

CIVIL PROCEDURE
Mid-Term Examination
Fall 1990
Instructor: Craig Smith

Time Allotted - Two Hours

An answer should demonstrate your ability to analyze the facts presented by the question, to select the material from the immaterial facts, and to discern the points upon which the case turns. It should show your knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. It should evidence your ability to apply the law to the facts given, and to reason logically in a lawyer-like manner to a sound conclusion from the premises adopted. Try to demonstrate your proficiency in using and applying legal principles rather than a mere memory of them.

An answer containing only a statement of your conclusions will receive little credit. State fully the reasons that support them. All points should be thoroughly discussed. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem.

Unless a question expressly asks for California law, it should be answered according to legal theories and principles of general application.

QUESTION 1

"An Artistic Disaster"

Dr. Benjamin Franklin, who lives in California, received in the mail a catalog from Parke-Bernet, a well-known auctioneer of works of art, describing certain paintings to be sold at an auction at its galleries in New York City. Finding a painting in which he was interested, *Les Baigneurs*, by Roger de la Fresnaye, Dr. Franklin called Parke-Bernet in New York and requested that "telephonic communication be established between myself and [Parke-Bernet] during the course of the bidding," so that he might keep abreast of and take part in the bidding while the auction was actually going on.

Parke-Bernet acceded to Franklin's request and, accordingly, an open telephone line was set up between Franklin in Los Angeles and a Mr. Nash, an employee of Parke-Bernet, in the latter's New York City premises. During the entire course of the auction sale, Nash informed Franklin in California of the bids that were being made, Franklin, in turn, gave Nash his bids and the latter relayed the bids to the auctioneer who announced them to the other bidders in the auction room. Two of Franklin's bids \$30,000 for the de la Fresnaye and \$26,000 for another painting, a Paul Klee, were high and the paintings were knocked down (i.e., sold) to Franklin as the purchaser.

After billing Franklin and receiving no payment, Parke-Bernet brought suit against him for the unpaid price in the New York State Supreme Court located in Manhattan. Parke-Bernet commenced the action by serving a copy of the summons and complaint upon Dr. Franklin's nurse as she was sitting behind the reception desk of the office in Los Angeles where Dr. Franklin conducted his practice. When Dr. Franklin returned to his office his nurse handed him the copy of the summons and complaint. Needless to say, it was met with a chilly reception.

New York Code of Civil Procedure section 302 provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

New York's statute governing service of process is identical to Federal Rule of Civil Procedure 4.

Franklin does not want to litigate this case in New York.

If he must litigate in New York he would rather be in Federal Court.

1. Discuss the objections Franklin may raise to the New York Court hearing the matter and the method by which he may raise them.
2. Assume that Franklin's objections will be overruled. Can the case be moved to Federal Court? Discuss.

QUESTION 2

"Some `Hot' Issues"

Polly, a resident of State Red, purchased an electric blanket from Dealer, a State Blue seller and manufacturer of electric blankets.

A few months after Polly's purchase, her blanket overheated and caught fire causing her severe injuries. Polly brought a diversity suit in Federal District Court in State Red against Dealer. The complaint was filed two weeks before the applicable State Red statute of limitations lapsed. Service of process was made by mail in accordance with the Federal Rules of Civil Procedure. Because of delays caused by the Post Office, service of a copy of the summons and complaint did not reach Dealer for three weeks.

Dealer moved for dismissal on the ground that the claim against it was barred by the statute of limitations. The motion was denied. The applicable State Red statute tolls the statute of limitations on the date when a copy of the summons and complaint are received. Rule 3 of the Federal Rules of Civil Procedure provides that an action "is commenced by filing a complaint with the court."

Dealer then sought to implead Thermo, a State Red firm that supplies thermostats to Dealer. Dealer alleged that the Thermo-supplied thermostat in Polly's blanket failed to properly regulate the blanket's temperature thereby causing the wiring to overheat. Over Thermo's objection the motion to implead was granted.

Polly then amended her complaint by adding Thermo as a defendant. Thermo moved to dismiss the entire action or, in the alternative, to dismiss Polly's claim as to Thermo, contending that the court lacked subject matter jurisdiction because of Polly's amendment. The court refused to dismiss the entire action but dismissed Polly's claim against Thermo.

The jury returned a verdict for \$45,000 in damages against Dealer. Immediately after the verdict, Dealer moved to dismiss Polly's suit, contending that the court lacked subject matter jurisdiction because of the amount awarded in the verdict. The motion was granted.

