

BAGS # 61

Grading Key: Civil Procedure, Spring 2006

Raw score 69.5
Final score 69.5

Question 1 (3 points each)

- 1(a) 1.5 True. Here there are problems with both diversity, because one plaintiff like defendant is from California, and amount in controversy, because it appears that not all members of the class have damages in excess of \$75,000, as is required. While, because all plaintiffs' claims appear to arise from the same transaction and appearance it would seem that the court could potentially allow the smaller claims to come in under supplemental jurisdiction, per 28 U.S.C. Section 1367, supplemental jurisdiction cannot solve the problem of non-diverse citizenship (Exxon).
- 1(b) 2 True. Article III only requires "minimal" diversity (at least one plaintiff diverse from at least one defendant) and does not impose any amount in controversy requirement. Thus, Congress has the power to enact legislation, such as CAFA, that broadens federal courts' subject jurisdiction beyond the limits of 28 U.S.C. Section 1332, so long as it does not exceed the scope of Article III as CAFA does not.
- 1(c) 2.5 False. Forum non conveniens is only appropriate, in federal court, when defendant is arguing that the claim is best heard in another country. Sparkle's best bet, instead, is to file a motion for discretionary transfer of venue per 28 U.S.C. Section 1404, or perhaps to file a motion to dismiss for lack of mandatory venue as required by 28 U.S.C. Section 1391, arguing that defendant does not reside in Nevada and that no substantial events took place in Nevada.
- 1(d) 2.5 True. Given plaintiffs' claims, as described, they do not qualify for certification under 23(b)(1) (all plaintiffs don't have identical claims) or 23(b)(2) (plaintiffs are seeking monetary as well as injunctive relief). While certification under 23(b)(3) is not a certainty either, given the disparity among plaintiffs' claims, it is their best bet.
- 1(e) 1.5 True. This question involves an application of the Erie doctrine, as a federal court hearing a claim brought under state law must apply state substantive but not procedural law. Sparkle will cite Gasperini and argue that the state's rule has substantive aspects but here, particularly given that there is a contrary Federal Rule directly on point, Hanna, it seems that the state's rule ought to be viewed as purely procedural and thus not relevant in federal court.
- 1(f) 3 True. Mediation is a form of settlement, and mediators do not have the power to order anyone to settle their claim. Thus, once the Named Plaintiffs decided to reject the coupon settlement offer the attorneys were justified in and indeed required to reject the settlement offer.

1(g) 3 False. If Andrews files a new claim against Sparkle, in state court, the state court is quite likely to find that his claim is precluded by res judicata. Instead, Andrews is best off filing a motion for relief from judgment, within a year of the date of the trial, per FRCP 60(b)(2) & (3), arguing that defendant engaged in fraud and that he has newly discovered evidence which could not have been discovered despite his diligent behavior.

1(h) 3 False. Because the Seventh Amendment has not been found to apply in state court, it is not relevant to this analysis. Instead, the state court should look to state statutes or constitution in considering whether the jury trial is available, and the mere fact that contact lens solution did not exist will not likely prove important as the court will be considering whether jury trials were available for tort claims generally.

1(i) 2.5 False. Preclusion doctrines apply equally in both federal and state courts. Instead, your best bet is to find a way to argue that because Derkowitz' interests were not fully and fairly represented in the class action, D should not be precluded by the plaintiffs' loss in the class action.

1(j) 3 False. While pleading just \$74,000 in damages would protect against removal, assuming the court found the pleading in good faith, seeking a low amount of damages does not serve plaintiff's overall interests. Instead, it would probably be smarter for Derkowitz to sue Sparkle in either California or Delaware, thereby preventing removal under 28 U.S.C. Section 1441(b), or to name an Alaskan co-defendant, thereby preventing removal on grounds of lack of complete diversity.

2(A) (7 total)

1 (1) Intervention, covered by FRCP 24, can either be as of right or permissive.

1 (2) Test for intervention as of right does not seem to be met. Even assuming Chamber "claims an interest," (questionable given no direct legal interest) there seems no reason to assume that defendants won't adequately represent interests.

2 (2) Might well be able to convince court to allow permissive intervention, since there would seem to be common issues of law/fact and case is at such an early stage that intervention likely won't cause delay/prejudice.

 (2) But, is it really in Chamber's best interest to intervene? Maybe it is better for them to sit back and wait and see if BR/Fiesta needs help, or provide funding, or maybe later file an amicus brief on appeal if needed. Intervention can be costly and may or may not be necessary to serve Chambers' interests; defendants may be capable of helping selves. Does Chamber need publicity could gain by

intervening?

