

Civil Procedure I § 2  
Fall 1999  
Final Exam

University of Mississippi  
Law School  
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General instructions.

This is a closed book exam.

Do not remove the exam, blue books, or any exam materials from this room while you are taking the exam. When you have finished and turned in your answers, you may take these questions with you.

Do not speak with any person other than the faculty member who is administering this exam until you have turned in your exam answers.

This exam consists of two parts. You will have two and one-half hours to complete the exam. Answer all questions. Do not answer a question by referring to an answer to a different question.

Identify yourself on your blue books only by your exam number. By placing your exam number on your blue book and by submitting your blue book for credit, you are agreeing to the following pledge as required by law school policy:

"On my honor I have neither given nor received improper assistance. And I will report any improper assistance that I am made aware of."

I. SHORT ANSWERS (suggested time one and one-half hours total=ten minutes each)

Instructions. Answer each of the following questions in your blue book. Each question in this part can be answered adequately with a short well-written answer that is not longer than one paragraph.

1. Novelty Products is a business operated by Don Dobbs and Deb Debbs, citizens of New York and New Jersey respectively. They incorporated the business in Delaware and its offices are in New York. Dobbs and Debbs own all of the stock in the corporation and are its officers and directors.

Novelty Products sells thousands of theme-oriented products over the Internet. It targets college students and sports enthusiasts. Novelty Products maintains a web site that it operates by posting information from its New York office to a computer located in New Jersey.

Its web site includes an on-line catalog and provides information on how to order. Orders are placed by calling a toll-free telephone number. The on-line catalog is accessible from any terminal in the United States, and its contents are regularly inventoried and indexed by servers and browsers, including "Web Walker." The toll-free order number can be reached from any telephone in the United States.

In July 1999 Novelty Products added to its on-line catalog an illuminated "Colonel Reb" Christmas tree ornament. The ornament consists of a figure of Colonel Reb, the mascot of the University of Mississippi college athletic programs. Inside the ornament is an electrical mechanism that is activated by an internal timer. When connected to an electric wall outlet, every five minutes the ornament becomes active, waves a flag, moves its legs as if marching, and plays "Dixie."

In early December 1998, Bub Varner, a graduate of the University of Mississippi who lives in Chicago, Illinois, was searching the Internet on his home computer for gift ideas for his brother Phil, also a graduate of the University of Mississippi. Phil lives and works in Clarksdale, Mississippi. Using the search term "Colonel Reb" on Web Walker, Bub Varner was led to the Novelty Products catalog. Delighted by the catalog description, Bub called Novelty Products' toll-free number and ordered two ornaments.

The order was shipped to Bub Varner's address in Chicago. After receiving the ornaments, Bub Varner kept one and wrapped

the other and mailed it to his brother Phil in Clarksdale for a Christmas present.

On Christmas morning Phil opened the present and was very pleased to receive the Colonel Reb ornament. He immediately placed it on the tree and plugged it in. All morning Phil enjoyed watching the energetic marching motions of the diminutive Colonel and thrilled to the sound of "Dixie" echoing through the house.

After an ample lunch Phil and his wife went for a walk. When they returned they were horrified to find that their lovely Christmas tree has been destroyed. Many branches were broken, and most of the lights and ornaments were shattered, including some valuable heirlooms. The cause was plain to see: the Colonel Reb ornament had broken loose from the branch and had marched all over the tree smashing and breaking everything in its path. It dangled from the tangled ruins of a tree, menacingly moving its legs and playing "Dixie" cheerfully.

When Phil called Novelty Products to explain the problem, Don Dobbs answered the phone. Dobbs refused to allow Phil to return the product and refused to refund the purchase price or pay any damages. Instead Dobbs laughed and called Phil offensive names.

