**Civil Procedure**

Eric M. Fink
Elon Law School
Fall 2019

# Final Exam: Model Answers & Observations

## Part I

### Question 1: Motion to Dismiss for Failure to State a Claim

#### Model Answer

FRCP Rule 8(a) sets out the requirements for stating a claim: (1) a statement of the court's jurisdiction, (2) a statement of the claim showing an entitlement to relief, and (3) a demand for the relief sought. Rule 9(b) imposes a heightened standard for allegations of fraud or mistake, which "must state with particularity the circumstances constituting fraud or mistake". A motion to dismiss for failure to state a claim under Rule 12(b)(6) asserts that the claimant has not satisfied the requirents under Rule 8(a)(2) and Rule 9.

In Twombly & Iqbal, the Supreme Court elaborated on the standard under Rules 8(a)(2) and 12(b)(6): the complaint must contain factual allegations that, if true, could plausibly support a verdict in favor of the claimant. The court's review begins by identifying the factual allegations in the complaint, treating these as true, while disregarding any legal conclusions, treating these as inferences. Such inferences must be "plausible" given the factual allegations in the complaint. In assessing plausibility, the court will consider alternative inferences under which the defendant would not be liable.

For example, in Twombly, the plaintiffs claimed that the defendants had colluded to restrain competition and fix prices, in violation of federal antitrust law. The complaint alleged that the defendants did not compete with each other in the same geographic markets and charged similar prices for similar services. The Court noted that such parallel conduct on its own did not amount to an antitrust violation; plaintiffs also had to show that defendants acted in furtherance of an agreement to restrain competiton. Treating plaintiffs' allegation of an agreement as an inference, the Court concluded that, absent some additional facts beyond the parallel conduct itself, the alternative inference that defendants' conduct resulted from market forces was more plausible.

Here, the plaintiffs assert a claim for "false or deceptive" product labeling under NC TIFLA. Unlike in Twombly or Iqbal, liability under TIFLA does not turn on the defendant's intent or motive. A plaintiff need only show that the defendant sold products in NC, that the product labels were false or misleading, and that plaintiffs incurred damages as a result. Under the statute, a label is deemed to be false or deceptive if it violates FDA regulations. The complaint identifies the products at issue and specifies the parts of the labels that were allegedly false or deceptive. The complaint further alleges that Healthway's use of the terms "soymilk", "almond milk", and "evaporated cane juice" violated

the FDA regulations identified in the complaint. Under the Twombly/Iqbal standard, whether the labels comply with FDA regulations is a legal conclusion. But the factual allegations in the complaint are enough to make that a plausible conclusion. Unlike in Twombly/Iqbal, liability here does not require any additional facts about the defendant's intent or state of mind, nor about the likelihood of consumer confusion. The question is simply whether the wording of the labels, as detailed in the complaint, is consistent with the FDA regulations. defining "milk", "sugar", and "juice".

Healthway might argue that a claim of "false or deceptive" labeling amounts to an allegation of fraud, subject to the heightened pleading requirement under Rule 9(b). Assuming that is correct, the allegations here are most likely detailed enough to satisfy Rule 9(b). The complaint specifically identifies the particular aspects of the labels alleged to be false or deceptive and the particular FDA regulations they are alleged to violate.

Because the complaint includes sufficient factual allegations to support a plausible finding of liability under the NC TIFLA statute, and because the allegations are sufficiently detailed to satisfy the heightened pleading requirement under Rule 9(b), the court should deny the motion to dismiss.

