

Civil Procedure

Final Examination

Fall 2007

Professor Davies

N.B. Multiple-choice questions omitted herein; only the essay portion of the exam is included.



EXAMINATION COVER SHEET

Student Examination Number: _____

Law 6040-1
CIVIL PROCEDURE
Professor Davies

Final Examination
Autumn 2007

Wednesday, December 12, 2007

⌚ Time Allowed: 3 hours, 30 minutes

- Authorized Materials:**
1. **Casebook** (Marcus, Redish, Sherman, Civil Procedure: A Modern Approach)
 2. **Rules book** (Clermont, Federal Rules of Civil Procedure and Selected Other Procedural Provisions)
 3. An **outline** created solely by you and not exceeding 5,000 words in length (**no** commercial outlines are permitted)
 4. Any **handouts** or other materials distributed by Prof. Davies in class or via TWEN

Special Instructions: This exam consists of two parts: a multiple-choice section and an essay section. The exam is being graded on a 200 point scale. There also are two bonus questions at the end worth up to a total of 4 points.

The multiple-choice section includes 16 separate questions. Each question is weighted equally and is worth 5 points. Thus, in its entirety, the multiple-choice section is worth 80 points.

The essay section consists of 2 questions. The first essay question is worth 80 points, and the second essay question is worth 40 points. In responding to the essay questions, you will be graded both on your ability to spot the issues of civil procedure presented and on the quality of your analysis of those issues. Organize your answer before you begin to write. Concise expression and clarity of analysis will be rewarded in grading.

The essay questions may fail to provide some information that you consider important. Should you find it necessary to make assumptions beyond those stated in the question, clearly explain your assumptions and their significance in your answer.

With respect to the multiple-choice questions, the “perfect” answer may not be among the possible alternatives given. You should select the “best” answer. Also, Scantrons will not be used; you should list the question numbers and your answers to each in your word-processed answer or, if you are using one, your Bluebook. However, credit will be given only for selecting the best answer to the multiple-choice questions; providing additional explanation for why you selected a given answer on a multiple-choice question will not garner any points.

There are 25 pages to the exam, not including this cover sheet. Make sure you have all of them.

When time is called, you must stop working on your exam immediately and turn in your copy of the exam and your answers to the exam questions.

Good luck!



GENERAL INSTRUCTIONS FOR ALL EXAMS:

- 1. Exams do not leave the exam room! Write your exam number on your copy of the examination questions, and return it to the proctor at the end of the exam.**
- 2. Students may NOT take any bluebooks or scratch paper from the examination room, whether blank or used. Return to proctor.**
- 3. If you are using a bluebook print your exam number, the title of the course and the instructor's name on the front of each bluebook.**
- 4. Number each bluebook (1 of 3, 2 of 3, 3 of 3, etc.) and place all bluebooks and examination questions inside the first numbered bluebook.**
- 5. If the examination utilizes a computer answer sheet (Scantron):**
 - You must use BLACK or BLUE INK only; no pencils**
 - You may use CORRECTION TAPE only; no liquid paper**
 - Print your examination number in the box found in the lower left-hand section of the form. Write the number in the first 4 spaces, and zero-fill any remaining spaces.**

For example, if your examination number is 2983:

IDENTIFICATION NUMBER

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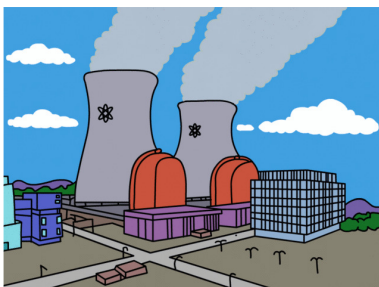
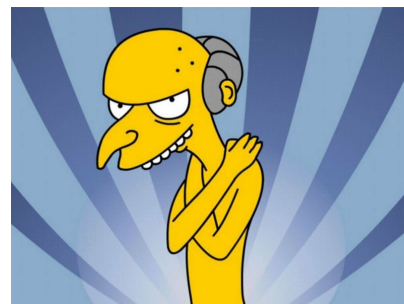
Fill in the bubbles corresponding to the numbers written.

