

**EXAMINATION  
CIVIL PROCEDURE – LAW 6212  
Section 3A – Siegel  
Fall 2019**

**INSTRUCTIONS**

1. This is an open book examination. You may use any written materials that you have brought with you (including handwritten, typewritten, printed, or published materials). The use of computers to type answers is permitted.
2. You have **THREE HOURS** to complete the exam.
3. The exam consists of this cover page and twelve exam pages numbered 1 through 12. Make sure you have all the pages.
4. There are **FOUR ESSAY QUESTIONS** and **TEN MULTIPLE CHOICE QUESTIONS**. All students must answer all questions. You may work on the questions in any order. Recommended times are:

Essay Question 1:	45 minutes
Essay Questions 2-4:	30 minutes each (90 minutes total)
Multiple Choice Questions:	4 minutes each (40 minutes total)

The recommended times add up to 175 minutes, so there are 5 extra minutes.

5. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam.
6. If you are writing your answers by hand, remember to *write legibly*.
7. If, with regard to any essay question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts and answer the question based on your assumption. Do not change the given facts.
8. Using good judgment, address all the issues presented and assigned by the essay questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.
9. Unless otherwise specified, assume all events occurred in the United States and answer all questions on the basis of current law.
10. Good luck.

## ESSAY QUESTION ONE

Astral Studios, Inc. (“Astral”), a movie studio, is incorporated in California and has its principal place of business in California. Beryl Pictures, Inc. (“Beryl”), another movie studio, is incorporated in Delaware. Beryl’s president and other top executives work at an office in Nevada, but all of Beryl’s actual filming of movies is done at a studio Beryl owns in California.

In 2020, Astral engages Simone Duchamp, a film director, to direct a film called *Midnight*. However, before Duchamp starts work on *Midnight*, she agrees to direct a film called *Glugmonster* for Beryl and withdraws from directing *Midnight* because the schedules for the two films conflict.

Astral sues Beryl in the United States District Court for the Central District of California. Astral claims that Beryl’s hiring of Duchamp constitutes “tortious interference with business relations,” which is a tort under California law. The only relief Astral seeks is an injunction prohibiting Beryl from hiring Duchamp. Astral’s complaint alleges (among other things) that “Duchamp’s talents makes her uniquely qualified to direct *Midnight*. The value of her services cannot be precisely quantified, but *Midnight* will be worth millions of dollars less if Duchamp does not direct it.” Astral’s complaint includes a demand for jury trial.

**Beryl moves to dismiss Astral’s complaint** on the ground of lack of subject matter jurisdiction. **Beryl also moves to strike Astral’s demand for jury trial** on the ground that Astral’s claim against Beryl is not triable by jury.

Beryl also asserts that although Beryl is financing *Glugmonster*, the film is being produced by Calliope Films, Inc. (“Calliope”), another movie studio, pursuant to a contract between Beryl and Calliope, and that it is Calliope that hired Duchamp. Calliope is incorporated in Delaware and has its principal place of business in California. Beryl asserts that Calliope contractually promised Beryl that it would not violate anyone’s rights in its production of the film. Beryl asserts that if Astral’s claim is valid, Calliope is in breach of this promise. **Beryl therefore moves to implead Calliope.** Calliope opposes Beryl’s motion on the grounds that it is not permitted by the joinder rules and that the court lacks subject matter jurisdiction over Beryl’s claim against Calliope.

**Astral moves to add a claim against Calliope** (assuming Beryl is permitted to implead Calliope). Astral’s claim against Calliope is for copyright infringement under the federal Copyright Act. Astral claims that *Jordan’s Journeys*, a film released by Calliope in 2019, infringes the copyright in *Trevor’s Travels*, a film released by Astral in 2012. Calliope opposes Astral’s motion on the grounds that it is not permitted by the joinder rules and that the court lacks subject matter jurisdiction over Astral’s claim against Calliope.

**You are the law clerk to the district judge considering the case. Write the judge a memo discussing the issues raised by the four pending motions (each motion is underlined and bolded above). Conclude your discussion of each motion by making a recommendation as to how to rule on that motion. You may refer to the parties as A, B, and C in your memo.**

## ESSAY QUESTION TWO

Duke Hospital is a hospital in New York City, New York. It is owned by Duke Hospital, Inc., a corporation incorporated in Connecticut. The corporation's principal place of business is the hospital in New York City.