## Observations

- Several answers did not include an explanation of the "plausibility" standard under Twombly/Iqbal or how courts are supposed to apply that standard. Others concluded that the complaint in the problem satisfies the plausibility standard, without explaining why (e.g. how the complaint here differs from Twombly/Iqbal).
- Only a few addressed the heightened pleading standard for allegations of fraud under Rule 9(b).
  - This wouldn't really apply here, because the NC statute, as described in the problem, doesn't require proof of fraud (i.e. knowing and intentional falsehood), but merely that the label be "objectively" false or deceptive (either because it violates FDA regulations or for some other reason), without regard to the defendant's state of mind.
  - Even Rule 9(b) does apply, the allegations are sufficiently detailed to satisfy Rule 9(b).
  - As a practical matter, satisfying the normal pleading standard under Twombly/Iqbal in this case would still require that the complaint specify how the labels are false or misleading, rather than just a conclusory assertion that they are. This illustrates one criticism of Twombly/Iqbal: that at least in certain types of cases, it has the effect of raising the pleading standard under Rule 8(a)(2) to the heighened level of Rule 9(b).
- There was no need to discuss personal or subject matter jurisdiction in this question. The problem stated that the court had both, and the question specifically asked about dismissal for failure to state a claim, which is a distinct motion (Rule 12(b)(6)) from dismissal for lack of subject matter (Rule 12(b)(1)) or personal jurisdiction (Rule 12(b)(2)).
  - Pay careful attention to the information given in the problem and to the call of the question, so you don't spend time discussing irrelevant issues.

## Question 2: Preclusion

### Model Answer

Claim and issue preclusion are two ways that the judgment in one case may bar a claim altogether, or limit the issues subject to dispute, in a subsequent case. These doctrines serve the interests of efficiency, finality, and fairness by preventing duplicative litigation and inconsistent outcomes. Under the full faith and credit clause of the Constitution, state courts must give the judgments of other states' courts the same preclusive effect that the judgment would receive under the original forum state's law. A similar requirement applies to federal courts by statute.

#### a. Claim Preclusion

Claim preclusion bars the assertion of any claims decided in a prior action between the same parties, if the prior action ended in a valid and final judgment on the merits.

*Same Parties*

The first requirement is that the party asserting the claim and the party against whom the claim is asserted are the same in both actions. Healthway was the defendant in the VA suit and is again the defendant in the NC sut. However, the plaintiff in the prior suit was Vance, an individual, suing on his own behalf. The plaintiff here is PHFC, an organization suing on behalf of its members.

While Vance is a PHFC member, and was represented by the same lawyer as PHFC, this isn't enough to make him and PHFC the same party for preclusion purposes. There is nothing in the facts to suggest that Vance brought the previous action as a representative or agent of PHFC or its other members; nor is there anything to suggest that PHFC had any control over or involvement in the VA suit. At most, the judgment in the prior suit might preclude a new claim on behalf of Vance himself. It will not preclude a claim by PHFC on behalf of its other members.

*Same Claim*

The next requirement is that the claims in the two actions are the same. Under the modern "transactional" approach, preclusion applies not only to the specific claims asserted and decided in the prior action, but to any other claims arising from the same transaction or occurrence. Other approaches limit the scope of preclusion to claims involving the same harm or same wrongful conduct. Under any of these approaches, there is an exception for claims that could not have been asserted in the prior action, because of jurisdictional or other limits.

Under any of the common approaches (transactional, same harm, or same wrongful conduct), the claims here are probably not the same for preclusion purposes. While the claims involve the same conduct by Healthway (i.e. its labeling of the products) and same general type of harm (consumer deception), they arise from from different transactions/occurrences: different purchases by different consumers in different states.

*Valid & Final Judgment on the Merits*

The last requirement is that the prior judgment was valid, final, and on the merits.

A judgment is valid if the court had personal jurisdiction over the defendant and subject matter jurisdiction over the claim. The problem states that the VA court had both personal and subject matter jurisdiction, so the prior judgment appears to be valid.

A judgment is final when there is nothing remaining for the court to do. Jurisdictions vary with regard to the effect of a pending appeal on the finality of a judgment. In any event, there's no mention of an appeal in the problem. The judgment appears to be final.

A judgment is on the merits when it is not based on jurisdictional or other procedural grounds. A final judgment in favor of the plaintiff is, by its very nature, on the merits. In this case, the VA court entered a final judgment in favor of Vance. That judgment was on the merits.

Conclusion

Because the claimants in the VA and NC suits are not the same, and because the claims arise from different transactions by different consumers, claim preclusion will not apply.