Phil has learned that Novelty sold a total of ten Colonel Reb ornaments, none directly to purchasers in Mississippi. Nor has it sold any other merchandise to customers placing orders from Mississippi. But Phil has learned that Novelty Products regularly purchases all its boxes and shipping materials from Tupelo Box Co. in Mississippi. It pays over \$50,000 per year to the Mississippi business, and in connection with those purchases, Dobbs and Debbs periodically visit Tupelo, Mississippi.

Phil has come to you for advice. He wants \$5000.00 damages and he specifically wants to know whether he can sue Novelty Products in Mississippi. May a Mississippi state court exercise specific jurisdiction in personam over the corporation in this case? Why or why not?

2. Same facts. Assume that Tupelo Box owes Novelty Products \$10,000.00. May Phil establish jurisdiction quasi in rem over part of this debt in an action arising from his dispute by garnishing \$5000 of Tupelo Box's obligation to Novelty Products in a Mississippi Court on the theory that the "debt" owed to Novelty Products is located "in" Mississippi? Why or why not?

3. Same facts. May a Mississippi state court exercise general jurisdiction in personam over Novelty Products? Why or why not?

4. Alison and Brett met at a bar in Oxford, Mississippi on April 1, 1997. They immediately fell madly in love and got married one month later on May 1, 1997 at the home of Alison's parents in Jackson, Mississippi. At the time they met, Alison and Brett were full-time college students over age twenty-one. Alison had grown up and lived with her parents in Jackson before going to live at a college dorm in Oxford. Brett had grown up and lived with his parents in Lamar, Mississippi, before going to live at a dorm in Oxford.

Soon after the wedding, Brett told Alison, "I'll love you forever, and what's mine is yours." Alison hugged him and said, "The same goes for me."

After they got married, Alison and Brett lived together for several months in an apartment they rented in Oxford. On September 1, 1997 Brett enrolled in Business School at the University of Memphis. Alison was finishing her class requirements in Oxford. At first Brett tried commuting to class, but on October 1, 1997 Brett rented an apartment in Memphis near his classes. On December 1, 1997, Brett met Lulu at a Business School party. He immediately fell madly in love. Two weeks later Lulu moved into Brett's Memphis apartment. On the same day, Brett called Alison to tell her he wanted a divorce.

On December 25, 1997, Alison's rich uncle gave her \$1,000,000. On January 1, 1998 Alison gave birth to a healthy daughter and named her Fortune.

On February 1, 1998, Brett accepted a full-time job offer from a Memphis business. Later that month he bought a house in Memphis, registered to vote there, and got a fishing license and library cards as a Tennessee resident.

On March 1, 1998, Brett commenced a civil action in federal court for the Western District of Tennessee seeking an order: 1) dissolving his marriage to Alison; 2) decreeing that he is entitled to payment of \$500,000, half of the gift to Alison; and 3) determining that he owes no child support for Fortune, whom he claims is not his daughter.

Brett served process on Alison by certified mail addressed to her Oxford apartment. Alison has never been in Tennessee before. She has read up on the law and has filed pro se a timely motion under Federal Rule of Civil Procedure 12 to dismiss Brett's complaint for 1) lack of personal jurisdiction and 2) lack of venue.

You are clerking for the federal judge who asks you what to do. Please advise.

5. Same facts. Meanwhile, Alison decides she wants to sue for divorce, child custody, and child support in Mississippi state court. Which state courts have subject matter jurisdiction in Mississippi?

6. Sam Sharpy is a state senator in Mississippi. Outraged by the number of lawsuits filed in state and federal courts, he wants to propose an amendment to the Mississippi Constitution that will significantly increase the financial burdens of litigation. Specifically, he proposes increasing the filing fee for all actions in Circuit and Chancery court to \$2500.00.

His proposed amendment contains a procedure for collecting the costs. It would require a plaintiff to deposit \$2500.00 at the time the complaint is filed as a condition of filing the complaint. Similarly, it would require a defendant to deposit \$2500.00 as a condition for filing its first pleading or motion in the case.

The proposed amendment provides that all the funds so deposited be paid to the winning party.

