

MBE Civil Procedure Sample Test Questions

The National Conference of Bar Examiners provides these Civil Procedure sample questions as an educational tool for candidates seeking admission to the bar within a U.S. jurisdiction. These sample questions are very similar in format to the Multistate Bar Examination (MBE), and are intended to familiarize candidates with Civil Procedure MBE-style questions. While these sample questions illustrate the kinds of Civil Procedure questions that will appear on the MBE starting in February 2015, they do not represent all the Civil Procedure material

that will be covered. Examinees are advised to review the [information on MBE content](#) provided on the NCBE website, including the Civil Procedure subject matter outline, before attempting to answer these sample questions.

Answer the questions according to generally accepted fundamental legal principles, except where noted. Assume the application of 1) the amendments to the Federal Rules of Civil Procedure through 2012; and 2) the sections of Title 28 to the U.S. Code pertaining to jurisdiction, venue, and transfer. To model the pacing required to complete a full MBE, these questions should be answered in approximately 18 minutes.

The key to these sample questions follows the questions themselves. After the key, you will find annotations to each question that explain why each answer is correct or incorrect.

1. An entrepreneur from State A decided to sell hot sauce to the public, labeling it “Best Hot Sauce.”

A company incorporated in State B and headquartered in State C sued the entrepreneur in federal court in State C. The complaint sought \$50,000 in damages and alleged that the entrepreneur’s use of the name “Best Hot Sauce” infringed the company’s federal trademark. The entrepreneur filed an answer denying the allegations, and the parties began discovery. Six months later, the entrepreneur moved to dismiss for lack of subject-matter jurisdiction.

Should the court grant the entrepreneur’s motion?

- (A) No, because the company’s claim arises under federal law.
 - (B) No, because the entrepreneur waived the right to challenge subject-matter jurisdiction by not raising the issue initially by motion or in the answer.
 - (C) Yes, because although the claim arises under federal law, the amount in controversy is not satisfied.
 - (D) Yes, because although there is diversity, the amount in controversy is not satisfied.
2. An investor from State A filed an action against his State B stockbroker in federal court in State A. The summons and complaint were served at the stockbroker’s office in State B, where the process server handed the documents to the stockbroker’s administrative assistant.

The stockbroker has answered the complaint, asserting the defense of improper service of process. Assume that both states’ requirements for service of process are identical to the requirements of the Federal Rules of Civil Procedure.

Is the court likely to dismiss the action for improper service of process?

- (A) No, because service was made on a person of suitable age found at the stockbroker’s place of employment.
- (B) No, because the stockbroker waived her claim for improper service of process by asserting it in her answer.
- (C) Yes, because an individual defendant may not be served by delivering process to a third party found at the defendant’s place of employment.
- (D) Yes, because the process of State A courts is not effective in State B.

3. A truck driver from State A and a bus driver from State B were involved in a collision in State B that injured the truck driver. The truck driver filed a federal diversity action in State B based on negligence, seeking \$100,000 in damages from the bus driver.

What law of negligence should the court apply?

- (A) The court should apply the federal common law of negligence.
 - (B) The court should apply the negligence law of State A, the truck driver’s state of citizenship.
 - (C) The court should consider the negligence law of both State A and State B and apply the law that the court believes most appropriately governs negligence in this action.
 - (D) The court should determine which state’s negligence law a state court in State B would apply and apply that law in this action.
4. A patent holder brought a patent infringement action in federal court against a licensee of the patent. The patent holder believed that a jury would be more sympathetic to his claims than a judge, and asked his lawyer to obtain a jury trial.

What should the lawyer do to secure the patent holder’s right to a jury trial?

- (A) File and serve a complaint that includes a jury trial demand.
- (B) File and serve a jury trial demand at the close of discovery.
- (C) File and serve a jury trial demand within 30 days after the close of the pleadings.
- (D) Make a jury trial demand at the initial pretrial conference.