### b. Issue Preclusion

Like claim preclusion, issue preclusion serves the interests of economy, finality, and fairness. Unlike claim preclusion, issue preclusion applies to specific factual or legal issues, rather than to an entire claim. The effect of issue preclusion is that the issue is deemed to be decided in the same way as in the prior suit. This may narrow the issues for trial, or dispose of a claim altogether if disposition of the issue means that one or the other party must prevail as a matter of law.

As with claim preclusion, for issue preclusion to apply the prior judgment must be valid & final; however it does not have to be on the merits (e.g. a prior judgment dismissing a claim for lack of personal jurisdiction may preclude relitigation of the issue of personal jurisdiction, or the underlying facts on which the prior determination rested). The same issue of fact or law must have been actually litigated and necessarily decided. In contrast to claim preclusion, issue preclusion does not necessarily require that both parties be identical in both actions. Non-mutual issue preclusion–asserted against someone who was a party in the prior action by someone who was not–is sometimes allowed.

*Valid & Final Prior Judgment*

The requirement of a valid and final prior judgment is the same as for claim preclusion. As noted above, the VA judgment was valid and final.

*Same Issue*

Issue preclusion may apply to issue of fact and issues of law. In this case, the issue of whether Healthway's product branding and labeling violates FDA regulations is the same as in the prior VA suit, which involved the same products with the same branding and labeling.

The issue of whether the branding and labeling are false or deceptive under the NC TIFLA statute may seem superficially new, since the prior suit was based on the VA statute. However, in reality this issue is also the same. The provisions of the two statutes are identical. Under both statutes, food labels that violate FDA regulations are deemed to be false or misleading. In the prior suit, the VA court determined that Healthway's branding and labeling of its products violate FDA regulations. Given that determination, the branding and labeling are deemed to be false or misleading under the NC statute.

*Actually Litigated & Necessarily Decided*

An issue is actually litigated when the party against whom the issue was decided contested it and presented evidence, either in a motion for summary judgment or at trial. An issue is necessarily decided when the disposition of the issue was essential to support the judgment. If a different determination of the issue would not have meant a different outcome, the prior judgment will not have preclusive effect on that issue.

In this case, both requirements are satisfied. The problem says that the case went to trial. There is nothing to suggest that Healthway stipulated or otherwise failed to contest the assertion that its branding and labeling violated FDA regulations and were thus false or deceptive. The issue was thus actually litigated. The judgment in favor of Vance specifically rested on the court's conclusion that the branding and labeling violated FDA regulations. Had the court determined that the branding and labeling complied with FDA regulations, Healthway would have prevailed in the suit (since there was no other apparent basis on which to find the branding or labeling was false or deceptive). As such, the issue was necessarily decided.

*Non-Mutuality*

While claim preclusion requires identify of both parties in both actions, issue preclusion may sometimes be asserted non-mutually, that is by someone who was not a party to the prior action against someone who was (but not by someone who was a party to the prior action against someone who was not). Courts generally allow defensive non-mutual issue preclusion, i.e. where the new party asserts issue preclusion to defend against a claim by the repeat party. Courts sometimes also allow offensive non-mutual issue preclusion, i.e. where the new party asserts issue preclusion to establish part of their claim against the repeat party. In the latter case, courts consider various factors, such as whether the new party could have joined in the prior action but chose not to do so to gain an unfair advantage, whether there were any procedural limitations in the prior forum that prevented the repeat party from fully contesting the issue, or whether the stakes in the prior action were such that the repeat party had little or no incentive to do so.

In this case, PHFC, which (as discussed above) was not a party to the prior action, would assert issue preclusion against Healthway, which was a party in the prior action. PHFC would do so to establish part of its TIFLA claim. This is an example of offensive non-mutual issue preclusion. The NC court may allow this, depending on its assessment of the fairness factors. Weighing against PHFC would be the fact that it may have known about the VA suit (since Vance is a member and he was represented by the same lawyer) and probably could have joined in the prior action to assert claims on behalf of its members then (though the Virginia court may have lacked jurisdiction over, or been an improper venue for, claims arising from purchases in NC). On the other hand, there is no indication that there were any procedural limits on Healthway's ability to contest the issues (the same procedural and

evidentiary rules apply in both the VA and NC federal courts). Nor were the stakes in the prior suit so limited–particularly since Healthway should have anticipated that a verdict in favor of Vance would inspire similar suits by other consumers–that Healthway wouldn't have been motivated to contest the issues fully in that case.