Peter is a citizen of Massachusetts. On March 1, 2020, while Peter is visiting New York City, he is in a car accident and is injured. He is taken by ambulance to Duke Hospital, where Edward, a surgeon, performs surgery on him. Edward is a citizen of North Carolina who normally lives in North Carolina, but Edward is serving as a Visiting Surgeon at Duke Hospital during the year 2020. During his visit, Edward resides in Stamford, Connecticut and commutes to New York City for work.

After the surgery, Peter is left with significant permanent injuries. Peter believes that Edward committed malpractice during the surgery and that Peter's permanent injuries would not have occurred but for the malpractice. On August 1, 2020, Peter brings suit against Duke Hospital and Edward in the United States District Court for the District of Connecticut. He claims \$1 million in damages. Jurisdiction is based on diversity. Connecticut is a single federal judicial district.

Peter's counsel hires a process server, who personally serves process on the General Counsel of Duke Hospital, Inc. at the General Counsel's office in the hospital in New York City, and who personally serves process on Edward at Edward's residence in Stamford, Connecticut.

A statute of the state of Connecticut provides: "In any civil action brought in any court within the state of Connecticut against a corporation, process must be personally served on the president of the corporation."

Duke Hospital, Inc., moves to dismiss the suit for improper venue and insufficient service of process. (Edward does not file a motion to dismiss, nor does he join in the hospital's motion.)

### **Part A. How should the court rule on the hospital's motion? Explain.**

Whatever you thought of the motion, it is denied and the case proceeds. Peter's counsel learns that Duke Hospital has an "Adverse Event Reporting System" that generates a report regarding every "adverse event" at the hospital—i.e., every injury that was (or may have been) caused by medical treatment provided by the hospital. Such an Adverse Event Report is prepared by a panel of medical experts and delivered to the President of the hospital. It includes information about what the panel believes caused the adverse event and how similar events might be prevented in the future. Peter's counsel submits a Rule 34 request to Duke Hospital that states, "Produce any Adverse Event Report concerning Peter's surgery." The hospital objects that such a report, if it exists, is not discoverable, citing such grounds as might be expected. Peter moves to compel discovery.

### **Part B. How should the court rule on this motion? Explain.**

### ESSAY QUESTION THREE

In western states where water is scarce, there is often litigation over water rights. One of the Arizona Rules of Civil Procedure requires that the plaintiff in a water-rights case must file a “Statement of Water Rights” (“SWR”) within 30 days after serving the defendant with process, and the defendant must file a SWR within 30 days after the plaintiff files one. The SWR must be filed on a standard form that requires information relevant, under Arizona law, to a party’s water rights, such as when the party first started using the water involved in the case, the kind of use to which the party is putting the water, whether the party has a permit for the use, and so on. Under the Arizona rule, if a plaintiff fails to file a SWR within the specified time, the case must be dismissed; if a defendant fails, the defendant is deemed to have defaulted. The purpose of the Arizona rule is to expedite the processing of water-rights disputes by requiring the parties to efficiently exchange information that is important to the resolution of such disputes.

Portia, a citizen of California, buys a parcel of land in Arizona with the intent to build a small hotel on it. She discovers that her water needs will conflict with those of her neighbor, Diego, who uses a large amount of water for agricultural purposes. Building her hotel may therefore be impossible, which would decrease her land’s value by \$1 million. Diego is a citizen of Arizona.

Portia sues Diego in federal district court in Arizona. Jurisdiction is based on diversity. Portia seeks an order requiring Diego to allow her to use enough water to operate her planned hotel. Forty days after Portia serves Diego with process, Diego moves to dismiss the case on the ground that Portia has not filed a SWR as required by Arizona law. Portia opposes the motion. Both sides make such arguments as one might expect on the above facts.

#### **Part A. How should the court rule on Diego’s motion? Explain.**

Whatever you think of the motion, the district court denies it and the case proceeds. The parties determine that the case turns on two facts: when Diego started using water at his current usage level and when he got a permit. Under Arizona law, if Diego used water at his current level, pursuant to a permit, for at least seven years before the suit, then Portia has no right to the water she needs for her hotel. If Diego has used his current level of water for less than seven years, or if he has had his permit for less than seven years, then Portia has the right to use enough water for her hotel.