5. A consumer from State A filed a \$100,000 products liability action in federal court against a manufacturer incorporated and with its principal place of business in State B. The consumer claimed that a flaw in the manufacturer's product had resulted in severe injuries to the consumer. In its answer, the manufacturer asserted a third-party complaint against the product designer, also incorporated and with its principal place of business in State B. Believing that the consumer had sued the wrong defendant, the manufacturer claimed both that the designer was solely responsible for the flaw that had led to the consumer's injuries and that the manufacturer was not at fault.
7. After being fired, a woman sued her former employer in federal court, alleging that her supervisor had discriminated against her on the basis of her sex. The woman's complaint included a lengthy description of what the supervisor had said and done over the years, quoting his telephone calls and emails to her and her own emails to the supervisor's manager asking for help.

The designer is aware that the manufacturer did not follow all of the designer's specifications when making the product.

Which of the following arguments is most likely to achieve the designer's goal of dismissal of the third-party complaint?

- (A) The court does not have subject-matter jurisdiction over the third-party complaint, because both the manufacturer and the designer are citizens of State B.
 - (B) The manufacturer failed to obtain the court's leave to file the third-party complaint.
 - (C) The manufacturer's failure to follow the designer's specifications caused the flaw that resulted in the consumer's injuries.
 - (D) The manufacturer's third-party complaint failed to state a proper third-party claim.
6. A wholesaler brought a federal diversity action against a large pharmaceutical company for breach of contract. During jury selection, one potential juror stated that five years earlier he had been an employee of the company and still owned several hundred shares of its stock. In response to questioning from the judge, the potential juror stated that he could fairly consider the evidence in the case.

The wholesaler's attorney has asked the judge to strike the potential juror for cause.

Should the judge strike the potential juror for cause?

- (A) No, because the potential juror said that he could fairly consider the evidence in the case.
- (B) No, because the wholesaler's attorney could use a peremptory challenge to strike the potential juror.
- (C) Yes, because other potential jurors still remain available for the jury panel.
- (D) Yes, because the potential juror is presumed to be biased because of his relationship to the company.

The employer moved for summary judgment, alleging that the woman was a pathological liar who had filed the action and included fictitious documents in revenge for having been fired. Because the woman's attorney was at a lengthy out-of-state trial when the summary-judgment motion was filed, he failed to respond to it. The court therefore granted the motion in a one-line order and entered final judgment. The woman has appealed.

Is the appellate court likely to uphold the trial court's ruling?

- (A) No, because the complaint's allegations were detailed and specific.
- (B) No, because the employer moved for summary judgment on the basis that the woman was not credible, creating a factual dispute.
- (C) Yes, because the woman's failure to respond to the summary-judgment motion means that there was no sworn affidavit to support her allegations and supporting documents.
- (D) Yes, because the woman's failure to respond to the summary-judgment motion was a default giving sufficient basis to grant the motion.

8. A man brought a federal diversity action against his insurance company, alleging that the company had breached its duty under his insurance policy by refusing to pay for his medical expenses resulting from a mountain-biking accident.
10. A student at a private university sued the university in federal court for negligence after he fell from scaffolding in a university-owned theater building. At trial, after briefing from both parties, the court permitted the jury to hear testimony that there had been several previous accidents in the same building. The jury found for the student, and the university appealed. One of the university's arguments on appeal is that the testimony about the previous accidents should have been excluded as irrelevant and highly prejudicial.

At the jury trial, the man presented evidence that he had paid all premiums on the insurance policy and that the policy covered personal-injury-related medical expenses arising from accidents. After he rested his case, the company presented evidence that a provision of the policy excluded payment for injury-related expenses resulting from an insured's "unduly risky" behavior. The company also presented a witness who testified that the accident had occurred in an area where posted signs warned bikers not to enter. The man did not cross-examine the witness.

After resting its case, the company moved for judgment as a matter of law.

Should the court grant the motion?

- (A) No, because a motion for judgment as a matter of law must first be made at the close of the plaintiff's case-in-chief.
- (B) No, because whether the man's behavior was unduly risky is a question of fact for the jury to resolve.
- (C) Yes, because the company's uncontradicted evidence of the man's unduly risky behavior means that no reasonable jury could find that the policy covers his injuries.
- (D) Yes, because the man waived his right to rebut the company's evidence by not addressing the "unduly risky" policy provision in his case-in-chief.
9. A motorcyclist was involved in a collision with a truck. The motorcyclist sued the truck driver in state court for damage to the motorcycle. The jury returned a verdict for the truck driver, and the court entered judgment. The motorcyclist then sued the company that employed the driver and owned the truck in federal court for personal-injury damages, and the company moved to dismiss based on the state-court judgment.