Essay Question No. 1 (80 points)

Homer Simpson is a hard-working (well, not really) bloke who has long lived in his hometown of Springfield, Virginia, with his wife, Marge Simpson; their three children, Bart, Lisa, and Maggie; and their cat, Snowball.

*Homer**Marge**Bart**Lisa**Maggie**Snowball*

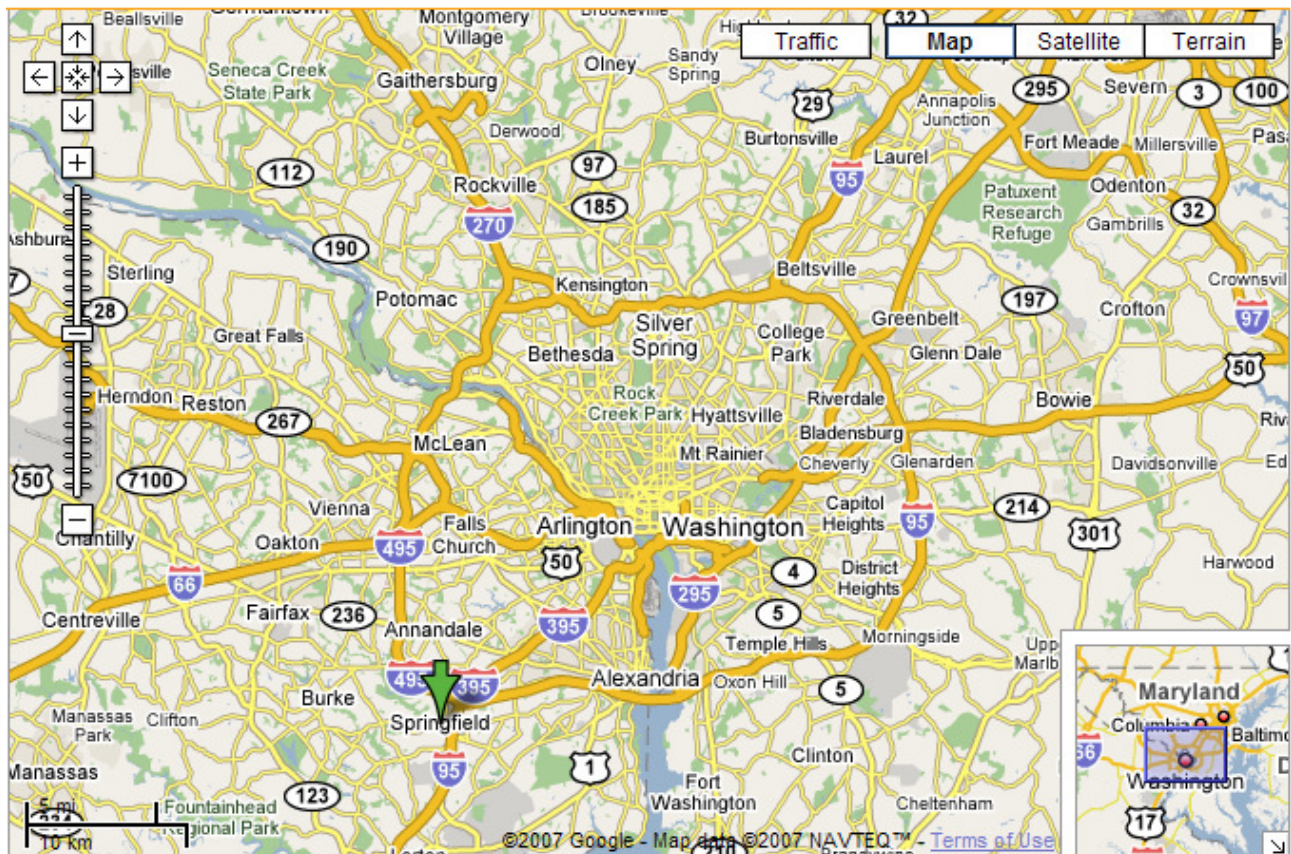
Springfield is a commuter town. There is not much going on. The town has an ice cream shop, a bookstore, a street with more churches per mile than anywhere else in the nation, a pathetic shopping mall, some seedy bars, and a number of apartment complexes. The town's main source of commerce is the nuclear power plant that supplies electricity to much of the region. Homer works as an operator at the power plant (given his "competence," a rather frightening thought), which is owned by Burns Is God Corp. ("BIGC"), a publicly-held Delaware corporation with headquarters and fifty-two percent of its operations in Springfield (its other operations are all in Crawford, Texas). Homer's boss and CEO of BIGC, Mr. Burns, holds a majority share of BIGC stock. Homer's employment contract specifies that it automatically terminates on January 1 of each year unless it is renewed by the board of BIGC. The contract gives Homer a total compensation package of \$65,000 annually (including salary, insurance, other benefits, etc.). Mr. Burns, by contrast, makes \$650,000 annually.

