ESSAY QUESTION NO. 5

Answer the question in booklet No. 5

In 2005, Dan comes to your law office for advice. He has received notice that execution liens have been recorded against some of his property in connection with a civil judgment against him in favor of Paul. After interviewing Dan and consulting court records, you piece together the following history:

As he drove down a Fairbanks street in 2000, Dan suddenly noticed an illegally parked car in his lane. Swerving to avoid it, he crossed the centerline and collided with a vehicle driven by Paul. Dan, Paul, and the driver of the illegally parked car, Tom, all escaped injury, but Paul's car was a total loss.

In 2004, Paul sued Dan for property damage, properly obtaining personal service on him with of a summons and complaint. Knowing that the suit was well beyond the statute of limitations, Dan ignored it, and he heard nothing further until the 2005 lien notices. Court records indicate that during 2004 Paul went on to obtain a default and default judgment against Dan for $25,000, complying with all applicable rules.

(Please do not discuss any insurance issues in responding to these questions.)

1. Can Dan successfully challenge the judgment? Discuss.
2. Dan tells you he thinks Tom is the person responsible for anything he might owe Paul. Discuss the availability of any procedural avenues for pursuing this claim.

GRADER'S GUIDE

***** QUESTION NO. 5 *****

SUBJECT: CIVIL PROCEDURE

A. Challenging the judgment (60 pts)

1. Rule 60(b)

a. *Rule 60(b) in general*: Dan can move for relief from judgment under Alaska Rule of Civil Procedure 60(b). The most promising avenue of relief in the factual context set up in the question is subpart Rule 60(b)(1), which allows a court to provide relief from judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect."

b. *Time limit:* Rule 60(b) provides that any motion for relief from judgment must be brought within a "reasonable time." *In addition,* the outside time limit for a motion brought under Rule 60(b)(1) is one year from "notice of the judgment" as that term is defined in Rule 58.1(c). Notice of the judgment is defined in Rule 58 as the date of the clerk's distribution of the judgment. Significantly, the one year time limit is not tied to when the party seeking relief actually learned of judgment.

In Dan's case, the deadline has been missed if one year has passed. The facts given in the question tell us only that judgment was entered in 2004 and that it is now 2005; the passage of time could be either more or less than one year. Examinees should ideally respond in the alternative, noting that relief under Rule 60(b)(1) is foreclosed to Dan if the year has expired, but proceeding to analyze c and d below on the possibility that less than a year has elapsed.

c. *Excusable neglect:* Among the grounds for relief under Rule 60(b)(1) is "excusable neglect," together with the related ground of "inadvertence." Failure to answer the complaint when served was neglect on Dan's part. Dan can argue that it was excusable neglect because he was presumably a layman, and his mistaken idea that one can ignore a stale claim may be an excusable misunderstanding on the part of a layman.[1] The weighing of whether neglect is excusable is within the discretion of the trial court; relief has been granted in a variety of circumstances, including situations where pro se litigants have failed to appear because of a legal misunderstanding, but relief is not a foregone conclusion. *See generally, e.g., Cook v. Rowland,* 49 P.3d 262, 265 (Alaska 2002).

[1] Dan's failure to answer the complaint was deliberate, not inadvertent, and so the ground of inadvertence does not appear to apply.

Meritorious defense: Ordinarily, a party hoping to obtain relief from a default judgment on grounds of excusable neglect must show that there is an arguably meritorious defense to be litigated thereafter. *E.g., Wright v. Shorten,* 964 P.2d 441, 445 (Alaska 1998). The potentially valid defenses are discussed below.

d. *Other grounds for relief under 60(b)(1):* Another ground for relief from judgment under Rule 60(b) is "mistake." In general, this term has been interpreted to mean a mistake on the part of the litigant (such as admitting to a fact based on a mistaken belief that it was true), or a procedural mistake on the court's part, rather than a mistake in the outcome of the case. *See, e.g., Dixon v. Pouncy,* 979 P.2d 520, 528 (Alaska 1999); 11 Wright & Miller, Federal Practice and Procedure § 2858. However, the breadth of the concept of "mistake" is unclear and applicants should not be unduly faulted if they mix the "potentially meritorious defense" issues with "mistakes" that might independently justify relief from judgment.