*Conclusion*

The same issues were actually litigated and necessarily decided in the prior suit, and the prior judgment was valid and final. Healthway may thus be precluded from contesting these issues, if the NC court concludes that the fairness factors permit offensive non-mutual issue preclusion in this case.

## Observations

- There appears to have been some confusion about who would assert preclusion in this case.
  - Healthway (the defendat) would assert claim preclusion against PHFC, since that would be a basis to dismiss the suit altogether (on summary judgment or motion for judgment on the pleadings).
  - PHFC would assert issue preclusion against Healthway, since that would be a way to establish a big part of the claim, i.e. whether the labels violated FDA regulations and were thus false or deceptive under the statute.
- Some answers did not distinguish between claim and issue preclusion, or did not correctly identify the elements of each.
  - For example, some identified "judgment on the merits" as a requirement for issue preclusion; that only applies to claim preclusion.
- Some answers mistakenly concluded that the claims in the Virginia and NC suits are not the same, because they are based on different states' laws.
  - The point of claim preclusion is that the same plaintiff may not assert a new claim against the same defendant arising from the same T/O as in a prior suit, even if the conduct or harm is actionable under a different law. See, *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (holding contract and tort claims under Maryland law were precluded by prior judgment dismissing similar claims under California law, where claims arose from same business dispute).
  - The reason the claims in this problem are not the same is that they arise from different, logically independent, transactions (i.e. purchases by different consumers in different states).
- Some answers mistakenly stated that *only* a newcomer (i.e. someone who was not a party to the prior action) may assert issue preclusion. A repeat party may also do so. This is the ordinary case of mutual issue preclusion. The important point is that non-mutual issue preclusion may only be asserted *against* a party to the prior action.

# Part II

## Model Answer

### a. Joinder of Co-Defendants

FRCP Rule 20(a)(2) governs the joinder of co-defendants. A plaintiff may sue multiple defendants in the same action if the plaintiff asserts claims against each defendant (i) arising from the same transaction or occurrence (or series thereof), and (ii) sharing at least one common question of law or fact. Both requirements–a common T/O **and** a common legal or factual question–must be satisfied. Joinder of co-defendants under Rule 20(a)(2) is permissive, meaning that the plaintiff may choose to sue them together in the same action, or separately in different actions.

Federal courts apply a "logical relationship" test to determine whether claims arise from the same T/O for joinder purposes. Rather than a mechanical focus on specific conduct or harm, the logical relationship tests asks whether the claims are so related that it makes sense, as a practical matter, to try them together in the same action. Thus, in one case, a federal court held that multiple employees of different GM divisions working at different locations could join as co-plaintiffs in a suit asserting discrimination claims against GM based on companywide personnel policies and practices. Even though each plaintiff alleged a different discriminatory act, they amounted to a series of related occurrences and involved common factual and legal questions about the alleged policies and practices.

GCR's claims against Giraldi and CDI all arise from the same T/O: Giraldi's quitting her job at GCR to work for CDI. GCR contends that Giraldi breached her noncompete agreement by going to work for another restaurant operator within 100 miles of Greensboro, and is concerned that she will divulge GCR's trade secrets to CDI, in breach of her confidentiality agreement and the DTSR. GCR also contends that CDI induced Giraldi to make this move in the hope that she would reveal GCR's trade secrets. The claims will also involve common legal and factual questions, such as the terms and validity of the noncompete agreement and the nature of GCR's alleged trade secrets.

Since the claims against Giraldi and CDI arise from the same T/O and involve common legal and factual questions, they are properly joined as co-defendants under Rule 20(a)(2).