Portia moves for summary judgment. Diego submits his own affidavit stating that he used water at his current usage level for ten years before the start of the suit. Portia submits affidavits from two neighboring landowners stating that Diego’s current level of water use began only five years before the suit. Portia also submits her own affidavit stating that she diligently searched the local permit records and found that Diego received his first permit for his current level of water use five years prior to the start of the suit. Diego submits no evidence regarding when he received a permit. If the case were tried, Portia would have the burden of persuasion on all factual issues.

#### **Part B. How should the court rule on Portia’s motion? Explain.**

## ESSAY QUESTION FOUR

When an inventor owns a patent on a valuable invention, competitors will sometimes try to get around the patent by selling a product that does not directly infringe the patent, but which can be easily modified by a purchaser so as to infringe the patent. A competitor who does this may be found to have “induced” infringement, in which case the competitor is fully liable for patent infringement, just as if its product had directly infringed the patent.

Preston, an inventor, owns a patent on an improved home furnace that lowers home heating costs. Preston sues the Danforth Corporation (“Danforth”) in federal district court for selling a home furnace which allegedly infringes his patent. Danforth asserts that Preston’s patent is invalid. Danforth also asserts that its furnace does not infringe Preston’s patent, because, Danforth asserts, the configuration of its furnace is different from the configuration specified in Preston’s patent.

Preston asserts that Danforth’s furnace infringes his patent despite the allegedly different configuration. Preston also asserts that if Danforth’s furnace does not directly infringe his patent, a homeowner could easily modify it to match the specification of Preston’s patented furnace, and that Danforth’s sale of its furnace constitutes induced infringement.

The case is tried by jury and is vigorously contested. The judge directs the jury to return a general verdict. In the jury instructions, the judge states (among other things), “You should first determine whether the plaintiff’s patent is valid. If you determine that the patent is not valid, you should return a verdict for the defendant. If you determine the patent to be valid, you should then decide whether the defendant has infringed the patent. You may decide that the defendant has infringed the patent *either* because the defendant’s furnace directly infringes the patent *or* because the defendant’s furnace could be so easily modified to infringe the patent that its sale constitutes induced infringement.”

The jury returns a general verdict for Preston and awards damages. The court enters judgment on the jury’s verdict. Danforth appeals, but the judgment is affirmed.

Thereafter, Danforth changes its furnace. The configuration of Danforth’s furnace remains the same, and it is clear that if Danforth’s previous furnace directly infringed Preston’s patent, then the new one does too. However, the changes make it impossible for purchasers to modify the new furnace. Therefore, if Danforth’s new furnace does not directly infringe Preston’s patent, there is no possibility that its sale could constitute induced infringement.

Preston again sues Danforth in federal district court for patent infringement. Danforth again asserts that Preston’s patent is invalid and that Danforth’s furnace does not infringe the patent. Both sides move for summary judgment on the basis of the preclusive effect of the first case. Both sides make all appropriate arguments.

**How should the court rule on the motions? Explain.**

## MULTIPLE CHOICE QUESTIONS

### Instructions

1. For each question, choose the best answer from the answers provided.
  2. Mark your answers on the Scantron sheet.
  3. Every question has five answer choices labeled A through E. Be sure to read all the answer choices, even if they continue onto the next exam page.
  4. There is no penalty for wrong answers, so answer every question.
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1. Preeta, a citizen of Virginia, is injured when Darren, a citizen of Maryland, hits Preeta with his car as Preeta is walking across a street in Maryland. Preeta sues Darren in federal district court in Maryland. Jurisdiction is based on diversity. Preeta claims that Darren negligently caused the accident. Darren claims that Preeta was contributorily negligent. The parties agree that the case is governed by the tort law of Maryland. Maryland applies the rule of contributory negligence, so if Preeta's own negligence played any role in causing the accident, she should recover nothing, even if Darren's negligence was also a cause of the accident.

The case is tried by jury. Preeta presents evidence suggesting that Darren negligently caused the accident, that Preeta was not contributorily negligent, that Preeta incurred \$25,000 in medical expenses, that she lost \$25,000 in wages through being unable to work, and that she experienced pain and suffering. Preeta's counsel suggests that Preeta's pain and suffering merits \$50,000 in compensation. Thus, Preeta asks for a total of \$100,000 in damages.

Darren presents evidence suggesting that Preeta's own negligence was partly responsible for her own injuries. Darren's counsel suggests that Preeta was 1/3 responsible for her own injuries. Darren also presents evidence that Preeta's pain and suffering was not as bad as she claims.

