606 Civil Procedure II
Final Examination, Fall 2000
Four Credits

Professor Occhialino
Wednesday, December 6, 2000
9:00 a.m. – 1:00 p.m.

CIVIL PROCEDURE II

Four Hours

INSTRUCTIONS

1. You may bring into this examination only one standard "Federal Rules Supplement."

2. There are three questions on this examination. Question One will determine 50% of the grade; Question Two and Question Three each will determine 25% of the final grade.

3. Answer each of the three questions in separate bluebooks.

4. Write on only one side of a page. Write only on every other line. Write as neatly as possible under the circumstances.

5. Note that you are to answer only one of the two alternative essays in Question One.

6. Note that you are to answer all six subparts of Question Two. Answer each of them in a concise but complete manner on no more than two blue book pages (writing on only every other line and on only one side of a page).

Question One
Suggested Time: 120 Minutes

Bouillabaisse Fr. n. A soup or stew containing several kinds of fish and shellfish, usually combined with olives, oil, tomatoes, and saffron.

CORE FACTS

For four years, Professor Martin had been a non-tenured professor at Boston College. In the Fall of 1998 he took an unpaid leave from Boston College and accepted a one year appointment as a Visiting Professor at the University of New Mexico. He rented his home in Massachusetts for a year, and rented a furnished condominium in Albuquerque from Nick Mix, a New Mexico citizen.

Professor Martin fell in love with New Mexico. By March, he bought a truck, got a New Mexico license plate, and obtained a New Mexico driver's license. In April, 1999, he was offered another one year contract at UNM. He resigned from Boston College and accepted the UNM offer. He put his Massachusetts home up for sale. He took an additional one year lease on the Albuquerque condominium, this time with an option to purchase the condominium at the end of the year.

In May, 1999, Martin decided to throw a "bouillabaisse party" for the one hundred and seventy-five students in his class at UNM. While in Boston to negotiate the sale of his Massachusetts home, Martin gathered the ingredients for the party.

First, he went to dockside in Gloucester, Massachusetts to purchase fresh mussels and cod. For years, Martin had purchased fresh fish from Sam Salty, who took up commercial fishing after he retired from teaching. Salty's commercial fish operation was limited. He sold his fish only at dockside and only to locals. He did not advertise. He netted about $2000 per year on annual sales of $6000. Salty had never before packaged his fish for traveling long distance. Salty welcomed old-customer Martin and learned from Martin of his year in New Mexico, his decision to stay another year there, and of the planned party back in Albuquerque. At Martin's request, Salty selected mussels and cod for Martin to use in the bouillabaisse for the party and specially packed them for shipment in containers that would keep the fish fresh for the time required for Martin to drive to Boston and then fly to Albuquerque. The cost of the cod and mussels was $450.00.

Salty purchases his mussels from Cape Cod Fishers, Inc. (CCF), a Massachusetts corporation which does business only in Massachusetts. A Massachusetts statute reads as follows: "No mussels shall be harvested from any portion of the waters within three miles of the Massachusetts coast during any period of time during which the United States Fish and Game Department declare and have in effect a "Pollution Alert" as to said portion of the waters." 12 Mass. Stat. Ann. Sec. 34. The United States Fish and Game Department issues the alerts periodically pursuant to a statutory grant of authority. The mussels which CCF sold to Salty who then resold them to Martin were harvested during a "Pollution Alert." Salty did not know that the mussels were harvested during the pollution alert.

Martin had not planned to use lobsters in the bouillabaisse, but when he arrived at Logan Airport in Boston for the trip back to Albuquerque, he was attracted to the "Lobster Pot" store located in

the airport lobby. Lobster Pot is operated by the Lobster Pot Corporation, a corporation incorporated in Delaware, and has its corporate offices in Portland, Maine. According to its most recent annual report, the corporation had revenues of $3,500,000.

Lobster Pot buys lobsters at dockside in Massachusetts and sells them exclusively at its airport store. It mostly sells to the many tourists who leave New England via airports and who make impulse purchases of lobsters. Less than 2% of its sales business is made to residents of the states in which it operates, almost all of whom were flying out of Logan and who bought lobsters as gifts for persons they were visiting in other states. The Lobster Pot at Logan Airport advertised "We pack live lobsters at no extra charge - guaranteed to keep lobsters alive at least 18 hours!" Martin was in a hurry, so he did not speak to the clerk about his destination or in any other way indicate to the clerk that he was taking the 75 lobsters that he purchased for $750 to Albuquerque. However, Martin paid for the lobsters with a credit card which clearly stated on its face that it was issued by "Bank of Albuquerque, New Mexico."

