Civil Procedure
Fall, 2013
Model Answer

Question I

A. The plaintiff has the burden of establishing personal jurisdiction over all defendants. Representing Tufline, I would argue that counsel for Tony has not done that. First, he has not and cannot show that the sovereign (Illinois) has authorized jurisdiction to be asserted over Tufline; second, even if he has established such an authorization under positive law, it would exceed the limits imposed by the Due Process Clause of the Fourteenth Amendment.

We're in federal court, but Fed.R.Civ.P. 4(k) authorizes the federal court to exercise jurisdiction only to the limits permitted by the state in which it sits. The Illinois Long Arm statute is reproduced in the casebook and we discussed it many times. It authorizes jurisdiction over persons conducting business in Illinois, entering into contracts to be performed in Illinois, or on any other basis up to the limits permitted by the United States Constitution. The facts show that Tufline conducts business in Virginia and, maybe, Wisconsin, but not in Illinois. There were some discussions between Tufline's CEO and Tony about maybe entering into a contract in the future to be performed in Illinois, but no such contract was entered into. The third statutory basis—to the limits of the Constitution—must be satisfied in any event, even if Tony hangs his hat on one of the other two statutory bases.

The facts establish neither of the categorically constitutional bases of personal jurisdiction. No agent of Tufline was present in Illinois when served with process; indeed Tufline has never been present in Illinois. No property of Tufline's was present in Illinois when it was attached; indeed Tufline has no property in Illinois.

That leaves *International Shoe's* minimum contacts analysis: exercise of jurisdiction is constitutional only over a defendant that has minimum contacts with the sovereign exercising jurisdiction. The first step in this analysis is to

inventory the contacts; the second step is to see what inferences are supported by the inventory; the third step is to see if exercise of jurisdiction based on those contacts would be fair and substantially just under a five-factor test.

There's nothing to go into the inventory. Contacts count, under *World Wide Volkswagen*, only if they are intentionally directed at the forum state; mere foreseeability of contact is not enough. Tufline did not direct the 50 foot length of line to Illinois. Tony called Debra, not the other way around. Indeed Debra had no way of knowing whether Tony was in Illinois or somewhere else; his commercials had been made in Iowa. Nor did Debra send the line to Illinois; Cam picked it up in Virginia. To be sure Debra and Tony discussed doing a photoshoot in Illinois, but they never reached agreement, and certainly never engaged in any conduct in Illinois pursuant to the idea. This is not like *Burger King*, where there was not only a contract, but also conduct in the forum state under the contract.

No contacts: no purposeful availment of the benefits of Illinois; no systematic and continuous relationship necessary for general jurisdiction; no basis for anticipating being haled into court in Illinois.

Even if the fantasy about shooting an ad campaign in Illinois could somehow be stretched into a contract and thus a contact under *Burger King*, it is unrelated to the claim arising from the accident on Lake Geneva, and thus exercise of specific jurisdiction would be unconstitutional.

This is all a good thing for our side because we have a weak argument on the five factors. It is no great inconvenience for Tufline to travel to Illinois to defend the lawsuit: worst case he can hire one of the thousands of lawyers in Chicago looking for more work. Illinois certainly has an interest in having its courts adjudicate this case because the injured plaintiff is suffering in Illinois, and presumably a citizen of Illinois. On the other hand, the plaintiff would have no great difficulty in getting effective relief elsewhere, such as Wisconsin or Virginia. The evidence is not in Illinois. It is either in Wisconsin, where the accident happened, or in Virginia, where the accused product was designed and manufactured. There's nothing one way or the other on the fifth factor.

Tony arguments border on the frivolous. Probably his best one is that the anticipated contract for shooting ads on Lake Michigan qualifies under the first or second prong of the Illinois statute and is constitutional under *Burger King*.

We are nearly certain to prevail in defeating personal jurisdiction.

B. Venue in federal court is determined by 28 U.SC. § 1391. It does not authorize venue in the Northern District of Illinois on these facts. No defendant resides in the district. A substantial part of the material facts did not take place in the district. There are at least two other federal judicial districts in which venue would be good—Wisconsin and Virginia—and therefore the existence of personal jurisdiction, even if it did exist, is not an authorized basis for venue.

   We better not wait for our challenge to personal jurisdiction to be resolved. Fed.R.Civ.P. 12(h) says that objections to venue are waived if they are not coupled to objections to personal jurisdiction.

   As long as we challenge venue in the same motion that we challenge personal jurisdiction, we have a slam-dunk as negating venue.

C. I understand why Tony wants to do this. By changing his legal theory to negligence per se, he needs less evidence in the record to survive summary judgment. For the same reason, I really want to get the amendment rejected.

