

**STETSON UNIVERSITY COLLEGE OF LAW
Gulfport, Florida**

GENERAL INSTRUCTIONS

**THE ATTENTION OF ALL STUDENTS IS CALLED TO THE FOLLOWING
INSTRUCTIONS:**

1. The answers and the pledge are to be identified by examination number only.
2. During the course of the examination, the examination and answers may not be removed from the rooms prescribed for taking the examination as posted on the Bulletin Board.
3. This examination ends at the expiration of the time indicated, or when the examination is turned in, whichever comes first.
4. The instructor will be permitted to grade only answers that have been submitted during the examination, in the method indicated by the instructor.
5. At the conclusion of the time prescribed for the examination, students are forbidden from communicating with the instructor with reference to the final examination until the grades have been turned in to the Registrar's Office except that students may communicate with the instructor at any time concerning matters related to the Code of Student Professionalism and Conduct or the Academic Honor Code.

TIME: 4 HOURS

SPECIAL INSTRUCTIONS

1. This is a LIMITED OPEN BOOK examination. You have previously been advised as to which materials you may use during the examination. You may bring to the exam the required books for the course, any handouts distributed as part of the class, your class notes and any outlines you prepared yourself or in conjunction with others. You may not bring any of my past exams or answers with you to the exam.
2. This examination consists of twelve (12) pages. You should check now that you have all pages. You will have four hours to complete the exam.

**FINAL EXAMINATION
CIVIL PROCEDURE–SECTION 1**

**PROFESSOR MICHAEL ALLEN
FALL SEMESTER, 2005**

3. The examination is in two Sections:
 - Section I of the examination requires you to provide essay answers. The Section contains two (2) questions. **YOU MUST ANSWER BOTH QUESTIONS IN SECTION I.** Section I is worth a total of 80 points. My suggestion is that you allot a total of approximately three hours and fifteen minutes to Section I. The point breakdowns and suggested times for the two essay questions are as follows: Question #1: 50 points; Suggested Time: two hours; Question #2: 30 points; Suggested Time: one hour and fifteen minutes.
 - Section II of the examination consists of five (5) multiple choice questions. **YOU MUST ANSWER ALL QUESTIONS IN SECTION II.** Each multiple choice question is worth four (4) points. Therefore, Section II is worth twenty (20) points in total. I suggest you allot approximately forty-five (45) minutes to Section II.
4. Please use a blue exam book or books or a computer to answer the essay questions in Section I. Make sure to write or type your exam number on your answer, including each blue exam book you use. You may use as many exams books or type as many pages as you would like.
5. Please use the answer sheet attached as the last page of this examination to answer the multiple choice questions in Section II. Make sure to write your examination number on the answer sheet. If you believe that any of the multiple choice questions are ambiguous or you perceive a mistake or flaw in the question, you should still answer the question. Then, explain concisely on the back of the answer sheet why you think the question is flawed. I would not suggest that you use this challenge option often because it takes time away from the rest of the exam.
6. Each multiple choice question has five possible answers designated A through E. Make sure you consider all possible choices.
7. You should assume that every lawsuit referred to in the exam has been filed in a United States District Court (*i.e.*, a federal court) unless otherwise noted.

END OF INSTRUCTIONS – GOOD LUCK!!

HAVE A GREAT BREAK. YOU HAVE EARNED IT.

Part I: Answer Both Question #1 and Question #2

Question #1 (Suggested Time: two hours; 50 points)

Lavern is a citizen of Florida, living in a suburb of Miami. In June 2005, Lavern purchased a microwave oven at a Walmart in Miami. She took the microwave oven home, plugged it in and began to cook dinner. Without warning, the microwave oven burst into flame. The fire caused property damage to Lavern's kitchen as well as injuring Lavern. The microwave oven remains in storage in Miami, Florida. Lavern remains a citizen and resident of Florida.

