

MEMORANDUM

TO: Civil Procedure Students – Fall 2005

FROM: Mike Allen

SUBJECT: Thoughts Concerning Final Examination

As I promised during class, this memorandum sets forth some of my thoughts concerning the questions I asked on the final examination. I have not tried to be comprehensive, but rather to give you an overview of the principal issues implicated on the exam. While I at times present information in an outline form, I would hope than you used normal narrative writing. In addition, do not worry if you included information in your answer that I have not discussed. I can assure you that if your answer included relevant and correct information you received appropriate credit. Finally, do not think that I expected any individual student to produce an answer covering all the points I address here. Remember, I wrote the questions and had unlimited time to complete this memo. I am well aware that you did not have the luxury of either of these things.

With the preliminaries out of the way, here are my thoughts about the questions I asked you.

Section I

Question 1

This question concerned a motion to transfer the case of *Lavern v. Lenny and Frank* from a federal court in California to the United States District Court for the Southern District of Miami. You should have begun by recognizing that Section 1404(a) provides for four criteria to be present in order to grant a motion to transfer a case.

Between Federal Courts

First, and most straightforward, the transfer may only be between federal courts. This is clearly the case in this question.

Convenience of Witnesses and Parties

A second factor to consider is that the transfer must be for the convenience of both the witnesses and the parties. Some of the issues that you might have wanted to discuss in connection with this requirement include the following:

- The location of relevant evidence. The microwave that caused the fire is stored in the Southern District of Florida (Miami). Of course, this fact may not be all that significant because the microwave is capable of being shipped at relatively little expense to California if it is needed there.

- Some of the major witnesses in the case are clearly located in the Southern District of Florida. For example, any health care professionals who treated Lavern are located in that area. In addition, Lavern herself still lives in the District. It is unlikely that Lavern will “count” in a significant way in this analysis because she elected to file in a place other than her home. The health care professionals could matter if their testimony would be required at trial. However, Rule 45 allows for the use of subpoena power in Miami in the case in order to preserve the doctor’s testimony for trial. Thus, some of the convenience issues could be addressed in this manner.
- It seems that many of the Lenny employees with relevant knowledge would be located in Atlanta, which is nearer to Florida than California. But this may not make all that much difference unless the defendant wanted to bring them to trial to testify. If so, the convenience for these witnesses would be a bit greater if they had to travel only to Miami. Of course, if Lavern’s main claim against Lenny involved actions taken at a plant other than the one in Atlanta, this factor would probably drop out of the picture.
- Frank’s employees are all in California so this case would be more difficult for them.
- And it seems in general that the litigation would be no easy for Frank and Lenny as parties if it were to proceed in the Southern District of Florida.

You should have come to a conclusion. It seems to me that this factor cuts against transfer.

Interests of Justice

A transfer must also be in the interests of justice. This is somewhat akin to the “public interest factors” we discussed in connection with the court-crafted doctrine of *forum non conveniens*. Some of the factors to consider were: the interests of the respective states, the interests of potential jurors, the interests of the courts themselves, and the ease or difficulty of applying the relevant law.

While these factors do not appear to be as clear cut as those concerning the convenience of the parties, on balance they probably do not point strongly in favor of transfer. For example, California and Florida both have significant interests in the litigation. It is true that Florida is the home of the plaintiff, but California is home to both defendants. There is no foreign law involved so one expects that the California federal court would be as applying the law as would a federal court in Florida. Of course, under *Erie* the California federal court would apply the law that the California state court

would. If that law was the law of Florida, then the Florida federal court might have an easier time of it.

The one factor that does tip decidedly against Florida here is the relative congestion of the dockets in the two relevant courts. Under the facts you have been given, the Florida court appears to be working under the load of more cases. Thus, unless there were some strong countervailing reasons, it does seem that this factor also points against transfer.

Where it Might Have Been Brought

The final requirement for transfer is that a court may transfer an action only to a district in which the case “might have been brought.” This requirement means that the Southern District of Florida must be a district in which venue would have been proper and *both* Lenny and Frank would have been subject to personal jurisdiction. Thus, you needed to address all of these issues.