*Subject Matter Jurisdiction*

The Constitution limits the subject matter jurisdiction of the federal courts to certain types of cases. Congress has further defined the scope of federal SMJ by statute. Most significantly, federal courts have SMJ over claims arising under federal law ("federal question"), 28 USC sec. 1331, and over claims between citizens of different states ("diversity"), 28 USC sec. 1332.

While the Consitution permits jurisdiction over cases involving any issue of federal law, jurisdiction under sec. 1331 is limited to cases where the federal question arises on the face of the complaint, and not by way of a defense. The simplest way to satisfy federal question is jurisdiction is under the "creation test": where federal law itself establishes the plaintiff's cause of action. Ordinarily, where state law creates the cause of action, there will be no federal question jurisdiction. An exception exists where a significant and disputed issue of federal law necessarily arises as an element of a state law claim.

In this case, GCR asserts two claims against Giraldi, one under a federal statute and the other under NC state law. Joinder of these claims is proper under Rule 18, which permits a party asserting any claim to assert as many other claims it has against the same opposing party, whether or not they arise from the same T/O. GCR also asserts a claim under NC state law for tortious interference against CDI. As discussed above, Rule 20(a)(2) permits joinder of CDI. However, the joinder rules under the FRCP do not confer SMJ. There must also be a statutory basis for SMJ over each claim.

The DTSA is a federal statute that creates a cause of action and remedies for disclosure and misappropriation of trade secrets. Accordingly, the court has federal question jurisdiction over the DTSA claim. But there is no federal question jurisdiction over the remaining claims, which arise under NC state law and do not entail any federal elements.

Nor is there diversity jurisdiction over the state law claims, because the requirements under sec. 1332–complete diversity (i.e. no common state of citizenship between any plaintiff and any defendant) and an amount in controversy exceeding $75,000–are not satisfied.

The citizenship of an individual is based on their domicile, i.e. the state where they currently reside or last resided with an intent to remain (or return if they are living elsewhere temporarily). Giraldi is a lifelong resident of NC and plans to keep living there despite taking a job in VA, so she remains a citizen of NC. An unincorporated association is a citizen of each state where a member is domiciled. GCR is an unicorporated business partnership, and its partners are all citizens of NC. A corporation is a citizen of both the state in which it is incorporated and the state where its principal place of business is located. CDI is incorporated and has its business headquarters in VA, so it is a citizen of that state. Because GCR and Giraldi are both citizens of NC, there is not complete diversity.

The amount in controversy between GCR and Giraldi is $75,000 (the salary she will lose if she is enjoined from working at CDI for a year). The amount in controversy between GCR and CDI is only $10,000 (the amount GCR seeks in damages). Neither sum exceeds $75,000. Consequently, even if there were complete diversity, the amount in controversy between GCR and each defendant would be insufficient.

However, the court may exercise supplemental jurisdiction over these claims. Once the court has original jurisdiction over at least one claim in a suit, it may then exercise supplemental jurisdiction over "all other claims that are so related … that they form part of the same case or controversy". 28 USC sec. 1367(a). The "same case or controversy" requirement is satisfied when the claims share a "common nucleus of operative fact" (CNOF). Where diversity is the sole basis for the court's original jurisdiction is diversity, supplemental jurisdiction is not allowed over claims by a plaintiff (or a party intervening or joined as a plaintiff) against parties joined under certain joinder rules, if it would destroy complete diversity (thus undermining the court's original jurisdiction). 28 U.S.C. sec. 1367(b). However, where the court has original jurisdiction based on a federal question, or where complete diversity is preserved, this limitation does not apply.

As discussed above, the state law claims against Giraldi & GCI arise from the same T/O as the federal DTSI claim. This is functionally equivalent to the "same case or controversy"/CNOF requirement for supplemental jurisdiction under sec. 1367(a). If diversity were the sole basis for original jurisdiction, sec. 1367(b) would preclude supplemental jurisdiction over the claim by GCR (the plaintiff) against Giraldi (a non-diverse co-defendant joined under Rule 20). But since original jurisdiction here is based on a federal questsion, sec. 1367(b) does not apply and the court may exercise supplemental jurisdiction over the state law claims against both defendants.