The senator argues that this cost will deter plaintiffs from bringing unmeritorious cases, on the one hand, and will induce defendants to settle meritorious claims before cases are filed, on the other.

The proposed amendment has been referred to committee. Committee member Ben Bristle is concerned that raising the costs of litigating in state court may simply encourage plaintiffs to litigate cases in federal court when there is concurrent jurisdiction. He cites 28 U.S.C.A. § 1914 (1999 Supp.), which provides:

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in any court, whether by original process, removal of otherwise, to pay a filing fee of \$150, except than on application for a writ of habeas corpus the filing fee shall be \$5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial conference of the United States.

You are an aid to Senator Sharpy. Senator Sharpy is aware that federal courts often must apply state law, and he asks whether the proposed state constitutional amendment would apply in cases arising under Mississippi state law that are brought in or

removed to federal court. Please advise.

7. Same facts. Senator Sharpy also asks whether there is any reason, if the proposed amendment were adopted, why it might not apply in Mississippi state courts. Please advise.

8. On June 1, 1998 Mac Avran, citizen of Ohio, sued Big Bank Corp. in Chancery Court in Mississippi. Big Bank Corp. is a business incorporated in Delaware with its principal place of business in California. Big Bank Corp. engages in residential real estate lending in Mississippi.

Avran owns real estate in Mississippi and borrowed money from Big Bank. He later learned that the Bank collected more interest than permitted by law.

In his complaint Avran asked for an injunction ordering Big Bank Corp. not to charge more than the legal rate of interest on his residential mortgage loan. Avran also demanded damages in the amount of \$1,000 for interest that had been charged and collected that had exceeded the legal maximum.

After completing discovery, Avran became convinced that Big Bank had deliberately overcharged him in violation of state criminal conspiracy laws. Accordingly, on July 5, 1999, Avran amended his complaint to add several additional claims for fraud and conspiracy. He also amended his prayer for relief to demand \$75,000 compensatory damages and \$1 million punitive damages.

You are representing Big Bank Corp. Its in house counsel asks you whether you can remove. Please explain.

9. Widgecorp is a Mississippi corporation with its principal place of business in Mississippi. Widgecorp. manufactures high quality widgets for an international market. In 1997 Widgecorp entered into a contract with Bama Industries to ship two thousand widgets to Bama Industries' manufacturing facility in Saudi Arabia. Bama Industries is an Alabama corporation with its principal place of business in Alabama.

Under the terms of the contract, Bama Industries paid a large deposit, and Widgecorp guaranteed that the widgets would arrive at the Saudi Arabia facility in good condition. The contract also contained a forum-selection clause providing that any dispute arising out of the contract could be brought only in a court located in Saudi Arabia.

When the widgets arrived in Saudi Arabia, Bama Industries claimed they had become demagnetized during shipping. But Widgecorp claimed that the demagnetization was caused by Bama Industries' misuse of the widgets after they had been received. Widgecorp refused either to refund Bama Industries' funds or to send new widgets, and Bama Industries commenced a civil action against Widgecorp in Alabama state court. Widgecorp promptly removed the case to the appropriate federal district court.

Subsequently, Widgecorp moved to dismiss the complaint arguing that the court should enforce the forum-selection clause. Bama Industries has countered that the clause is void and unenforceable as a matter of Alabama contract law because Alabama courts have ruled that such clauses are contrary to public policy. Rule on the motion and explain.

## II. Long Answer (suggested time one hour)

Instructions. Consider the following problem carefully and write a coherent, literate essay in your blue book that responds to it.

### The Case of the Tagged Trucker

Eastern Trucking Corp. ("Eastern") is a trucking company incorporated in Delaware with its principal place of business in Memphis, Tennessee. Eastern engages in extensive interstate transportation in all states east of the Mississippi River. It maintains two large warehouses in New York and Memphis, and about one-third of its trucking consists of shipments between the two warehouses.

