Civ Pro Final Fall 2014

With Answer Key

PART I

This first section of the exam contains two essay questions.

Question 1 (worth 43% of final exam grade)

Question 1
Worth up to 43 points

In 2010 a private recreation center in Iowa ordered an Aquaslide product from a local distributor. The order was forwarded to Purity Swimming Pool Supply in Hammond, Indiana. A slide was delivered from a Purity warehouse to the recreation center, and was installed by recreation center employees. On July 15, 2012, Jerry A. Beeck, a member of the rec center, was injured while using the slide.

Soon thereafter, accident investigations were undertaken by representatives of the recreation center's insurance company. On October 31, 2012, Aquaslide first learned of the accident through a letter sent by a representative of the rec center's insurer to Aquaslide, advising that "one of your Queen Model slides" was involved in the accident. Aquaslide forwarded this notification to its insurer. Aquaslide's insurance adjuster made an on-site investigation of the slide in May, 2013, and also interviewed persons connected with the ordering and assembly of the slide. An internal memo from the insurance company's files dated September 23, 2013 indicated that Aquaslide's insurer was of the opinion the "Aquaslide in question was definitely manufactured by our insured." The complaint was filed October 15, 2013. Having been told both by the insurance company for the rec center and by its own insurer that it had manufactured the slide, Aquaslide answered the complaint on December 12, 2013, and admitted that it "designed, manufactured, assembled and sold" the slide in question.

The statute of limitations on plaintiff's personal injury claim expired on July 15, 2014. About four months later, on November 5, 2014 Carl Meyer, president and owner of Aquaslide, visited the site of the accident prior to the taking of his deposition by the plaintiff's lawyer. From his on-site inspection of the slide, he determined it was not a product that his company had made. Thereafter, Aquaslide moved the court for leave to amend its answer to deny manufacture of the slide. How should the court rule?

Answer
Time period for amending as a matter of course has passed (just 21 days after answer, so around early Jan 2014). So only option is to either get written consent from other side (certainly not going to happen here) or leave of court.

Standard is 15a2. Leave freely given when justice so requires.
According to 10th Circuit's Spencer v. Wal-Mart, "Leave may properly be

denied by the district court if it finds "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." Similar standard as described by SDNY's decision in On Track v. T-Mobile (in Course Materials), "Under this liberal standard, motions to amend should be denied only for reasons of undue delay, bad faith or dilatory motive, undue prejudice to the non-moving party, or futility."

None of the other reasons for denying leave to amend apply- so question is only delay and prejudice

Bad faith and Dilatory Motive are not applicable here. According to On Track, bad faith is about whether decision to hold off on amendment was for "strategic advantage." There's nothing to indicate that Aquaslide intentionally waited. Indeed, if they had known about it sooner they would almost certainly have asked promptly for change since it would likely mean their dismissal from the case. They had no motive to delay.

Repeated failure to cure deficiencies by amendments, and "futility of amendment" both not applicable. Thus, focus to turns to undue delay and prejudice.

Undue Delay

For starters, if undue delay has occurred, that—standing alone—is enough to justify denying leave to amend, according to Spencer. Undue prejudice not also required by 10th Circuit. By comparison, according to SDNY's decision in On Track v. T-Mobil, delay is a relevant factor in 2d circuit, but delay alone isn't enough: court specifically says must have delay and prejudice together.

So first- is there even inordinate delay? Pretty strong arg that answer is yes. Delay is defined by On Track as "where the motion is made after an inordinate delay, [and] no satisfactory explanation is offered for the delay." On Track. Under Spencer v Wal-Mart, similar formulation as to delay: not just any delay, but must be "undue" delay. And in figuring out if delay was undue Spencer said: "In determining whether the delay was undue, we consider both the length of the delay and the reason for its occurrence."

So do we have inordinate/undue delay here for which no satisfactory explanation was offered? To be sure, cases note that delay can be up to one year or longer and not be deemed undue delay. Here, by contrast, delay was roughly one year or less. So question about delay really will turn on whether reliance on the insurance comp statements provides justifiable reason for waiting so long to check slide

themselves and, upon finding that it wasn't their slide, seeking to amend their answer.