2(B) (35 total)

— (1) Intro: This court lacks PJ over BR first because a valid forum selection clause states all claims must be filed in Mexico, and second because even assuming the forum selection clause is invalid, the Constitution forecloses PJ given the facts of this case.

— (3) BR's first line of defense is to argue that the forum selection clause on the bottle is valid, and that any claim must be tried in Mexico, rather than any U.S. jurisdiction. Carnival Cruise held that forum selection clauses are valid, so long as they are reasonable. We argue that this clause is reasonable, because we have put the forum as our own home jurisdiction, (as was done successfully in Carnival). Even though this is a foreign jurisdiction, it should be permitted as this will help keep prices down. Plus, as was held in Carnival, the mere fact that the clause is set out in small print does not mean it is unenforceable. Actually, our clause, on the label, is much more conspicuous than the notice the purchasers got in Carnival, only after they had purchased their ticket.

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— (1) Even assuming the forum selection clause is invalid, this court lacks PJ. To establish personal jurisdiction one needs to show that PJ is permitted by state longarm statute and U.S. Constitution.

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— (2) Here, these two issues merge into one another, as the statute, 14.065(1) allows the courts jurisdiction to the extent permitted under the Constitution. Thus, no further discussion of longarm is needed.

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— (1) As BR is not a citizen of Nevada, did not consent to be sued in Nevada, was not served in Nevada, and does not own property in Nevada, the only Constitutional means by which Nevada could have PJ over BR is based on BR's contacts with Nevada.

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— (1) Court lacks specific jurisdiction over BR. 3 part test for specific jurisdiction: in-state contacts must give rise to cause of action; purposeful availment, such that it would not be unjust for defendant to be haled into court; fairness factors.

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— (4) In-state contacts do not give rise to cause of action. The only direct contacts BR has with Nevada are selling liquor that ended up in Nevada. But, plaintiff did not buy any of the bottles sold in Nevada, since plaintiff bought all her liquor in D.C. Thus, whatever complaints plaintiff has arise out of contacts with D.C., not Nevada. Nor can it be said that identical product is sold in Nevada, as the labels are different (banker v. farmer). Mere fact that plaintiff lives in Nevada is not

enough to say cause of action accrued from defendant's contacts in Nevada; would extend doctrine beyond point of reasonable policy.

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(11) Even assuming contacts give rise to the cause of action, BR did not purposefully avail itself of the state of Nevada. On its own BR did nothing except manufacture liquor that eventually made its way to Nevada in the stream of commerce. BR does no advertising or marketing in Nevada. Only a minute portion of its products, world-wide, are sold in Nevada (.0003). Just as the NY retailer could not reasonably foresee being sued in Oklahoma, just because its car happened to be driven to Nevada, (Worldwide) so too BR could not anticipate being haled into court in Nevada. As plurality found in Asahi, merely putting product into stream of commerce is not enough for purposeful availment. Here, BR took none of additional steps Justice O'Connor mentioned might be enough to support purposeful availment (marketing; product design; help lines). Nor is this an inherently dangerous product (Stevens concurrence). The contacts that exist are "unilateral", in that Borracha herself brought the bottles into the state after having purchased them in D.C. (like the car driver in Woodson). Nor would it be appropriate to attribute marketing engaged in by Fiesta to BR, as they are mere business partners. And anyway, even if Fiesta's actions could be attributed to BR, the amount of advertising (\$20,000) done in Nevada was minimal. The product was not specially tailored to Nevada. Burger King distinguishable, in that here there was no contract relating to Nevada. Shoe distinguishable in that BR sent no marketing team. Calder distinguishable in that no reason to anticipate harm particularly in Nevada. And, finding that a company such as BR purposefully availed itself of the Nevada forum would mean that BR and similarly situated companies are potentially suable anywhere their product is sold, and that would both be unfair and likely cause prices to rise. Plus, federalism concerns (Pennoyer) – don't want states overreaching.

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(7) Even assuming contacts give rise to cause of action and that BR purposefully availed itself of the Nevada forum, it would be unfair, per the fairness factors as set out in Burger King, for BR to be sued in Nevada. This is a case, like Asahi in which even if there had been purposeful availment, PJ would be unfair. Like the Asahi company, BR is a foreign manufacturer which sells products throughout the world. Only .03% of its sales worldwide are made in Nevada. Only 1% of its U.S. sales are made in Nevada. BR has a strong interest in not being sued in Nevada as it would be quite inconvenient and expensive to mount a Nevada defense. While Borracha is from Nevada, she has not alleged harm specifically linked to Nevada and brings a class action representing persons throughout the U.S. It would not be particularly inconvenient for her to sue elsewhere. As shown in Worldwide, plaintiffs have no "right" to sue in their home jurisdiction. Nevada has no particular interest in this claim, as the suit is brought on behalf of persons from throughout the U.S. and against defendants having no Nevada

connection. Nor do the interstate interests in efficiency or social policy favor permitting this claim to be brought in Nevada.