Venue

The critical question here is whether 28 U.S.C. § 1391 provides for venue in this case in the Southern District of Florida. The relevant portion of the statute is sub-section (a) because the basis for subject matter jurisdiction is diversity. Under that statute venue would be appropriate in the Southern District of Florida.

You could start with section 1391(a)(1). That *might* provide a basis for jurisdiction *if* you conclude that both Lenny and Frank are subject to jurisdiction in Florida. That analysis is complicated as explained below.

But there is no question that venue is appropriate under section 1391(a)(2). That section provides for venue in a judicial district “in which a substantial part of the events or omission giving rise to the claim occurred.” The explosion of Lavern’s microwave occurred in the Southern District. At the very least, it seems that such an event would qualify under this section.

Personal Jurisdiction

You should have addressed personal jurisdiction for both Lenny and Frank. I would have done so separately. You might also have noted that according to the defendants could not obviate the need to consider this issue by consenting to personal jurisdiction in Florida.

Lenny

Lenny would be subject to personal jurisdiction in Florida if such jurisdiction was authorized by the Florida long arm statute and was consistent with principles of Due Process under the United States Constitution.

Long Arm Analysis

The relevant long arm statute was that of Florida. The California long arm statute was irrelevant to this question. Lenny would clearly be subject to jurisdiction under the terms of the Florida long arm statute. Fla. Stat. 48.193(f)(2) provides the basis for such jurisdiction. Lavern's claimed injuries arose from a situation in which Lenny is said to have caused an injury in Florida arising from an activity taken outside Florida and at the time things manufactured and processed by Lenny were used in the ordinary course of commerce in the state.

Constitutional Analysis

General Jurisdiction

Lenny is not subject to general jurisdiction in Florida based on the bright-line rules of state of incorporation or principal place of business. One could attempt to argue that it is subject to general jurisdiction based on continuous and systemic contacts with Florida. But to do so we would need additional information.

Specific Jurisdiction

There are two issues concerning whether Lenny is subject to specific jurisdiction on Lavern's claim in Florida: minimum contacts and fairness.

Minimum Contacts

It is clear that Lenny has minimum contacts with Florida with respect to Lavern's claim. The facts indicate that Lenny has a nationwide distribution system in place to sell microwave ovens. That system includes Florida. And the injury alleged in this case grew directly out of Lenny's forum related activities. In these circumstances, Lenny could clearly have foreseen being haled into court in Florida for such a claim. This is an easy case for minimum contacts.

Fairness

This is also an easy case for fairness. The primary factor is the burden of litigation in Florida on Lenny. Lenny has set up a distribution network that includes Florida. Thus, it is not a burden to deal with Florida when it is necessary for business. As such, Lenny should not be heard to complain about coming to Florida to defend itself.

Florida's interest in the case is strong. One of its citizens was harmed by this conduct. In addition, other citizens could be in jeopardy if the claims made in the case are true.

The plaintiff's interest is not significant here because Lavern could construct this lawsuit in the same form in other courts.

You then should have come to an ultimate conclusion.

Frank

The jurisdictional issue concerning Frank is far more complicated than that for Lenny. You should then have once again considered both the long arm statute and the constitution.

Long Arm Statute

Frank would qualify for jurisdiction under the long arm statute for the same reason as Lenny. Consistent with section (f)(2) Frank is alleged to have caused an injury in Florida through an act outside of Florida while products manufactured by Frank were used in the ordinary course of use. The only potential argument that you might have wanted to discuss against this issue is whether a *component* part should qualify under the terms of the statute. We have no law on point, so all I would have expected from you is to raise the issue.

Constitutional Issues

General Jurisdiction

Unlike Lenny, it is clear that Frank is not subject to general jurisdiction in Florida.¹ Frank is incorporated and has its principal place of business in Florida. In addition, as clear from the specific jurisdiction discussion Frank does not have continuous and systemic contacts with Florida.

Specific Jurisdiction

As with Lenny, there are two issues to discuss concerning specific jurisdiction: minimum contacts and fairness.