In Spencer v. Wal mart, in finding that there was undue delay by Plaintiff before seeking to amend, court emphasized that focus should be on whether facts were known "or should have been known":

> Their claim for deceit and their assumption of duty theory of negligence, both based on Wal-Mart's allegedly fraudulent representation that it was monitoring its video cameras, have been evident throughout the proceedings. Facts necessary to support these claims were known or should have been known to the Spencers at the time the original complaint was filed…

Here, arguably, Aquaslide should have known that the slide wasn't its slide by time it filed its answer. If it chose to rely on what its own insurer told it, without doing its own investigation, that is on it; it certainly could have figured it out back when it filed its answer. By comparison, the On Track Innovations case found no undue delay because it found there was a new event that occurred that justified plaintiff waiting as long as it did to seek amendment. Here, the event that occurred (CEO looking at the slide closely) could have occurred at any point earlier if Aquaslide had bothered to look. Thus, under both Spencer and On Track, a strong—but not unassailable--arg for delay can be made.

Was there undue prejudice?

Note first that it isn't entirely clear that undue prejudice, standing alone, is enough according to On Track [and Spencer court never addresses prejudice independently, so we can't say as much about Spencer court]. Certainly there is a strong argument that it would be: language in On Track reads: "motions to amend should be denied only for reasons of undue delay, bad faith or dilatory motive, undue prejudice to the non-moving party, or futility." Moreover, if there is undue prejudice, seems like that really should be enough: it is the factor of delay, standing alone, that makes more sense to potentially not be an independent factor

Seems very likely that there is undue prejudice here since SOL has run. According to On Track, "In deciding whether undue prejudice exists, courts should consider whether the new claim would "prevent the plaintiff from bringing a timely action in another jurisdiction." [Spencer court never addresses what is undue prejudice because it finds that there was undue delay and that that alone is enough to justify denying leave to amend.] Only if there's a way to make otherwise expired claims timely again (by way of state or fed relation back law, or some other tolling of limitations), then acquaslide's failure to confirm if it was its slide arguably has caused undue prejudice since plaintiff relied on their admission back before limitations had run that it was their slide.

We aren't told anything about state relation back law or about any state tolling devices, so only possibility we can consider is the fed relation back rule of Rule 15 c1c. However, 15c1C almost certainly will not allow relation back: not just a name change of the party; and exam prompt doesn't say anything about the actual manufacturer of slide having any notice of the action and that it knew or should have known that but for a mistake it would have been joined.

So, in sum, it appears that a very strong arg can be made that there is undue prejudice to P to allow the amendment now. Both On Track and Spencer courts consider undue prejudice as an independent factor

So, framework looks like this:

Matter of course amendment not available	Exc 4 VG 3.5 G 3 PG 2.5 F 2 P 1 or less
15a2- other factors beyond delay and prejudice not applicable at all	Exc 3 VG 2.5 G 2 PG 1.5 F 1 P 0
Delay Key issues: 1. not just any delay; undue delay 2. perhaps not just delay; On Track said also need undue prejudice; spencer said delay alone 3. whether reliance on ins company justifies A's delay	Exc 18 VG 15 G 12 PG 9 F 6 P 3 or less
Prejudice- primary focus needs to be on whether claim would now be stale against actual manufacturer. So focus needs to be on 15c1c	Exc 18 VG 15 G 12 PG 9 F 6 P 3 or less

Question 2 (worth 42% of final exam grade)

In 2005, Houston artists Dan Havel and Dean Ruck used wooden house boards to create a jagged, portal-like conical sculpture that drew the viewer from the front to the back of a house located in the city's eclectic Montrose neighborhood. The sculpture, entitled *Inversion*, has a registered copyright. *Inversion* was torn down later that year, but photographs—also copyrighted—remain. Here is an image of the sculpture:

Roughly seven years later, employees at a London-based British advertising agency, McGarry Bowen UK, stumbled on some of these images on the internet while working on a pitch to present to Honda Motor Europe Ltd. to create a commercial for the European debut of a CR-V model Honda vehicle. McGarry Bowen UK provides advertising and marketing services to companies selling goods and services in Europe.

