CIVIL PROCEDURE

FINAL EXAMINATION
FALL 2010
PROFESSOR PERRITT

MODEL ANSWER

QUESTION I

A. There is no indication that Plan C has consented to jurisdiction, so the questions are whether the relevant sovereign has asserted jurisdiction over defendants like this one on these facts and whether that assertion is constitutional. Illinois is the relevant sovereign, because under Fed.R.Civ.P. 4(k) the federal court has only as much personal jurisdiction as a state court in the state in which it sits

Illinois asserts specific personal jurisdiction under 735 Ill.Cons.Stat. 5/2-209(a) over any person who transacts any business in Illinois, commits a tortious act in Illinois, or makes or performs a contract substantially connected with Illinois. Section 2-209(b) asserts general jurisdiction over a corporation doing business in Illinois. Section 2-209(c) also asserts jurisdiction on any basis permitted by the United States Constitution.

On the face of subsections (a) and (b), Illinois has asserted jurisdiction, assuming that Varnum is an agent of Plan C. It appears that he was acting as an agent because everything he did was for his principal, Plan C, and everything he did was within the scope of what Plan C directed him to do. If Plan C challenges his agency, I would have to do more research on agency within the context of personal jurisdiction. Assuming he was an agent, his conduct and his mental state are attributable to Plan C.

Plan C and Varnum transacted business in Illinois because they sold a skateboard to Chad. The statute says "*any* business," so one skateboard is enough. They also committed a tortious act in Illinois, on the allegations of the complaint, because Plan C negligently designed and manufactured and improperly labeled a skateboard which caused injury in Illinois. Under *Gray v. American Radiator*, which interpreted an earlier version of the same long arm statute, the tort of negligence is not complete until injury occurs and therefore the tort is committed in Illinois when injury occurs in Illinois. Finally, Plan C and Varnum made and performed a contract substantially connected with Illinois because their performance due to Chad was delivery of the skateboard to him in Illinois. If they had promised delivery somewhere else, the analysis would be different, but there is nothing in the facts that suggests delivery other than to Chad at his place of residence in Illinois.

Whether Plan C was "doing business" in Illinois under subsection (b) is a harder question. "Doing business" presumably means more than "any business," else there would be no reason for the phrase to appear in both the specific and general jurisdiction parts of the statute, with the adjective "any" only in the specific jurisdiction. There is nothing to suggest that Plan C ever sold more than one skateboard in Illinois, so Chad probably cannot establish coverage by subsection (b) absent discovery revealing a pattern of skateboard sales or other business activities by Plan C in Illinois.

Whether Illinois has asserted jurisdiction under subsection (c) depends on the constitutional analysis which follows next.

Assertion of personal jurisdiction under the Illinois statute is constitutional only if it qualifies for one of the traditional categories of in personem or in rem jurisdiction or if it satisfies the minimum-contacts and fair-play-and-substantial-justice requirements of *International Shoe*. Nothing in the facts suggests personal service on Plan C while it was present in Illinois, and this is not an in rem action, so that eliminates the traditional categories.

The starting point for minimum-contacts analysis is to inventory the contacts Plan C intentionally made, on its own, or through its agent Varnum with Illinois. Only intentional contacts targeting the forum state count, under *World Wide Volkswagen*. Plan C presumably shipped the skateboard to Chad in Illinois. It could not have done this unless it knew his address, so that contact was intentionally directed to Illinois. Plan C made a contract with Chad in Illinois, but whether that contact was intentionally directed at Illinois is questionable because paying through PayPal does not reveal the payer's address or credit card number. Still, it must have acquired his address when the contract was made. Otherwise it could not have delivered it. Third, Plan C caused an injury in Illinois by shipping its negligently designed and manufactured and mislabeled skateboard to someone who would skate on it in Illinois.

Then the question is: do these contacts qualify as "minimum?" They certainly do not qualify as systematic and continuous, so any assertion of general jurisdiction under subsection (b) or (c) would be unconstitutional.

But general jurisdiction is not necessary because the claim plainly arose from the contacts: Chad was injured because of the negligence and mislabeling combined with the sale, the contract, and the tort.

Chad's main problem in establishing the constitutionality of specific jurisdiction is that, except for the shipping and the acceptance of his offer, nothing else was explicitly directed at Illinois, as opposed to other Midwestern states. He could argue that Chicago's dominance of the Midwestern skateboard market for bands with items of clothing in their name means that targeting the Midwest is tantamount to targeting Chicago and Illinois. That depends on facts not yet in the record. So he would need to do discovery to flesh out this argument. Abundant

authority exists that one sale and one shipment into the forum state is not enough for specific-jurisdiction minimum contacts. Burger King itself says that one contract is ordinarily not enough. This case is unlike Burger King and International Insurance, where one contract involved continuing performance over a period of many years. Here one event on each side—one payment by Chad, and delivery of one skateboard by Plan C--constitutes complete performance.