The judge instructs the jury on the law, including the rule of contributory negligence. The judge directs the jury to return a general verdict with an answer to one written question. The question is, "was the plaintiff's own negligence a contributing cause of her injuries?"

The jury returns its verdict. The jury's answer to the written question is "No." The jury's general verdict is for the plaintiff in the amount of \$66,667. Upon hearing the verdict, both sides make such motions, requests, and/or arguments as might be expected on these facts.

Which of the following is true?

A. Because the jury's general verdict is inconsistent with its answer to the question, the court must order a new trial.

B. Because the jury's general verdict is inconsistent with its answer to the question, the court may (1) enter judgment in accordance with the answer, which would mean entering judgment for the plaintiff in the amount of \$100,000, (2) direct the jury to deliberate further, or (3) order a new trial.

C. Because the jury's general verdict is inconsistent with its answer to the question, the court may (1) enter judgment in accordance with the answer, which would mean entering judgment for the defendant, (2) direct the jury to deliberate further, or (3) order a new trial.

D. Because the jury's general verdict is consistent with its answer to the question, the court

must enter judgment on the verdict.

E. Because the jury's general verdict is consistent with its answer to the question, the court must enter judgment on the verdict, unless it determines that the circumstances are appropriate for post-verdict relief such as JMOL for the defendant, a new trial on the ground that the verdict is against the weight of the evidence, or remittitur.

**2.** Mona, a generally healthy, 35-year-old woman, is diagnosed with a urinary tract infection and is prescribed an antibiotic. While she is on the antibiotic, she suffers a heart attack and is left with permanent injuries. She sues Pfizer, Inc., the manufacturer of the antibiotic, in federal district court. Jurisdiction is based on diversity.

The case is tried by a bench trial. Mona's cardiologist testifies that in his opinion, Mona's heart attack was caused by the antibiotic. Mona also presents expert evidence suggesting that in light of her state of health prior to the heart attack, there is no likely alternative explanation for her heart attack besides the antibiotic. Pfizer puts on an expert who testifies that an epidemiological study shows that patients who received the antibiotic suffered heart attacks at the same rate as those not taking the antibiotic. This expert testifies that in her opinion, this study proves that the antibiotic does not cause heart attacks. The defendant also presents an expert cardiologist who testifies that heart attacks with no apparent cause can happen to any person at any age.

At the conclusion of the evidence, the court enters written findings of fact. Among other findings, the court finds that Mona's heart attack was not caused by Pfizer's antibiotic. The court enters judgment for the defendant.

Mona appeals. After reviewing the evidence, the judges of the court of appeals believe that Mona's heart attack was caused by Pfizer's antibiotic, but they see how a reasonable person might have reached the opposite conclusion. What is the likely outcome of the appeal?

A. Affirmed, because the question presented is a question of fact as to which the standard of review is deferential.

B. Affirmed, because the district court's error was harmless.

C. Affirmed, because Mona did not preserve the error for review by objecting at the proper time in the trial court.

D. Reversed, because the question presented is a question of law as to which the standard of review is de novo.

E. Dismissed, because the district court's ruling is not appealable.

**3.** Wyatt is a citizen and resident of Virginia. While he is on vacation in Florida, he is injured in a car accident with Sam, who is a citizen of Florida. Wyatt returns home to Virginia. Wyatt learns that Sam has \$20,000 in a bank account at Prosperity Bank. Sam opened the account at a Prosperity Bank branch in Florida, but Prosperity Bank also has branches in Virginia, and Sam could make a withdrawal from his Prosperity Bank account at a Virginia branch if he wanted to. Sam has no other property in Virginia and no other contacts with Virginia.

A Virginia state statute provides: "At the request of any person, a Virginia state court may order the seizure of any property located in Virginia. For the purposes of this statute, 'property' includes any account from which a withdrawal may be made within Virginia. Once property is

seized, the court may determine any claim by the person requesting the seizure against the owner of the property, whether the claim is related to the seized property or not, and any claim that is proved may be satisfied out of the seized property.”