*Springfield Nuclear Power Plant**Mr. Burns*

BIGC has big plans in the works. The Springfield Nuclear Power Plant has yielded such great profits that the company has decided to build three additional plants farther south in the state capital, Richmond. However, having caught wind of these plans, the Virginia legislature springs into action. The legislature has long been petitioned by citizens and environmental groups to ban the construction of any additional nuclear power plants within the state's boundaries. The groups cite concerns over the continuing lack of a permanent storage site for spent nuclear fuel anywhere in the nation, and thus argue that it would be imprudent and unsafe to build further nuclear stations when it is quite likely the waste will be permanently stored in "temporary" cooling ponds onsite at the generation facilities themselves.

Pointing to these concerns but also quite nervous about the ability of the state's own new coal-fired power plants, which are nearly operational, to compete with BIGC's proposed nuclear facilities, the legislature enacts an indefinite moratorium on the construction of nuclear power reactors in the state. The governor signs the bill into law the next day.

Seeing in the political tea leaves what implications this may carry, the Virginia Department of Redundancy Department ("VDRD"), which has authority over all government contracts for the Commonwealth, cancels its longstanding power purchase agreement ("PPA") with BIGC, informing the company, "By receipt of this letter, you are hereby informed and told that the Commonwealth of Virginia will henceforth acquire and obtain all of its electricity needs and demands from other sources, effective immediately."



Meanwhile, Mr. Burns has his hands full with other problems. Homer was recently elected to head the local United Nuclear Power Workers of Springfield labor union, largely on his platform of “free donuts every Friday.” However, when BIGC refuses to, as Homer puts it, “pony up the moola for the do-dos,” the union becomes upset and starts making other demands. Most prominently, the union insists that BIGC provide an improved dental insurance plan (something Homer is particularly interested in given Bart’s and Lisa’s impending need for braces), as well as a new health insurance plan for employees’ pets (something that Marge has leaned on Homer to seek in light of Snowball’s increasingly poor health).

Enraged by the union’s newfound chutzpah with Homer at the helm, Burns fires Homer. “You’re a loser, Homer, and you always have been,” Burns declares. Homer, strapped for cash and bored with what he refers to as the “really really lame bar scene” in Springfield, promptly rents his family’s home out to his vegan friend, Apu Nahasapeemapetilon, and takes a job at another company’s nuclear plant across the Potomac River in Oxon Hill, Maryland. While looking for a place to live closer to Homer’s new job, the Simpsons take up residence in the lavish Oxon Hill Best Western Hotel.