Eastern employs over 400 truck drivers. One of them is Daniel Gomez, a citizen of Mexico who has been admitted to the United States for permanent residence. Gomez lives with his wife and two children in DeSota County, Mississippi and commutes to work in Memphis.

On June 10, 1998, Gomez was making a delivery of lamp shades from the Memphis warehouse to another location in Memphis. At an intersection his truck collided with a car driven by Pat Patterson. At the time of the collision, Patterson worked for the city of Southaven, Mississippi and lived in the city. As a result of the collision, Patterson was injured, and Patterson's car was destroyed.

Patterson claimed that Gomez ran a red light. Gomez claimed that Patterson ran a red light.

At the end of 1998 Patterson moved to New Jersey to look for a new permanent job and he moved temporarily into his brother's home in Teaneck, New Jersey.

In February 1999, Gomez drove a truck for Eastern from its Memphis, Tennessee warehouse to its New York warehouse. This was the first and only time that Gomez drove the route. On the way Gomez stopped at a Truck Stop gas station off the interstate highway in New Jersey. This was the only time Gomez was ever in New Jersey.

While Gomez was sitting at the counter drinking a cup of coffee, a pretty woman approached and handed him a copy of the Sports Illustrated swimsuit edition. She winked at Gomez and said "Take a look inside, Honey."

When Gomez opened the magazine he discovered two sets of complaints and summonses naming both him and Eastern Trucking Corp. defendants in a civil action that had been commenced by

Patterson in federal district court in New Jersey seeking \$100,000 damages for the June 10 collision in Memphis.

Please consider 1) whether the service is effective against Gomez and against Eastern Trucking Corp.; 2) whether the federal court has personal jurisdiction over each defendant; 3) whether venue is proper against both defendants in the district; and 4) whether the federal courts have subject matter jurisdiction. Finally, consider 5) whether there is any way to transfer the action to another court.

Short answers

1. A Mississippi court probably cannot exercise valid specific in personam jurisdiction even if the state-long arm is construed to apply on the theory that defendant committed a tort in the state. The only contact by the defendant relating to the tort is the presence of the defective product in the state, but this would not satisfy the necessary minimum contacts requirement when the defendant did not cause it or any other merchandise to enter the state. Unilateral acts by third persons are not enough. World Wide Volkswagen v. Woodson.

2. The court may not exercise quasi in rem jurisdiction over the debt in this case. Absent minimum contacts, the exercise of quasi in rem jurisdiction violates due process. Shaffer v. Heitner.

3. The court probably cannot exercise general jurisdiction. The regular purchases and related trips are not enough to establish the necessary continuous and systematic contacts. Helicopteros Nacionales de Colombia v. Hall.

4. The federal court must dismiss for lack of subject matter jurisdiction. First, federal courts lack subject matter jurisdiction over domestic relations matters. Second, the lack of subject matter jurisdiction has not been waived and may be raised at any time by the court.

5. Chancery court has exclusive jurisdiction over divorce and alimony.

6. The federal statute clearly covers the issue and governs under the supremacy clause. Therefore, the proposed state constitutional amendment would not control federal courts and might encourage forum shopping.

7. Requiring the defendant to pay \$2500 before answering (or risk a default judgment) violates due process. Even though defendant recovers the cost (doubled) if defendant prevails, the procedure would temporarily deprive the defendant of property merely as a result of plaintiff filing a complaint. A loss of temporary use of property is a taking, and the lack of any opportunity for a hearing and other safeguards and the complete lack of any strong need for such a taking before a hearing would seem to violate the requirements of Mitchell v. WT Grant and Connecticut v. Doehr.

8. The case cannot be removed because a case cannot be

removed more than 1 year after commencement of the action.