Wyatt asks a Virginia state court to seize Sam’s bank account at Prosperity Bank. The court does so by ordering Prosperity Bank to freeze the account. Wyatt then sues Sam in that same Virginia state court over the car accident. Wyatt claims \$50,000 in damages from the accident. Wyatt has process from the Virginia state court personally served on Sam at Sam’s home in Florida. Sam moves to dismiss Wyatt’s suit for lack of personal jurisdiction and/or insufficient service of process pursuant to Virginia Rule of Civil Procedure 12(b), which is similar to Federal Rule of Civil Procedure 12(b). Which of the following is true?

A. The state court may exercise jurisdiction in accordance with the state statute, but any judgment Wyatt receives will be satisfiable only from the \$20,000 in the seized bank account, even if the judgment is for more than \$20,000.

B. The state court may exercise jurisdiction in accordance with the state statute, and if Wyatt receives a judgment for more than \$20,000, he may receive \$20,000 from the seized bank account and may then seek to satisfy the remaining amount of the judgment against any other assets owned by Sam that he can find elsewhere (e.g., in Florida).

C. The state court may not exercise jurisdiction because Sam lacks minimum contacts with Virginia for purposes of the case.

D. The state court may not exercise jurisdiction because the “situs” of Sam’s bank account cannot constitutionally be regarded as being within Virginia.

E. The state court may not exercise jurisdiction because the process of a Virginia state court may not be served on a defendant outside Virginia.

4. Title VII of the federal Civil Rights Act of 1964 prohibits employment discrimination based on sex. Polly Peters sues Delta Plumbing, Inc. in federal district court. Her complaint states:

POLLY PETERS, plaintiff, v. DELTA PLUMBING, INC., defendant  
COMPLAINT

1. This case arises under Title VII of the Civil Rights Act of 1964. This court has jurisdiction under 28 U.S.C. § 1331.

2. The plaintiff was a plumber employed by the defendant starting July 1, 2018. The plaintiff was the only female plumber employed by the defendant.

3. On June 1, 2019, the plaintiff was assigned a new supervisor. Shortly thereafter, the plaintiff was fired because of her sex. In firing her, the plaintiff’s supervisor said, “you’re fired, get out of here, women can’t be plumbers.”

WHEREFORE, the plaintiff demands reinstatement with back pay.

(signed) Louise Lawyer, Counsel for Plaintiff



The defendant's counsel asks the president of the defendant company about the alleged facts. The president tells the counsel that the allegations of paragraph 2 of the complaint are true but not the allegations of paragraph 3. The president says that the plaintiff was fired because the defendant had to fire someone and the plaintiff had the least seniority. The president says that the plaintiff's supervisor never made the statement alleged in paragraph 3 of the complaint.

The defendant moves to dismiss the case under Federal Rule 12(b)(6). How should the court rule on the motion?

A. Granted, because on a Rule 12(b)(6) motion the court is not required to assume that conclusory allegations of the complaint are true.

B. Granted, because a complaint must state enough factual allegations to make its claim plausible.

C. Granted, because the factual allegations in the plaintiff's complaint are not true.

D. Denied, because the complaint contains factual allegations that the court must accept as true and that make the plaintiff's claim plausible.

E. Denied, and the court must enter judgment for the plaintiff, because on a Rule 12(b)(6) motion the court must accept the factual allegations of the plaintiff's complaint as true, and if the allegations of this complaint are true then the plaintiff should win the case.

**5.** Amazon.com ("Amazon") is a corporation incorporated in Delaware with its principal place of business in the state of Washington. Carole, a citizen of California who is an undergraduate student at the University of Washington in Seattle, Washington, is injured in Seattle in a car accident with an employee of Amazon. As Carole starts her sophomore year in Seattle, she sues Amazon in the U.S. District Court for the District of Delaware about the car accident. Jurisdiction is based on diversity. The state of Delaware is a single federal judicial district. Which of the following is true?

A. Amazon would likely succeed on a motion to dismiss the case for improper venue.

B. Amazon would likely succeed on a motion to transfer the case to a federal district court in the state of Washington under 28 U.S.C. § 1404.

C. Amazon would likely succeed on a motion to transfer the case to a federal district court in the state of Washington under 28 U.S.C. § 1406.

D. Amazon would likely succeed on a motion to dismiss the case based on the doctrine of forum non conveniens.

E. None of the foregoing motions would be likely to succeed.

**6.** Park buys a used Tesla car from Dependable Motors ("Dependable"), a used car dealer, for \$50,000. The car's odometer shows that the car has 5,000 miles on it. Later, Park discovers that the car actually had 100,000 miles on it and was therefore worth only \$10,000.