If the court grants the company's motion, what is the likely explanation?

- (A) Claim preclusion (*res judicata*) bars the motorcyclist's action against the company.
- (B) Issue preclusion (*collateral estoppel*) establishes the company's lack of negligence.
- (C) The motorcyclist violated the doctrine of election of remedies.
- (D) The state-court judgment is the law of the case.

Which standard of review applies to this argument?

- (A) Abuse of discretion.
- (B) Clearly erroneous.
- (C) De novo.
- (D) Harmless error.

Answer Key

1. A
2. C
3. D
4. A
5. D
6. D
7. B
8. B
9. A
10. A

MBE Civil Procedure Sample Test Questions with Annotations

1. An entrepreneur from State A decided to sell hot sauce to the public, labeling it “Best Hot Sauce.”

A company incorporated in State B and headquartered in State C sued the entrepreneur in federal court in State C. The complaint sought \$50,000 in damages and alleged that the entrepreneur’s use of the name “Best Hot Sauce” infringed the company’s federal trademark. The entrepreneur filed an answer denying the allegations, and the parties began discovery. Six months later, the entrepreneur moved to dismiss for lack of subject-matter jurisdiction.

Should the court grant the entrepreneur’s motion?

- (A) No, because the company’s claim arises under federal law.

Correct. The claim asserts federal trademark infringement, and therefore it arises under federal law. Subject-matter jurisdiction is proper under 28 U.S.C. § 1331 as a general federal-question action. That statute requires no minimum amount in controversy, so the amount the company seeks is irrelevant.

- (B) No, because the entrepreneur waived the right to challenge subject-matter jurisdiction by not raising the issue initially by motion or in the answer.

Incorrect. Under Federal Rule 12(h)(3), subject-matter jurisdiction cannot be waived and the court can determine at any time that it lacks subject-matter jurisdiction. Therefore, the fact that the entrepreneur delayed six months before raising the lack of subject-matter jurisdiction is immaterial and the court will not deny his motion on that basis.

- (C) Yes, because although the claim arises under federal law, the amount in controversy is not satisfied.

Incorrect. There is no amount-in-controversy requirement for actions that arise under federal law.

- (D) Yes, because although there is diversity, the amount in controversy is not satisfied.

Incorrect. Although diversity jurisdiction requires an amount in controversy of \$75,000 or more, when diverse parties are litigating a federal claim, the action is treated for jurisdictional purposes as a federal-question action, not a diversity action. The claim here asserts federal trademark infringement and therefore it arises under federal law. The fact that the action does not meet all the requirements for diversity jurisdiction is irrelevant.

2. An investor from State A filed an action against his State B stockbroker in federal court in State A. The summons and complaint were served at the stockbroker’s office in State B, where the process server handed the documents to the stockbroker’s administrative assistant.

The stockbroker has answered the complaint, asserting the defense of improper service of process. Assume that both states’ requirements for service of process are identical to the requirements of the Federal Rules of Civil Procedure.

Is the court likely to dismiss the action for improper service of process?

- (A) No, because service was made on a person of suitable age found at the stockbroker’s place of employment.

Incorrect. Federal Rule 4(e)(2) governs service on individual defendants and authorizes service on a person of “suitable age and discretion” only when service is made at the defendant’s “dwelling or usual place of abode,” not at the defendant’s workplace.

- (B) No, because the stockbroker waived her claim for improper service of process by asserting it in her answer.

Incorrect. Federal Rule 12(b) provides that every defense to a claim for relief, including insufficient service of process, must be asserted either in the responsive pleading (answer) or by motion. Therefore, the stockbroker did not waive her claim for improper service by asserting it in her answer.

- (C) Yes, because an individual defendant may not be served by delivering process to a third party found at the defendant’s place of employment.

Correct. Federal Rule 4(e)(2) provides that an individual defendant may be served by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process on behalf of the defendant. No facts suggest that the administrative assistant was a designated agent of the stockbroker, and the Rules provide no general authority to serve process on third parties at a defendant’s place of employment.