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(4) Nor, given that specific jurisdiction fails, would it be appropriate to use general jurisdiction. For general jurisdiction plaintiff would have to establish “continuous and systematic” contacts by BR with Nevada. Yet, as we have seen, BR’s contacts with Nevada consisted solely of other persons (plaintiff and Fiesta) bringing BR’s products to Nevada. This level of contact is far less than Perkins (whole office in Ohio), which Supreme Court found sufficient for general jurisdiction, and even far less than in Helicopteros, where court found contacts insufficient for general jurisdiction (in Helicopteros purchases and banking transactions and training had taken place in state). Even if attribute Fiesta marketing to BR, the minimal level of marketing that was done, \$20,000, does not establish general jurisdiction.

2(C) 4

(6) The general rule is that one can only appeal from final judgments. 28 U.S.C. Section 1291. Here, as Fiesta remains in the case, the ruling dismissing BR does not dispose of the entire case. However, R. 54(b) allows the district court to direct the entry of final judgment in a case, such as this, where the ruling involves fewer than all of the issues or all of the parties. So, we need to look at the exact wording of the district judge’s order. If it is labeled a final judgment, we need to appeal within 30 days of that order. If it was not labeled a final judgment, and we decide we want to appeal now, we could ask the district court to make its ruling final, and the court can do so upon determining that “there is no just reason for delay.” The other way we could seek to file an immediate appeal would be to ask both the trial and appellate courts to allow an appeal from a non-final ruling, per 28 U.S.C. Section 1292(b) on the ground that the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation.” Grant or denial of such a motion would be discretionary. Absent any of these rulings we would need to wait until the case as a whole is terminated.

2(D) 3

(8) Given that you have told me you think it is pointless for Fiesta to argue lack of personal jurisdiction, our one option for securing dismissal, at this point, would seem to be Rule 19. In particular, we can try to argue that BR is an indispensable party to the litigation, and that because they cannot participate in the litigation, due to lack of personal jurisdiction, the court ought to dismiss the entire case. Unfortunately, the Supreme Court’s ruling in Temple v. Synthes may make it difficult for us to win. To prevail on our motion we would need to convince the court that we meet the tests of both 19(a) and 19(b). Per 19(a) we must argue that BR is a “person to be joined if feasible.” Specifically, per 19(a)(1) we would need to show that in BR’s absence complete relief cannot be accorded among those already parties. Or, under 19(a)(2) we would need to show that BR claims an

interest and that in their absence their ability to protect their interest may be impeded or we or plaintiff may be put at risk of multiple or inconsistent liabilities. In Temple the Supreme Court held that the mere fact that two parties are alleged joint tortfeasors is not enough to show that the 19(a) test is met. We can try to distinguish Temple, by arguing that as participants in a joint venture we are far more closely related than the alleged joint tortfeasors (manufacturer, doctor & hospital) in Temple. If we can convince the court that we and BR are in privity, such that a ruling against us would bind BR, as a matter of collateral estoppel, we may prevail under 19(a)(2). Alternatively, perhaps we can convince the court that we may be subject to inconsistent liabilities if we lose to plaintiffs but cannot later recover against BR. Next, we would have to show that the test of 19(b) is also met, considering the extent of prejudice, the extent the court could protect against prejudice, whether a judgment rendered without BR would be adequate, and whether P could sue in another forum. Given that BR could waive its personal jurisdiction defense, if it chose, I am not sure the court will be too worried by purported prejudice to BR. But, maybe the court will be more sympathetic to our own situation, perhaps having to take full responsibility for the acts of our co-joint venturer. In our favor we can point out to the court that if this action is dismissed plaintiff might well be able to refile and secure personal jurisdiction against both us and BR in California, given that BR has contracted with us there. All in all I give our motion 50/50 odds, at best.

Question 3 (14 points total)

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- (9) Arguments as to why Congress ought to make a change.
 - (5) Addressing counterarguments

Alternatively:

- (9) Extent to which parties ought to be able to use contracts to modify laws/rules that would otherwise apply in court
- (5) Addressing counterarguments