Note that the facts of this question do not raise any issue as to whether the judgment was validly entered—when Dan failed to appear, Paul was entitled to proceed to default judgment *ex parte* pursuant to Rules 55(a)(1) and 5(a), and in any event the question states that Paul followed all applicable rules in obtaining his judgment.

e. *Meritorious defense: Expiration of limitations period:* The statute of limitations for tort actions of this type is two years. AS 09.10.070. Thus, Dan has a potentially meritorious defense and, if his failure to appear and answer was excusable, he thereby satisfies the requirements for relief from judgment so as to reopen the action.

(The proceeding was not flawed because of failure to join Tom as an indispensable party under Rule 19. As a second tortfeasor, Tom is not indispensable under Rule 19 because the person's absence does not preclude complete relief between the parties before the court, nor does he claim an interest in the subject matter of the action. *See* Part B-2 below.)

f. *Rule 60(b)(6)*: Subpart (6) of Rule 60(b) allows the court to consider "any other reason justifying relief from the operation of the judgment." There is no fixed time limit for a motion under Rule 60(b)(6), although it remains subject to the general limitation that it be brought "within a reasonable time." This catchall basis is something that could perhaps be tried if the one-year time limit has expired for Rule 60(b)(1). However, the reasons for relief must genuinely be something "other" than those provided for in the other subdivisions of Rule 60(b), and the Alaska Supreme Court has held that the circumstances must be "extraordinary." *Bauman v. Day,* 892 P.2d 817, 829 (Alaska 1995). Since the reasons for relief written into this question do fall

within the ambit of another subdivision, Rule 60(b)(1), there is no real prospect for relief under the catchall provision.

2. Not Rule 55(e)

Once default judgment has been entered, the only rule that supplies a procedure for relief from that judgment is Rule 60. Rule 55(e) provides that "for good cause shown, the court may set aside an entry of default," but goes on to provide that if a default judgment has been entered the court may set it aside "in accordance with Rule 60(b)." Had judgment not been entered, of course, Rule 55(e) would be the proper avenue for seeking relief.

B. Claims against Tom (40 pts)

1. *Third-party complaint under Rule 14:* If Dan gets the case reopened on the merits, he can seek to bring a third-party complaint against Tom for apportionment under Rule 14(c). This can be done at any time after commencement of the action with leave of the court. In addition, one can bring a third-party action without leave of the court if one files the third-party complaint within 10 days of one's original answer; thus, if part of Dan's relief from the judgment entails reopening the period for him to answer the complaint, he will be able to bring Tom into the case without leave.

The underlying basis for the third-party complaint would be AS 09.17.080, enacted through Alaska's 1987 Tort Reform Initiative. The statute provides that in a civil action involving the fault of multiple parties, including third party defendants, the court should enter judgment for the original plaintiff severally against each of the parties before the court, according to that party's percentage of fault.

2. *Joinder under Rule 19 or Rule 20*: Rule 19 governs the joinder of additional parties to an action who are needed for a just adjudication, making the joinder mandatory if it is feasible. Rule 20 covers the permissive joinder of parties. In this case, if Dan gets the case reopened on the merits, he might in theory move the court to join Tom to the action as a defendant.

The question of whether ordinary joinder as a defendant (as opposed to third-party practice under Rule 14) is an appropriate way to address the potential liability of a party not named a defendant in the original action is now an academic one in Alaska, because the Alaska Supreme Court has expressly adopted Rule 14(c) "[f]or purposes of apportioning damages under AS 09.17.080." However, before it adopted Rule 14(c), the Court seems to have felt that a mechanism for bringing in parties for equitable apportionment of fault under AS 09.17.080 might be to use Rule 20 (permissive joinder) to make that party a cross-claim defendant under Rule 13(h). *Benner v. Wichman*, 874 P.2d 949, 956 n.17 (Alaska 1994).

Rule 20 permits all persons to be joined in an action "if there is asserted against them, jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." A claim under AS 09.17.080 is a claim that the added party is severally liable to the defendant. AS 09.17.080(d); *Benner*, 874 P.2d at 956 n.17. Moreover, the theory that Tom is liable arises from the same transaction or occurrence and has numerous issues of fact in common with the claim against Dan. Thus, it does meet the criteria in Rule 20 for permissive joinder, and if Rule 14(c) were not available Rule 20 would be a basis Dan might successfully rely upon to bring Tom into the action.

