasons noted above.

C. No, because Atticus' claim against Shelly is unrelated to his claim against Luci.

Incorrect. Obviously the two claims are related. See the fact pattern and additional facts of question 6.

D. No, because including Shelly would contaminate complete diversity.

Incorrect. Under the revised facts, Atticus is a citizen of Florida, and Shelly and Luci are citizens of Pennsylvania. There is no problem of contamination (which would involve using supplemental jurisdiction over a party who destroys the original diversity jurisdiction. But see the next question, #7.

A	B	C	D
32.79	<div style="border: 1px solid black; padding: 2px;">59.02</div>	0.00	8.20

7. The same question as question # 6, except assume instead that Shelly is a citizen of Florida.

A. No, because the amount in controversy sought against Shelly is too low.

Incorrect, because it's not the best answer. See the explanation for question # 6(a) above. Choosing this answer tells the professor that you've ignored supplemental jurisdiction.

B. No, because the claim against Shelly is a claim against a defendant joined under FRCP 20.

Closer but still incorrect. You've recognized that 1367(b) can divest supplemental jurisdiction, but is there original jurisdiction to start with? Did you consider contamination? See explanation for D below.

C. No, because Atticus' claim against Shelly is unrelated to his claim against Luci.

Incorrect, and thank goodness nobody chose this.

D. No, because including Shelly would contaminate complete diversity.

Correct. Atticus and Shelly are both citizens of Florida. Using supplemental jurisdiction to allow the claim against Shelly would contaminate the original diversity jurisdiction of Atticus v. Luci, and take away all SMJ.

**A**  
4.92

**B**  
13.11

**C**  
0.00

**D**

81.97

8. Suppose Atticus is a citizen of Arkansas and Luci is a citizen of California. In the lawsuit, Atticus joins a claim against Shelly Turtle, a citizen of Denmark (Greenland territory), who is a lawful permanent resident of the United States domiciled in Arkansas. The suit is filed in federal court and the amount in controversy is met for all claims and all parties. Is there subject-matter jurisdiction under 28 U.S.C. § 1332?

A. Yes, because the suit includes a dispute between citizens of different states.

**Correct. The suit involves citizens of different states (Atticus and Luci) and has a foreigner (Shelly) as an additional party. See 1332(a)(3).**

B. No, because the suit includes a dispute between a citizen of a state and a citizen of a foreign state admitted for lawful permanent residence who is domiciled in the same state.

This incorrect answer drew most of you in. You likely focused only on 1332(a)(2), and assumed correctly that it would prohibit SMJ because the suit involves a citizen of Arkansas versus a foreign LPR domiciled in Arkansas. But what about 1332(a)(3), which permits foreigners as additional parties if the suit already involves a suit between citizens of different states? That is the case here. The bar on LPRs limits 1332(a)(2) only and does not limit 1332(a)(3).

C. Yes, because all three persons are of diverse citizenship from one another.

Incorrect. Section 1332 does not require every single party to be diverse from every other party.

D. No, because a plaintiff cannot assert jurisdiction against a Rule 20 defendant.

Incorrect and irrelevant to 1332 analysis. Rule 20 joinder may prohibit supplemental jurisdiction under 1367(b), but section 1367 is not at issue here because there already is diversity SMJ under 1332(a)(3).

A	B	C	D
6.56	86.89	3.28	3.28

9. Assume that Atticus and Luci were both citizens of New York. Further assume that in his complaint, Atticus additionally alleged that “Luci cannot rely on the First Amendment to the United States Constitution for her outrageous conduct, because the First Amendment does not give anybody the right to make me cry and ruin my life!” The lawsuit is otherwise the same as described in the essay fact pattern. Could the lawsuit be filed in federal court?

A. Yes, because the case involves a federal ingredient.

True but incorrect. A federal ingredient is enough to satisfy Article III, but not necessarily enough to satisfy section 1331.

B. No, because none of Atticus’ claims arise under federal law.

Correct. Atticus’ claims are all state-law tort claims. Under the Well-Pleaded Complaint rule, we can only consider the plaintiff’s claims for relief. All of them were created by federal law and none of them involve any federal ingredient. The only issue of federal law is Atticus’ allegation that Luci might want to rely on federal law in her defense. But federal defenses do not count for the purposes of the WPC rule, which only looks at the P’s claims. *Mottley!*

C. Yes, because the issue of the First Amendment is substantial.

Incorrect. “Substantiality” is relevant to the *Gunn* test, which is triggered when the P’s state-law claim includes (or “embeds”) one or more issues of federal law. But none of Atticus’ claims relies on federal law.

D. No, because allowing federal-question jurisdiction under such circumstances might open up the floodgates in federal court to tort and contract claims in cases where diversity is lacking.

Again, incorrect. This is a consideration under the *Gunn* test, which is not at issue under these facts.

A	B	C	D
4.92	49.18	1.64	44.26

**10.** Assume that the contract between Atticus and Luci said that “any claims arising from this contract or the services provided thereto may be brought in any state or federal court in Dade County, Florida.” What is Atticus’ best argument that personal jurisdiction is proper in Pennsylvania despite the contractual language?

- A. He has no argument, because the contract constitutes express consent to litigating in Dade County, Florida.

**Incorrect. See D.**

- B. Luci waived any objection to personal jurisdiction in Pennsylvania through her breach of contract.

**Incorrect. The purpose of a forum selection clause is to indicate where PJ is appropriate for claims involving the contract!**

- C. Luci has impliedly consented to personal jurisdiction in Pennsylvania through her entering into a contract with a Pennsylvania resident.

**Incorrect. *International Shoe* said that implied consent was a “legal fiction.” Also, such an argument is irrelevant if the forum selection clause prohibits PJ in Pennsylvania.**

- D. The contract does not preclude personal jurisdiction in Pennsylvania.**

**Correct. The forum selection clause (FSC) appears to *allow* PJ in Florida, but does not *divest* PJ in Pennsylvania. Luci may want to argue that the FSC divests PJ in PA, and she is free to make such an argument. But the question asked you what is *Atticus*’ best argument that PJ is ok in PA.**

A	B	C	D
27.87	14.75	1.64	55.73