After the fire, Lavern sought out an attorney. The attorney conducted an investigation during which the attorney discovered the following facts:

- The microwave oven was manufactured by Lenny, Inc. ("Lenny"). Lenny is a corporation with its principal place of business in Los Angeles, California and that is incorporated in Delaware.
- Lenny manufactures microwave ovens from a number of component parts. After assembling the ovens in various manufacturing plants around the country, it then distributes them nationwide. Lenny has distributors covering every state.
- One component part used by Lenny was the lighting mechanism that triggered the light that turns on when one opens the door. This is the "Lighting Mechanism." It appears that the Lighting Mechanism may have been a contributing cause of the fire.
- The Lighting Mechanism used in the oven at issue was manufactured by Frank Lighting, Inc. ("Frank"). Frank has its principal place of business in Los Angeles, California. It is also incorporated in California.
- Frank sells all its Lighting Mechanisms, the only product it manufactures, to Lenny. It ships its Lighting Mechanisms to Lenny's microwave assembly facility located in Atlanta, Georgia. The assembly is completed by Lenny's employees at the Atlanta plant, all of whom live and work in Georgia. Thus, Frank's only business is selling Lighting Mechanisms to Lenny.
- All of Frank's employees are employed at its manufacturing facility located in Los Angeles, California. The Los Angeles facility is Frank's only business location.
- Frank received monthly reports from Lenny providing a range of information

concerning their relationship. Those monthly reports show, among other things, (1) how many Lighting Mechanisms had been delivered during the previous month; (2) the number of installations completed during that month; (3) the number of sales of microwaves containing the Frank Lighting Mechanism; (4) where the microwaves were sold; (5) the costs of the sales; and (6) the anticipated sales for the next month. The reports Frank received prior to Lavern's incident indicated that a sizable number of microwave ovens containing Frank's Lighting Mechanism had been sold in Florida.

After her lawyer had completed the investigation, Lavern filed a lawsuit against both Lenny and Frank. She filed the suit in the United States District Court for the Central District of California, the district in which you should assume both Lenny and Frank have their headquarters. Jurisdiction was based on diversity of citizenship. Lavern claimed the Lighting Mechanism and the microwave oven as a whole were defective and caused her injuries.

Lavern properly served Lenny by delivering the appropriate papers to its California headquarters. Somewhat by luck, Lavern properly served Frank by delivering a copy of the appropriate papers personally to Frank's President when he was changing planes at Miami's airport. The president was traveling from California to Jamaica for pleasure when he was served.

You may interested to know that the federal court in the Central District of California has an average time to trial in a civil case of 18 months. In the Southern District of Florida, the average time to trial in a civil case is 25 months. This difference is due to the high volume of immigration cases in Miami.

Frank and Lenny have filed a motion to under 28 U.S.C. § 1404(a) to transfer Lavern's lawsuit to the United States District for the Southern District of Florida. You should assume that Lavern's home near Miami is in the Southern District of Florida. To the extent they may be relevant, the long arm statutes of California and Florida are included as Exhibit A to this exam (pages 10-11).

You are the United States District Judge to whom the case has been assigned in California. How do you rule on the transfer motion? Be sure to state the reasons for your ruling.

Question #2 (Suggested Time: one hour and fifteen minutes; 30 points)

Buzz Partnership is a business entity that operates a facility in Tampa, Florida at which children have birthday parties. The facility contains inflatable slides and other devices on which children play during the party. Buzz Partnership's principal place of business is in Tampa, Florida. Buzz Partnership is composed of two partners: Vince, a natural person who is a citizen of Alabama; and Woody Corporation, with a principal place of business in Atlanta, Georgia and which is incorporated in Delaware.

Adam is the father of a child who was invited to a birthday party at the Buzz Tampa facility. Adam is a citizen of Florida. Adam was familiar with the Buzz location because he had done work on the electronics in the building. He did this work with his friend Tom, also a citizen of Florida. Tom and Adam do not have a permanent business relationship. Adam was a bit nervous about attending the party. Buzz Partnership had told Adam and Tom that the electronic work was substandard. Buzz requested that Adam and Tom each pay Buzz \$25,000 to cover the problem. Adam and Tom had refused to pay.

