

## Final Examination

### Instructions

- This is an open-book/open-note examination. This includes (but is not limited to) the material posted or linked to on the course website ([emfink.net/CivilProcedure](http://emfink.net/CivilProcedure)).
- The exam consists of three questions, all based on the same fact pattern. You must answer each question.
- There is no minimum or maximum length to your answers.
- You must submit your completed exam in ExamSoft no later than *11:59 pm on Wednesday, December 2nd*. Subject to that deadline, you may take as much time as you wish to complete the exam.

### The Case of the Missing Ivy

Harold Richman has lived in California for the past 25 years. He grew up in Gritty City, a gruff but lovable metropolis located in the State of Susquehanna. His parents, Marvin and Shirley, shared an obsession with English Ivy. In 2010, they died in a tragic gardening accident, becoming ensnared and eventually suffocating in the thick shroud of ivy covering their house. Harold returned to Susquehanna for their funeral and arranged for their burial at Whispering Glades Cemetery, where he purchased two burial plots, at a cost of \$5000, as part of an “Eternal Rest Assured Plan”. The Plan also included a choice of ground cover planting to be maintained by Whispering Glades, for an additional annual fee of \$100. For the ground cover, Harold naturally selected his parent’s beloved English Ivy.

Recently, while on a business trip not far from Gritty City, Harold decided to pay a visit to his parents’ graves for the first time since their funeral 10 years ago. When he got there, he was shocked to discover that, while the gravesites were otherwise in excellent condition, there was not a trace of ivy. Although Harold was not the world’s most attentive son, he was well aware of his parents’ passion for ivy. Harold immediately marched to the Whispering Glades office and demanded to speak to the manager. When the manager, a Mr. Thanatogenos, appeared, Harold asked what happened to the ivy on his parents’ graves. Mr. Thanatogenos calmly explained that Whispering Glades had removed all the ivy five years ago, because “it’s gone out of fashion and it’s a real nuisance to maintain”. Incensed at this callous lack of respect for his deceased parents’ wishes, Harold sternly declared, “A contract is a contract. I’ll see you in court!”, and then departed in a huff.

Harold immediately contacted Waldorf T. Flywheel, a lawyer in Gritty City, and recounted his devastating experience. Fighting back the tears, he explained, “They loved the ivy so. It’s not about the money, it’s about justice.” Deeply moved, the lawyer agreed to represent Harold in a lawsuit against Whispering Glades. A week later, the lawyer filed a complaint (a copy of which has been provided to you along with the exam questions) in the U.S. District Court for the Eastern District of Susquehanna, asserting a claim under the Susquehanna Unfair Trade Practices Act (SUTPA) (the pertinent sections of which are reproduced below).

## Susquehanna Unfair Trade Practice Act

### Section 1. Unfair or Deceptive Acts or Practices.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

### Section 3. Private Actions.

Any person who purchases goods or services primarily for personal, family or household purposes and thereby suffers any loss of money or property as a result of an unfair or deceptive act or practice by the seller, may bring a private action to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and in addition the court may award to the plaintiff costs and reasonable attorney fees.

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### Question 1

As indicated in the complaint, Harold has lived in California for 25 years, returning to his birthplace in Susquehanna for brief visits only twice in the past ten years. Whispering Glades, Inc., which owns and operates Whispering Glades Cemetery, is incorporated and has its sole place of business in Susquehanna.

Does the federal court have subject matter jurisdiction over Harold's suit?

### Question 2

*Regardless of your answer to the previous question, assume that the federal court has subject matter jurisdiction.*

Susquehanna state law provides that a plaintiff seeking damages for mental or emotional distress must include a certification from a licensed mental health professional attesting to the plaintiff's mental or emotional state, when filing the complaint. A complaint lacking the required certification must be dismissed.

In contrast, FRCP Rule 8 requires only that the complaint include a general "demand for the relief sought". Production of evidence to substantiate the claims happens later, in the discovery process. Specifically, FRCP Rule 35(a)(1) deals with "Physical and Mental Examinations":

*In General.* The court where the action is pending may order a party whose mental or physical condition ... is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. ...

Whispering Glades moves to dismiss on the grounds that Harold did not include a certification from a licensed mental health professional with his complaint, as required under Susquehanna law. Harold opposes the motion, arguing that the federal court should follow the procedures under FRCP Rule 8 and Rule 35, not state law.

What should the federal court do?

**Question 3**

*Regardless of your answer to the previous questions, assume that the federal court has subject matter jurisdiction and that the state law requirement of a certification from a licensed mental health professional does not apply.*

The Susquehanna Unfair Trade Practices Act, § 3(a)(i), defines “unfair or deceptive acts or practices” to include “Advertising goods or services with intent not to sell them as advertised”. The statute does not define “advertising”, but Susquehanna courts have interpreted § 3(a)(i) to include descriptions of the goods or services that the seller makes or provides to the consumer, whether orally or in writing, prior to the sale.

The Susquehanna Supreme Court (the state’s highest court) has held that the defendant’s mere failure to provide goods or services as promised does not constitute an unfair or deceptive act or practice as defined in SUPTA § 3(a)(i). Rather a claim based on SUPTA § 3(a)(i) requires proof that, at the time of sale, the defendant either intended to provide no goods or services at all, or intended to provide goods or services of lesser value than advertised. The Susquehanna Supreme Court has further explained that a plaintiff might prove the requisite intent either by direct evidence (e.g. an admission by the defendant) or by inference based on evidence that the defendant has engaged in a pattern and practice of advertising goods and services but never providing them as advertised.

Whispering Glades moves to dismiss the suit under FRCP Rule 12(b)(6), arguing that Harold’s complaint fails to state a claim for unfair or deceptive acts or practices under SUPTA § 3(a)(i).

Should the court grant that motion?