As the pitch-development work unfolded, the McGarry Bowen UK creative team members narrowed the concept to a portal. One of these portal concepts closely resembled Dan Havel and Dean Ruck's *Inversion*, both in material (wooden boards) and style (long, conical, and with a trumpet-head like opening). Two McGarry Bowen UK employees primarily originated and developed the portal idea. McGarry Bowen UK used the *Inversion* images in its final presentation to Honda Europe and received the production contract.

On July 17, 2012, Jim Kelly, McGarry Bowen UK's CEO, circulated an email entitled "Houston Hole house video" to five McGarry Bowen UK employees. The email contained a hyperlink to a video depiction of *Inversion* on the website www.arteryhouston.org. The www.arteryhouston.org website is administered by Artery Media Project, "a Houston based organization created to support the promotion of interdisciplinary works of art focusing on local Houston artists." According to the organization's founder, the link Kelly circulated in 2012 would have accessed a "video depicting the creation and final installation of Dan Havel and Dean Ruck's sculpture, *Inversion*." The website "prominently displays a copyright notice on all of its pages, noting expressly 'all rights reserved,'" and the "website makes clear

that we are based in Houston, including by providing our mapped Houston address and, of course, through use of the name of the website."

Presumably concerned about the copyright, the commercial's producer, who also worked for McGarry Bowen UK, called Dean Ruck in Houston. The parties dispute the result of the phone and email communications that ensued. Ruck believed that the commercial might feature the general concept of a portal stretching through a wooden house structure but would not use *Inversion* images or anything too similar. The commercial's producer, on the other hand, believed that Ruck consented to the agency's use of his copyrighted material as long as the commercial did not use an actual image of *Inversion*.

McGarry Bowen UK's production team used the photograph and built a replica of *Inversion* to use in filming the commercial. When Ruck learned that McGarry Bowen UK had built what was close to an *Inversion* replica, he promptly notified the agency that he disputed its right to do so. Ruck told the agency that it had misinformed him in the earlier call and emails. The producer and Ruck exchanged a few more emails but were unable to resolve their disagreement. The television commercial began airing in Europe in October 2012. Several months later, Ruck and Havel sued McGarry Bowen UK in Texas federal court, alleging copyright infringement and state-law fraud. Defendant moved to dismiss for lack of personal jurisdiction. Assume that the Texas long arm statute has been interpreted to reach to the full extent of due process. How should the court rule?

(closely based on *Havel and Ruck v. Honda Motor Europe*, No. H-13-1291, opinion by the Honorable Lee Rosenthal)

Answer:

"A federal court sitting in diversity may exercise personal jurisdiction over a non-resident defendant (1) as allowed under the state's long-arm statute; and (2) to the extent permitted by the Due Process Clause of the Fourteenth Amendment." The Texas long-arm statute extends to the limits of due process, according to the prompt (it also turns out be true under how LA has been interpreted.

DP

To satisfy due process, the plaintiff must demonstrate "(1) that the non-resident purposefully availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with the state; and (2) that the exercise of jurisdiction does not offend 'traditional notions of fair play and substantial justice.'"

1. MC

"A defendant establishes minimum contacts with a state if 'the defendant's conduct and connection with the forum state are such that [he] should reasonably anticipate being haled into court there.'" B*urger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)). "There are two types of 'minimum contacts': those that give rise to specific personal jurisdiction and those that give rise to general personal jurisdiction." *Lewis v. Fresne*, 252 F.3d 352, 358 (5th Cir. 2001).

A. GJ inapplicable

Walk through Daimler and Goodyear standard: for corporation, "essentially at home" is only in place of incorporation (here, outside US); and PPB (here, outside US).

Might also mention that can't attribute contacts for GJ purposes, it seems, after goodyear.