Were the court's rulings correct as to:

1. Dealer's pre-trial motion to dismiss? Discuss.
2. Dealer's motion to implead Thermo? Discuss.
3. Thermo's pre-trial motion to dismiss? Discuss.
4. The post-trial motions to dismiss? Discuss.

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QUESTION 1

In order to resolve this question the following issues must be addressed:

1. Did the New York court acquire personal jurisdiction over Dr. Franklin?
2. Assuming it did, may the case be removed to federal court?

PERSONAL JURISDICTION

Challenging Jurisdiction

Personal jurisdiction can only be challenged by a special appearance. I.e., an appearance which solely attacks jurisdiction and raises no issues related to the merits of the case.

Minimum Contacts

Jurisdiction is the power of a court to make valid orders which determine the rights of persons and their property. If the court can validly acquire personal jurisdiction over Franklin, then he will be obliged to defend the lawsuit in New York although it is many thousands of miles away from where he lives. Traditionally, the only valid basis for asserting personal jurisdiction over a person was his or her presence within the forum state. (Pennoyer v. Neff) Although service of process while present in the forum (regardless of how fleeting or transitory that presence may be) still remains a valid method of acquiring personal jurisdiction, (Grace v. McArthur) there are other methods upon which personal jurisdiction may be based. They are consent, (Hess v. Pawlowski) domicile (Milliken v. Meyer) and minimum contacts (Int'l Shoe). Since Franklin never was served while physically present in N.Y., nor are there any facts to indicated that he consented to jurisdiction in N.Y. and since he is a domicilliary of California, the only possible basis for asserting jurisdiction over him would be under the theory of "minimum contacts."

Under the minimum contacts test a person is subject to in personam jurisdiction when his contacts with the forum state are such that compelling him to appear and defend does not offend traditional notions of fair play and substantial justice. This means that even a single contact, so long as it is initiated by the defendant, makes the assertion of jurisdiction over that defendant constitutional provided that the cause of action arose out of that contact.

Turning to the facts, N.Y. does have a "long-arm" statute which purports to confer power on its courts to assume jurisdiction over absent defendants. That long arm statute appears to go to the limit of constitutional power by allowing NY to assume jurisdiction by any means not inconsistent with constitutional due process. That means that the power conferred is coterminous with the minimum contacts test discussed above. Here, although Franklin never set foot in New York he did use the telephone to reach out and touch someone there. He bid over a phone line, set up at his request, at an auction. His submission of the winning bid was accepted in NY and had the effect of depriving someone who was present in NY at the auction, the opportunity of acquiring the paintings. Hence, a contract was formed there. This is an example of specific in personam jurisdiction. A single transaction in the forum state initiated by the defendant which gives rise to the underlying cause of action. Franklin is subject to personal jurisdiction in N.Y. provided he receives adequate notice of the lawsuit.

Service of Process

The second component of valid personal jurisdiction is that of notice. In addition to one of the basis for exercising jurisdiction discussed above, a defendant must be notified of the lawsuit and given an opportunity to be heard. While actual notice is not constitutionally required, the form of

notice that is given must be calculated under all the circumstances to apprise the defendant of the pendency of the action. (Mullane v. Central Hanover Trust)

In analyzing the notice issue, first we look to see what the relevant statute authorizing notice prescribes, we then consider whether the statute is within the constitutional limitations set forth in Mullane.

Here, the statute in question is patterned after FRCP 4. That rule authorizes substituted service. However, under rule 4, the substituted service must be made on someone of suitable age residing at the defendant's place of residence. Although we may assume Franklin's nurse is of suitable age it is not reasonable to assume that Franklin resides at his office. He could attack this defect in service of process by bringing a motion to quash service. Note, that if Rule 4 had permitted substituted service made on someone of suitable age working at defendant's business, that would probably meet constitutional muster under Mullane, but, Rule 4 does not go that far. Since service of process does not meet the requirements of the rule, there is no need to consider whether it also meets the minimum requirements of due process.

REMOVAL

Removal permits a defendant sued in a state court to transfer or "remove" a lawsuit to federal court. Whether a case is removable depends upon the following factors:

1. The case must have been one which could have originally been brought in federal court.
2. Only "out-of-state" defendants may remove.
3. The case may only be removed to the federal court for the judicial district where the state court which the suit was originally filed in sits.

Here, Franklin's case could have originally been brought in federal court. There is complete diversity among the parties & the amount in controversy exceeds \$50,000 exclusive of interests and costs. (Note that a plaintiff with one or more claims against a single defendant may "aggregate" its claims in order to meet the threshold amount in controversy requirement.)

