

MEMORANDUM

To: Fall 2002 Civil Procedure Class
From: Michael Allen
Date: December 2002
Subject: Final Exam – Outline of Answer

I wanted to take the time and give you an outline of possible responses to the questions posed in the final examination as well as an explanation of the answers for the multiple choice questions. You should recognize a few things about this outline. First, this outline may not contain all possible points that students could legitimately raise in response to the questions. I would certainly give credit when a student provides a correct response that I did not think about. Second, I have used an outline form. I expected (and I am sure that you all used) an essay format. Third, I do not expect that any student will raise all of the points in the outline.

For your reference I have also attached the following two items to this memo: (1) as Exhibit A a copy of the exam itself since you could not remove it from the test room, and (2) as Exhibit B a copy of my grading sheet. With these preliminaries out of the way, here are my thoughts on the exam:

Section I

Question 1

The issue here is whether Thomas may properly join H&G in its litigation with Sodor. There are only two issues to discuss under the terms of the question: (a) is joinder of H&G consistent with the Federal Rules of Civil Procedure and (b) is there subject matter jurisdiction over this claim?

Joinder Under the Rules

- Rule 14 provides the only means available under the Federal Rules for Thomas to join H&G in this case. The analysis is in two steps.
 - Step one is Rule 14(b). That rule provides that when a plaintiff has a counterclaim asserted against it, it may assert a third party claim under the same circumstance as would allow a defendant to do so under Rule 14(a). In this case, Sodor asserted a counterclaim against Thomas. Thus, Thomas may implead H&G if the prerequisites of Rule 14(a) are satisfied.
 - Step two is Rule 14(a). Rule 14(a) allows Thomas to bring H&G into the

case as a third-party defendant if Thomas can claim that H&G will be liable to it if Thomas is liable to Sodor on its counterclaim. Under these facts, Thomas meets the requirements of Rule 14(a). Its claim against H&G would be that if it has to pay Sodor on its breach of contract claim it is entitled to have H&G pay Thomas under the terms of the insurance contract. This is the classic Rule 14 impleader situation.

- Therefore, Rule 14 allows H&G to be joined in the action.

Subject Matter Jurisdiction

- The second issue is whether there would be subject matter jurisdiction over Thomas' claim against H&G. There are three possibilities that could provide subject matter jurisdiction over the claim. I will address each of them in turn.
 - Federal Question Jurisdiction (28 U.S.C. § 1331):
 - Section 1331 provides that a federal court has subject matter jurisdiction if the action "aris[es] under" the U.S. Constitution, a federal law, or a treaty to which the U.S. is a party.
 - There is no federal question jurisdiction over Thomas' claim against H&G. Thomas' claim is a straightforward state law breach of contract claim.
 - The fact that H&G may raise the NRIA as a defense does not affect this analysis. It is not enough under the well-pleaded complaint rule for there to be a federal defense. The federal question must be a part of the plaintiff's claim. Mottely.
 - Diversity Jurisdiction (28 U.S.C. § 1332):
 - There are two conditions for diversity jurisdiction: one involving the amount in controversy and one relating to the citizenship of the parties.
 - The amount in controversy requirement is satisfied. The counterclaim against Thomas is in the amount of \$1,000,000. Thomas seeks the reimbursement of this amount from H&G.
 - The citizenship requirement of Section 1332 is not satisfied in this case. Thomas is a citizen of Texas and Delaware (see Section 1332(cc)(1)). H&G is considered a citizen of Delaware and Florida because of the citizenship of Henry and Gordon, the two partners in the partnership. Thus, there is no complete diversity of

citizenship because both Thomas and H&G have Delaware citizenship. Note: The citizenship of Sodor is irrelevant for this analysis.

- Supplemental Jurisdiction (28 U.S.C. § 1367):
 - The first step in the supplemental jurisdiction analysis is whether the claim falls within sub-section 1367(a). In order to do so, Thomas's claim against H&G must arise out of the same nucleus of operative fact as Sodor's claim against Thomas. In my assessment, the claim does. Sodor claims that Thomas is liable because it built the railroad on soft ground. Thomas claims that if that is so, then H&G must pay Thomas. In addition, the last sentence of sub-section 1367(a) makes clear that the supplemental jurisdiction statute applies to the addition of parties as well as claims.
 - The difficulty with the analysis comes with respect to Section 1367(b). A straightforward reading of that section provides that because (1) the original action was based on a diversity (a fact you should have been able to determine from the facts) and (2) the claim against H&G is being made by Thomas, a plaintiff, jurisdiction is not proper. The applicable statutory language is that supplemental jurisdiction is not appropriate "over claims by plaintiffs against persons made parties under Rule 14 . . . of the Federal Rules of Civil Procedure." Because the H&G was made a party under Rule 14 and Thomas is a plaintiff, there is no jurisdiction under Section 1367.
 - One could make an argument that subsection 1367(b) should not apply because Thomas is acting as a defending party – in other words, it is responding to Sodor's counterclaim. This argument would need to rely heavily on the Supreme Court's language in Owen Equipment in which it focused on giving a "defending party" all the tools necessary to respond to the claim. The problem one would need to address here is the language of the statute.

