

Grading Key: Civil Procedure, Winter 2001

Exam # \_\_\_\_\_

Raw score \_\_\_\_\_

Final score \_\_\_\_\_

Question 1 (3.5 points each)

- 1(a) \_\_\_\_\_ True. FRCP 16(c), governing pretrial conferences, permits judges to “require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.” While judges who try to force parties to settle may go over the line (Kothe) courts have upheld orders to appear at settlement conferences (G. Heileman Brewing) and R. 16(f) permits courts to sanction parties or attorneys who fail to participate in good faith.
- 1(b) \_\_\_\_\_ True. Pursuant to 28 U.S.C. § 1446(b) a defendant has just 30 days from the date of service by which to request removal, unless there is a valid reason why defendant did not initially know the case was removable. If the removal was untimely plaintiff has 30 days from March 2 to request remand pursuant to 28 U.S.C. § 1447(c).
- 1(c) \_\_\_\_\_ False. Service by publication is permitted under Rule 4 to the extent it is permitted by the rules of the state in which the federal court is located. Service by publication is sometimes permitted under the due process clause of the Constitution, per Mullane, so long as it is reasonably calculated, under the circumstances, to inform interested parties of the existence of the lawsuit.
- 1(d) \_\_\_\_\_ True. In state courts that use this doctrine it permits courts to dismiss actions that more appropriately would have been filed in another state court or in a foreign country. In federal court the doctrine is only used to dismiss actions that would more appropriately have been filed in a foreign country, as federal courts have the power to directly transfer cases to other federal courts.
- 1(e) \_\_\_\_\_ False. While it is true that plaintiffs rarely file motions for summary judgment, it is false that it is “impossible” for plaintiffs to prevail on such motions. Plaintiffs who bear the burden of proof on an issue can prevail so long as they can show that even viewing the facts in the light most favorable to the defendant, no reasonable finder of fact could help but find for the plaintiff.
- 1(f) \_\_\_\_\_ True. Under Erie, a federal court sitting in diversity must apply federal law as to procedure, and state law as to substantive issues. In Klaxon the Court held that because the question of what substantive law to apply is itself substantive, a federal court sitting in diversity must apply the choice of law provisions of the state in which it is located. (The rule that on transfers of venue the federal court applies the choice of law provisions of the original state is an exception to this general rule).
- 1(g) \_\_\_\_\_ True. Both claim preclusion and issue preclusion operate only when an issue has actually been decided by a court, and not just settled. Defendant should have protected itself against this eventuality by drafting a settlement agreement including a waiver of future claims.

1(h) \_\_\_\_\_ False. To determine whether or not the defendant is entitled to a jury trial the court should apply the test set out in Terry. Even if (as in this case) the statute did not exist in eighteenth century England, the court should consider whether the remedy provided by the statute is equivalent to a common law remedy (in which case a jury is required) or an equitable remedy (in which case no jury is required).

1(i) \_\_\_\_\_ False. While success is by no means guaranteed, defendant can still file a timely motion attempting to use 60(b)(6) or an argument that there was “fraud upon the court” to set aside the judgment. Defendant could also file an independent fraud action against the plaintiff in an attempt to recover the money, although there might be a dispute whether such an action would be barred by res judicata.

Question 2 (47.5 points)

A. Personal jurisdiction (25.5 points)

\_\_\_\_\_ (1) In general, for PJ, need both statutory authorization and Constitutionality. The possible ways to obtain PJ are citizenship, consent, present & served, & minimum contacts (either specific or general jurisdiction)

\_\_\_\_\_ (1) Here, the court does not appear to have PJ over Casinos Inc.

\_\_\_\_\_ (1) Casinos Inc. is a citizen of Delaware and of Nevada so PJ in Missouri cannot be based on Mo. citizenship.

\_\_\_\_\_ (1) CI did not consent to PJ, but instead filed a motion to dismiss for lack of PJ, so no PJ based on consent.

\_\_\_\_\_ (1) PJ cannot be based on transient jurisdiction (present and served) per Burnham, because service was accomplished by mail, in Nevada, and not in person in Mo.

\_\_\_\_\_ (1) Specific jurisdiction per minimum contacts does not work. For specific jurisdiction would need to show that both the long arm and constitutional requirements are met. Here, neither are met.

\_\_\_\_\_ (3.5) The longarm (506.500) only applies “as to any cause of action arising from the doing of [various acts in the state]”. But, as the judge has already concluded that the cause of action arose in Nevada rather than Missouri, the longarm does not apply.

\_\_\_\_\_ (4) The basic Constitutional test for specific jurisdiction has 3 parts: purposeful availment; fairness factors, and that the contact gave rise to the cause of action. Here, because the judge has already concluded that the causes of action arose in Nevada, not Missouri, any contact with Missouri did not give rise to the cause of action in Missouri. (Helicopteros)

\_\_\_\_\_ (2) General jurisdiction might seem promising, as it can provide jurisdiction when a defendant has sufficiently “continuous and systematic” contacts with a jurisdiction, even though the cause of action did not arise out of one of those contacts. Perkins;

Helicopteros

\_\_\_\_\_ (5) Here, the assertion of general jurisdiction seems permissible under the Constitution. CI has substantial and continuing contacts with Missouri given its advertising, profits, receipts, # employees, real estate, etc. It has far more contacts than Helicopteros did with Texas (explain). While it may not have as many contacts as the company did in Perkins (explain) contacts seem sufficient under the Constitution.