B. SJ

Specific personal jurisdiction "is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (citation omitted). The question is "whether there was 'some act by which the defendant purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id*. at 2854 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). A court considers two issues in deciding whether a defendant's suit-related conduct creates a sufficient relationship with the forum state. *See id*. at 1122. "First, the relationship must arise out of contacts that the 'defendant himself' creates with the forum State." *Id*. (quoting *Burger King*, 471 U.S. at 475). The limits imposed on a state's "adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of the plaintiff[] or third parties." *Id*. (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980)). The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id*. (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). The "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Id*. "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id.*

"Second, [the] 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id*. (citations omitted). A "plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id*. "[A] defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id*. at 1123. "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State."

Application

The plaintiffs' allegations raise a plausible inference that McGarry Bowen UK and its

employees had a front-row seat to, and at times an active role in, appropriating *Inversion*, a copyrighted Houston-based sculpture, from Houston-based artists. McGarry Bowen UK's creative team members discovered *Inversion* images (which were necessarily taken in Houston) on Pinterest, added *Inversion* images with superimposed Honda CR-Vs to their pitchbook, and included *Inversion* images in their final presentation to Honda Europe. Many images of *Inversion* credit the sculpture's artists and location, and carry copyright notices. The plaintiffs plausibly allege that McGarry Bowen UK employees knew the Houston location of the sculpture and its creators throughout. The question is whether these contacts are too "random, fortuitous, or attenuated" to satisfy due process because they stemmed more from Ruck and Havel's (and *Inversion*'s) connection to Houston, or whether they are sufficient to meet the due process test.

When viewed alongside McGarry Bowen UK's subsequent acts connecting them to Houston, Texas and to the intellectual property created and displayed there, "not just to a plaintiff who lived there," these contacts are enough. *See Walden*, 134 S. Ct. at 1124.

After the successful pitch and during the development process, but before the set was built, McGarry Bowen UK's CEO, Jim Kelly, circulated an email to five members of the creative team entitled "*Houston* Hole house video."

Larsen's sworn declaration also states that the *Inversion* video on the Artery Houston website prominently displayed a copyright notice. (The website made it clear that *Inversion* and its creators were firmly tied to Houston. Even if the above contacts are not sufficient, they surely are enough when paired with internal emails suggesting that McGarry Bowen UK executives knew of and condoned, or actively supported, Hitchings's deceptive phone call with and emails to Houston to obtain permission from Houston residents Dean Ruck and Dan Havel to use the design and images of their Houston sculpture, *Inversion*.

McGarry Bowen UK's "suit-related conduct" created "a substantial connection with" Texas, such that exercising jurisdiction does not offend traditional notions of fair play and substantial justice. The court denies McGarry Bowen's motion to dismiss for lack of personal jurisdiction.

Framework for answer looks like this:

General Jurisdiction Walk through Goodyear and Daimler	E 21 VG 17 G 13 PG 9 F 5 P 0-1
Specific Jurisdiction Walk through two part DP test; focus especially on Walden v Fiore standard for intentional tort cases.	E 21 VG 17 G 13 PG 9 F 5 P 0-1

PART II

This second section, worth 15% of the final exam grade, contains 15 multiple choice questions. Each multiple choice question is worth one point each. You should mark your answers to the multiple choice questions on the scantron answer sheet provided.

1. Plaintiff sues her employer for job discrimination in federal court. Two weeks later the employer moves to dismiss for failure to state a claim on which relief can be granted, citing the plausibility pleading standard of *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. Which of these is the strongest argument for denying the motion?

A. The motion should be denied if it relies on evidence beyond the pleadings.

B. The motion should be denied if, assuming that evidence would eventually be introduced to support the allegations, the allegations raise a plausible right to relief.

C. The motion should be denied if it is not supported by any competent evidence.

D. The motion should be denied if it is not supported by any evidence.

2. Two weeks after defendant is sued in federal court, she files a preanswer motion to dismiss for lack of subject matter jurisdiction. A month later, before the Court has ruled on the motion, defendant realizes that she should have filed a motion to dismiss for improper venue. Which of the following is correct?