- (D) Yes, because the process of State A courts is not effective in State B.

Incorrect. Federal Rule 4(k)(1)(A) makes clear that the process of the federal courts may exceed state boundaries. Therefore, the process of the federal courts in State A can be effective in State B so long as the stockbroker is subject to jurisdiction in State A.

3. A truck driver from State A and a bus driver from State B were involved in a collision in State B that injured the truck driver. The truck driver filed a federal diversity action in State B based on negligence, seeking \$100,000 in damages from the bus driver.
4. A patent holder brought a patent infringement action in federal court against a licensee of the patent. The patent holder believed that a jury would be more sympathetic to his claims than a judge, and asked his lawyer to obtain a jury trial.

What law of negligence should the court apply?

- (A) The court should apply the federal common law of negligence.

Incorrect. There is no federal common law of negligence, and the federal courts are prohibited from creating general federal common law. Rather, they must adhere to state law in substantive matters.

- (B) The court should apply the negligence law of State A, the truck driver's state of citizenship.

Incorrect. The court cannot simply select the law of the truck driver's state of citizenship as the governing law. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the Court made clear that in a federal diversity action a court must look to the choice-of-law rules of the state in which it sits to determine which of two competing states' laws should be applied to the action before it.

- (C) The court should consider the negligence law of both State A and State B and apply the law that the court believes most appropriately governs negligence in this action.

Incorrect. If the court were to review both states' laws and select the one it found most appropriate, it effectively would be developing its own federal choice-of-law rules. This would violate both *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). In *Klaxon*, the Court made clear that in a federal diversity action a court must look to the choice-of-law rules of the state in which it sits to determine which of two competing states' laws should be applied to the action before it.

- (D) The court should determine which state's negligence law a state court in State B would apply and apply that law in this action.

Correct. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the Court made clear that in a federal diversity action a court must look to the choice-of-law rules of the state in which it sits to determine which of two competing states' laws should be applied to the action before it.

What should the lawyer do to secure the patent holder's right to a jury trial?

- (A) File and serve a complaint that includes a jury trial demand.

Correct. Federal Rule 38(b)(1) provides specifically that a jury trial demand may be included in a pleading. Therefore, including it in a properly filed and served complaint secures the right.

- (B) File and serve a jury trial demand at the close of discovery.

Incorrect. Under Federal Rule 38(b)(1), a jury trial demand must be served no later than 14 days after service of the last pleading directed to the issue on which a jury is sought. The close of discovery will be much later than 14 days after the pleadings have closed.

- (C) File and serve a jury trial demand within 30 days after the close of the pleadings.

Incorrect. Under Federal Rule 38(b)(1), a jury trial demand must be served no later than 14 days after service of the last pleading directed to the issue on which a jury is sought.

- (D) Make a jury trial demand at the initial pretrial conference.

Incorrect. Under Federal Rule 38(b)(1), a jury trial demand must be served no later than 14 days after service of the last pleading directed to the issue on which a jury is sought. The initial pretrial conference likely will not be scheduled until weeks after the pleadings have closed. Therefore, making the demand at the initial pretrial conference is too late.

5. A consumer from State A filed a \$100,000 products liability action in federal court against a manufacturer incorporated and with its principal place of business in State B. The consumer claimed that a flaw in the manufacturer's product had resulted in severe injuries to the consumer. In its answer, the manufacturer asserted a third-party complaint against the product designer, also incorporated and with its principal place of business in State B. Believing that the consumer had sued the wrong defendant, the manufacturer claimed both that the designer was solely responsible for the flaw that had led to the consumer's injuries and that the manufacturer was not at fault.
6. A wholesaler brought a federal diversity action against a large pharmaceutical company for breach of contract. During jury selection, one potential juror stated that five years earlier he had been an employee of the company and still owned several hundred shares of its stock. In response to questioning from the judge, the potential juror stated that he could fairly consider the evidence in the case.

The designer is aware that the manufacturer did not follow all of the designer's specifications when making the product.

Which of the following arguments is most likely to achieve the designer's goal of dismissal of the third-party complaint?