Alternatively, he could argue that Plan C marketed the skateboard in a stream of commerce focused on Midwestern states, including Illinois. Stream of commerce has not been rejected as an intentional-contacts theory, but it is viable only if the stream is limited geographically under Asahi. The stream of commerce continued into Illinois until Plan C passed title to Chad, and that occurred in Illinois. So this is unlike World Wide Volkswagen, in which the stream of commerce ended before the chattel reached the forum state.

I think Chad has an uphill battle on minimum contacts because of the caselaw that says that one sale and one delivery into a state does not satisfy minimum contacts.

On the other hand, fair play and substantial justice is unlikely to present a constitutional impediment. Under factor #1, it's not particularly burdensome for Plan C to travel to Illinois to litigate or to hire a recent law graduate member of the Illinois bar to represent it. Under factor #2, Illinois certainly has an interest in compensating injury to Chad, its citizen. Under factor #3, if Chad gets a judgment in Illinois he certainly can enforce it against Plan C's asserts in California under the Full Faith and Credit Clause. Factor 4 might militate against personal jurisdiction in Illinois because any evidence of Plan C's negligence or labeling decisions likely is in California rather than in Illinois, but the evidence of Chad's injuries is in Illinois. Factor 5 is not in play because there is no reason to believe that the law that would be applied in Illinois is out of step with the law of other U. S. states generally.

Chad has some principled arguments in favor of personal jurisdiction but they are modest in their strength.

B. Chad must serve process on Plan C under Fed.R.Civ.P. 4. Rule 4 allows him to make service in any one of three ways: under Rule 4 itself, under Illinois state rules for service (state in which the district is located) of process, or under California state rules for service of process (where service is made). Fed.R.Civ.P. 4(e)(1).

He could do it directly under Rule 4 by having "any person who is at least 18 years old and not a party" serve the federal summons and complaint by delivering it to an officer or authorized agent of Plan C in California. We do not have the California rules for service, but they probably authorize service in a similar way, so we could get a California deputy sheriff or private citizen (depending on what the California rules require) deliver the federal summons and complaint to the corporate headquarters there. Even if CA authorizes unusual

methods of service, it is best to avoid them lest raise constitutional problems under *Mullane* and *Greene*. Hand-to-hand delivery of process is safe constitutionally.

We do have the Illinois rules, which authorize service in the same manner as the federal rule—by any person over 18 and not a party—by delivering it to an officer or authorized agent of Plan C.

Both Rule 4 and the Illinois rules require proof of service by filing an affidavit with the court. Fed.R.Civ.P. 4(l)(1); Ill. Cons. Stat. 735 5/2-208(b).

Chad could avoid all this by requesting, by mail, that Plan C waive service under Fed.R.Civ.P. 4(d), but he cannot count on Plan C waiving it.

C. The question does not ask *how* Patty could join the lawsuit, only whether the court would have subject matter jurisdiction over her claim. So I assume joinder either under Fed.R.Civ.P. 20, in which case Chad would have to be willing to file an amended complaint with Patty as a co-plaintiff, or under Rule 24, assuming she satisfies the requirements of that rule, on which I would have to do further research.

The only possible basis for subject matter jurisdiction is supplemental jurisdiction under 28 U.S.C. § 1367. Patty and Chad are not diverse in citizenship, so that rules out section 1332 as a basis. Her claim is for common law battery, so that rules out section 1331 as a basis.

Supplemental jurisdiction requires that she identify an "anchor claim," and show that her claim has a common nucleus of operative fact with the anchor claim. There are two potential anchor claims: Chad's negligent design and manufacture claim, which is supported by diversity jurisdiction since Chad is a citizen of Illinois and Plan C is a citizen of California; and Chad's mislabeling claim which he argues is supported by federal question jurisdiction. The mislabeling claim probably is not supported by federal question jurisdiction, however, because there is no labeling duty regarding skateboards under the federal statute quoted in the appendix. The state only authorizes a civil action for violation of a Commission rule, and there is no Commission rule pertaining to skateboards. Given that lack, it is hard to see how any issue of federal law figures in his mislabeling claim, even under an expansive reading of *Merrell Dow* and *Grable*.