Minimum Contacts

The question is designed in such a way that there are really only two contacts between Frank and Florida that are meaningful in any respect. First, Frank sells all its products (the Lighting Mechanisms) to Lenny. It was one of these Lighting Mechanisms that allegedly caused Lavern's injuries. Frank ships these products from California to Lenny's plant in Atlanta. They are then incorporated into Lenny's microwaves and shipped to a number of states including Florida. It is uncontested that Frank was aware

¹ To the extent that you concluded that *Burnham* compelled a finding that Frank is subject to jurisdiction in Florida (something discussed later in this answer) there would in a sense be general jurisdiction over the company. My discussion here excludes consideration of *Burnham*.

on a monthly basis of a number of pieces of information concerning the Lenny microwave ovens. This information included the location to which the microwaves were shipped. Thus, it appears that Frank was *actually aware* that its products would be shipped to and sold in Florida.² As discussed below, this contact raised the open issue from *Asahi*.

The second potentially relevant contact between Florida and Frank is that Frank's president was personally served with the summons for this lawsuit while he was in Florida at the Miami airport. The president was on his way to Jamaica on a personal trip. As I discuss below, this contact raises the open issue from *Burnham*.

As to the *Asahi* issue, the question is whether placing your product into the stream of commerce with actual awareness that it will reach the forum state qualifies as minimum contacts for jurisdictional purposes. The Court was unable to resolve this issue. Unless the service on the president is deemed dispositive under *Burnham*, this question called on you to (1) recognize the issue; and (2) determine which to the possible approaches to the problem was most consistent with jurisdictional doctrine.

There was no "right" answer to this question. The key was for you to explain why it was that you took the position you did. Some issues that you might have discussed include the following: (1) is jurisdictional doctrine *too* focused on the defendant (as Justice Brennan contends); (2) does Justice O'Connor have the better of the argument based on the strong focus in jurisdictional doctrine on the defendant's voluntary activity; (3) what role, if any, does the modern economy play in this analysis.

The second major issue concerns *Burnham*. In *Burnham* the Court was split (and unable to reach a conclusion) as to whether the in-state service of process that was the rule for in personam jurisdiction in *Pennoyer* remained an automatic basis for jurisdiction or whether *International Shoe* replaced that bright-line rule with the minimum contacts test. Justice Scalia took the position that in-state service of process remained a viable means of establishing jurisdiction while Justice Brennan opined that such service was a contact (albeit an important one) that was to be evaluated within the *International Shoe* framework.

This question was also designed to have you address this open issue in jurisdictional doctrine. First, you should have determined whether you believed that Scalia or Brennan had the better of the argument. As with the *Asahi* question, it was less important how you resolved the issue. Instead, the key was to sufficiently explain your position.

² It might have been possible to argue that the facts are unclear as to whether Frank knew that product made it to *Florida*. For example, maybe the shipments were to a Walmart central distribution center in another state. If that were the case, then there would be no contact with Florida for jurisdictional purposes. But the issue is framed in such a manner that you still should have considered the impact if Frank knew that product was being shipped to Florida.

Even if you concluded (or assumed) that Justice Scalia's position was correct, you should have discussed whether the facts of *this* case were sufficient to come within the rule. For example, should the in-state service rule apply only to individuals and not corporations? If so, the in-state service on a corporate officer is a contact but does not satisfy the automatic rule. Also, even if the rule should apply to corporations, does it matter that the corporate officer in this example was in Florida for personal matters and not while representing the corporation. Again, it was less important to me that you resolved these matters in any specific way. I was much more interested in your analysis.

Fairness

Assuming that a court did not resolve the jurisdictional issue on the Justice Scalia position from *Burnham*, it would have had to consider the *World-Wide Volkswagen* fairness factors. The first factor is the burden on Frank of litigating in Florida. There could conceivably be a significant burden on the company in this regard. First, we have a significant distance between Florida and California. Second, it seems as if Frank may be a relatively small company. At least we know it has only one customer. Third, if there is minimum contacts in this case it likely because of the Justice Brennan argument from *Asahi*. If that is so, then relatively little was required of Frank to subject it to jurisdiction in Florida. Thus, one cannot say that Frank is necessarily trying to have its cake and eat it too. All that being said, without some more specific information concerning Frank's finances, it seems likely that a court would conclude that jurisdiction would be fair over Frank. (And this is especially so when one compares the situation to that in *Asahi* with a foreign company).