- (A) The court does not have subject-matter jurisdiction over the third-party complaint, because both the manufacturer and the designer are citizens of State B.
Incorrect. Third-party claims fall within the court's supplemental jurisdiction, so there is no need to have diversity between the manufacturer and the designer. This is because the manufacturer's claim is so closely related to the consumer's main claim that it is part of the same case or controversy. Both claims rest on whether there was a product defect and who is responsible for any defect.
- (B) The manufacturer failed to obtain the court's leave to file the third-party complaint.
Incorrect. Under Federal Rule 14(a)(1), a defendant is required to seek leave to file a third-party complaint only if it seeks to add the claim more than 14 days after serving its original answer. Because the manufacturer inserted its third-party claim in its answer, there was no need for it to seek leave.
- (C) The manufacturer's failure to follow the designer's specifications caused the flaw that resulted in the consumer's injuries.
Incorrect. The assertion that the manufacturer's failure to follow the specifications caused the flaw is a factual allegation that goes to the merits of the dispute. A motion to dismiss does not resolve factual allegations but instead seeks to determine whether, if taken as true, the factual allegations are sufficient to state a claim for relief as a matter of law.
- (D) The manufacturer's third-party complaint failed to state a proper third-party claim.
Correct. Under Federal Rule 14(a)(1), a defendant may serve a third-party claim only on a nonparty "who is or may be liable to it for all or part of the claim against it." This means that the basis of the claim must be derivative liability (e.g., indemnification or contribution). In order to satisfy the Rule, the manufacturer cannot simply allege that the consumer sued the wrong defendant.

The wholesaler's attorney has asked the judge to strike the potential juror for cause.

Should the judge strike the potential juror for cause?

- (A) No, because the potential juror said that he could fairly consider the evidence in the case.
Incorrect. In deciding how to rule, the judge may take into account the fact that the potential juror said that he could fairly consider the evidence in the case. However, the juror's statement is not determinative and, standing alone, is not sufficient for the judge to refuse to strike the juror for cause.
- (B) No, because the wholesaler's attorney could use a peremptory challenge to strike the potential juror.
Incorrect. Peremptory challenges allow an attorney to disqualify a potential juror because the juror has displayed an attitude or characteristic that is unfavorable to the attorney's client but that does not rise to the level of bias or a relationship to one of the litigants that would be grounds for a challenge for cause. Therefore, the fact that the wholesaler has peremptory challenges remaining is irrelevant. If the court finds that the wholesaler's attorney has met the objective standard for disqualification for cause, it must exclude the potential juror.
- (C) Yes, because other potential jurors still remain available for the jury panel.
Incorrect. The fact that other potential jurors remain available is irrelevant to how the judge should rule. A challenge for cause requires the court's objective determination as to whether the potential juror meets the statutory qualifications for jury duty. In making this determination, the court will consider only a potential juror's relationship to one of the litigants or evidence of bias or prejudice regarding one of the litigants.
- (D) Yes, because the potential juror is presumed to be biased because of his relationship to the company.
Correct. Stock ownership, or having worked for or having a spouse who works or worked for one of the litigants, has been found to create a presumption of bias that merits striking a potential juror for cause.

7. After being fired, a woman sued her former employer in federal court, alleging that her supervisor had discriminated against her on the basis of her sex. The woman's complaint included a lengthy description of what the supervisor had said and done over the years, quoting his telephone calls and emails to her and her own emails to the supervisor's manager asking for help.

The employer moved for summary judgment, alleging that the woman was a pathological liar who had filed the action and included fictitious documents in revenge for having been fired. Because the woman's attorney was at a lengthy out-of-state trial when the summary-judgment motion was filed, he failed to respond to it. The court therefore granted the motion in a one-line order and entered final judgment. The woman has appealed.

Is the appellate court likely to uphold the trial court's ruling?

- (A) No, because the complaint's allegations were detailed and specific.

Incorrect. The fact that the complaint's allegations were detailed and specific does not automatically prevent the court from entering summary judgment. The question is whether, taking into account those allegations, as well as the allegations the employer raised in its summary-judgment motion, there remains no genuine dispute of any material fact such that the employer is entitled to judgment as a matter of law. By challenging the woman's credibility in its motion, the employer disputed all the facts and evidence she had laid out in her complaint.