A. **She has waived her right to seek dismissal for improper venue.**

B. She has not waived her right to seek dismissal for improper venue because of the exception in Rule 12(h)(3).

C. She has waived her right to seek dismissal by preanswer motion but can still ask the court to dismiss for improper venue whenever she files her answer.

D. She has waived her right to seek dismissal by preanswer motion but can still ask the court to dismiss for improper venue in her answer, as long as she files her answer no later than 14 days after the court rules on her subject matter dismissal motion under Rule 12(a)(4).

3. Paul sues David in federal court. David timely files an answer and counterclaim. A month later, David moves for entry of a default judgment on the ground that Paul failed to respond to the counterclaim. How should the court rule?

A. The court should enter a default judgment in favor of David on his counterclaim against Paul only if David properly and timely served an official summons on Paul under Rule 4.

B. The court should enter a default judgment in favor of David on his counterclaim against Paul only if David can show that Paul is subject to personal jurisdiction in the forum.

C. The court should enter a default judgment on the counterclaim against Paul and he need not serve Paul with an official summons and need not demonstrate Paul is subject to personal jurisdiction in the forum.

D. The court should enter a default judgment against Paul on the counterclaim and dismiss the entire action.

4. Plaintiff sues defendant for negligence in federal court. Paragraphs 6-10 of the complaint spell out how defendant's conduct fell below the standard of care. Defendant timely files an answer admitting all of the allegations in paragraphs 6-10, denying all other allegations. Thereafter, Plaintiff moves for partial summary judgment as to defendant's negligent conduct. How should the court rule?

A. It should deny the motion on the ground that only defendants can move for summary dismissals before trial.

B. It should deny the motion because the plaintiff bears the burden of proof on all of the elements of her claim (duty, negligence, causation and damages); summary judgment is not appropriate as to a single element only.

C. It should grant the motion.

D. It should grant the motion but only on condition that the defendant does not later seek to amend its answer to deny the allegations.

5. Plaintiff brings suit in federal court against defendant, who timely files an answer. A month later, defendant seeks to amend her answer to add an affirmative defense that the plaintiff's claims are barred by the statutory defense of comparative liability. Which of the following is the strongest argument the plaintiff can make against the proposed amendment?

A. The court should deny the amendment because the statutory defense is not included in the list of affirmative defenses under Rule 8(c)

B. The court should deny the amendment if it finds that the defendant waited too long to seek to amend under Rule 15(a)(1)(A); that is, defendant had only 21 days after serving her answer to move to amend.

C. The court should deny the amendment if it finds that the defendant waited too long to seek to amend. Under Rule 15(a)(1)(B); that is, defendant had only 21 days after service

of plaintiff's responsive pleading or 21 days after service of a motion under Rule 12(b), (e) or (f0, whichever was earlier.

D. The court should deny the amendment if it finds that justice does not require allowing the amendment under Rule 15(a)(2).

6. Plaintiff sues defendant in the United States District Court for the Southern District of Texas. Her sole claim for relief is for intentional infliction of emotional distress. Assume that currently, under Texas law, there is no such cause of action but that a case is pending before the Texas Supreme Court in which the sole issue is whether such a cause of action should exists in Texas. Defendant moves to dismiss for failure to state a claim on which relief can be granted and also seeks sanctions against plaintiff under Rule 11. What is the strongest argument that plaintiff can make against the imposition of monetary sanctions?

A. Sanctions are not appropriate if the plaintiff can show that his factual contentions have evidentiary support or will likely have evidentiary support.

B. Sanctions are not appropriate if the plaintiff can show that his lawyer, not he, suggested suing for intentional infliction of emotional distress.

C. Sanctions are not appropriate because only the court can order a party to show cause why its conduct has not violated Rule 11.

D. Sanctions are not appropriate against the plaintiff since the Texas Supreme Court may rule that the cause of action exists.