Finally, Martin stopped in the North End of Boston on his way to the Airport and bought three quarts of Cortopassi Virgin Olive Oil at Tony Tosca's Grocery Store. The olive oil is made in Italy by Mario Cortopassi, an Italian national who has an olive grove in Lucca, Italy. Tony goes there each year and brings back a small quantity Cortopassi Virgin Olive Oil to Tony Tosca's Grocery Store for sale in Boston. It is a specialty item, and Tony Tosca imports and sells only three hundred quarts of the oil each year, all of the sales occurring at his little grocery store in the North End of Boston. Tony Tosca is a citizen of Massachusetts.

After he returned to Albuquerque, Martin decided to tinker with the old family remedy by adding one unusual ingredient to the stew—New Mexico green chile. Martin took a ride out to the Navajo Nation Farm and Fruit Stand in Shiprock, New Mexico and purchased a sack of roasted green chile for thirty dollars. The Farm and Fruit Stand is owned and operated by the Navajo Nation.

Martin prepared the bouillabaisse and served it an outdoor party at his Albuquerque condominium on May 7, 1999. One hundred and seventy-five students and twenty-five faculty members from UNM attended the party and all of them ate the bouillabaisse at the party except one—Anne Azure, a citizen of Arizona. She stopped off at the party for a few minutes prior to leaving for her home in Tucson. Instead of eating the bouillabaisse, she was invited by Martin to package some of the bouillabaisse and take it home with her to Tucson. Azure did so and, when she arrived in Tucson, she served the bouillabaisse to herself and her family. She and her mother, Annie, her father, Alan and her brother, Alex all became sick and were treated at a Tucson hospital where they were kept for 24 hours for observation.

Martin, the one hundred and seventy-four students and the twenty-five faculty members who ate the bouillabaisse at the party (Azure ate it in Arizona) suffered from food poisoning and became ill. One hundred and fifty of the students are citizens of New Mexico, nine are citizens of Arizona, ten are citizens of Texas, three are citizens of Massachusetts and two are citizens of Delaware. All but one student became ill enough to require a visit to the emergency room of the Presbyterian Hospital. Half of them remained in the hospital for twenty-four hours and all of them spent several days thereafter convalescing. One person, Norvell Major, a citizen of New

Mexico, died after eating the bouillabaisse. Denny Dietz, a Delaware citizen, was in the hospital for three weeks. Nicki Mecks, a student who is a citizen of New Mexico, was sicker than any other survivor. She almost died from the food poisoning. Only Joe Kennedy from Massachusetts suffered a very mild form of food poisoning; he was nauseous for an hour and then was fine.

The state's Poison Control Center investigated. The Center issued a preliminary report which tentatively has pinned the problem to a defective component of the bouillabaisse. The Center has been able to eliminate the tomatoes and the saffron from consideration, but has not yet been able to determine whether the food poisoning was the result of bad mussels, cod, lobster, olive oil, green chile, poor handling, improper cooking or a combination of all of them.

NEW MEXICO LAW (You are to assume that this is correct)

Conflict of Laws

Under New Mexico law, the substantive law to be applied in a personal injury action is the law of the place of injury.

Collateral Estoppel

New Mexico adopted non-mutual collateral estoppel in State v. Silva, allowing both defensive and offensive collateral estoppel under conditions set forth in Silva.

Several Liability

Under New Mexico law, each tortfeasor is liable only for the percentage of fault attributable to him. Thus, assume that three people are negligent and cause a combined $100,000 in damage to P. If the jury determines that D1 is 20% at fault and D2 is 30% at fault and D3 is 50% at fault, then a lawsuit by P against only D1 would result in a judgment for P and against D1 of only $20,000.

Class Actions

In 1995, the Supreme Court of New Mexico abandoned its opposition to class actions for money damages and adopted as New Mexico's Rule 1-023 the text of Federal Rule 23. The Court has not yet adopted the 1996 amendment to Federal Rule 23 which provides an opportunity to seek immediate review of rulings granting or denying class actions

Long Arm Jurisdiction Statute

New Mexico's long arm statute provides: "Any person or corporation that commits a tortious act in New Mexico is subject to in personam jurisdiction in New Mexico for any cause of action arising therefrom." A New Mexico Supreme Court case states that for purpose of the long arm statute, "a tort is committed where the injury occurs."

ARIZONA LAW (You are to assume that this is correct)

Conflict of Laws

Under Arizona law, the substantive law to be applied in actions for person injury is the law of the place of injury.