Park brings suit against Dependable in federal district court. Park claims that Dependable violated the Federal Odometer Act (FOA), which provides that any person who "knowingly" sells a car with an altered odometer is liable for any resulting damages. The case is tried by jury. Some evidence in the case suggests that employees of Dependable actually knew about the altered odometer. Other evidence suggests that employees of Dependable did not actually know that the

odometer had been altered, but that they suspected that it had been altered and deliberately avoided investigating. Still other evidence suggests that no employee of Dependable had any knowledge, any suspicion, or any reason to suspect that the odometer had been altered.

At the close of the evidence, the court holds an instructions conference, at which the trial judge informs the parties that she will instruct the jury that it may find for Park if it determines that employees of Dependable *knew or should have known* that the car's odometer was altered. Park's counsel nods enthusiastically and Dependable's counsel nods reluctantly, but neither says anything further about the instruction. The court subsequently gives that instruction to the jury. The jury returns a general verdict for Park and awards him \$40,000 in damages. The court enters judgment on the jury's verdict.

Dependable appeals on the ground that the FOA imposes liability only on someone who sells a car with *actual knowledge* that its odometer has been altered. The judges of the court of appeals believe that the question of whether a FOA plaintiff must show that the defendant *knew* that the car's odometer was altered, or whether it is enough that the defendant *should have known*, is a close question, but that Dependable is correct and the district court was wrong on this point. What should the court of appeals do?

- A. Reverse, because the applicable standard of review is de novo.
- B. Affirm, because the applicable standard of review is deferential.
- C. Affirm, because the defendant failed to preserve the error for review.
- D. Affirm, because the district court's error was harmless.
- E. Dismiss, because the district court's ruling is not appealable.

7. Alpha Construction, Inc. ("Alpha") is a corporation incorporated in New York with its principal place of business in New York. After Alpha completes construction of an office building in Connecticut, it determines that it accidentally overpaid its plumbing subcontractor, Beta Plumbing, Inc. ("Beta") and its electrical subcontractor, Gamma Electrical, Inc. ("Gamma"), by \$50,000 each. Beta is a corporation incorporated in Connecticut with its principal place of business in Connecticut. Gamma is a corporation incorporated in Delaware with its principal place of business in Connecticut.

Alpha asks for refunds of the overpayments, but Beta and Gamma refuse. Alpha sues Beta and Gamma in the United States District Court for the District of Connecticut for refunds of the accidental overpayments and seeks \$50,000 from each of them. Which of the following is true?

- A. The district court lacks subject matter jurisdiction because Beta and Gamma are both deemed to be citizens of Connecticut.
- B. The district court lacks subject matter jurisdiction because the amount in controversy is insufficient.
- C. The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.
- D. The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.
- E. The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1367.

8. Martin, a citizen of Kentucky, is walking by a construction site in Kentucky when a construction crane accidentally drops a massive girder, which crashes to the ground just a few feet from Martin. The construction was being done by Jenkins Construction, Inc. (“Jenkins”) a corporation incorporated in Ohio with its principal place of business in Ohio. Martin is not physically harmed in any way, but he is psychologically traumatized by the incident and becomes afraid to leave his home for any reason, as a result of which he loses his job.

Martin sues Jenkins in federal district court in Kentucky. Jurisdiction is based on diversity. Martin’s complaint alleges the above facts. Jenkins moves to dismiss under Federal Rule 12(b)(6) and argues that the tort law of Kentucky provides no remedy for a person psychologically harmed by an accident in which he suffers no physical injury. Martin opposes the motion. The district court rules that the case is governed by the tort law of Kentucky and that Kentucky law does provide a remedy for someone psychologically harmed by an accident in which he suffers no physical injury, provided he was close enough to the accident to be within the “zone of danger” created by the accident. The district court therefore denies Jenkins’s motion to dismiss.

Jenkins immediately files a notice of appeal. The judges of the court of appeals believe that the question of whether Kentucky tort law provides a remedy in the circumstances described is a close question on which reasonable people could differ, but that Jenkins is right and the district court is wrong. What should the court of appeals do?

- A. Affirm, because the question presented is a question of fact as to which review is deferential.
- B. Affirm, because Jenkins failed to preserve the error for review.
- C. Affirm, because the district court’s error was harmless.
- D. Reverse, because the question presented is a question of law as to which review is de novo.
- E. Dismiss, because the district court’s ruling is not appealable.