In any event, there is no common nucleus of operative fact as between Patty's battery claim and the mislabeling claim. Establishing the mislabeling claims requires showing that Plan C knew of a risk—the risk that the front truck of the skateboard would detach from the skateboard—and failed to warn Chad of it. Patty's claim requires showing that Chad acted intentionally or with substantial certainty that an unconsented-to contact with her would result from his conduct *after* the skateboard broke. Even if she claims that he operated the skateboard *before* it broke with the intent to make contact with her, that has nothing to do with the elements of the claim against Plan C. There is no overlap.

That leaves only the possibility of supplemental jurisdiction based on Chad's diversity claim for negligent design and manufacture. There also, there is almost no overlap. The proof that Chad would have to offer of negligent design and manufacture and knowledge of the risk has nothing to do with his intentionality or substantial certainty, once he was in flight off of the broken skateboard.

Even if a common nucleus of operative fact existed between Patty's claim and the diversity anchor claim, § 1367(b) is a problem. That subsection negates supplemental jurisdiction over claims "by plaintiffs," which includes Patty, against persons "made parties under Rules . . . 20 or 24." If Patty intervenes under Rule 24, Chad definitely is within this subsection, and no supplemental jurisdiction exists. If Patty is allowed by Chad to be a co-plaintiff in an amended complaint, the question is whether Chad, the original plaintiff, can be said to have been "made a party" under Rule 20." That seems like a dubious interpretation textually, so I would have to do some research on how 1367(b) has been interpreted in this context.

I would not put too much effort into it, however, because a common nucleus of operative fact is so obviously lacking.

Patty is going to have to sue Chad in state court.

D. Chad either already has the information because Plan C disclosed it under Fed.R.Civ.P. 26(a)(1)(A)(ii), or he may get it by requesting it under Fed.R.Civ.P. 34. His request should read as follows:

"[caption]

"Request for Production

"Under the provisions of Fed.R.Civ.P. 34, Plaintiff requests that you produce the following at the offices of Plaintiff's lawyer, Neo Fite Kownsell, 565 West Adams Street, Chicago, IL 60661, by certified mail, return receipt requested, or as scanned .pdf files emailed to Plaintiff's lawyer, nkownsell@bmail.com, on or before 15 January 2010:

1. "Any and all engineering drawings of the "Economy Trick" skateboard and its wheeltrucks.
2. "Any and all test results for the "Economic Trick" skateboard and its wheeltrucks.

"[signed] Attorney at Law"

The information requested is well within the scope of discovery under Fed.R.Civ.P. 26(b)(1) because is relevant to Chad's claim of negligent design and manufacture and his mislabeling claim.

It is unlikely to be shielded by the work product doctrine under Fed.R.Civ.P. 26(b)(3) because it was prepared before the accident occurred.

If he does not receive it before the deadline, he may move for an order to compel a response under Fed.R.Civ.P. 37, violation of which would subject Plan C to sanctions under Rule 37.

E. There is no federal common law, under *Erie Railroad v. Tomkins*. The negligent design and manufacture claim is a diversity claim. So the court must apply either California or Illinois common law. Which state's law must be applied depends on the Illinois choice of law rules, which the federal court is obligated to apply under *Erie*. If Illinois uses the traditional rule for torts, lex locus delicti, it must apply the law of the place where the tort was committed—Illinois, since that's where injury, the last element of the tort of negligence, occurred. If it applies the more modern and flexible most-significant-contacts, or governmental-interests rules, there are some arguments that California law should apply because that's where the negligent design and manufacture occurred, but even those modern rules would permit Illinois law to be applied because of the contacts with Illinois and Illinois interests.

QUESTION II

A. The complaint provided in Appendix A is seriously deficient under Florida's fact pleading requirements. It is not organized into numbered paragraphs; it fails to identify the cause of action; it does not plead ultimate facts; it does not show that the plaintiff is entitled to relief.

I would redraft it and submit an amended complaint as follows. The quoted language from the Florida statute does not require that jurisdiction be pleaded, so I am omitting that.

[caption]

COUNT I – BREACH OF CONTACT

1. In a 1 October 2010 email, the Plaintiff offered to pay the Defendant $15 per hour if he agreed to do paralegal work as an independent contractor
2. On the same date, by email, the Defendant accepted the offer
3. On 2 October Plaintiff FDXed case files to Defendant and directed him to scan and analyze them
4. On 3 October Defendant sent a cellphone text message agreeing to do the work by 21 October, thereby agreeing that this work was the performance due under the contract
5. Defendant did not complete the work by 21 October, and has been unresponsive to repeated efforts to contact him since them, thereby breaching the contract and evidencing no intent to perform as he promised.
6. He has failed to return the files
7. Wherefore Plantiff has suffered damages from having to hire another person to perform the analysis and to accomplish the scanning

RELIEF DEMANDED FOR COUNT I

8. Plaintiff demands money damages in an amount sufficient to cover her costs of covering Defendant's breach, and
9. An injunction compelling him to return the file.