Compulsory joinder under Rule 19, on the other hand, could not ordinarily be an appropriate procedure for handling a claim like the one against Tom. Rule 19 applies in two circumstances. First, joinder is required (when feasible) if leaving the addition party out would preclude complete relief between the parties before the court. Tom's absence would not preclude complete relief between Paul and Dan for Dan's several share of Paul's damages. Second, joinder is required (when feasible) if the person to be added "claims an interest relating to the subject of the action" and various other conditions obtain. Tom claims no interest in the monetary compensation for damages that is at issue in this action.

3. *Limitations*: The call indicates that Dan wants to bring an action against Tom to recover only whatever he might owe Paul. Such an action is not barred by the statute of limitations even though more than two years have passed since the Tom's alleged tort. The Alaska Supreme Court has held, in keeping with third-party practice in most jurisdictions, that the normal statute of limitations does not apply to third-party actions, including apportionment claims under Rule 14(c). *Alaska Gen. Alarm v. Grinnel,* 1 P.3d 98 (Alaska 2000).[2]

4. *Relief through a separate action*: If Dan cannot reopen the *Paul v. Dan* proceeding on the merits, his remedies against Tom would be problematic for two reasons. First, AS 09.17.080(d) has abolished actions for contribution between joint tortfeasors. Second, the statute of limitations has expired.

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[2] In the days of traditional contribution actions, courts reasoned that third-party actions for contribution did not accrue until judgment was entered on the underlying claim against the original defendant. *Alaska General Alarm,* 1 P.3d at 105. The limitations period could not begin running until the cause of action accrued, and therefore ordinarily could not bar the third-party claim. Alaska's current apportionment procedure is distinct from traditional contribution claims, and the accrual reasoning does not directly apply. However, the Alaska Supreme Court relied on the long tradition relating to contribution actions in construing AS 09.17.080.

001066

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Alaska
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JULY
2005

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~~[illegible]~~ ① Can Dan successfully challenge?

Yes, because Paul failed to file the lawsuit within the statute of limitations for a tort action. (3 years). Dan can successfully challenge by asking for a dismissal or by seeking summary judgement.

Ⓐ Dismissal - Rule 12 states that a dismissal can occur when there is no question for which relief can be granted. Here, there is not doubt that the ~~proper~~ lawsuit was filed well beyond the statute of limitations.

~~B~~ Because of Paul's failure to timely serve a proper summons and complaint within a reasonable amount of time as adhered ~~to~~ in

the SOL the lawsuit shall be dismissed.

(B) Summary Judgement - Rule 56 summary judgement occurs when there is no genuine issue of material fact. Here, again the lawsuit was filed well beyond the SOL. Therefore, the court is obligated to grant summary judgement for Dan because Paul failed to properly file service and complaint in a timely fashion.

(2) Procedural Avenues for getting Tom on the hook.

A party can ~~get a the~~ identify any third party that might be subject to a lawsuit but they have to do it ~~up~~ within a reasonable time of receiving a complaint from a moving party. They must identify and idemnify within 30 days or else they will lose

their chance to bring in other ~~[illegible]~~ parties after that 30 day period. Here, Dan would have bring in Tom as his 3rd party idemnity at the beginning of the applicable ~~time~~ period.

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(1) Dan can challenge the judgment entered against him and seek to have it set aside on the grounds that the action was originally barred by the statute of limitations. Dan's most appropriate course of action at the time he was served with the complaint and summons would have been to answer the complaint and argue that the action was brought beyond the statutory period and seek a motion to dismiss that requested attorney fees be borne by Paul because the action was frivolous, vexatious, and capricious. In general, a party will be held responsible for failing to answer a properly served complaint or summons, even if the action at issue is clearly meritless. The success of Dan's challenge will turn in large part on whether Paul presented any meritorious arguments that the action somehow fit an exception to the general application of the statute of limitations. If he did not, it may have been a clear abuse of discretion by the judge to enter a default judgment. Allowing default judgments to stand in situations such as these would be in contravention of public policy because it would encourage unscrupulous parties to file large volumes of suits that were barred by the statute of limitations in the hope that some of the defendants would fail to answer or appear and the plaintiff would be awarded a default judgment on an otherwise barred claim.