- (B) No, because the employer moved for summary judgment on the basis that the woman was not credible, creating a factual dispute.

Correct. The standard for summary judgment is whether there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. By challenging the woman's credibility in its motion, the employer disputed all the facts and evidence she had laid out in her complaint. Therefore, the motion did not meet the standard for summary judgment, and the trial court should be reversed.

- (C) Yes, because the woman's failure to respond to the summary-judgment motion means that there was no sworn affidavit to support her allegations and supporting documents.

Incorrect. Although the woman failed to respond, that is not in itself a basis for summary judgment. The court may grant summary judgment only if the employer's motion and supporting materials show that the employer is entitled to that relief. The standard for summary judgment is whether there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. By challenging the woman's credibility in its motion, the employer disputed all the facts and evidence she had laid out in her complaint.

- (D) Yes, because the woman's failure to respond to the summary-judgment motion was a default giving sufficient basis to grant the motion.

Incorrect. The woman's failure to respond does not act as a default by which the court can automatically enter summary judgment. The employer has the burden to show that the summary-judgment standard is met—that there is no genuine dispute as to any material fact such that it is entitled to judgment as a matter of law. Only if the employer satisfies that burden will the burden then shift to the woman to introduce arguments or evidence showing that a genuine dispute of material fact does exist.

8. A man brought a federal diversity action against his insurance company, alleging that the company had breached its duty under his insurance policy by refusing to pay for his medical expenses resulting from a mountain-biking accident.

At the jury trial, the man presented evidence that he had paid all premiums on the insurance policy and that the policy covered personal-injury-related medical expenses arising from accidents. After he rested his case, the company presented evidence that a provision of the policy excluded payment for injury-related expenses resulting from an insured's "unduly risky" behavior. The company also presented a witness who testified that the accident had occurred in an area where posted signs warned bikers not to enter. The man did not cross-examine the witness.

After resting its case, the company moved for judgment as a matter of law.

Should the court grant the motion?

- (A) No, because a motion for judgment as a matter of law must first be made at the close of the plaintiff's case-in-chief.

Incorrect. A motion for judgment as a matter of law may be made at any time before the court submits the case to the jury.

- (B) No, because whether the man's behavior was unduly risky is a question of fact for the jury to resolve.

Correct. Because a motion for judgment as a matter of law takes the case away from the jury, it can be granted only if the court determines that the evidence is legally insufficient to allow the jury to decide the case. The jury here must determine the meaning of the warning signs and whether the signs alone establish that the man's behavior was unduly risky. A reasonable jury might conclude that the warning signs were designed to keep bikers out of the area for reasons other than risk, given no additional evidence as to why the signs were posted or of other events in which harm occurred to those ignoring the signs.

- (C) Yes, because the company's uncontradicted evidence of the man's unduly risky behavior means that no reasonable jury could find that the policy covers his injuries.

Incorrect. The fact that the man did not introduce any evidence to contradict the testimony about the warning signs does not in itself establish that the man's behavior was "unduly risky." The jury must determine the meaning of the warning signs and whether the signs alone establish that the man's behavior was unduly risky. A reasonable jury might conclude that the warning signs were designed to keep bikers out of the area for reasons other than risk, given no additional evidence as to why the signs were posted or of other events in which harm occurred to those ignoring the signs. Therefore, the testimony, standing alone, does not establish that a reasonable jury could determine that the company had met its burden to prove that the area was actually dangerous.

- (D) Yes, because the man waived his right to rebut the company's evidence by not addressing the "unduly risky" policy provision in his case-in-chief.

Incorrect. The company properly raised, as a defense to the man's claim, the issue of whether the man's behavior was unduly risky and excluded from coverage. Therefore, the man had no obligation to raise the issue of the warning signs in his case-in-chief, but could decide either to rebut the issue on cross-examination or remain silent, as he did, and allow the jury to determine whether the testimony was sufficient to satisfy the company's burden of proof.

9. A motorcyclist was involved in a collision with a truck. The motorcyclist sued the truck driver in state court for damage to the motorcycle. The jury returned a verdict for the truck driver, and the court entered judgment. The motorcyclist then sued the company that employed the driver and owned the truck in federal court for personal-injury damages, and the company moved to dismiss based on the state-court judgment.