Collateral Estoppel

Arizona follows the doctrine of mutuality under which collateral estoppel applies only if the parties in the first and second lawsuits were the same or in privity.

Tort Liability

Arizona applies joint and several liability to tort actions to which its substantive law applies. Under this doctrine each tortfeasor is liable for the full amount of plaintiff's injury and may have a claim for indemnity or contribution against other tortfeasors if plaintiff is obligated to pay the full amount to plaintiff.

Class Actions

Arizona abolished class actions for money damages in 1998.

MASSACHUSETTS LAW (You are to assume that this is correct)

Conflict of Laws

Under Massachusetts law, the substantive law to be applied in actions for personal injury is the law of the place of injury.

Collateral Estoppel

Massachusetts follows the doctrine of non-mutual collateral estoppel, allowing both defensive and offensive collateral estoppel under conditions essentially the same as those set forth in New Mexico's case of Silva v. State.

Tort Liability

Massachusetts applies the doctrine of joint and several liability in lawsuits to which its substantive law applies.

Class Actions

Mass. Rule of Civil Procedure Rule 23. Class Actions

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. The court may require notice of such proposed dismissal or compromise to be given in such manner as the court directs.

(d) Orders to Insure Adequate Representation. The court at any stage of an action under this rule may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and the court shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.

REPORTERS' NOTES TO MASS. R. CIV. P. 23

. . . . Rule 23(b) deletes substantial portions of Federal Rule 23(b) which are unnecessary to state practice. Beyond the four requirements set out in Rule 23(a) for maintaining a class action the only further requirements set out in Rule 23(b) are findings by the Court: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Rule 23(c) and (d) are designed to afford protection to absent members of the class. Unlike Federal Rule 23, the Massachusetts class action rule does not require the giving of notice to members of the class; nor does it provide to members of the class the opportunity to exclude themselves. Instead Rule 23(d) provides that the court may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. No doubt the trial judge will order the giving of appropriate notice to members of the class, of the commencement of the action where fairness and justice so require, particularly where the failure to give notice may raise subsequent problems of res judicata.

FLETCHER v. CAPE COD GAS COMPANY
394 Mass 595, 477 N.E. 2d 116 (1985).

NOLAN, Justice.

The questions before us arise out of litigation related to the installation of urea-formaldehyde foamed-in-place insulation (UFFI) into a number of homes in the Cape Cod area during the years 1977 through 1979. The plaintiffs sought class certification of their action, pursuant to Mass.R.Civ.P. 23. . . . A judge of the Superior Court refused to certify the suit as a class action. We ... consider ... [w]hether the trial court erred in denying plaintiffs' Motion for Class Certification under Rule 23?

. . . . we answer "No" . . . . The plaintiffs, fourteen individuals, filed suit against the defendants, Cape Cod Gas Company and MEAK, Inc., claiming that they have suffered personal injuries and property damage as a result of the defendants' sale and installation of UFFI in homes owned or occupied by the plaintiffs. The complaint, as amended, contains counts against each defendant . . .

The plaintiffs asked the judge to certify the case as a class action [encompassing] "All persons who have purchased

UFFI from Cape Cod Gas Company and had it installed in their homes by MEAK, Inc." The Superior Court judge conducted a hearing on the plaintiffs' motion for class certification. After considering relevant factual materials submitted by the parties, he issued a memorandum of decision and an order denying the motion.

. . . . [T]he judge considered whether the plaintiffs had demonstrated that the requirements of Mass.R.Civ.P. 23 were satisfied. He ruled that the plaintiffs had sustained their burden with regard to the prerequisites of rule 23(a): namely numerosity, commonality, typicality, and fairness and adequacy of representation. He decided, however, that the plaintiffs were not entitled to maintain a class action under rule 23 because the requirements of rule 23(b) were not met. The judge was not satisfied that "the questions of law or fact common to the members of the class predominate over any questions affecting only [individual] members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass.R.Civ.P. 23(b).

. . . .

The plaintiffs challenge the judge's refusal to certify a class action under rule 23 on the ground that he erred in ruling that the plaintiffs did not demonstrate that the predominance and superiority requirements of rule 23(b) had been met. There was no error.

In seeking class certification of their claims under rule 23, the plaintiffs bore the burden of establishing that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass.R.Civ.P. 23(b). The plaintiffs contend that the judge's ruling on the rule 23(b) requirements was premised upon his erroneous view that, under rule 23, absentee members of the class would not be permitted to request exclusion from the suit, and that certification of a class for the purpose of determining limited issues common to the class would not be possible. They argue that this interpretation of rule 23 constituted an error of law, and resulted in the judge's improperly restricting his own discretion. In his memorandum of decision, the judge expressed his view that, under our rule 23, members of a class would not have the option to request exclusion from class action litigation. This view is correct. . . .