COUNT II – REPLEVIN

[I would have to do more research into the exact elements of a replevin action under Florida law]

10. Plaintiff owns the files she sent to Defendant on 3 October
11. Defendant, on information and belief, has the files in his possession or under his control

12. Plaintiff transferred the files to Defendant for a limited time and for a limited purpose, obligating him to return the files when he had completed the work assigned by Plaintiff
13. Defendant has failed and refused to return the files

RELIEF DEMANDED ON COUNT II

14. Wherefore Plaintiff demands and order of replevin compelling Defendant to return the files

COUNT III – CONVERSION

15. Plaintiff owns the files she sent to Defendant on 3 October
16. Defendant's continued possession of the files and his failure to return them deprives Plaintiff of her dominion and control over and use of the files
17. Defendant's intent to deprive Plaintiff can be inferred from his refusal to return the files

RELIEF DEMANDED ON COUNT III

18. Wherefore Plaintiff demands damages sufficient to enable her to reconstruct the files

COUNT IV – INJUNCTION

19. Plaintiff has been deprived of her legal rights as set forth in Counts I-III
20. Money damages and other legal remedies are insufficient to remedy the wrong to Plaintiff
21. Wherefore Plaintiff demands an injunction compelling Defendant to return the files.

B. The Florida venue statute does not cover nonresidents, so we must fall back on Florida common law, which says that venue is proper in any Florida circuit court over non-residents. Under this common law, venue is proper, assuming there is personal jurisdiction, which the question says I need not analyze.

Forum non Conveniens ("FNC") does not come into play unless venue exists, and the question only asks whether venue is good. Still, FNC is work considering as a peripheral matter. Chad might argue that the requested injunction cannot be enforced in CA, where he is, but an injunction from a CA court could be enforced. [I think that the Full Faith and Credit Clause does not require that injunctions from a court in one state be enforced by the courts of another state, but I would have to do more research on this.] In any event, FNC analysis gives great weight to the plaintiff's choice of forum, and if Susan wants an

unenforceable injunction, it should be up to her. All the other FNC factors either favor FL or are mixed between FL and CA.

C. Tyler is a party defendant, so he can be obligated to be deposed by a simple notice under Fed.R.Civ.P. 30, without the need for a subpoena. Rule 30 contains none of the geographic limitations that the Rule 45 subpoena rule does, so the deposition notice can obligate him to be deposed anywhere, in Orlando, or in California.

   The Rule 30 notice, however, must be consistent with the Discovery Plan developed under Fed.R.Civ.P. 26(f) and approved by the court under Fed.R.Civ.P. 16(b). If no such plan has been formulated, Susan must first complete that step, providing for a deposition of Tyler where she wants to take it. Then she would send the Rule 30 notice.

   She might anticipate a Rule 26(c) motion for a protective order on the grounds that it is burdensome for Tyler to come to Florida to be deposed. Her counsel and Tyler's counsel must confer before that motion is made. It is likely that such a conference could work out a location and a method, such as a remote deposition by telephone or Internet video.

   If no protective order issues and if Tyler persists in refusing to come to Orlando or any other place she specifies, she can move for an order to compel Tyler to attend his deposition under Fed.R.Civ.P. 37. Her counsel must confer with opposing counsel before such a motion is made. The motion can be made only in the United States District Court for the Middle District of Florida under Fed.R.Civ.P. 37(a)(2).

   In a separate motion, without waiting for an order to compel, she can then seek sanctions against Tyler for failing to attend his deposition under Rule 37(d)(1)(A)(i) and (iii).

   If an order to compel issues and he does not comply, she can seek sanctions under Rule 37(b)(2). In any event, the sanctions can range from paying Susan's expenses of the unsuccessful deposition and the motion to comply, to entry a default judgment against Tyler, in the discretion of the court.

D. Summary judgment against Susan must be granted, unless she files affidavits in her response to the motion. She has the burden of proof and may not rest on the allegations in her pleadings, under *Celotex*.

E. Denial of a motion for summary judgment is not a final order and thus is not within the subject matter jurisdiction of the United States Court of Appeals for the 11th Circuit, which is the venue for appeals from the United States District Court for the Middle District of Florida.

There is a remote chance that Tyler might be able to get a writ of mandamus from the 11th Circuit compelling the district judge to do his nondiscretionary duty to apply the proper Rule 56 standards. On the other hand, if the district judge exercises discretion available to him or her under Rule 56, e.g. to reopen discovery, mandamus would be unavailable.