The remaining fairness factors track the discussion above concerning Lenny.

In the end, you should have reached a final conclusion on jurisdiction over Frank as well as the motion to transfer.

Question #2

Part A.

Part (A) of Question 2 posed a narrow issue: was subject matter jurisdiction in the lawsuit of *Adam v. Buzz Partnership* proper? Yes it is. The asserted basis for jurisdiction is diversity of citizenship under section 1332. Such jurisdiction requires that two elements be present: (1) a sufficient amount in controversy; and (2) complete diversity of citizenship between the parties within the terms of the statute. Both of these conditions are satisfied here.

Amount in Controversy

The statute requires that there be more than \$75,000 exclusive of interest and costs at issue in the case. That is clearly met. At the very least Adam has incurred \$200,000 in medical bills as result of the alleged negligence of Buzz.

Citizenship

There is also complete diversity of citizenship between the parties. Adam is a citizen of Florida. Buzz is a partnership. Therefore, it does not matter that its principal place of business is in Florida. Instead, what is important is the citizenship of the Buzz partners. Partner #1 (Vince) is a citizen of Alabama. Partner #2 (Woody Corp.) is a citizen of both Georgia (its principal place of business) and Delaware (its state of incorporation). *See* 28 U.S.C. § 1332(c). Thus, there is complete diversity of citizenship between the plaintiff and the defendant.

Part B.

This question called on you to give advice to the defendant in the action (Buzz Partnership) about its ability to assert claims in this action against the plaintiff (Adam) and two non-parties (Tom and Fidelity). The question specifically stated that you should not address personal jurisdiction in your answer. Instead, you were to address only joinder under the Federal Rules and subject matter jurisdiction.

I would have organized my answer by discussing each relevant party or non-party separately. I do so below:

Adam

Joinder under the Rules

Buzz has a claim against Adam concerning the alleged faulty electric work done at the Tampa facility. That claim is allowed under Rule 13(b) as a permissive counterclaim. It is a permissive counterclaim because the claim concerning faulty electronic work does not arise out of the same transaction or occurrence as Adam's claim against Buzz. Adam's claim concerns alleged negligence in maintaining the slide. On the facts given, that claim has no relationship with the electric work that Adam did for Buzz.

Subject Matter Jurisdiction

The problem for Buzz is that there would not be subject matter jurisdiction over the counterclaim it wishes to assert. First, there is no federal question under Section 1331. Nothing that Buzz would need to establish on its breach of contract claim for faulty electric works requires reliance on the United States Constitution, a federal statute, or a treaty to which the United States is a party.

A second possible basis for jurisdiction is diversity of citizenship jurisdiction under Section 1332. There is no problem with the requirement of complete diversity. As explained in response to Part A above, Adam is a citizen of Florida while Buzz is a citizen of Georgia, Alabama, and Delaware. The difficulty concerns the amount in

controversy. There must \$75,000 exclusive of interest or costs at issue on Buzz's counterclaim. On the facts, there is likely only \$25,000 and at most \$50,000 (if you assume that Buzz's total damages were \$50,000 and it arbitrarily divided the costs between Tom and Adam). Under either view, the amount in controversy requirement is not satisfied. Finally, there can be no aggregation of claimed damages between Adam's claim and Buzz's counterclaim because the two claims do not arise out the same transaction or occurrence.

This leaves the final possibility for jurisdiction, supplemental jurisdiction under Section 1367. The issue here is that Buzz's claim does not qualify for supplemental jurisdiction under section 1367(a). To do so, the counterclaim would need to form part of the same case or controversy as Adam's claim against Buzz. This is not so in this case as described above when discussing why Buzz's counterclaim is permissive. Because Buzz's counterclaim does not qualify for supplemental jurisdiction under sub-section (a), there is not need to consider sub-section (b). If you had satisfied (a), however, (b) would not have been an impediment because the claim would not have been brought by a plaintiff.