Question 2

- This question asked you to address four separate questions. I will discuss each question in turn.
- Waiver of Rule 19 Issue
 - Sodor should have raised the Rule 19 issue as part of its answer. Rule

12(b).

- Sodor has not, however, waived the objection by failing to assert the defense in its answer. Rule 12(h)(2) provides a defense of failure to join a party under Rule 19 may be raised through trial by using a motion for judgment on the pleadings.
- Therefore, Sodor's motion is not barred by waiver.
- Rule 19(a) Issue
 - The first step in the Rule 19 inquiry is to consider whether Percy is "a person to be joined if feasible." To make this determination, you need to address the factors listed in Rule 19(a)(1) and (2).
 - Percy does not fall within Rule 19(a)(1). Complete relief can be afforded between Thomas and Sodor without Percy being present in the lawsuit. In other words, if the court determines that there has been a breach of contract, Thomas can obtain full recovery from Sodor.
 - Percy likely would fall within Rule 19(a)(2).
 - The first step under Rule 19(a)(2) is to determine if Percy claims "an interest relating to the subject of the action." Percy does claim such an interest under the meaning of the Rule because it is a party to the contract that is the subject of the pending action. It does not matter for the technical Rule 19 analysis that Percy has not tried to join the action. The assessment is one for the court to make.
 - The next step in the analysis is to determine if Percy falls within either Rule 19(a)(2)(i) or Rule 19(a)(2)(ii). Note that Sodor only needs to satisfy one of these subsections so long as Percy meets the interest requirement.
 - In terms of Rule 19(a)(2)(i), a good argument can be made that Percy's interest as a practical matter could be harmed as a result of this case. It is true that Percy will not be bound by issue or claim preclusion by a result in the case because it is not a party. But the requirement of harm here is broader than a mere legal harm to the interest. The harm is that if Sodor loses it could take the money from the

joint account (over which it has sole control) and then Percy would have more work to do to recover any funds from Sodor.

- The requirement of Rule 19(a)(2)(ii) is also met because Thomas or Sodor could be subject to inconsistent rulings if Percy is not a party. For example, Sodor could lose this case and then try to sue Percy for contribution. It might also lose that case because a different court makes different findings under the same contract at issue in this case. In addition, Thomas could have to try to proceed against Sodor in the future on this contract (say if Sodor goes bankrupt) and also would run the risks of an inconsistent judgment.

- Personal Jurisdiction

- The next issue to consider is whether Percy would be subject to personal jurisdiction in Florida.

- The first step in the personal jurisdiction analysis is to consider whether either claim against Percy falls within Florida's long arm statute. This statute restricts the jurisdictional reach of the state. Both claims essentially deal with the same underlying facts – not paying under the contract – and can be considered together. As set forth below, the breach of contract claim against Percy does not fall under the terms of the long arm statute.

- Subsection (2) concerns substantial activity in Florida. On the facts, Percy does not meet this standard.

- Subsection (1) sets forth several activities that could subject Percy to personal jurisdiction under the statute if the claim arose from those activities. None of the items on the list applies. There are two that seem like possibilities, but upon analysis they do not.

- First, sub-section 1(a) provides for jurisdiction of the claim arises from some transaction of business in Florida. On the facts we have, it does not appear that Percy conducted any business in Florida. It certainly did business with a Florida entity. This, however, is not enough under the statute.

