

# Civil Procedure: Midterm Exam Explanations

## Question 1: Personal Jurisdiction

The main issue I expected you to address was whether the court would have specific jurisdiction over the defendants based on their contacts with the forum state.

**Rule:** State and explain the two-part approach under *International Shoe* & subsequent cases

1. Does the defendant have contacts with the forum state?
  - Contacts are based on defendant's acts in or intentionally aimed at the forum state
    - The relevant acts are those "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denkla*
    - Independent/unilateral acts of the plaintiff or third parties don't count.
      - Example: Independent distributor, without direction, control, or input by defendant manufacturer, sells machine to forum state, where plaintiff was injured. *McIntyre*
      - Example: Manufacturer of finished goods, without direction, control, or input by defendant manufacturer of component parts, sells finished goods to forum state, where plaintiff was injured. *Asahi* (O'Connor opinion)
    - But acts by intermediaries under the defendant's control or direction may establish contacts by the defendant.
      - Example: Defendant hires sales employees to generate orders through in-person solicitations in forum state. *Int'l Shoe*
      - Example: Manufacturer contracts with independent distributor, and contract specifically provides that distributor will market and sell manufacturer's products in forum state.
    - Each defendant's contacts must be assessed individually, based on their own activity. See below for analysis of the three defendants in this problem.
  - The claim(s) must arise out of defendant's forum contacts.
    - That's not in serious dispute here. The claim arises out of the airing of the program in NC.
      - The fact that the program was also aired elsewhere doesn't matter. That's more an issue of substantive defamation law, under which a plaintiff may bring a single suit in one jurisdiction to recover for all harm resulting from the publication wherever it was published.

- One point for noting that the party asserting jurisdiction (the plaintiff here) has the burden on this prong.
- 2. If defendant has minimum contacts, is the exercise of jurisdiction otherwise unreasonable?
- Identify and explain the 5 factors
  - Analysis in this case is relatively simple. There's nothing in the facts to indicate any undue burden on any of the defendants (the mere expense or inconvenience of travel isn't enough), the plaintiff has an interest in obtaining relief in a state where it was injured, the forum state has an interest in providing a forum for persons injured there, and there's nothing pertinent to the final two factors.
- One point for noting that the party objecting to jurisdiction (i.e. the defendant) has the burden on this prong.

### Contacts Analysis

#### 1. UBC

- Minimum contacts are satisfied based on UBC's arrangements with the affiliate station(s) in NC.
  - It doesn't matter that the local affiliates are independent. They're not unilaterally deciding whether and where to air UBC programs. This is simply the way UBC has organized its operation to get its programs on the air in NC (and elsewhere), and UBC receives benefits (revenue) as a result.
    - This arrangement is analogous to *Int'l Shoe* (where the defendant decided where it wanted to distribute its goods and set up a system to accomplish that purpose) and distinguishable from *Asahi* or *McIntyre* (where the defendant manufacturer had no input or control over where the intermediary/distributor actually distributed defendant's goods).
  - It also doesn't matter that UBC airs its programs nationally through this affiliate network. The specific arrangements with the NC affiliates are what count here.
    - This is similar to *Calder and Keeton*, where the publishers distributed their publications (whether directly or through independent distributors) nationally, including the forum states.
    - It's different from a website that is indiscriminately accessible anywhere (*New Haven Advocate*) and not specifically targeted at the forum state.
  - The "effects test" (*Calder*) isn't really necessary to establish jurisdiction over UBC, because contacts are established more directly through the affiliate arrangement.

#### 2. Kaplan & Lewis

- Jurisdiction over Kaplan and Lewis must be based on their own contacts with the forum state. The mere fact that their employer has contacts with the state is not enough. *See Calder*, 465 US at 791 (individual employee defendants' "contacts with [forum state] are not to be judged according to their employer's activity there. ... Each defendant's contacts with the forum State must be assessed individually.")