9. Motion to dismiss denied [or granted]. First, I rule that the federal preference for enforcing forum selection clauses when reasonable in admiralty cases like The Bremen and Carnival Cruise Lines and in interpreting the "interests of justice" in granting transfers under § 1404(a) in Stewart Organization v. Ricoh expresses [does not express] a strong judge-made federal procedural rule to apply in diversity cases. Second, I rule that the state policy extinguishes substantive rights that may not be given further effect in federal courts. York. Or, alternatively, I rule that the state rules are remedial but should nevertheless be followed by federal courts as a result of an unguided Erie analysis because failure to do so would significantly affect the outcome of litigation and encourage forum shopping, contrary to Erie policies. [Alternatively, having found a strong federal procedural rule favoring forum-selection clauses, one might argue that the federal policy should outweigh the Erie policy of adherence to state law].

[The main thing, for full credit, was 1) to recognize that the question of the application of Carnival Cruise authority in a diversity case, and 2) to recognize that the problem then required an "unguided" Erie analysis. Half credit was awarded for a reasonable effort to distinguish the facts from those in Carnival Cruise in order to show that this clause was "unreasonable."]

#### Long answers

##### The Case of the Tagged Trucker

Service. Service was sufficient against Gomez because personal delivery of service is authorized upon adult individual defendants in any federal district by Federal Rule 4(e)(2).

Service is not sufficient against Eastern Trucking Corp. by personal delivery on its truck driver employee because he is not an officer, managing or general agent, or an agent authorized by appointment or by law to receive service. Fed. R. Civ. P. 4(h). Nor were there any circumstances making it fair to imply his authority nor was he so well-integrated that he would know what to do with the process. Insurance Co. of N. America v. S/S Hellenic Challenger.

Personal jurisdiction. There is personal jurisdiction over Gomez because he was served in hand in the state. This method may automatically satisfy due process because it is traditional. Burnham v. Superior Court (Scalia, J.), or it may satisfy due process because presence, tradition, and other factors establish contacts that make the exercise of general personal jurisdiction fair under these circumstances.

Personal jurisdiction over the defendant corporation has not been established unless there has been proper service of process. But when process is properly served, the federal court in New Jersey may have valid personal jurisdiction (either under an applicable long-arm or nonresident corporation statute) provided that the corporation engages in such extensive transportation business in New Jersey that it constitutes systematic and continuous business activity. If its contacts are not so extensive, then personal jurisdiction will not be valid because the underlying cause of action has nothing to do with the defendant's contacts in New Jersey.

Venue. Venue is proper against Gomez. An alien may be sued in any district. § 1391(d).

Venue might be proper against the corporation if it were the only defendant. Venue is proper where any defendant resides if all reside in the same state. § 1391(a)(1). A corporation is deemed to reside in a district where it is subject to personal jurisdiction at the time the action was commenced, and the Eastern might have been subject to personal jurisdiction in New Jersey.

Even if venue were proper in separate actions against both defendants, however, venue would not appear to be proper in a single action against both Gomez and the corporation. Even if Eastern is a "resident" of New Jersey, Gomez is not (though venue is proper against him on another basis), so venue over both defendants is not proper.

Venue is clearly not available on the fall back provision, § 1391(a)(3), because there is a district in which the action may otherwise be brought--viz. the district where the accident happened.

Subject matter jurisdiction. At the time of the cause of action there was no federal diversity jurisdiction. Plaintiff was a citizen of Mississippi and Gomez was also a citizen of Mississippi as an alien admitted to permanent residency who was domiciled in that state. This would prevent complete diversity.

Citizenship, however, is determined at the time the action is commenced, and there will then have been complete diversity provided that plaintiff then had the necessary intent to make New Jersey his home.

Transfer. If the federal court system has subject matter jurisdiction, transfer to another district is possible under § 1404(a) (provided venue was laid properly in New Jersey) if the trial judge in his or her discretion concludes that litigation in the district encompassing Memphis would promote the convenience of parties and witnesses and serve the interests of justice.

If venue is improper in New Jersey a transfer to a proper district, such as the one encompassing Memphis, may be accomplished under § 1406(a).