[N]o provisions in our rule 23 ... would permit a judge to allow individual parties to "opt out" of a class action. Moreover, the Reporters' Notes to rule 23(c) state that "[u]nlike Federal Rule 23, the Massachusetts class action rule does not ... provide to members of the class the opportunity to exclude themselves." . . . . We decline, therefore, to construe [the rule] to permit parties to request exclusion from the class.

The plaintiffs claim that the judge's view that he did not possess the right to certify a class action for the purpose of deciding limited common issues resulted in an error of law which tainted the exercise of his discretion. The argument is without merit. Neither rule 23 nor [any statute] contains a limited issue provision similar to that set forth in Fed.R.Civ.P. 23(c). . . . We are unwilling to read into either the rule or the statute the authority for issue certification expressly provided by the drafters of the Federal rule.

We find no abuse of discretion in the judge's decision that the predominance and superiority requirements of rule 23(b) were not met. . . . The record also supports his conclusion that the individual questions of liability, damage, and injury clearly predominate. . . . The judge's conclusion that a class action would not be superior to individual adjudication of claims similarly was warranted. It is evident from the record that he would have been warranted in finding that a class action would neither advance the parties' interests nor aid economy of judicial administration. . . . We conclude that there was no error in the judge's refusal to certify the plaintiffs' common law claims under rule 23. . . .

You are an associate in the law firm of Norwood and Martinez in Albuquerque, New Mexico. Senior Partner Martinez called you into his office and the following conversation occurred:

Martinez told you that Nicki Mecks, who suffered food poisoning at Martin's party, has retained the law firm to represent her in litigation seeking redress for her injuries.

Martinez told you that he is considering filing a class action on behalf of Mecks and all others who became sick after eating the bouillabaisse and that he may ask your help concerning this proposed course of action.

He told you that there is a preliminary matter that concerns him as well. He is concerned about whether the firm can be of help to Mecks because of certain litigation that has already taken place.

Martinez then told you the following:

In May, 1999, two weeks after the party, Kennedy went home to Massachusetts for the summer. While there, he contacted a Massachusetts law firm and asked it to represent him in a lawsuit seeking compensation for his injuries. The firm informed him that it could not economically represent him unless it filed a class action. Kennedy agreed to the proposal.

The firm filed a class action in Massachusetts state district court on behalf of Kennedy "and all other persons similarly situated –to wit all persons who suffered food poisoning after eating Professor Martin's bouillabaisse." Named as defendants were Salty, Lobster Pot and Tosca. The complaint sought compensatory damages from each of the parties.

Salty, Lobster Pot and Tosca filed answers. Each denied liability and set up the affirmative defense of the other two defendants. In addition, without seeking to join the Navajo Nation as a defendant, each set up as an affirmative defense the fault of the Navajo Nation and asked that the liability of each, if any, be reduced by the percentage of fault of the Navajo Nation.

The trial court ruled that New Mexico substantive law applied because the injuries occurred there, and further ruled that the four prerequisites for a class action were met, that the common questions concerning liability predominated over individual claims for damages and that a class action was a superior device for resolution of the litigation. The judge therefore certified the class as stated in Kennedy's complaint. The defendants did not oppose the request for certification. Indeed, they joined in Kennedy's motion to certify.

The court then ordered that notice be given to class members via an ad in the classified section of the UNM Daily Lobo which publishes once a week during the summer. Defendants volunteered to pay for the ad and did so. None of Professor Martin's students was on campus during the summer and so none saw the ad. Of those who attended the party, only Professor Nora Miranda saw the ad. She wrote to the Massachusetts court and asked that she be eliminated from the lawsuit because she might choose to sue in New Mexico. The court responded by informing her that there was no provision in Massachusetts law for withdrawing from a certified class action, but that she would be a party to the Massachusetts action and would share in any judgment. Professor Miranda accepted this explanation and did nothing more to pursue her own action.

The case speedily proceeded through pretrial proceedings. . . .

At this point in your conversation with Martinez, he was called away to assist in handling a pressing legal matter in Florida. He told you, as he left, that he will continue the conversation on

his return.

When Martinez met with you again on his return from Florida, he continued the briefing:

By the way, the Massachusetts Rules of Civil Procedure are the same as the Federal Rules of Civil Procedure except for Rule 23.