   We have two challenges to the amended complaint: that the amendment is impermissible under Fed.R.Civ.P. 15, and that there is no subject matter jurisdiction over the new claim under 28 U.S.C. § 1331. Our problem with the second challenge is that diversity jurisdiction almost certainly exists over any and all claims worth more than the jurisdictional amount of $75,000 under 28 U.S.C. § 1332. The legal theory for the new claim is almost identical to that in *Merrill Dow*, in which the Supreme Court held that a per-se negligence claim premised on a federal agency standard did not make federal law outcome-determinative in a claim otherwise based on state law. Thus the federal ingredient did not support federal question jurisdiction. That is exactly what is going on here: Tony could win if he can establish the elements of negligent product design, manufacture, or labeling, regardless of whether he can establish a violation of federal law.

If the new claim were not supported by subject matter jurisdiction , the amendment must be dismissed. The problem is: we can't defeat diversity jurisdiction over it.

As far as Fed.R.Civ.P. 15 goes, however, discovery is closed, and we are well beyond the period when Rule 15 permits Tony to amend his complaint without leave of the court. Also, while Rule 15 says that leave should be freely given, it should not be given if we can demonstrate prejudice. Our argument would be that introducing a new legal theory so late in the game severely prejudices our ability to respond to it. We have prepared to support summary judgment based on the legal theories that were the case from the beginning. Introducing a new one now means that we're caught flat-footed.

Tony,, on the other hand, will argue that amendment should be allowed for three reasons: first, because the "new regulation" by CPSC didn't exist when he first filed his complaint; second, because he will be barred by claim preclusion from bringing his per se claim in a separate action later, regardless of what happens on the summary judgment motion; and third, because the facts supporting the new theory are no different from the ones that have been developed in discovery and submitted in the record for deciding the summary judgment motion. Most of the preparation for our summary judgment motion is based on the factual record; it's no big deal, he would say, for us to accommodate a new legal theory—one that is only a modest variant of the ones always in the case.

Depending on when the regulation actually was promulgated, he may have a good argument. Because there's diversity jurisdiction over the new claim, because he may have an excuse for filing it in the middle of the litigation, and because we already know all of the material facts, I expect we're going to lose on getting the amended complaint dismissed.

Worst case, we are surely entitled to a delay in a decision on the summary judgment motion, so we can supplement our motion for summary judgment and memorandum of law to cover the per-se negligence theory.

D. We're going to have a difficult time prevailing on the argument for jurisdiction has not been properly asserted over Tufline. Fed.R.Civ.P. 4(e) allows process to be served, and thus jurisdiction to be asserted, in three alternative ways: under

Rule 4 itself, under the law of the state where the court sits–Illinois– or under the law of the state where the defendant is to be served – Virginia. Rule 4 allows service but anyone not a party, over 18, by leaving it with an officer of a corporate defendant. Debra is an officer of Tufline, so the identity of the individual served, is fine. Tony is almost certainly over 18 and is not a party. The only question is geographic or locational restrictions. Unlike service on individual defendants, Rule 4(h) does not limit service a corporation to any particular place, such as its corporate offices. So service of Debra in her condo exercise room should be fine. Then the question is whether Rule 4 itself limits service to the judicial district where the court sets. It does not. It refers to "a judicial district of the United States," rather than limiting service to *the* judicial district in which the court sits.

The Illinois rule is problematic because only an Illinois deputy sheriff is qualified to serve process. Cam is not a deputy sheriff. Moreover, service on a corporation is authorized only if it is "found anywhere in the state." Tony has strong enough arguments under Rule 4 and under the Virginia rule that detailed interpretation of the Illinois rule is not determinative. The Virginia rule allows service by anyone not a party, over 18, on a corporation by serving an officer. It has no territorial or vocational restrictions. His personal relationship with Tony in no way makes him *legally* "interested".

So the service was good under the Virginia rule. , and probably under federal Rule 4 itself. We might have Rule 11 problems if we challenge the adequacy of service.

Of course, jurisdiction cannot be "asserted" validly when it does not exist. As the answer to question (A) explains, personal jurisdiction probably is lacking. As the answer to question (C) explains, subject matter jurisdiction probably is present.

E. We have a good shot at getting the video recordings. There's no question about their being within the scope of discovery under Fed.R.Civ.P 26(b)(1). They presumably show exactly what happened on Lake Geneva, and we hope that they will show something that might constitute contributory or comparative negligence by Tony. In any event, we should be entitled to examine them to see what they do show.

Also, anticipating any conditional privilege or discovery exclusion that might be asserted by Tony such as the work product doctrine under Rule 26(b)(2), we have a compelling need for them. This no other way that we can generate a video recording of what actually happened.

In any event, they're not privileged, because they did not involve lawyer-client communications, and they are not shielded by the work product doctrine, because they were not prepared in anticipation of litigation.

