Civil Procedure

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Model Answer

Question I

A. Cory has a slim chance of resisting remand. He has asserted only federal question jurisdiction as the basis for removal and Sandra has not pleaded a federal question under 28 U.S.C. § 1331. She pleaded only negligence per-se, which is a common-law state claim. *Louisville & Nashville R.R. v. Motley* says that federal-question jurisdiction exists only when it appears in a well-pleaded complaint. Even if Cory can avoid that basis for remand on the grounds that the federal basis for Sandra's claim is evident from the claim actually pleaded because it is dependent on the interpretation of federal law, he runs into *Merrill-Dow* and *Graber*, which say that resolution of an issue of federal law must be necessary to decide the claim. It isn't. Indeed this case is very similar to *Merrill-Dow*, in which the Supreme Court held that a negligence-per-se claim did not present a federal question because it could be decided without reference to federal law. Cory can try to argue that violation of the FARs is more central to Sandra's claim than violation of the FDA drug labeling rules in *Merrill-Dow*, but he faces an uphill battle. This is unlike *Graber*, where the property dispute could not be decided without resolving federal requirements for tax sales.

   If he somehow could establish federal-question jurisdiction over the negligence-per-se claim, he would have a good shot at keeping the other claims in federal court under supplemental jurisdiction conferred by 28 U.S.C. § 1367 because they have a common nucleus of operative fact with the negligence per se claim. All involve alleged negligent operation of the helicopter. The emotional distress claim has additional elements, but like common-law negligence, negligence per se, and reckless and wanton operation of a helicopter, involve the central question of whether Cory operated the helicopter so as to avoid foreseeable risks of harm to another.

B. Bennett can keep the case in state court by refusing to join the notice of removal. 28 U.S.C. § 1446(b)(2) requires that "all defendants . . . must join in or consent to the removal . . . ."

C. (1) Other State has affirmatively asserted jurisdiction over persons, such as Cory, who have committed a tortious act within the state. Sec. 1-101(a)(2). None of the other categories of jurisdiction in the statute fit the facts. The alleged tort was not complete until injury occurred, see *American Radiator v. Gray*, and injury occurred in Other State. Other State also has prescribed the method of giving notice—mailing the summons and complaint, and I, representing Martha, have complied with that.

To defeat personal jurisdiction, Cory must successfully argue that the personal jurisdiction asserted by the statute exceeds what is permitted by the Fourteenth Amendment to the United States Constitution. He has a pretty good argument that it does. No categorical basis of jurisdiction is asserted by Other State, such as personal service on a defendant present within the borders, or attachment of property found within the borders. *International Shoe* teaches that long-arm assertions of jurisdiction must be supported by minimum contacts and fair play and substantial justice. Fair play and substantial justice is not a problem here: if Cory could fly a helicopter over Other State, he can conveniently appear in court there. Other State has an interest in redressing the demolition of the Mercedes and the demise of Wilbur in its territory; Martha has chosen the forum, so she must think it can provide convenient and effective relief. All the evidence is located in Other State, and there is no reason to think that the law applied would be out of step with what would be applied elsewhere.

The problem is minimum contacts. The Other State long-arm statute asserts both general and specific jurisdiction ("whether or not it arises. . ."). Systematic and continuous contacts constitutionally necessary for general jurisdiction plainly are lacking. The helicopter incident is Cory's only contact with Other State. The claim arises from that contact, so specific jurisdiction is involved. But *Worldwide Volkswagen* teaches that contacts do not count constitutionally unless they are intentional; merely foreseeable is not enough. Cory will say that he did not intend to land in Other State because he did not know he was flying over Other State.

Martha's counterargument is that he did intend to land in Other State because he did intend to land in the parking lot. That he had not kept track of his position does not matter under *Grace v. MacArthur* where minimum contacts were found sufficient when the defendant was served aboard an airliner over Arkansas, the forum state.