9. The “mailbox rule” in contract law provides that when parties exchange messages of offer and acceptance, a contract is formed at the moment the message of acceptance is placed in the mail addressed to the offeror. All 50 states follow the mailbox rule. In 2020, the U.S. Congress passes the Federal Helium Regulation Act (“FHRA”). Among other things, the FHRA provides that “no contract for the sale of helium in interstate commerce shall be considered formed by an exchange of messages until the message of acceptance is received by the offeror.”

Thereafter, the Atomic Chemical Corporation (“Atomic”), a corporation incorporated in New York with its principal place of business in New York, decides to get out of the helium business. Atomic decides to try to sell its stock of helium to the Brilliant Chemical Corporation (“Brilliant”), a corporation incorporated in California with its principal place of business in California. The president of Atomic writes a letter to the president of Brilliant offering to sell Atomic’s entire stock of helium to Brilliant for \$10 million. Brilliant’s president writes a letter accepting the offer and puts this acceptance letter in the mail in California, addressed to Atomic’s president in New York. While the acceptance letter is in the mail, Atomic’s president calls Brilliant’s president on the telephone and says, “Atomic withdraws its offer as we are selling our helium to someone else.”

Brilliant then sues Atomic in state court in California. Brilliant claims that a contract

between Atomic and Brilliant was formed as soon as Brilliant's acceptance letter was mailed and that Atomic breached the contract, damaging Brilliant in the amount of \$1 million. Atomic removes the case to federal district court in California based on diversity. Atomic claims that no contract was formed between Atomic and Brilliant because of the FHRA and that Atomic was therefore free to withdraw its offer to Brilliant and sell its helium to someone else.

Which of the following is true?

A. The district court must apply the mailbox rule because it is a rule of substantive contract law, and federal district courts sitting in diversity must apply state substantive law.

B. The district court must apply the mailbox rule even though it is a procedural rule because the difference between the mailbox rule and the rule of the FHRA would affect the outcome of the case in a way that would lead to forum shopping ex ante.

C. The district court must apply the FHRA because the FHRA is a valid exercise of Congress's power to set procedural rules for inferior federal courts.

D. The district court must apply the FHRA because the FHRA is a valid exercise of Congress's power to regulate interstate commerce.

E. The district court must remand the case to state court as the plaintiff's claim is a state-law claim for breach of contract, and so even if the defendant relies on the FHRA, the district court lacks subject matter jurisdiction under the well-pleaded complaint rule.

**10.** The Franklin Concert Hall, Inc. ("Franklin"), a corporation incorporated in Pennsylvania with its principal place of business in Philadelphia, Pennsylvania, hires Cecily, a famous artist who is a citizen of California, to paint a mural in its lobby. The contract provides that Cecily shall complete the mural by October 1, 2020. In November 2020, the mural is barely started. Photos in celebrity magazines show that Cecily appeared at gala openings and other parties around the world practically every day throughout 2020. Franklin invokes a clause in the contract that allows it to terminate the contract if Cecily fails to complete the mural by the deadline without good cause.

Franklin sues Cecily in federal district court in Pennsylvania for the return of a \$250,000 advance it gave her for the painting. In her answer, Cecily asserts that the delay in the mural was caused by the failure of Franklin's board of directors to respond to Cecily's many inquiries about their desires regarding the design of the mural.

Franklin serves notice on Cecily that it will take Cecily's deposition at its main offices in Philadelphia on February 1, 2021, and that during the deposition it will have a doctor examine Cecily to make sure that she has no health problems that could have constituted good cause for her failure to complete the mural on time. Cecily has no scheduling conflicts that would prevent her from being in Philadelphia on that date. Which of the following is true?

A. Cecily must appear for the deposition, answer questions, and submit to examination by the doctor.

B. Cecily must appear for the deposition and answer questions, but she need not submit to examination by the doctor, as Franklin has not obtained a court order for the examination.

C. Cecily need not appear for the deposition, nor answer questions, nor submit to the medical examination, as Franklin has not obtained a court order for the deposition or the examination.

D. Cecily need not appear for the deposition, nor answer questions, nor submit to the medical examination, as these forms of discovery would not be proportional to the needs of the case.

E. Cecily must appear for the deposition and answer questions, but she is entitled to charge Franklin an expert fee for her time.

END OF EXAM