In August, 1999, well before coming to our law firm, Mecks had a casual conversation with Professor Miranda who told Mecks what little she knew about the Massachusetts class action that had been filed on behalf of all persons who suffered food poisoning from eating the bouillabaisse. The professor explained to Mecks that the Massachusetts court had told her that under Massachusetts law she was in the class and could not opt out. Mecks therefore did nothing until coming to our office on December 1, 2000 for help.

During discovery, the defendants learned that possibly Professor Martin's handling and cooking of the food was partially or fully responsible for the food poisoning and so the defendants amended their pleading to raise the partial affirmative defense of Martin's negligence. This led Kennedy to drop Martin as a class plaintiff and to move to amend his complaint to add Martin as a defendant in the Massachusetts lawsuit. The court granted Kennedy's motion. Also during discovery, defendants learned that each of the class plaintiffs at the party participated in getting the lobster meat out of the shells of the seventy-five lobsters after playing a game of touch football on a muddy field. After obtaining the opinion of a qualified expert that such conduct could have been the cause of the food poisoning, defendants successfully moved to amend their complaint to allege the comparative negligence of each of the class plaintiffs.

Tosca filed a motion for summary judgment, supported by affidavits from the Massachusetts Department of Health which had seized all 299 remaining bottles of Cortopassi Virgin Olive Oil, inspected them and found nothing wrong. Kennedy's counsel opposed the motion only half heartedly in large part because Tosca had few assets and counsel was pleased that a summary judgment would be entered finding no fault against Tosca because that would only increase the fault of the remaining defendants. The remaining defendants did not oppose the motion either. In December, 1999, the court granted summary judgment for Tosca and, consistent with the Massachusetts version of Rule 54, stated that there was no just reason for delay and expressly ordered the entry of judgment for Tosca. Final judgment was entered for Tosca on December 20, 1999.

In March, 2000, Salty's counsel served an offer of judgment pursuant to Mass. Rule 68 which offered to allow judgment against Salty for $50,000, the full amount of Salty's insurance. Because Salty had sworn in his 1999 deposition that he had no other significant assets, Kennedy accepted the offer on behalf of the class and the offer of settlement was approved by the court pursuant to Mass. Rule 23 after giving notice once again by publishing a notice in the Daily Lobo, this time during Spring Break when students and faculty were away. The court entered a final stipulated judgment of dismissal with prejudice on April 1, 2000 based on the acceptance of the offer of judgment. The $50,000 was placed in the court registry pending a determination of the issues remaining for trial. Thereafter, Salty and his lawyer played no role in the trial that followed.

The two remaining defendants, Lobster Pot and Martin, made a motion to bifurcate the trial into liability and then damage phases. The trial court granted the motion. On October 1, 2000 the liability phase of the trial began before a twelve-person jury. After an eight-day trial, the jury returned the following verdict:

--Lobster Pot was not negligent.
--Professor Martin was not negligent.
--Salty was negligent and his negligence was a cause of each plaintiff's illness;
    -Salty's negligence constituted 50% of the total causal negligence.
--Tosca was not negligent because the trial court had instructed the jury that the court had so found when the court granted Tosca's motion for summary judgment.
--The Navajo Nation was negligent and its negligence was a cause of each plaintiff's illness;
    -The Navajo Nation's negligence constituted 25% of the total causal negligence.
--Kennedy and each member of the plaintiff class was a negligent cause of his and her own illness;
    -Each class plaintiff's negligence constituted 25% of the total causal negligence that led to that plaintiff's illness.

Because the jury had only found Salty and the Navajo Nation negligent and because Salty had already settled and because the Navajo Nation was not named as a defendant, the trial court ruled that there was no need to determine damages and entered a final judgment in favor of Lobster Pot and Martin on November 1, 2000.

On November 15, 2000, Kennedy filed a timely notice of appeal from the judgment of November 1, 2000. It is rumored that Kennedy's Massachusetts counsel may advice Kennedy to abandon the appeal soon because counsel sees little likelihood of success on appeal and the firm has already expended several hundred thousand dollars in costs. It is also rumored that Kennedy may take that advice if it is given. Martinez is contemptuous of Massachusetts counsel because Martinez believes that Kennedy has several (unspecified) grounds for overturning the judgments on appeal.

On December 1, 2000, Salty received $5,000,000 upon the completion of the probate of his mother's will. At the time of his 1999 deposition, Salty was aware that his recently-deceased Mother's estate was in probate, that he was named as a beneficiary of $5,000,000 in the will, and that it was unlikely that there would be any challenges to the validity of the will or that any portion of the bequest to him would have to be paid to creditors instead of to him. However, probate technically was not complete at the time of Salty's deposition.