Cory also could challenge the constitutionality of how he was given notice, but that is a long shot. First-class mail is a classic means of giving notice. The Supreme Court preferred it as likely to result in actual notice in *Mullane*. To be sure, special circumstances may exist that deny constitutional adequacy to traditional means of giving notice, such as posting it on the door of a dwelling in *Greene v. Lindsey*, but no such special circumstances appear in this circumstance.

Cory has a strong argument, but on balance, Martha is likely to prevail.

C. (2) Now Other State has not asserted minimum-contacts bases for jurisdiction, only traditional categorical bases. The best way to get personal jurisdiction over Cory is to have a deputy sheriff from Other State serve him while he is there. Under Justice Scalia's plurality opinion in *Burnham*, that is constitutionally sufficient because of its long historical pedigree. That depends, however, on Cory's being in or returning to Other State and the deputy sheriff being able to find him while he is there. That may or may not happen.

The remains of the helicopter almost certainly are still present in Other State, however. A second possibility is to have a deputy sheriff attach them under Section 1-101(b). That probably would be a constitutional basis for jurisdiction to decide an in-rem action under the reasoning of *Burnham*. The problem is that we have no basis for an in-rem action against the helicopter. Asserting jurisdiction over Cory by attaching his property is classic quasi-in-rem jurisdiction, which *Shaffer v. Heitner* says is constitutional only if it is under minimum-contacts analysis. Other State, like Delaware in *Shaffer*, has not asserted minimum-contacts bases for jurisdiction.

There also is a question whether Cory can be said to "own" the helicopter. The jurisdictional statute says, "by owning property found within this state . . . ." He rented the helicopter and therefore has a small property interest in it, akin to a leasehold, unless the damage to the helicopter while he was flying it terminated

the rental agreement according to its terms. But it does not matter because quasi-in-rem jurisdiction is unconstitutional on these facts. There is nothing to suggest that Other State has a fraudulent debtor's attachment statute or that Cory is about to remove the helicopter remnants or otherwise hide property if it does.

C. (3) Martha has good prospects for establishing diversity jurisdiction under 28 U.S.C. § 1332 in federal court in Other State. She is still a citizen of Massachusetts because her expression of intent to move to Other State has not coincided with physical presence there. Citizenship turns on domicile, and one does not get a new domicile except by being physically present within the new domicile and at the same time having the intent to make it one's domicile. Cory presumably has become a citizen of Other State. His registration to vote and for driving privileges support an inference of the requisite intent and he is present there. But it does not matter where he is a citizen, as long as it is not Massachusetts, and there is nothing in the question that suggests that he is a citizen of Massachusetts.

   That leaves the jurisdiction amount of $75,000. The $105,000 Mercedes was "crushed," and showpig Wilbur was killed. There is little doubt that Martha may be able to recover more than $75,000.

Question II

A. We did not respond to Facebook's Rule 34 request for production with objections, as required by Fed.R.Civ.P. 34(b)(2)(B). Moreover, we apparently failed to object during the discovery conference under Rule 26(f). This failure exposes us to sanctions under Fed.R.Civ.P. 37(d)(1)(A)(i) for failure to serve a written response, including objections, to a Rule 34 production request. We may be able to avoid these, however, if we promptly file a motion for a protective order under Fed.R.Civ.P. 26(c). Whether this means to escape sanctions is available is unclear, however, because Rule 37(d)(2) excuses a failure to respond only when a motion for a protective order is "pending," and the question says that a motion to compel has already been filed.

   In any event, we should file a motion for a protective order now, which the court, under Fed.R.Civ.P. 37(a)(5)(B) and (C), is authorized to hear in conjunction with its consideration of the Rule 37 motion to compel. Our protective-order argument

is the same as our opposition to an order to compel: (1) that the emails are outside the scope of permissible discovery under Fed.R.Civ.P. 26(b)(1) because the emails involving the affair are not relevant to the patent-infringement claim—and we certainly do not plan to use them to support any defense; (2) that the request did not comply with Rule 34, in that it did not specify the electronic information requested with "particularity," as required by Rule 34(b)(1)(A), and (3) that the protective order is necessary to protect Brownall and his lover ("any party or person") from "annoyance" and "embarrassment." We will argue that access to all emails, without differentiating between relevant and irrelevant messages, always represents a huge privacy intrusion. At the very least, we should be entitled to make the emails available only to the court ("sealed container") or only to a neutral party ("designating the persons who may be present") who will sort through them and keep confidential the ones irrelevant to the patent claims.