Tom

Joinder under the Rules

Buzz would also like to bring a claim against Tom concerning the faulty electric work. It will not be able to do so. The only way in which it could try to do so would be under a combination of Rule 13(h) and Rule 20. Rule 13(h) provides that a defendant asserting a counterclaim (or a cross-claim) could add to that counterclaim an additional party *if* the requirements of Rule 20 are satisfied. In this case, the *Rules* alone would allow the joinder of Tom because Buzz wants to assert the counterclaim against Adam for the electric wiring issue. The claim against Tom would satisfy the requirements of Rule 20(a) because (1) the two claims arise out the same transaction or occurrence (the electric work at the Tampa facility) and (2) there are a number of common questions of fact between the claims (e.g., the cause of the electric problems to name just one).

The problem is that as described above, Buzz will not be allowed to bring a counterclaim against Adam. As such the prerequisite under Rule 13(h) for Buzz being to use Rule 20 would be absent.

Jurisdiction

Even if joinder was somehow proper under the Rules, there would be no jurisdiction under the Rules. The same analysis applies as for the claim against Adam. There is no federal question. In terms of diversity, the amount in controversy will not be satisfied. This is so even though Buzz could aggregate its claims against both Tom and Buzz. The most you get while doing so is \$50,000. And finally there is no supplemental jurisdiction for the same reason described above for the counterclaim against Adam.

Fidelity

Buzz has two claims its would like to assert against Fidelity: (1) a claim that the insurance company has inappropriately denied insurance coverage concerning Adam's claim; and (2) a claim that that insurance company owes Buzz a \$10,000 rebate that is apparently unrelated to Adam's accident. I would have discussed each potential claim separately.

The Insurance Dispute Concerning Adam's Claim

Joinder under the Rules

Buzz will be able to join Fidelity under Rule 14(a). Rule 14(a) allows the joinder of a non-party when the defendant (or third-party plaintiff) claims that the non-party (or third-party defendant) is or may be liable to it if it (the defendant) is liable to the original plaintiff. This type of derivative liability claim is precisely the type of assertion that Buzz is making here. Buzz claims that if it is required to pay Adam on the claim of negligence, then Fidelity is required to pay it under the terms of the relevant insurance agreement. Indeed, this type of indemnity dispute is a classic example of when joinder under Rule 14(a) is proper.

Subject Matter Jurisdiction

There will also be subject matter jurisdiction over this claim. There is no federal question under Section 1331. Buzz's claim against Fidelity is a state law breach of contract (or bad faith) claim. Buzz will not be required to establish anything under the United States Constitution, a federal statute, or a treaty to which the United States is a party.

Diversity of citizenship jurisdiction under Section 1332 will also not be available concerning this claim. There will be no problem with the amount in controversy. Adam is claiming at least \$200,000 from Buzz and that amount seems to all potentially be covered by the Fidelity insurance policy. This amount easily clears the \$75,000 amount in controversy requirement. The issue concerns the requirement of complete diversity. The only parties who matter on this claim are Buzz and Fidelity. As set forth in response to Part A, Buzz Partnership is a citizen of Alabama, Georgia, and Delaware. Pursuant to section 1332(c), Fidelity is a citizen of both its principal place of business (New York) and its state of incorporation (Delaware). Therefore, there is a Delaware citizen on both sides of the "v" and there is no diversity of citizenship jurisdiction.

The final possibility for subject matter jurisdiction is supplemental jurisdiction under Section 1367. Buzz's claim qualifies under Section 1367(a) because it forms part of the same case or controversy as Adam's claim against Buzz for negligence. It is precisely because of that negligence claim that Buzz is asserting a breach of contract claim against Fidelity. Having satisfied sub-section (a), you needed to consider whether sub-section (b) would prevent the application of supplemental jurisdiction. It would not.

The reason is that Buzz is not a plaintiff in the action. Therefore, this is not a claim “by a plaintiff.” The bottom line is that there is subject matter jurisdiction over this claim.³

The Rebate Claim

Joinder under the Rules

Rule 18(a) would allow the joinder of Buzz’s claim against Fidelity concerning the insurance company’s failure to pay the \$10,000 rebate. Once a valid third-party claim has been asserted (as it will have been based on the analysis set forth above), Rule 18(a) allows Buzz to assert as many additional claims as it would like.