YOU ARE TO ANSWER <u>EITHER</u> ESSAY QUESTION ONE <u>OR</u> ESSAY QUESTION TWO, BUT NOT BOTH ESSAY QUESTIONS. YOU MAY CHOOSE WHICH ESSAY QUESTION YOU WANT TO ANSWER

ESSAY QUESTION ONE

It is December 6, 2000. Taking the facts as set forth:

A. What is the likelihood that the res judicata effect of the Massachusetts judgments will bar Mecks from successfully prosecuting her own action in New Mexico against each of the defendants in the Massachusetts action? Explain fully.

B. For this part of the question, please assume that res judicata will not be a bar to a new lawsuit by Mecks in New Mexico:

1) Will the finding of the Massachusetts court that Lobster Pot was not negligent be available as a collateral estoppel defense to Lobster Pot if Lobster Pot is sued by Mecks in a New Mexico lawsuit? Explain fully.

2) Will the finding of the Massachusetts court that Salty was negligent and that his negligence was 50% of the total causal negligence be available to Mecks as collateral estoppel in an action against Salty so that Mecks will be entitled to a ruling in her lawsuit that Salty was causally negligent and Salty's negligence was 50% of the total causal negligence that harmed Mecks? Explain fully.

C. For this part of the question, please assume that Martinez is convinced that the Massachusetts judgments may be given res judicata effect in a subsequent New Mexico action by Mecks against the defendants in the Massachusetts action:

Martinez has asked you to plan a method or methods for preventing the Massachusetts judgment from being given res judicata effect that can be carried into effect before any litigation is filed on behalf of Mecks in New Mexico. Fully setting forth your plan or plans and explaining your reasoning, do so.

ESSAY QUESTION TWO

(There are two parts to this question. You are to answer both parts if you select this question)

It is December 6, 2000. Taking the facts as set forth:

Martinez called you into his office and told you the following:

My research convinces me that the Massachusetts lawsuit will not have res judiciata or collateral estoppel effect in an action brought in New Mexico by Mecks against the persons and entities that were defendants in the Massachusetts lawsuit. You are to assume that this is true.

Part One

I plan to file suit in Federal District Court in New Mexico.

I have reached the conclusion that I will not file a class action on behalf of all persons who because sick after eating the bouillabaisse.

Mr. Norwood and the other partners are more attuned than I am to the financial benefits of a class action to the firm's profits, and they will probably question my decision. I believe that Ms. Meck's injuries are sufficiently serious that the law firm can economically represent her alone without having to create a class, and I personally believe that it is my responsibility to pursue her interests exclusively rather than burden her with the delay and complications of a class action. I will explain this to the partners.

In addition, I believe that a class action on behalf of all persons who became ill after eating the bouillabaisse probably would not be certified under the circumstances present here. What I need from you is a crisp, but thorough memorandum to the partners that will persuade them that a class action probably would not be allowed in this case, together with an explanation of the delays and difficulties that the filing of a class action complaint would entail for the successful prosecution of Meck's case. The partners know the basic structure of Rule 1-023 so do not spend a lot of time merely outlining the rule and its requirements. Get to the heart of the matter.

Part Two

When planning a major case, I like to ask associates to put themselves in the simulated position of one of the likely defendants and to write a memo from the assigned defendant's perspective about how that defendant might defend a lawsuit brought by me. Such "game-playing" allows me to anticipate possible defense moves and to adjust my own litigation strategy in response to what I learn from the memos that associates write.

Please write a memorandum from the perspective of an attorney for Lobster Pot setting out possible defense tactics that would benefit Lobster Pot if Mecks were to file the following lawsuit:

> Mecks files a diversity action in federal district court in New Mexico.
> She names as defendants Lobster Pot, Salty and Professor Martin.
> She alleges that each of the three was a negligent causer of Meck's illness and asks the court to award damages based upon comparative fault among the three defendants.

Please do not select merely a single tactic, but discuss the range of possibilities you would expect Lobster Pot's lawyers might consider. You may assume for the purpose of this hypothetical scenario that Martin, Lobster Pot and Salty are each subject to personal jurisdiction in the state of New Mexico pursuant to New Mexico's long arm statute.

Appendix to Question One

28 U.S.C. Sec. 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts
shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is
dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

End of Question One

Question Two
Suggested Time: 60 Minutes

Answer each of the following six "Short Answer Questions" in a concise but complete manner on no more than two blue book pages (writing on only every other line and on only one side of a page).