Additionally, if Dan relied upon the advice of legal counsel in ignoring the complaint and summons, Dan may be able to obtain relief from the judgment based upon a showing of deficient counsel. Failure to answer a complaint, even a spurious one, is a per se violation of an attorney's professional responsibility to his client and a court would likely view those circumstances with some sympathy for Dan.

(2) If Dan had defended Paul's action rather than ignoring, it would have been simple for Dan

to crossclaim Tom and thus make Tom a party to the action between Dan and Paul. However, because a judgment has been entered against Dan, Dan may have to bring a separate action against Tom to seek contribution for the judgment owed by Dan to Paul.

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1)

An argument that a claim is barred by the statute of limitations (which for tort claims is 2 years) must be brought in the first responsive pleading to a complaint, or it is waived. Once a default judgment is entered, it may be reconsidered only where there has been improper service of process or some other action which makes the judgment substantially unjust and unfair. The claim must be brough in a timely manner.

Dan's statute of limitations claim should have been brought in his first responsive pleading, and since it wasn't (because he never provided a response), he waived it. Dan was properly served and should have entered a response within 20 days of receiving the summons and complaint. Dan will want to argue his ignorance regarding whether he was required to respond, and that he was given no notice of the default and default judgment until the lien notices arrived, which deprived him of due process of law. Having heard nothing about the suit between the original service and the lien notices, he was not given adequate opportunity to respond and defend himself. Such an argument may succeed in gaining him a retrial.

2)

A person can seek comparative fault and indemnity by joining a third party to a suit, or by bringing a separate suit against them following the entering of a judgment agaisnt them. Claims such as improper joinder of a mandatory party may be brought at any time before a

judgment is entered. To join a party under the joinder rules of Rule 19, a person must prove that the court has jurisdiction over the third party and that the third party's interest arose out of the same transaction or occurrence. Then the court must balance factors such as the how timely the request is, the prejudice that the party may be subjected to if they are not joined, likelihood of confusion caused by joining the party, whether their interest are protected and represented by a current party, the likelihood of delay that joining the party may cause, and other factors relating to the interest of justice.

Dan will want to argue that Tom is a necessary party under 19(b), and alternatively that he is just a party who should be joined under 19(a) because the accident was his fault due to the fact that his car was parked in Dan's lane. He will want to claim that Tom can be served in the state and was involved in the transaction or occurrence that is at issue so the court has personal jurisdiction over him. Furthermore, he has a substantial need to protect his interest because his fault will be the primary argument that Tom makes in his defense. Dan will also want to argue that there is no party currently involved in the litigation who will protecting Tom's interest. The court may be concerned about delay (although joining one party to a suit of this kind is not likely to cause a substantial delay), but there is little risk of confusion of issues since Tom's fault is likely to be a primary issue in the case.

A third party may be permissively joined where they have an interest in the litigation which is not adequately protected by the current parties, when their claim arises out of the same transaction or occurrence, and when they may be prejudiced by a decision made in their absence.

Here, Dan will want to join Tom and argue that he has a strong interest in the litigation and not including him could prejudice his ability to protect his interest. However, a party may also point to an "empty chair" in litigation to have their fault limited by a certain percentage, or to be completely relieved of liability. Here, if Dan does not join Tom, he can still point to the empty

chair to alleviate some of his liability.

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Dan can successfully challenge the Judgment under Mistake, New evidence, void, or any other Just Reason and will probably get the Judgment dismissed.

The statute of Limitations, Mandatatory Joiner, and issue/claim preclusion will probably prevent Paul from successfully suing Tom.

2/7

#1

Under Alaska law there are several ways in which a party may challenge a Judgment against them. If the Judgment is less than 1 year old, it can be challenged for Mistake, New evidence, or fraud. However if the Judgment is challenged more than 1 year after the date of Judgment it can also be challenged for satisfaction of Judgmenent, void, or any other Just Reason.

3/7

In this case though the years are given, the exact dates and months are not given. If the challenge is conducted w/in 1 year of the judgment the best challenge to use would be the "Mistake" challenge. Dan can argue that the court erroneously issued a judgment well beyond the 2 year S of L for Tort. The court made a mistake. Therefore the judgment is invalid and would be dismissed.