Before Facebook's Rule 37 motion to compel can be heard, and before our motion for a protective order can be heard, counsel must confer, and this provides an opportunity to work out a procedure such as we request in our protective-order-motion.

It's not a good idea simply to stiff the court by defying an order to compel, because the court may enter a default judgment against Brownall as a sanction, and/or hold him in contempt. Rule 11 does not apply to discovery documents. See Fed.R.Civ.P. 11(d). On the other hand, Brownall might prefer a default judgment to disclosure of the emails, and a contempt penalty might open up an avenue for appellate review. Discovery orders are not otherwise appealable before final judgment. Whether Brownall wants to take these risks rather than disclosing the emails is up to him.

B. We were prima facie obligated to disclose this liability insurance policy under Fed.R.Civ.P. 26(a)(1)(A)(iv) because it plainly would cover Brownall's personal liability resulting from piercing the veil of Prettyface. Our best argument is that it is not discoverable under Rule 26(b)(3)(A) because it constitutes attorney-work product. It is a document prepared in anticipation of litigation, and it reflects the mental impressions of an attorney. The interesting question is what sanctions we are subject to if we are obligated to disclose it and fail to do so. The typical

sanction for violation of Rule 26(a)(1) disclosure obligations is to block use of the non-disclosed evidence at trial. We do not intend to use the insurance policy as evidence. So we need not fear that sanction. It is also not clear what expenses Facebook would incur because of our failure to disclose—except for its expenses in filing a motion for an order to compel under Rule 37.

There is a catchall sanction in Fed.R.Civ.P. 37(c)(1)(C), which authorizes taking facts as established, or a default judgment, among other things. The risk is that Facebook will find out about it and move for a sanction to take Brownall's knowledge of insolvency as established. This would be very bad for our position on veil piercing. Rule 11 does not apply to discovery documents. See Fed.R.Civ.P. 11(d).

I would advise Brownall that we should disclose existence of the policy but withhold its terms, including the contents of the rider, either by amending our Rule 26(a)(1) disclosures, by raising it in a Rule 26(f) discovery conference (unless it has already occurred), or by filing a motion for a protective order. At the very least, we should take this position in the pre-motion conference with opposing counsel mandated by Rule 37.

C. The biggest problem that we face is that Brownall has waived, under Fed.R.Civ.P. 12(h), his defenses based on lack of personal jurisdiction and improper service of process, if his answer stands. Lack of subject matter jurisdiction, however, is never waived. So we should move to amend his answer to assert these defenses. If no more than 21 days have passed since he filed his answer, we can amend as a matter of right. If more than 21 days have passed we must seek leave of the court to amend, but it should be freely granted, since it is hard to see what prejudice to Facebook would result from a slightly delayed assertion of these defenses because of the pro-se initial answer.

   As to the merits of the defenses: the challenge to adequacy of service is strong. Fed.R.Civ.P. 4 does not authorize service by email, and, as far as I know, neither does California, under Fed.R.Civ.P. 4(e). The subject matter jurisdiction argument is strong. Diversity of citizenship is lacking, because Brownall and Facebook are citizens of California. There is no federal question. The license agreement is a contract, and this is a state common-law action for breach of

contract. The personal jurisdiction argument is frivolous. Both Brownall and Facebook are citizens of California and thus are subject to general jurisdiction in California—if they are served properly.

D. *Celotex* says that a party cannot resist summary judgment by relying on its pleadings. That is exactly what Facebook is trying to do. It has the burden to plead and produce persuasive evidence as to each element of breach of contract. Pre-occupied by challenging Brownall's impossibility defense, it has put nothing in the record to establish its prima facie case: nothing to establish offer, acceptance, consideration, contract terms, or failure to perform. This is a slam dunk for summary judgment in favor of Brownall.