If the court grants the company's motion, what is the likely explanation?

- (A) Claim preclusion (*res judicata*) bars the motorcyclist's action against the company.

Correct. Claim preclusion prevents a claimant from splitting his cause of action; when the claimant loses a judgment, all possible grounds for relief arising out of the same transaction or occurrence are barred in future litigation between the same parties. Because the motorcyclist's personal-injury and property-damage claims arise out of the same accident, they are part of the same cause of action and he should have brought them in one action. Although claim preclusion typically operates to prevent relitigation between the same parties, it also operates in favor of entities that are in privity with the parties. Here, because the company is in privity with the truck driver (based on the employer-employee relationship), the company cannot be found liable for his acts if he is not found liable. Therefore, the first judgment extinguishes the claim against the company as well.

- (B) Issue preclusion (*collateral estoppel*) establishes the company's lack of negligence.

Incorrect. It is true that the same negligence issue that was presented against the truck driver is being presented in the action against the company and that that issue was actually litigated in the first action—two requirements for the application of issue preclusion. However, the jury's general verdict for the truck driver does not necessarily establish that he was free from negligence. It may instead reflect the jury's conclusion that the motorcyclist was more negligent than the truck driver. This may prevent the application of issue preclusion. In addition, the court is not likely to base its ruling on issue preclusion because that defense will be utilized only if claim preclusion is unavailable.

- (C) The motorcyclist violated the doctrine of election of remedies.

Incorrect. The election-of-remedies doctrine was a pleading limitation at common law and under some early codes that prevented a plaintiff from presenting alternative or inconsistent claims when the plaintiff had a choice among inconsistent remedies. For example, a plaintiff who was fraudulently induced to enter into a contract had to elect either to sue under the contract for damages or to disaffirm the contract and seek rescission. The Federal Rules reject this doctrine and allow for alternative and inconsistent allegations in a complaint. Even if the doctrine were applicable, it would be inapposite here because there is no inconsistency between the motorcyclist's claims for personal-injury and property damages, and the question presented is one addressed to preclusion, not pleading.

- (D) The state-court judgment is the law of the case.

Incorrect. Law of the case prevents redetermination of issues that are decided in a case but that recur in later stages of the same case. For example, issues decided on appeal are binding on the trial court if the case is remanded to the trial court for further action. While there was only one accident here, there are two separate actions, one in the state court and one in the federal court. Therefore, the law-of-the-case doctrine is inapplicable.

10. A student at a private university sued the university in federal court for negligence after he fell from scaffolding in a university-owned theater building. At trial, after briefing from both parties, the court permitted the jury to hear testimony that there had been several previous accidents in the same building. The jury found for the student, and the university appealed. One of the university's arguments on appeal is that the testimony about the previous accidents should have been excluded as irrelevant and highly prejudicial.

Which standard of review applies to this argument?

- (A) Abuse of discretion.

Correct. A determination as to whether evidence is irrelevant or highly prejudicial and should be excluded is within the trial court's discretion because it requires an understanding of the entire case and the factual context in which the evidence is being offered. Therefore, it is reviewed on appeal using an abuse-of-discretion standard.

- (B) Clearly erroneous.

Incorrect. An appellate court applies the clearly-erroneous standard when reviewing findings of fact made by the trial court in a bench trial. Therefore, the standard does not apply to judicial rulings on the admissibility of evidence in a jury trial.

- (C) De novo.

Incorrect. An appellate court applies the de novo standard to trial court rulings on pure issues of law. Because an evidentiary ruling involves the application of legal standards to facts—i.e., relevance and prejudice as related to the facts in the case—it is not a ruling on a pure issue of law and therefore not subject to de novo review.

- (D) Harmless error.

Incorrect. An appellate court applies the harmless-error standard when it determines that a trial court's erroneous admission of evidence did not affect any party's substantial rights. It is a conclusion an appellate court reaches after reviewing and determining the impact of an erroneous evidentiary ruling, not the standard of review that the court applies to determine whether it was erroneous to admit the evidence in the first instance.