7. Plaintiff, who lives in Houston, files suit in the United States District Court for the Southern District of Texas claiming that while he was working in Florida the defendant discriminated against him in violation of federal law. At the time of the suit, Defendant had moved to Oklahoma, where he intended to reside permanently. Other than plaintiff and defendant, all other witnesses in the case live in Florida. Defendant moves for a change of venue to Oklahoma or, alternatively, to Florida. What is the most likely result?

A. The action may be dismissed since it was commenced in an improper forum, or transferred to Oklahoma or Florida.

B. The action must be dismissed since it was commenced in an improper forum.

C. The action may be transferred to Oklahoma, only.

D. The action may be heard in the Texas federal court since it was commenced in a proper forum.

8. Plaintiff, a citizen of Texas, filed suit against defendant in Harris County district court in Houston, alleging employment discrimination under federal law. Defendant, also a citizen of Texas but living in Dallas, Texas, filed a petition for removal to the in the United States District Court for the Northern District of Texas Which of the following is correct?

A. The action was properly removed.

B. The action was improperly removed; under 1441(b), the forum defendant rule, the case was not removable because defendant is a Texas citizen.

C. The action was improperly removed to the wrong district court.

D. The action was improperly removed because the Notice of Removal failed to set forth the amount in controversy.

9. Plaintiff, from Texas, brings suit in federal court against defendant, from New York, on a state cause of action for $100,000. Defendant impleads Tom, also from New York, claiming that Tom owes him statutory indemnity for any liability he may be found to owe plaintiff. Which of the following is correct?

A. Defendant can maintain his indemnity claim against Tom in the same suit.

B. Defendant cannot maintain his indemnity claim against Tom in the same suit because there is no diversity of citizenship between the parties.

C. Defendant can maintain his indemnity claim against Tom in the same suit, but only if the amount-in-controversy exceeds $75,000.

D. Defendant can maintain his indemnity claim against Tom in the same suit, but only if the source of statutory indemnity is federal law.

10. If one party seeks discovery of a written statement of a non-party witnesses that has been secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen, which of the following is true under Rule 26?

A. A written witness statement is discoverable by the party seeking the statement, without regard to whether it is a verbatim statement of the witness or includes mental impressions, conclusions, opinions or legal theories of the adverse party's counsel.

B. **A written witness statement is discoverable by the party seeking the statement if that party shows that it has substantial need for the statement to prepare its case and cannot, without undue hardship obtain its substantial equivalent by other means.**

C. If the written statement includes mental impressions, conclusions, opinions or legal theories of the adverse party's counsel, then the statement is discoverable by the party seeking the statement on a showing of extraordinary circumstances, but without regard to whether the party has substantial need for it.

D. If the witness statement was communicated in confidence to the adverse party's counsel, then it is exempt from discovery under the attorney-client privilege.

11. Plaintiff, a citizen of Kansas, filed an action in the United States District Court for the District of Kansas against D1, a Texas corporation, and D2, a Louisiana corporation, alleging that defendants were both liable for negligence and (2) that plaintiff's actual damages were $70,000. Which of the following is true?

A. The case can remain in federal court because the claims against D1 and D2 can be aggregated to $150,000, thereby exceeding the minimum amount in controversy.

B. The case can remain in federal court only if the plaintiff can show that her claims against D1 and D2 arise out of the same transaction or occurrence or series or transactions or occurrences, and any common question of law or fact will arise in the action.

C. The entire case should be dismissed.

D. The court has discretion to decide to retain the case if it finds that it would be in the interest of justice to do so.

12. Plaintiff, a New York citizen, files suit against defendant, a Delaware company with its principal place of business in New York, in the United States District Court for the Southern District of Texas. (Plaintiff has substantial other business dealings in Texas.) The suit concerns a contract plaintiff alleges defendant breached that was to be performed entirely in Oklahoma and New York. Assume there is a valid forum selection clause in which the parties agreed in advance that any dispute between them would be litigated in a court in New York. Defendant files a motion to dismiss or, in the alternative, to transfer the case to the Southern District of New York under 28 U.S.C. §1406. Which of the following is correct?