If Tony does not give them up in response to our Rule 34 requests for them – they're either documents, tangible things, or electronic data explicitly within the scope of Rule 34--we can obtain an order to compel disclosure under Rule 37. Whether we can get sanctions directly Rule 37 without getting an order to compel first depends on whether refusing discovery of the video is punishable without a court order, under Rule 37(d)(1)(A)(ii). Does this language include requests for production, or only requests to inspect premises? We will have to marshal caselaw in the Seventh Circuit for the former interpretation. Maybe a compete lack of response by Tony would permit sanctions to be imposed now, without waiting for an order to compel.

In any event, before we seek sanctions, we must confer in good-faith with Tony's counsel.

If Cam has the videos, and not Tony, we should serve a Rule 45 subpoena on Cam, along with a Rule 34 request. If Cam refuses to give them up, his refusal is punishable by contempt.

As to sanctions, we should seek dismissal of Tony's complaint or, in the alternative, under Rule 37(b)(2)(A)(i)—" directing that . . . designated facts be taken as established for purposes of the action"--a finding of contributory negligence, which would lead to the same result – if the state whose law is to be applied is a contributory negligence state.

Question II

A. It doesn't really matter what court we file in. It probably will have subject matter jurisdiction. If we file in state court, virtually all state trial courts are courts of

general jurisdiction, meaning that they have subject matter jurisdiction over any claim known to the law. If we file in federal court, there's a high probability of diversity jurisdiction. Mike and Blanche are citizens of different states. If they are the only parties to the lawsuit, the diverse citizenship requirement of section 1332 is satisfied, and we only need to satisfy the jurisdictional amount of $75,000. While the value of the stock exchanged for the idea was only $50,000, Blanche can plead more than $75,000 in good faith, based on the ultimate value of the invention, or she can plead intentional tort claims that would support punitive damages. It does not matter in which federal district we file, because the parties are diverse in citizenship. There might be venue problems, but that is independent from subject matter jurisdiction.

If the invention had been patented, a suit for patent infringement would support federal question jurisdiction in federal court; indeed there would be exclusive subject matter jurisdiction in federal court; the action could not be brought in state court. But there is nothing in the question to suggest that the invention has been patented.

B. The complaint is woefully deficient under Fed.R.Civ.P 8 and 10. There is no caption; there is no docket number; there are no factual allegations supporting jurisdiction; and the claim for relief is probably deficient because it is so general. While paragraph 1 certainly is a short and plain statement, it does not show that the pleader is entitled to relief, because it does not provide enough to understand the legal theory, or to suggest how the elements of any legal theory will be satisfied. It also is not concrete or detailed about to give the defendant sufficient notice of the transactions giving rise to the claim. Paragraph 2, on the other hand, is probably sufficient as a claim for relief.

   We are entitled to amend it unilaterally any time before a responsive pleading is served. I will hustle to do that. If we don't amend and provide more detail about her claim and meet the requirements of Rules 8 and 10, it almost certainly will be vulnerable to a motion to strike, or dismissed on a motion to dismiss for failure to state a claim upon which relief can be granted.

C. All of the claims are premised on state law. Accordingly, the federal court is obligated by *Erie* and the Rules of Decision Act to apply state law. Which state's

law depends upon the choice-of-law rule in Georgia; *Erie* obligates a federal court exercising diversity jurisdiction to apply the choice-of-law rule of the state in which it sits. George is a pretty traditional state, so I would guess that it likely utilizes a traditional choice-of-law rule such as *Lex Loci Delicti* for torts or *Lex Loci Contractus* for contracts. We don't really have enough facts to know exactly where these rules will point, but the principal candidates would be Georgia, Texas, and maybe Massachusetts. Presumably the work that Mike and Blance did together were where they were in college together. So we would need to know where they went to college. The deal between Mike and Pete may have come down almost anywhere. We would need to know where that occurred as well.

D. The question says that I want to spare Blanche from having to answer the question. So I would instruct her not to answer. Then one of three things could happen. The other side might just continue with the deposition and not insist on an answer. They might adjourn the deposition and go to court seeking an order to compel under rule 37. Or, I could adjourn the deposition and go to court to seek a protective order under Rule 26(c). It doesn't make all that much difference whether I follow the protective order route, or wait for the other side to follow the order to compel route. The two processes are largely symmetrical; whoever loses is likely to have to pay the expenses the other side.

   Whoever violates either a protective order or an order to compel is subject to sanctions under Rule 37, up to and including dismissal of our complaint for us, and entry of a default judgment against the other side.

E. If Blanche is telling me the truth, and I would need to have a reasonable basis for believing that she is, I should proceed against Mike's counsel under Rule 11. He is entitled to a 21 day window to withdraw the fictitious part of his answer, and if he doesn't do so and I can establish that he had no reasonable basis for asserting it, then we can get sanctions under Rule 11 against both Mike and his lawyer in the form of expenses and monetary penalties.