The party did not go particularly well. Adam was climbing on the inflatables with his son. He stood on top of one of the slides and hit his head on the ceiling. As a result, he fell to the floor and broke his neck. He has incurred substantial medical bills thus far, totaling over \$200,000.

Immediately after the accident, Buzz Partnership notified its liability insurer, Fidelity, Inc. about the incident. Fidelity is incorporated in Delaware and has its principal place of business in New York. Buzz Partnership was not happy with Fidelity because the firm owed it money as a rebate, which it had not paid. The amount of this dispute was \$10,000. Buzz Partnership became even more unhappy with Fidelity when Fidelity told Buzz Partnership that it would not cover any damages that might be awarded in connection with Adam's accident.

Adam has brought a lawsuit against Buzz Partnership in the United States District Court for the Middle District of Florida. Adam claims that Buzz Partnership was negligent in its maintenance of the slide and that this negligence caused his injuries. He asserts that jurisdiction is proper under 28 U.S.C. § 1332(a).

You are a lawyer representing Buzz Partnership in this lawsuit. Buzz Partnership has asked you to address two questions. Make sure to address both of them.

- A. Is subject matter jurisdiction in Adam v. Buzz Partnership proper? Why or why not? (3 points)**
- B. Assume for purposes of this part that this case proceeds in federal court as Adam v. Buzz Partnership based on diversity of citizenship jurisdiction. Buzz Partnership would like your advice about its ability to assert all possible claims against Adam, Tom, and Fidelity in this action. Do not address personal jurisdiction in your answer. Address only joinder of claims under the Federal**

Rules and any relevant jurisdictional statutes. Be sure to address both jurisdiction and joinder for each claim you consider. (27 points)

**Part II: Answer All Five (5) Questions in This Part
(Suggested Time: 45 minutes; Total points: 20 (4 points per question))**

David operates a bakery. David was famous for his Chocolate Chunk Cookie. People came from miles around to eat this cookie. The Chocolate Chunk Cookie was such a good seller that Sue's Supermarkets (Sue) entered into a contract with David under which David agreed to sell the Chocolate Chunk Cookie exclusively to Sue. In exchange, Sue agreed to pay David \$100,000 per year. Sue paid the money and David supplied the Chocolate Chunk Cookies. David kept the recipe for the Chocolate Chunk Cookie secret, as he did with all his recipes.

After the parties had begun to perform under their contract, the President of Sue's Supermarket was checking out the selections in Julie's Supermarket (Julie). While there, Sue's President saw that Julie was selling "David's Chocolate Chip Cookies." Sue bought that cookie and was sure that it was the Chocolate Chunk Cookie being sold under another name.

Sue has filed a lawsuit against David in federal court for breach of contract. The claim is that David is selling Chocolate Chunk Cookie to Julie in violation of the contract. You should assume that jurisdiction is proper under diversity of citizenship.

Question #1

Assume that David filed a motion to dismiss under Federal Rule 12(b)(3) on the ground that venue was improper in the federal court. The court denied the motion. Which of the following statements is MOST ACCURATE?

- A. David has waived a defense based on the absence of subject matter jurisdiction.
- B. David has waived a defense based on the absence of personal jurisdiction.
- C. David has waived a defense based on the failure to join a Rule 19 party.
- D. David has waived a defense that Sue's complaint fails to state a claim on which relief may be granted.
- E. None of the statements in A-D above are correct.

Question #2

Assume that the case of Sue v. David proceeds into the discovery phase. Which of the following statements concerning discovery in the case is MOST ACCURATE?

- A. There is no discovery mechanism that would afford Sue the ability to depose the President of Julie Supermarkets.
- B. There is no discovery mechanism that would afford Sue the ability to obtain documents from Julie Supermarkets.
- C. There is no discovery mechanism that would afford Sue the ability to require Julie Supermarkets to answer, in writing and under oath, written questions Sue had prepared.
- D. If Sue asked David to produce documents showing the recipes for both cookies, there is nothing David could do to attempt to prevent disclosure of these recipes.
- E. None of the statements in A-D above are correct.