\_\_\_\_\_ (5) But, there is a significant problem because the Mo. longarm does not provide for general jurisdiction. That is, the statute does not create PJ for causes of action arising outside of the state. Unless the state asserts PJ, it does not exist, even though constitutionally the state had the power to assert it. See UMB v. Bank of New York, 723 F. Supp. 408 (W.D. Mo. 1989) (no general jurisd. allowed over co. without office or agent, because though due process would allow it, longarm does not provide for gen. jurisd.). Nor is there evidence PJ exists on basis CI having appointed an agent for service and having been served that way. Cf. State ex rel K-Mart v. Holliger, 986 S.W.2d 165 (Mo. 1999) (despite long arm, general jurisd. exists here over K-mart, because it apptd an agent for service and was served that way).

\_\_\_\_\_ Other

B. Subject matter jurisdiction (15 points)

\_\_\_\_\_ (1) There does not seem to be subject matter jurisdiction over the negligence claim, and therefore it must be dismissed.

\_\_\_\_\_ (1) The negligence claim is not a federal claim, and therefore is permissible only if there is diversity or supplemental jurisdiction.

\_\_\_\_\_ (2) There is no diversity jurisdiction over the negligence claim. Even assuming the \$75,000 amount in controversy requirement is met, there is no diversity of citizenship. Both CI & Lucy are Nevadans.

\_\_\_\_\_ (2) CI is a citizen of Delaware and of Nevada, its principal place of business. 28 USC § 1332(c).

\_\_\_\_\_ (4) Lucy is a citizen of the place where she has her domicile, i.e. her “true, fixed and permanent home .. to which she has the intention of returning...” (Mas). Given that she grew up in Nevada, attended college there, has her driver’s license there, does not pay Mo. taxes and last voted there, it seems that remains her domicile. Though she currently resides in Mo. and may want to make it her residence, facts point to Nevada.

\_\_\_\_\_ (5) The negligence claim cannot be brought under supplemental jurisdiction, 28 USC § 1367. The negligence claim and the federal TILA claim are not part of the same cause of action. They do not involve the same facts, witnesses, or evidence. Therefore, 1367(a) is not met. Moreover, even if the statutory test were met, the claim would not be allowed under Article III of the Constitution because it is not part of the same “common nucleus

of operative fact” as the federal claim. Gibbs.

\_\_\_\_\_ Other

C. Transfer of venue (7 points)

\_\_\_\_\_ (7) I would recommend that the district court exercise its discretion, per 28 USC § 1404, to transfer the federal claim to the federal court in Nevada. (The tort claim must be dismissed). 1404 permits transfer “where justice so requires” after considering public and private interest factors. Here, the events took place in Nevada, so the witnesses will mostly be there. Also, CI will be amenable to personal jurisdiction there, because it is a citizen of Nevada. It is more efficient to transfer the case than to force plaintiff to refile. Even though the WD Mo. lacks PJ over CI, it can still transfer the case, in Piper.

\_\_\_\_\_ Other

Question 3 (21 points)

\_\_\_\_\_ (7) No Constitutional problem with repeal. Article III §2 gives Congress the power to create subject matter jurisdiction for certain claims but does not require it to do so. There are many examples of situations in which the statutory provision of smj has been more narrow than the Constitution would permit (e.g. the Strawbridge requirement of complete diversity, the fact that Congress did not create federal question jurisdiction until the 1870s, the fact that Mottley has interpreted statutory federal q. jurisdiction to include only federal questions asserted in the “well pleaded complaint” whereas appellate jur. is broader)

\_\_\_\_\_ (7) Pros of repeal. No longer necessary to worry so much about supposed hometown advantage, because state boundaries are no longer deemed so important. It has always been difficult for federal court judges to apply state law. Don’t want to step on toes of state courts. Diversity jurisdiction is already treated as “second class” jurisdiction, e.g. in terms of harder to remove, harder to bring supplemental claims, ever increasing amount in controversy requirement. Why not just eliminate it?

\_\_\_\_\_ (7) Cons of repeal. Diversity jurisdiction does still serve valid purpose of protecting against home court advantage. Particularly with elected judges, they may be loyal to the local. Allowing diversity jurisdiction allows parties who have both federal and state law claims to bring them together in federal court, so long as there is diversity. This allows for more efficiency and allows more federal claims to be brought in federal court, which is good because of competence and uniformity. We should not worry about federal courts stepping on the toes of state courts, because the federal courts are required to follow state courts’ interpretations of the law.

\_\_\_\_\_ Other