A. The Southern District of Texas was not a proper venue, but after *Atlantic Marine* the proper statutory section to invoke was §1404.

B. The Southern District of Texas was not a proper venue, but even after *Atlantic Marine* the proper statutory section to invoke was § 1406.

C. Because the Southern District of Texas was not a proper venue, the proper procedural ground for this motion was the federal doctrine of forum non conveniens.

D. Because the Southern District of Texas was not a proper venue, the only proper procedural ground for this motion was to seek dismissal under Rule 12(b)(3).

[note: question 13 not counted because of mistake in answers (references to Texgumbo should be have been to Bubba's)]

13. Texgumbo, Inc. is owned by Guy Lemont. Texgumbo is a Texas corporation. Its owner and chief executive officer is Guy Lemont. His office, and the company's main financial and distribution center, is in Houston, Texas (S.D. Tex). It has retail stores in Houston, Dallas (N.D. Tex), San Antonio (W.D. Tex), Austin (W.D. Tex) and El Paso (W.D. Tex).

Texgumbo gets most of its key ingredients from Bubba's Supply, Inc, a Louisiana corporation with its principal place of business in New Orleans, LA (E.D. La). Texgumbo has ordered $200,000 worth of supplies from Bubba's every year for the past two years. After Lemont discovers that Bubba's has been misrepresenting the quality and volume of almost all of its shipments to Texgumbo over the last two years, he decides he wants to file suit against it for fraud and breach of contract. Which of the following statements is true?

A. In addition to the E.D. La, venue is proper in the S.D. Tex, N.D. Tex., W.D. Tex. because Texgumbo's contacts would be sufficient to subject it to personal jurisdiction if that each of these districts were a separate state.

B. In addition to the E.D. La, venue is proper in any judicial district in Texas because Texgumbo is incorporated in Texas and, therefore, subject to general jurisdiction anywhere in the state.

C. In addition to the E.D. La, venue is proper only in the W.D. Tex because it is the district in which Texgumbo has the most significant contacts.

D. Venue is proper in the S.D. Tex, N.D. Tex, and W.D. Tex only if the court concludes that a substantial part of the events giving rise to the claim arose in those districts.

14. Polly and David are neighbors. In January 2011 David runs his car over Polly's flowerbed. Polly is frustrated but doesn't bring suit against him. About three years later, in February 2014, David runs over her flowerbed again. The statute of limitations in Texas for negligence claims is two years. If Polly brings suit in February 2014 against David for both incidents, and David moves to dismiss the claims against him relating to the January 2011 incident, what result?

A. The court should deny the motion to dismiss unless David received notice of her action such that he would not be prejudiced in defending against it on the merits.

B. The court should deny the motion to dismiss if the court finds that Texas law allows relation back.

C. The court should deny the motion to dismiss if the court finds that the January 2011 incident and the February 2014 incident arose out of the same conduct transaction, or occurrence.

D. The court should grant the motion to dismiss as to the January 2011 incident.

15. Plaintiff, a Texas citizen, sues D1, a New York citizen, and D2, also a New York citizen, in the United States District Court for the Southern District of Texas. Plaintiff asserts a cause of action for breach of contract against both defendants, seeking damages of $10 0,000 against each defendant. D2 wants to assert an unrelated counterclaim against plaintiff for negligent destruction of his personal property. The counterclaim's amount-in-controversy is $50,000. Which of the following is true?

A. If the court disallows the counterclaim, D2 will be barred from asserting it against the plaintiff in state or federal court.

B. If the court disallows the counterclaim, D2 can bring it against the plaintiff in state court, but would never be able to bring that claim against the plaintiff in federal court.

C. The court should allow the counterclaim.

D. The court should allow the counterclaim only if D1 does not object.

MC Answer Key

1. B
2. A
3. C
4. C
5. D
6. D
7. A
8. C
9. A
10. B
11. C
12. B
13. D
14. D
15. B