Part One

Assume that: a) Mecks decides to sue in Federal District Court in Massachusetts and b) the federal court must apply New Mexico substantive law to resolve the matter and c) the federal district court judge is not certain whether the New Mexico statute which provides that joint and several liability applies to certain product liability cases (NMSA 40-3A-1) is applicable to all or some of the parties:

What means are available to the judge to determine the applicable law? What, if any, are the requirements for the use of each such method? What are the benefits and detriments of each such method?

Part Two

Assume that Martin is a citizen of New Mexico. Assume also that Mecks chose to sue Lobster Pot and Salty in State District Court in New Mexico and that both defendants moved to dismiss on the ground that Martin was an indispensable party defendant in the lawsuit:

Decide the motion and explain your reasoning.

Part Three

Assume that Tosca had an insurance policy that covered his liability for up to $100,000. Assume also that, Mecks is planning to sue Tosca and others in New Mexico State District Court and Professor Miranda has already filed suit against Tosca and others in Massachusetts State District Court. Assume that Tosca's lawyer is planning to file an interpleader action in Federal District Court in Massachusetts to compel all persons who became sick after eating the bouillabaisse to litigate their claims against all defendants, including Tosca, in the Massachusetts Federal District Court and not elsewhere:

Advice the lawyer as to which type of interpleader action should be filed, explain why, and give him an opinion and your reasoning concerning whether he is likely to succeed in having the interpleader action be the sole forum for resolving all claims arising from the food poisoning.

Part Four

Assume that Mecks and five other persons who suffered food poisoning sue Lobster Pot, Martin, Salty and Tosca in the State District Court in New Mexico:

Is it possible to disqualify a judge without proof of bias or prejudice? Why (not)? If so, how many such recusals are possible? Why? Will the plaintiffs have the same number of peremptory challenges to jurors as the defendants or will one side get more than the other? What criteria are relevant to making the determination?

Part Five

Assume that Mecks sues Lobster Pot, Martin and Shorty in State District Court in New Mexico and six months after that suit has been filed and one month after a motion for summary judgment by Lobster Pot is denied by the court, the Azure family files a motion in the pending proceeding to intervene as a matter of right:

Will the Azure family be able to intervene as a matter of right? Explain.

Part Six

Assume that Mecks sues Lobster Pot, Martin, Shorty and Tosca in State District Court in New Mexico and Tosca's pre-trial motion for dismissal on the ground of lack of personal jurisdiction is denied. Assume that Tosca's lawyer is now contemplating filing a cross-claim against Martin and planning to appeal, at the conclusion of the entire case, the refusal to dismiss for lack of personal jurisdiction:

Advise Tosca's lawyer whether this is a good idea. Explain why (not). If is not a good idea, propose an alternative and identify, describe and explain the best means to accomplish your proposed alternative.

End of Question Two

Question Three
(Suggested Time: Sixty Minutes)

Potbelly Inc. decided to build bleachers in its sports bar so that patrons watching sporting events on television could simulate the experience of rooting from the stands. Potbelly hired architect Arthur to plan the space and the bleachers. Potbelly then hired contractor Cornelius to install the stands. The City of Tucumcari approved the plan and issued a building permit authorizing Cornelius to begin construction.

Four months later the bar was packed with fans who were watching the Dallas Cowboys/New York Giants football game. All the patrons were rooting for Dallas except one, Petrone. Petrone was a loud, brash New Yorker who was passing through Tucumcari and stopped at the bar to watch the game. The bleachers reserved for Giants fans (which only Petrone was sitting in) collapsed and Petrone was badly injured, suffering multiple fractures of both legs and a severe concussion.

Petrone filed suit in New Mexico State District Court. Petrone named Potbelly, Arthur and Cornelius as defendants, charging each with negligence. Potbelly raised the affirmative defense of the fault of the City of Tucumcari based on the theory that the City was negligent in approving the building permit because Cornelius did not have a valid contractor's license.

At the trial, Petrone sought to introduce the testimony of an expert witness to prove that architect Arthur negligently designed the stands. The proposed expert, Exner, was a liberal arts major at UNM who had taken one course in architecture while in college and who now designed and built metal storage sheds. Over the objection of Arthur, the court allowed Exner to testify and state her opinion that Arthur was negligent in the design of the bleachers.