Apu Nahasapeemapetilon



Oxon Hill Best Western

Things do not go well for Homer in Oxon Hill. He decries the local bars as “even more pathetic than in Springfield,” and on his first day of work he is fired for falling asleep at the control panel and nearly causing a Chernobyl-like meltdown that would have contaminated the vast majority of the Washington, D.C. metro area. Homer then takes up a job dancing at a strip club down the street. Confiding over cosmopolitans later that night with a customer who gave him a particularly good tip, Homer admits in slurred, hushed tones, “I didn’t care about that stupid nuclear gig anyway. I’m just waiting for Burns-y to take me back so I can go back where I belong, to my beloved Springfield and the best-est bartender in the world, Moe. D’oh!”



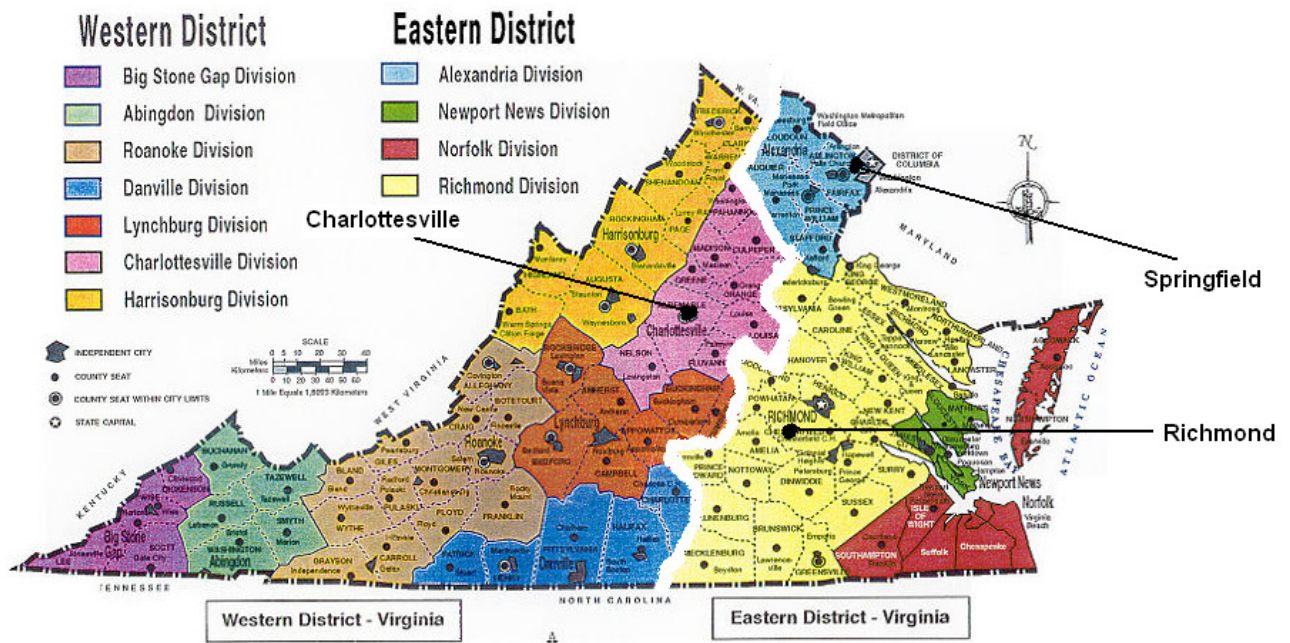
Moe's Tavern in Springfield



Moe Szyslak

With Homer out of the picture, BIGC easily settles with the union, agreeing to provide two free medium-sized Squishee drinks at the local Kwik-E-Mart to each employee twice a year in lieu of the insurance the union had been demanding. BIGC thus moves on to bigger fish. BIGC files suit in the United States District Court for the Western District of Virginia, Charlottesville Division. Named as defendants are the Virginia Department of Public Utilities (“VDPU”), which is charged with enforcing the nuclear moratorium, and the state Department of Redundancy Department. The complaint alleges (1) that the nuclear moratorium violates the United States Constitution as inconsistent with the Commerce Clause and also as preempted under the Supremacy Clause because the federal Atomic Energy Act occupies the entire field of nuclear power plant safety regulation, and (2) that the Department of Redundancy Department breached its contract with BIGC, worth an estimated \$8.9 million over the next twelve years.