- The second possibility is subsection (1)(g) concerning breaching a contract in Florida by failing to perform acts within Florida. Percy breach, if one occurred, was in either New York or Texas where its obligation to pay was centered. Remember, the facts state that the payments at issue were to be made from an account in New York City to one in Texas. The fact that Thomas was to conduct activities in Florida is irrelevant to this analysis.
- The second step in the jurisdictional analysis is to consider whether the exercise of personal jurisdiction would be consistent with the United States Constitution.
 - Step one in the constitutional analysis is general jurisdiction. A corporate defendant may be subject to general jurisdiction in a forum if it is incorporated in that forum or if it has its principal place of business there. Percy does not meet either of these tests. A defendant may also be subject to general jurisdiction if it has engaged in substantial and continuous activity in a state. The record makes clear that Percy does not engage in anything close to such activity in Florida.
 - Step two in the constitutional analysis is specific jurisdiction. Under this analysis, you are trying to decide whether the defendant's forum-related activities are so closely related to the claim at issue that the assertion of jurisdiction over the defendant would not "offend traditional notions of fair play and substantial justice." *International Shoe*. Specific jurisdiction has two components: minimum contacts and fairness. *Asahi*.
 - Minimum Contacts: There likely would have minimum contacts with Florida on Thomas's claim. The facts here show that Percy reached out to Thomas in order to have Thomas undertake a large construction project in the State of Florida. This type of activity is a very good example of the "purposeful availment" the Supreme Court considered important in finding minimum contacts. *Hanson, McGee*. Given this voluntary activity, it is reasonable to assume that Percy could have foreseen being haled into court in Florida.
 - This point is driven home by looking at the specific breach of contract claim that would be at issue in this case. In the *Burger King* case, the Supreme Court indicated that three considerations were

important in making the jurisdictional analysis for a breach of contract claim: the negotiations leading to the contract, the contract terms themselves and the post-contract course of dealings. All of these factors point towards Florida as a natural home to certain litigation. In each of these periods of the life of the contract, Percy not only was aware that Thomas was undertaking activities in Florida, it was the force driving Thomas to actually take those actions.

- Fairness: The second specific jurisdiction issue is whether the assertion of personal jurisdiction over Percy on this claim in Florida would be fair. It would be based on the fairness factors articulated in *Worldwide Volkswagen*.
 - The primary consideration is the burden the defendant. Here there might be a burden on Percy because the company is based in New York. This fact, standing alone, however, does not appear to be persuasive. There is no indication that Percy would experience a financial hardship. In fact, the facts suggest just the opposite. Moreover, as discussed above, Percy had no problem engaging in activity related to Florida as part of the process leading to this dispute.
 - Another fairness factor to consider is the interest of Florida in being involved in resolving the dispute. That interest is high. It is true that neither Thomas nor Percy are citizens of Florida. Florida's interest comes, however, from the fact that the matter underlying this dispute concerns an important transportation project in the state.
 - Yet another factor is the interest of Thomas in obtaining relief in Florida. Thomas' interest in proceeding in Florida is not particularly strong. IT is not a citizen of the state and could sue all other parties in Texas or New York if it so elected.
 - The final two factors are not particularly relevant.
- In sum, while it is close, I believe it would be fair to

subject the Percy to jurisdiction in Florida on Thomas' claim.

- Rule 19(b):
- Once you determine that Percy should be joined under Rule 19(a) and that it cannot be joined because of problems with personal jurisdiction you should then proceed to the Rule 19(b) analysis. The idea behind Rule 19(b) is that a party can be so important in a case that if it cannot be joined the action should be dismissed. The resolution of the Rule 19(b) issue is a close and difficult one in this factual situation. The key in your answer should have been to explain your thought process. I discuss some of the general points in the analysis below:
 - Rule 19(b) provides four factors to consider in resolving this question.
 - The first Rule 19(b) factor is a consideration of the extent to which a judgment in Percy's absence would be prejudicial to either the Percy or either of the parties. As set forth above under Rule 19(a), it is possible for both parties and Percy to be prejudiced by some judgment if Percy is not made a party to the case.
 - The second Rule 19(b) factor is the extent to which a judgment can be shaped to avoid the prejudice. In this case, there is not much that could be done to lessen the various possibilities of prejudice. The reason for this conclusion is that there is nothing that can be done to bind Percy to any judgment or rulings in this case if it is not a party.
 - The third Rule 19(b) factor is whether a judgment rendered without Percy will be adequate. It would. Thomas does not need to have both parties to get paid under the contract.
 - The final Rule 19(b) factor is a consideration of whether the plaintiff would have an adequate remedy elsewhere if the action were dismissed. The answer here is yes because she could file the claim in Texas or New York. We know this is so because the long arm statute of each of these states goes to the full extent of the constitution and a constitutional personal jurisdiction analysis would indicate that both Percy and Sodor would be amendable to suit in both these jurisdictions.
 - At the end of the day, you should have reached a conclusion as to whether Percy was a Rule 19(b) party based on your assessment of the facts. The most

important thing is to show your work.