Petrone asserted two theories of liability against Potbelly. First, Petrone alleged that he was an invitee on the premises and was thus owed a duty of reasonable care by Potbelly. Second, Petrone alleged that Potbelly was negligent in choosing the unlicensed Cornelius to construct the bleachers. At the close of Petrone's case, Potbelly made a motion for directed verdict as to the first theory (premises liability) on the ground that there was no evidence that Potbelly knew or should have known of the defect in the bleachers. The trial judge denied the motion.

When jury instructions were being settled, Petrone submitted a proposed instruction that would inform the jury that Potbelly owed Petrone, an invitee, the "highest possible duty of reasonable care." Potbelly submitted a jury instruction directly from the Uniform Jury Instructions which provided that Potbelly owed "a duty of reasonable care." The trial judge announced that the court would use Petrone's proposed instruction. Potbelly did not then object to the court's ruling that the Petrone proposed instruction would be used.

Potbelly requested that the judge submit two special interrogatories to the jury, one asking whether the jury found that Potbelly had breached its duty to Petrone as an invitee and the second asking whether Potbelly was negligent in hiring Cornelius as the contractor. The court declined the request and merely asked the jury to determine whether Potbelly was negligent and, if so, to assess percentages of fault.

The jury returned a verdict for Petrone. The jury found compensatory damages in the amount of $10,000. The jury found Potbelly negligent and assigned 50% of the fault to Potbelly. The jury found Cornelius negligent and assigned 20% of the fault to Cornelius. The jury found Arthur negligent and assigned 25% of the fault to Arthur. The jury also found the City negligent and assigned 5% of the fault to the City.

Judgment was entered against Potbelly for $5,000, against Cornelius for $2,000 and against Arthur for $2500.

Thereafter the defendants each filed timely motions for new trial and judgment NOV. Petrone filed a timely motion for new trial limited to damages or an additur, and presented in support of his motion the affidavit of one of the jurors, James. James's affidavit states that all the jurors except James were Cowboys fans who became aware that Petrone was a Giants fan when they overheard the bailiff comment to Petrone during a lunch break in the midst of trial that "his (Petrone's) Giants were a seven point underdog in next Sunday's game against the Jets." James also stated that two of his fellow jurors, upon hearing this, said that "it would be hard to go out of the way to help this New York s.o.b." James's affidavit also reveals that during deliberations, Juror Judy said "I won't give the guy a penny for pain and suffering. New York Giants fans are mindless and so can't suffer mental pain." Finally, James's affidavit stated that several of the jurors stated during the jury deliberations that they disliked Petrone's "big city" lawyer and did not want to see that "shyster" get a significant contingent fee award.

You are the clerk to the trial court judge who is considering the post trial motions. The judge has sent the following memo to you. Please respond to the judge's questions.

Dear Clerk Casey,

Below are my preliminary views on the manner in which I expect to rule on the post trial motions in Petrone, subject to your input. Please provide me with thoughtful but concise assessments of my proposed rulings and responses to my questions.

1. Arthur's Motion for NOV or new trial

In retrospect, I realize that it was a mistake to qualify Exner as an expert and allow her to testify against Arthur. I also realize that without Exner's testimony Petrone has no case at all against Arthur. I am therefore thinking that Arthur clearly deserves relief and so I think I will grant a judgment NOV or new trial in favor of Arthur. Please comment and explain concisely your reasoning.

2. Potbelly's Motion for NOV or new trial

I now realize that I erred in instructing the jury that Potbelly owed the "highest possible duty of reasonable care" to Petrone and that I should have given the UJI instruction proposed by Potbelly. But: A) Did Potbelly properly preserve the error? B) Did the error cause provable prejudice (since the general verdict of the jury against Potbelly might have been based

on the negligent hiring theory, as to which there is no error, instead of on the invitee issue which I did misinstruct on)?

In light of your answers to my two questions, what can and should I do about the error in instructing the jury?

3. Petrone's Motion for new trial or additur

Should I consider the affidavit of James? Explain. Should I grant an additur, assuming that I am convinced that the jury's assessment of only $10,000 in damages is too low, or should I grant a new trial for that reason? Explain. If I use additur, what measure of damages should I use in setting the amount of the additur? Explain. If I use additur, should I tell the defendants that there will be a whole new trial or only a trial limited to damages if the defendants do not agree to the additur? Explain.

4. Scope of new trial

Assume that I finally conclude that I made no mistake other than the admission of Exner's testimony against Arthur and I conclude that Arthur deserves a new trial. Are there any problems in ordering a new trial for Arthur and simply affirming the verdict and judgment as to the others? If so, explain, and propose a solution and explain why your proposal is correct.

END OF EXAMINATION