Question #3

Assume that Sue properly noticed the deposition of David. David believed that Sue scheduled the deposition at a time designed to be inconvenient for him. David did not show up for his deposition at the scheduled time. Which of the following statements is MOST ACCURATE?

- A. The court properly could sanction David for failing to attend the deposition by awarding attorney's fees against David.
- B. The court properly could sanction David for failing to attend the deposition by awarding attorney's fees against David's attorney.
- C. The court properly could sanction David for failing to attend the deposition by ordering that David's answer be stricken.
- D. The court properly could sanction David for failing to attend the deposition by ordering that David not be allowed to introduce evidence at trial on the issue of whether he breached the contract with Sue.
- E. All of the statements in A-D above are correct.

Question #4

Assume that the case proceeds to the summary judgment phase (with no sanctions entered as potentially contemplated in Question #3). Further assume that the dispositive issue at this stage of the proceeding is whether the parties (David and Sue) made an oral modification to the contract such that David could not sell cookies “similar to” the Chocolate Chunk Cookie to supermarkets other than Sue’s Supermarket. The relevant law provides that such an oral modification would be enforceable if there was a meeting of the minds between the parties.

David moved for summary judgment on the “similar to” modification issue. In support of the motion, David submitted affidavits from 4 people. David submitted his own affidavit stating that he and Sue’s President met in Sue’s office and agreed to the “similar to” modification. David also submitted the affidavits of three other people who he asserts were in the room at the same time: David’s assistant, David’s vice president, and a representative of a vendor who also sold products to Sue and who happened to be in the office at the same time. All of these affidavits confirmed David’s account.

In response to David’s motion, Sue submitted a single affidavit. The affidavit was from Sue Supermarket’s President. The affidavit stated that during the meeting David mentioned in his affidavit, there was discussion of the “similar to” issue. However, she further stated that there was no agreement to modify or supplement the written contract.

Based on these assumptions, which of the following statements is MOST ACCURATE?

- A. David’s motion should be denied because there is a genuine issue of material fact in dispute.
- B. David’s motion should be denied because it is clear that there was no oral modification to the written contract.
- C. David’s motion should be granted because the affidavit of Sue’s President should be disregarded because it is from an “interested person.”
- D. David’s motion should be granted because it is clear that there was an oral modification to the written contract.
- E. None of these statements in A-D above are correct.

Question #5

Assume for purposes of this question that the case of Sue v. David proceeds to trial. At trial the issue is focused on the claim that the parties modified the agreement as discussed in Question #4 above. The parties presented the same evidence laid out in Question #4. No motions were made by either party before the jury deliberated. The jury returned a verdict for Sue on liability (the issue of damages was deferred).

Assume that David has filed two post verdict motions: A motion for new trial and a renewed motion for judgment as a matter of law. Given this state of affairs, which of the following statements is MOST ACCURATE?

- A. The motion for renewed judgment as a matter of law should be denied, but the motion for new trial should be granted.
- B. The motion for renewed judgment as a matter of law should be granted, but the motion for new trial should be denied.
- C. Both motions should be granted.
- D. Both motions should be denied.
- E. Both motions should be denied but only if the judge satisfies herself by interviewing the jurors that the jurors understood her instructions.

EXHIBIT A

The California Long Arm Statute:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States.

The Florida Long Arm Statute

48.193 Acts subjecting person to jurisdiction of courts of state.

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or
2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

END OF EXHIBIT A

**MULTIPLE CHOICE ANSWER SHEET
CIVIL PROCEDURE FINAL EXAMINATION – FALL 2005**

EXAMINATION #: _____

QUESTION #1

A B C D E

QUESTION #2

A B C D E

QUESTION #3

A B C D E

QUESTION #4

A B C D E

QUESTION #5

A B C D E

**ON MY HONOR, I HAVE NEITHER
GIVEN NOR RECEIVED AID ON
THIS EXAMINATION.**