### Observations

- Some answers omitted the "common question of law or fact" requirement for permissive joinder under Rule 20(a)(2)
- Some answers did not explain the "logical relationship" standard for "same T/O" under Rule 20.
- Some answers analyzed federal question jurisdiction using the standard from *Grable*.
  - That doesn't apply in this case, because the federal statute itself creates the plaintiff's cause of action.
- Some answers did not consider supplemental jurisdiction over the state law claims, or mistakenly concluded that supplemental jurisdiction was disallowed under § 1367(b) because of incomplete diversity.

## Question 2

### Model Answer

#### a. GCR v. Giraldi: Replevin

As noted above, Rule 18 allows the joinder of multiple claims by the same claimant against the same opposing party, without regard to whether they arise from the same or different T/O. Having asserted a federal DTSA claim and state breach of contract claim against Giraldi, GCR may also join its replevin claim for return of the knives.

The court will have neither federal question nor diversity jurisdiction over the replevin claim. This claim arises under state law, but GCR & Giraldi are both citizens of NC.

Supplemental jurisdiction will not be allowed, because the replevin claim does not share a common nucleus of operative fact with the noncompete & trade secret claims. The only fact in common is that Giraldi allegedly kept the knives when she quit her job at GCR. But this is not material to the replevin claim, which does not depend on when or why Giraldi kept the knives, but only on whether she had no right to do so.

#### b. Giraldi v. CDI: Estoppel

Rule 13(g) governs crossclaims, i.e. claims by one co-party against another. Crossclaims are permitted if they arise out of the same T/O as the plaintiff's underlying claim against the party asserting the crossclaim. They may include, but are not limited to, claims for contribution or indemnification. Giraldi and CDI are co-defendants, and the estoppel claim arises out of the same T/O as CDI's claims against Giraldi and CDI. Giraldi seeks to hold CDI liable for the salary should would lose if the court grants an injunction prohibiting her from working at CDI for a year. Both the harm to Giraldi and CDI's liability would stem from the same underlying T/O, specifically CDI's inducing Giraldi to quit her job at GCR with the promise of a job at a higher salary.

On its own, the court would have neither federal question nor diversity jurisdiction over this claim. Estoppel is a state law claim. While CDI and Giraldi are citizens of different states, diversity jurisdiction requires an amount in controversy *exceeding* $75,000 but the amount in controversy between Giraldi and CDI is *exactly* $75,000.

However, the court may exercise supplemental jurisdiction. Since a crossclaim arises from the same T/O as the plaintiff's underlying claim, it always satisfies the CNOF requirement. Sec. 1367(b) doesn't apply, because the court has original jurisdiction based on a federal question. Even if the court had jurisdiction based on only on diversity, sec. 1367(b) only limits supplemental jurisdiction over crossclaims by a plaintiff against a non-diverse co-plaintiff, not crossclaims between co-defendants.

### c. Giraldi v. GCR: Wage Payment

Rule 13(a) & (b) governs counterclaims, i.e. a claim by party B against party A, where party A has already asserted a claim against party B. A counterclaim is compulsory if it arises from the same T/O as the underlying claim by party A against party B. Compulsory means that party B must assert the claim as a counterclaim in the same action, or forfeit that claim altogether. This places defending parties on an even footing with claimaints for preclusion purposes. A counterclaim not arising from the same T/O is permissive: it may be joined in the same action (if the court has SMJ) or asserted separately in a subsequent action.

Girladi's claim against GCR is a counterclaim, because GCR has already asserted claims against her in the original complaint. Whether it is compulsory or permissive depends on whether the circumstances surrounding the noncompete and trade secret claims against Giraldi are relevant to the wage claim (e.g. whether GCR really could lawfully withhold Giraldi's final month's salary as a penalty, as their lawyer allegedly advised). If so, this should provide enough of a logical relationship to bring the claims within the same T/O. If not, the wage claim would more likely be permissive, since there would not be any factual or legal relationship apart from the mere coincidence in timing.