Question 3

- This question calls on you to rule on two of Thomas' post-trial motions. I will address each motion below.
 - Renewed Motion for Judgment as a Matter of Law
 - The motion is governed by Federal Rule of Civil Procedure 50(b).
 - The standard (imported from Rule 50(a)) is that the motion should be granted if “there is no sufficient evidentiary basis for a reasonable jury to find for [Sodor on the soft soil issue.]”
 - The motion is deemed to be timely filed and is appropriate procedurally because Thomas made a motion for judgment as a matter of law at the close of all the evidence.
 - The motion should be denied.
 - A reasonable jury could have ruled in favor of Sodor on the soil issue. If the jury (a) believed the Sodor report and (b) did not believe Thomas' experts and employees, the decision would be possible.
 - Motion for New Trial
 - The motion is governed by Federal Rule of Civil Procedure 59(a).
 - There are two general bases on which a motion for a new trial could be granted: a problem with trial procedure and a problem with the verdict. There is not indication in the fact pattern that there is any problem with trial procedures in the case. Therefore, the analysis should have focused on the appropriateness of the verdict.
 - The question in this case comes down to whether the verdict in favor of Sodor on the soft soil issue was “against the great weight of the evidence.” If it was, then the motion for a new trial should be granted. If the verdict was not against the great weight of the evidence, then the motion should be denied and the verdict should be allowed to stand.
 - The question here is a close one. So long as you defended the outcome that you advocated, either answer would be acceptable.

My view would tend to be that the motion should be granted, but the opposing view is tenable as well.

- Please note that it would be inappropriate for the judge to grant the motion merely because he or she would have voted as a juror that the soil was not too soft. The federal courts have rejected this so-called “13th juror” standard.

Section II

Question 1

The correct answer is D. This question primarily assesses your understanding of the basic working of Federal Rule of Civil Procedure 4(d). That rule makes clear that Martha may but is not required to seek a waiver of formal service and George may but is not required to agree to waive such formal service. Therefore, options A and B are not correct. Option C is not correct because without a waiver or formal service the action has not yet started and the default rules (Rule 55) do not yet apply. Option D is correct because Rule 4(d)(1) makes clear that agreeing to waive service does not waive a defense that personal jurisdiction is lacking. Finally, option E is not correct because under Erie matters of procedure are dealt with by the Federal Rules of Civil Procedure and not state law. This is true even in diversity cases.

Question 2

The correct answer is C. Rule 33(a) provides that interrogatories may only be directed to parties. Abigail is not a party and so George may not compel her to respond to interrogatories. Options A and B may both be statements of the best practice; they are not, however, correct statements of the rules. Option D is not a correct statement of the restriction on the number of interrogatories under the rules. Rule 33(a) restricts interrogatories to 25 per party not in total. Finally, option D is not correct because there is no numerical limit on document requests.

Question 3

The correct answer is B. The best way to address George’s concern is to file a motion for a protective order under Rule 26(c). Option A is a possibility. It is not the best one, however, because there is no power to back up the threat. Option C does protect George’s right to object at trial to the introduction of the testimony. It does not, however, keep the information from getting out. Option D is not correct because Rule 30(d)(1) does not allow for an instruction not to answer in this situation. Finally, option E is simply incorrect under the terms of the rules.

Question 4

The correct answer is E. This question requires you to understand the basic procedures

involved in filing a motion for sanctions under Rule 11. Option A is not correct because Rule 11 does not impose a requirement that sanctions motion be filed after a substantive response to a frivolous argument. Option B is not correct because Rule 11(c)(1)(A) requires that a motion for sanctions must be made separately from other motions. Option C is not correct because Rule 11 requires a 21 day waiting period. Option D is not correct because the entire point of the waiting period is that the Rule 11 motion cannot be filed if the party has withdrawn the allegedly frivolous argument. Option E is a correct statement of the procedures used to pursue sanctions under Rule 11. It is a better selection than option E because while it is true that Martha may not be sanctioned monetarily for a violation of Rule 11(b)(2), other sanctions are possible.

Question 5

The correct answer is E. Option E is correct because a person who is not a party to a case cannot, except in very specific circumstances not present here, be bound by an issue decided in a case to which they were not a party. Abigail was not a party in the first case. Therefore, she cannot be bound by anything that happened in that case. This explanation is also the reason why option A is not correct. It does not matter that Abigail could have intervened. She did not. Option B misses the point of issue preclusion: an issue is precluded not because it is correct but because it was already decided between the same parties. Finally, options C and D are not correct under the Federal Rules. Abigail need not plead res judicata with particularity under Rules 8 and 9. Also there is nothing in the rules to require Abigail to make a pre-answer motion concerning the res judicata issue.