Franklin, a California resident who was sued in New York is an out-of-state defendant.

Franklin may remove the lawsuit to the federal court sitting in the district where the state court in which the suit was originally filed in sits.

QUESTION 2

Dealer's Pre-Trial Motion to Dismiss

This motion is based on the theory that the lawsuit was barred because the statute of limitations had run. Whether the statute had indeed run depends upon what law the court applies, federal or state. Under the Erie doctrine, a federal court sitting in diversity should apply state substantive law and federal procedural law. While that sounds simple enough what is truly "substantive" and what is truly "procedural" is not always easily determined.

In attempting to settle on a dispositive test of what is "substantive" and what is "procedural." The U.S. Supreme Court has journeyed to several different waystations. In Guaranty Trust v. York the court adopted the outcome determinative test. In other words, if in choosing the law to be applied would be dispositive of the outcome of the case the court should use applicable state law to insure that the result would be the same regardless of whether the suit was filed in state or federal court. If this were the test to be adopted, then the lawsuit would have to be dismissed because state law provides that the statute is not tolled until defendant is actually served with the summons and complaint and this event did not occur until after the limitations period had run.

In Byrd v. Blue Ridge the court settled on a "balancing test" to determine if the state had a strong interest in applying its rule in cases of conflict with the federal rules. In Hanna v. Plumer the court adopted the test which governs today. In determining what law to apply the court simply looks to

see whether there is a specific federal rule of procedure to cover the situation. If there is, and that rule was a valid exercise of the rulemaking power, then the federal rule and not state law is followed. Here, there is a rule which covers the situation. (FRCP 3) There is no reason to believe that the rule is not a valid exercise of the rulemaking power. Since the rule provides that the lawsuit is commenced and hence the statute is tolled upon filing the complaint, the statute is not a bar and the court was correct in overruling the motion to dismiss.

Dealer's Motion to Implead Thermo

A defendant may implead a third-party who may be liable for all or part of the plaintiff's original claim against the defendant. (FRCP 14) The only qualification is that the liability be derivative. A defendant may not implead a third-party on the theory that the plaintiff sued the wrong defendant or that the third-party and the third-party alone is solely liable for plaintiff's claim. Even though the third-party may share a common citizenship with the plaintiff, the court may nevertheless hear the third-party claim under its ancillary jurisdiction. Diversity is not destroyed by impleader. Dealer may implead Thermo, on the theory that as manufacturer of the faulty thermostat, Thermo may be liable for all or part of plaintiff's claim against dealer. The impleading of Thermo does not deprive the court of subject matter jurisdiction.

Thermo's Pre-Trial Motion to Dismiss

Federal courts are courts of limited jurisdiction. A federal court may only entertain a lawsuit if it has been empowered to do so pursuant to Article III, sec. 2, of the Constitution and Congress has permitted the exercise of jurisdiction by enacting a statute. Hence, federal courts may hear lawsuits between "citizens of different states." (28 U.S.C. 1331) This is commonly called "diversity" jurisdiction. Valid diversity jurisdiction requires that there be complete diversity between plaintiffs and defendants. (Stawbridge v. Curtiss) If one of the defendants shares a common citizenship with any of the plaintiffs there is no diversity and a federal court may not entertain the suit. Although impleader is an exception to this rule, Polly, now that Thermo has now been brought in may not assert her own direct claim against Thermo. If she had made them a defendant when she initially filed her suit, the federal court would have lacked subject matter jurisdiction. (Thermo and Polly are citizens of the same state.) To allow her to do it now would permit her to do indirectly what she could not accomplish directly. (Kroger v. Owen Equipt.) The trial court made the correct ruling.

The Post-Trial Motion to Dismiss

For a federal court to have subject matter jurisdiction in a diversity suit the amount in controversy requirement must be met. That amount is \$50,000 exclusive of interest and costs. Although lack of subject matter jurisdiction can never be waived, and defects in subject matter jurisdiction can be raised at any time, even after judgment or on appeal, Dealer's apparent argument that because the amount awarded was less than \$50,000, the court lacks SMJ, must fail. Subject matter jurisdiction is determined as of the time the complaint is filed. Subsequent events, generally speaking, do not affect SMJ. In other words once a court acquires SMJ it can never lose it. Assuming plaintiff's "well-pleaded" complaint prayed for in excess of \$50,000 the fact that the jury returned a verdict for a lesser sum does not affect SMJ. The court's ruling granting the motion to dismiss was incorrect.