The court's jurisdiction will depend on whether this counterclaim is compulsory or permissive. If compulsory, then, by definition, the CNOF requirement for supplemental jurisdiction will be satisfied and (as noted above) sec. 1367(b) would not apply. If permissive, the court will have no SMJ. The wage claim arises under state law, but GCR and Giraldi are both citizens of NC and the amount in controversy is well under $75,000.

### d. GCR v. Poorman: Malpractice

Rule 14 governs the joinder of third-party defendants ("impleader"). Rule 14(b) permits a plaintiff to join a third-party defendant on the same conditions as a defendant under Rule 14(a)(1). The plaintiff's claim against the third-party defendant must not merely arise from the same T/O as a claim against the plaintiff, but must specifically be a claim for contribution or indemnification on that prior claim.

Here, GCR seeks to join Poorman to assert a malpractice claim for allegedly negligent legal advice regarding whether it could withhold Girladi's final pay. While this claim thus arises from the same T/O as Girladi's wage claim, it is a based on Poorman's alleged breach of his duty of care to GCR directly, not on a right of contribution Poorman as a joint tortfeasor or indemnification based on GCR's vicarious liability to Giraldi for Poorman's conduct. However, if the representation agreement between Poorman and GCR included an indemnification provision, GCR could implead Poorman on that basis.

If joinder under Rule 14(b) is proper, then the court may exercise supplemental jurisdiction. A claim for contribution or indemnification, by definition, shares a CNOF with the underlying claim against the third-party plaintiff, over which the court must have SMJ. Assuming Giraldi's wage claim is a compulsory counterclaim over which the court has supplemental jurisdiction, GCR's claim against Poorman would share a CNOF with that claim. Again, because the court has original jurisdiction in this case based on a federal question, sec. 1367(b) would not apply, so it would not matter that GCR & Poorman are both citizens of NC.

## Observations

- Some answers neglected to consider supplemental jurisdiction over these claims.
- Some answers overlooked the fact that sec. 1367(b) only applies where diversity is the sole underlying basis for the court's original jurisdiction, and then only to claims by plaintiffs against parties joined under the specified rules, if allowing supplemental jurisdiction would undermine complete diversity.
- Question 2(a)
  - Most answsers argued that this claim arises from the same T/O as, and thus shares a CNOF with, GCR's other claims, but did not consider the counterargument. As the model answer suggests, the relationship here is pretty thin.
- Question 2(b)
  - Most answers correctly analyzed this as a crossclaim. A few mistakenly said that crossclaims are compulsory. While they must arise from the same T/O (like compulsory counterclaims), they are permissive (essentially because the drafters of the FRCP didn't want to force co-parties to assert claims against one another where that might hurt their common defense against the common opposing party).
- Question 2(c)
  - Most answers analyzed the claim only as a compulsory counterclaim but did not consider whether it might be permissive. As the model answer suggests, this is a situation where there are good arguments on both sides. On an exam, that's an opportunity for you to earn more points. Don't pass it up.
- Question 2(d)
  - Most answers correctly identified this as a third-party claim under Rule 14, but many overlooked the fact that Rule 14 limits third-party joinder to claims for contribution or indemnification.

- For the reason explained in the model answer, the malpractice claim here isn't really a claim for contribution or indemnification claim, though it is contingent on GCR's losing the wage claim. Since this is a matter of substantive law (you'll learn about malpractice and related claims in Professional Responsiblity), I gave credit for answers that assumed this was a contribution/indemnification claim, but more credit for answers that explained why it is not.

- A few answsers analyzed this as a claim by a plaintiff against a third-party defendant under Rule 14(a)(3).
  - This is incorrect, because Rule 14(a)(3) applies to claims by a plaintiff against a third-party defendant that has already been joined *by a defendant* under Rule 14(a)(1). In that circumstance, the plaintiff may assert any claim against the third-party defendant arising from the same T/O as the plaintiff's underlying claim(s) against the (original) defendant, and not just claims for contribution/indemnification.