Federal Judicial Districts of Virginia



Catching wind of this, Homer hires an attorney, Ima G. O’nasueya, and asks, “Can I nail that dirty dog Burns for calling me a loser? Isn’t that, what do you call it, ‘slanderosity’ or something?” Ms. O’nasueya promptly files a motion to intervene as a plaintiff in the *BIGC v. Virginia Department of Public Utilities et al.* proceeding. Attached to this motion is a complaint in which Homer seeks (1) a declaration that the state nuclear moratorium is unconstitutional as violative of a little-known, never before used provision of the Virginia Constitution, and (2) to obtain \$6 million in damages as part of a cross-claim against BIGC for BIGC’s alleged breach of Homer’s employment contract. The motion to intervene further requests that if Homer is not allowed to intervene, the complaint be accepted for filing as instituting a standalone case.

BIGC files an opposition to Homer’s motion to intervene. The VDPU and the VDRD, in turn, respond by filing two motions: one motion to dismiss Homer’s complaint as jurisdictionally improper and barred by forum non conveniens (and opposing his motion to intervene), and one motion to either dismiss BIGC’s complaint as jurisdictionally improper or to transfer the case to the Eastern District of Virginia.

At the time all of these documents are filed in the court, Virginia has on the books a statute waiving sovereign immunity for breach of contract actions in which the state or any of its departments or subdivisions is named as a defendant, as well for constitutional challenges to state laws. The Virginia long-arm statute then on the books is identical to Utah's current statute.

It is your first day on the job as a law clerk to a "rising star" judge in the Western District. A native of Charlottesville wine-and-horse country and a long-time political player in the state, she recently was nominated to an empty position on the Fourth Circuit and is entirely preoccupied with preparing for her confirmation hearing in the U.S. Senate. "I'm so glad you're here," she says, greeting you at the door of her chambers. "I know you're excited about your \$170,000/year job in D.C. after this clerkship is over, but I promise you this will be a year you'll never forget. Anyway, if I'm confirmed, I'm also hoping you might join me as a clerk on the Court of Appeals once you're done with this clerkship, and I know your firm offers \$75,000 bonuses for the honorable completion of two federal clerkships. So, we'll definitely have lunch once this blasted confirmation hearing is over—I really want to get to know you better, and there is this great crepe place just off the historic Downtown Mall by campus—but for now, would you kindly write me a memo on how you think I should come out on these pending motions in the *BIGC* case? It's such a mess!"

[THIS SPACE LEFT INTENTIONALLY BLANK]

Essay Question No. 2 (40 points)

You are a junior partner at a major law firm in Salt Lake City. Recently, through your indefatigable networking, you landed the legendary software giant, Microsoft, as a client. You are serving only as Microsoft's local counsel, and only on certain civil litigation matters. But the retainer fee even for this was significant enough that your colleagues at the firm now give you knowing looks when passing you in the hall, and it pushed up your take of the firm's annual profits enough that you have just scheduled a weeklong vacation with your family on Maui to celebrate the successful year and your favorite holiday, Winter Solstice.

Enjoying this thought and the fact that you just sent your final bills out for the year, you lean back comfortably in your chair and start flipping through the morning paper while you wait for your lunch appointment. Immediately, this article jumps out at you:



Better watch out: Microsoft Santa pulled for dirty talk

The Associated Press
Article Last Updated: 12/05/2007 11:52:53 PM MST

SEATTLE - Microsoft Corp. quickly shut down Santa Claus' Web privileges after it found out the automated elf it created for kids to instant message with was talking naughty, not nice.