If the challenge is conducted

past the 1 year mark, Dan's better argument may be that the Judgment is <u>void</u> because of the 2 yr SOL on Torts. Either way - Dan has a good argument to set aside the Judgment and will probly be successful.

#2

As per the previous discussion on challenging a court judgment, Dan could also challenge under <u>New Evidence</u> or <u>Any other good Reason</u> Because of Paul's Failure to

include Tom as a party to the suit.

Under Alaska law All parties must be included in the original suit. Some parties are "mandatory" and some parties are "permissible". Since Tom was directly linked to the accident and injury he is considered a mandatory joiner and the plaintiff must include him as a party to the case. In this case Paul did not include Tom as a party to the case and therefore the

case should be dismissed, thus dismissing the judgment against Dan.

Under Alaska law claim preclusion or issue preclusion may prevent Tom from being sued by Paul. claim preclusion would prevent Dan from being sued again on the same claim and issue preclusion would allow Tom to be sued because he was not previously sued. However, there is still the whole 2 yr SOL issue that would prevent further claims unless Paul just now discover

the injuries + damages.

Paul will probably be unable to collect any money from either Dan or Tom.

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5)

1. **Challenging the judgment: Rule 60(b)**

Under Alaska civil procedure law, a person may challenge a judgment under rule 60(b). This rule allows a court to change or revoke a judgment for one of six reasons: mistake, new evidence, fraud, void, inequitable and any other reason. The first three of the six reasons must be brought within one year. The other three must be brought within a reasonable time period. The final "any other reason" claim may only be used for a purpose not outlined in any of the other rules and must have good cause.

Void: Dan here will challenge the judgment under this rule under the argument that the case for which the default judgments were issued was void under the statute of limitations. The statute of limitations for a tort claim after the tort reform act of '97 is 2 years. The accident here took place in 2000 and Paul ended up suing Dan in 2004. The court issued a default judgment in error becasue the statute of limitations had run on this claim. For this reason Paul should prevail in his rule 60(b) motion that the defalt judgment was based on a case which was void. Dan is coming to the lawyers office within one year of the judgment, which is a reasonable time to do so, and thus satisfies the time requirement for the voidness claim.

Inequitable; Dan could also try to allege that the default judgment is not equitable since the statute of limitations had run. This claim would have to be raised in a reasonable time. Basically, this claim under 60(b) is claiming that the judgment is not warranted because the underlying claim is stale and no longer good due to the statute of limitations.

Mistake: if for some reason a court would allow the claim to be brought so long after it

occurred, Dan may try to claim a mistake under 60(b) by stating he thought the statute of limitations had run. He would have to bring this claim within one year and the court would consider the honesty of the mistake.

Judgment notwithstanding the verdict: Dan may try to ask the court to change it's judgment under a judgment notwithstanding the verdict claim, but this will probably not prevail. Dan did not particiapte in a trial with Paul and did not lose on the merits.

Affirmative defenses - the Statute of limitations: This argument goes against Dan. Dan was properly served with summons and the complaint and there was no venue problems or service issued. He did not answer the complaint at all, with the affirmative defense of statute of limitations running. Affirmative defenses claiming a statute of limitations defense must be raised in the answer or they are waived. A party has 20 days to answer a compaint and Dan did not do so. He did not bring any defenses to the court for Paul's claim and therefore may not be able to use those defenses now. He should have at least answered Paul's complaint with an affirmative defense, as this would have been easier than bringing the rule 60(b) claim.

2. Dan may bring Tom into the lawsuit because he believes Tom is the actual cause of the accident and should be available to satisfy any judgment. A defendant in a case may add a third party in a counterclaim within 10 days of the answer. Dan did not file an answer to this claim by Paul yet, but if he did he could counterclaim Tom within 10 days. After the 10 day limit the defendant could bring a 3rd party into the lawsuit by asking leave of the court. The court would consider the prejudice to the parties for not allowing the 3rd party to be brought into the case, the reasons why the party was not brought in earlier, will examine the difficulty of the case, and any injustice that may occur to either party by allowing or not allowing the 3rd party

in.