Subject Matter Jurisdiction

The problem with asserting the rebate claim concerns subject matter jurisdiction. There is no federal question jurisdiction over the claim under Section 1331. On the facts we have, Buzz is not required to prove anything under the United States Constitution, a federal statute or a treaty to which the United States is a party in order to prove its claim.

There is no diversity of citizenship jurisdiction over this claim for the same reason discussed above – there is no complete diversity between the parties. Note that if there was such diversity the amount in controversy would not be an issue. While the rebate claim is only for \$10,000 the value of this claim could be aggregated with the indemnity issue.

Finally, there would be no supplemental jurisdiction over this claim. The claim for a rebate (at least on the facts we have presented) does not form part of the same case or controversy as the main claim in the action. Therefore, there is no supplemental jurisdiction under Section 1367(a). There would be no need to address the exception in subsection (b).

Section II

Question #1

The correct answer is B. David elected to file a pre-answer motion under Rule 12(b)(3). Rule 12(g) requires that he assert all possible motions under Rule 12 in a single pre-answer motion if one is made. This question asked you to recognize Rule 12(g)’s requirement and then address the consequences under Rule 12(h) of David’s failure to comply with 12(g). B is correct because Rule 12(h)(1) indicates that David’s defense of absence of personal jurisdiction has been waived. Options C and D are not waived pursuant to Rule 12(h)(2). Option A is not waived under Rule 12(h)(1).

³ You might also have wanted to alert Buzz that it is conceivable that the court could decline to exercise supplemental jurisdiction under Section 1367(c). Such a possibility is remote. None of the factors set forth in sub-section (c) are likely to be present in this case.

Question #2

The correct answer is C. Option C is correct because there is no means under the Federal Rules for a non-party such as Julie Supermarkets to be required to answer an interrogatory. Options A and B are incorrect because Rule 45 allows a non-party to be compelled to produce documents (as under Rule 34) or to give deposition testimony (as under Rule 30). Option D is not correct because David could seek a protective order Rule 26(c) to protect his confidential business information.

Question #3

The correct answer is E. Option E is correct because Options A through D all are correct statements of the possible consequences of David's failure to attend the deposition. Rule 37(d) provides that the failure of a party (or non-party) to attend a deposition provides that a possible sanction for that action includes an order to either the party or the party's attorney to pay, among other things, certain attorneys' fees of the opposing party. Thus, Options A and B are correct. In addition Rule 37(d) allows the court to impose certain sanctions listed in Rule 37(b). Among those sanctions is an order striking out pleadings. *See* Rule 37(b)(2)(C). Therefore, Option C is correct. Also among the Rule 37(b) sanction is the ability of the court to restrict the evidence the non-complying party may submit at trial. *See* Rule 37(b)(2)(B). Thus, Option D is also correct.

Question #4

The correct answer is A. This question dealt with summary judgment. The question indicates that there is disputed evidence in the central issue of whether the modification was agreed to between the parties. Thus, Option A is correct. Summary judgment is not about deciding what actually happened. Therefore, Options B and D are not correct. In addition, the fact that the President of Sue's Supermarkets is interested in the litigation does not mean that person's affidavit does not count. It may mean that the jury at trial will not believe that person, but a rationally functioning jury *could* believe her. That is all that is necessary to deny summary judgment. Therefore, Option C is not correct.

Question #5

The correct answer is D. The renewed judgment as a matter of law must be denied because David did not make a motion for judgment as a matter of law at the close of all the evidence. Such a motion is required. *See* Rule 50(b). Therefore, Options B and C are not correct. The motion for a new trial should be denied because the verdict in favor of Sue is not against the great weight of the evidence. It is only against the evidence *if* one believes David's witnesses and disbelieves the witness put on by Sue. Such a credibility determination is not a proper basis on which to grant a motion for new trial. Thus, Option A is not correct. Option E is not correct because it would be

improper for the judge to grant a post trial motion on the basis of what is described in the answer.