Last year, Microsoft encouraged kids to connect directly to "Santa" by adding northpolelive.com to their Windows Live Messenger contact lists. The Santa program, which Microsoft reactivated in early December, asked children what they wanted for Christmas and could respond on topic, thanks to artificial intelligence.

The holiday cheer soured this week when a reader of a United Kingdom-based technology news site, The Register, reported that a chat between Santa and his underage nieces about eating pizza prompted Santa to bring up oral sex.

One of the publication's writers replicated the chat Monday. After declining the writer's repeated invitations to eat pizza, a frustrated Santa burst out with, "You want me to eat what?!? It's fun to talk about oral sex, but I want to chat about something else."

The exchange ended with the writer and Santa calling each other "dirty b-----."

Microsoft spokesman Adam Sohn said the company's engineers tried to clean up Santa's vocabulary, but even after making changes to the software, the company wasn't comfortable keeping him online.

Sohn said Santa's lewd comment was sparked by someone "pushing this thing to make it do things it wasn't supposed to do."

Santa is just one of many "agents," or automated I.M. programs, that computer users can chat with on Live Messenger. Some are useful - customer service agents, for example - while others are frivolous, like an alien that responds to I.M.s with burbling extraterrestrial noises. Sohn said some of the bots are programmed to fend off inappropriate messages.

Sohn said Microsoft . . . did not suspect an employee prank.

Microsoft disabled Santa on Tuesday. On Wednesday, northpolelive.com appeared to be online in one reporter's Messenger contact list, but Santa did not respond to her messages.

“Oh, what old news,” you think to yourself as you finish the article. “Microsoft already defeated those two plaintiffs from Murray, Utah, and San Mateo, California, who sued them for intentional infliction of emotional distress based on Santa’s ‘dirty talk’ last year. They were beaten so badly that the Utah decision was summarily affirmed by the state appellate court, and the Californian didn’t even bother trying to appeal. That other plaintiff from Iowa settled her suit for a pittance. Now, it sounds like there was some glitch in the software patch the Live Messenger engineers were going to apply, but, still, this story is *so* last holiday season. This paper has *really* gone down hill the last few years!”

You toss the paper in the recycling bin, grab your coat, and start heading for the lobby to wait for your friend when the phone rings. You notice the Redmond, Washington area code—Microsoft’s headquarters—so immediately pick up. “Yes, yes, yes, this is Gustaf,” you hear in the handset.

* * *

During the conversation with Gustaf, your point of contact at Microsoft, you learn that a slightly overzealous mother from a rural town outside of Parowan, Utah, was surfing the internet with her son when Microsoft’s virtual Santa started “talking dirty” to them. (Something unprintable about reindeer and peppermint ice cream was mentioned.) The mother was so offended by this that she immediately called Microsoft headquarters to complain, but after getting stuck in a neverending loop of “If you would like to . . . , then please press . . . ,” hung up and hired a lawyer instead. The lawyer promptly filed suit in the United States District Court for the District of Utah, raising three causes of action: intentional infliction of emotional distress, breach of contract, and unfair trade.

Gustaf would like your assessment of how to deal with this case, and he would like it very promptly. “Garbage! Refuse! Rubbish!” he exclaimed during your call. “That’s what this case is! Litter on the highway of Microsoft’s future! I don’t like it. I don’t like it one little bit. Certainly we can’t have to keep going to court over this silliness. Santa isn’t even real!”

Your task is to draft Gustaf a memorandum making your recommendation for how to respond to this new complaint. Gustaf is in-house counsel at Microsoft, but because he has spent his career practicing in Europe, he is somewhat unfamiliar with the applicable rules of procedure in the United States. Thus, you recognize that any recommendation you make will need to be accompanied by an explanation of why the procedural device you believe should be used is the best choice, and what tactical advantages or drawbacks it has in comparison with other alternatives. Assume that jurisdiction and venue are proper.