- So the court would not have jurisdiction over Kaplan or Lewis merely based on UBC's airing its program through the NC affiliate stations (assuming Kaplan and Lewis have no role in the relationship between UBC and the affiliate stations).
- There's nothing in the facts to suggest that Kaplan or Lewis ever went to NC or reached-out to/communicated with anyone there in connection with the program. Rather, their activity appears to have taken place in SC and California.
- The best argument for jurisdiction over Kaplan and Lewis would be under the "effects test".
  - In Calder, the editor had contacts with California based on his role in overseeing, editing, and approving an article that was "expressly aimed at California" where the plaintiff lived and worked. It didn't matter that the editor himself never went to California, communicated with anyone there, nor had any other contact with the state in connection with the story.
  - Also in Calder, the reporter had contacts with California based on his activity in preparing the story, which included contacting the plaintiff's husband and other sources in California.
  - The analogy to Calder is somewhat unclear in this case.
    - Kaplan and Lewis might be able to argue that their activity was expressly aimed at SC, not NC.
    - Additional facts – e.g. does Tiger Foods have its business headquarters in NC, does NC account for the largest share of the company's stores/sales/revenue, etc., do the NC stations represent an especially significant share of UBC's audience – might strengthen the argument that Kaplan and Lewis should have anticipated being sued in NC. But the decision in Calder suggests that mere knowledge of these facts on the part of Kaplan and Lewis wouldn't be enough, without some act on their part specifically aimed at NC.

## Other Issues

- Some credit for addressing these additional issues:
  - traditional bases of jurisdiction over non-residents (presence, consent)
  - general jurisdiction over resident individuals, and over non-domestic corporations under the "virtually at home" standard
- No credit for discussing these issues (because they're not raised by the problem and are too peripheral):
  - Application of long-arm statutes
  - Removal and remand
  - In rem/quasi in rem jurisdiction

## Problems & Pointers

- The most common problems were cursory or incomplete rule statements or analyses.
  - It's not enough just to state the basic rule. You need to explain what the operative

- terms mean and how the rule works. You should use prior cases as illustration, being sure to explain which facts mattered and why.
- Similarly, it's not enough to say that the defendant's activity established contacts. You need to explain why, with specific reference to the facts and analogy/distinction to other cases.
  - Another common problem was assuming that court would have jurisdiction over the two individual defendants (Kaplan and Lewis) based on UBC's activity.
    - As noted above, jurisdiction over each defendant must be based on their own activity, not activity by others over which they had no control or involvement.

## Question 2: Subject Matter Jurisdiction

Your answer should address the standard for subject matter jurisdiction over (1) cases between citizens of different states and (2) cases arising under federal law, including the *Grable* standard for state-law claims with an essential federal element.

### Diversity Jurisdiction

Rule: State and explain the requirements for jurisdiction under 28 USC § 1332

1. Suit between citizens of different states
  - Determining citizenship
    - Individual: State of domicile=residency with intent to return/remain indefinitely
      - No single fact is decisive. Court looks at totality of circumstances to determine party's intent
      - "indefinitely" doesn't mean "forever", just that the party has no present intention of moving anywhere else
      - Until party establishes residency with intent to remain in a new state, they retain their last established domicile, even if they are currently transient and don't actually intend to return to their last domicile.
    - Corporation; State of incorporation **and** state where company has principal place of business
      - "Nerve center" test for principal place of business
    - Unincorporated association: Domicile of each member
  - Complete diversity requirement
    - No common citizenship between any plaintiff and any defendant
    - Citizenship determined at time suit is filed and subsequent changes don't matter
2. Amount in controversy
  - Must exceed \$75,000 (excluding interest and costs)
    - May include any amounts legally recoverable (e.g. compensatory damages, punitive damages, statutory damages, attorney fees, etc.)

- “Legal certainty” standard: Party objecting to jurisdiction on grounds that amount in controversy requirement is not satisfied must show that, as a matter of law, plaintiff may not recover more than \$75,000
- Aggregation
  - Single plaintiff v. single defendant: may aggregate all claims to satisfy amount
  - Single plaintiff v. multiple defendants: plaintiff may not aggregate separate amounts sought against multiple defendants
    - Where plaintiff sues multiple defendants in the alternative or jointly and severally, the requirement is satisfied as long as each defendant’s potential liability exceeds \$75,000
  - Multiple plaintiffs v. single defendant: at least one plaintiff must individually satisfy amount; court may then have supplemental jurisdiction over related claims by other plaintiffs without regard to the amount (subject to restrictions under 28 USC § 1367(b) which we’ve not covered yet)

### Analysis

1. Determining Citizenship
  - Determining Citizenship
    - Tiger Foods is a business partnership (unincorporated), so it is a citizen of every state where the partners (members) are domiciled. The problem says this is NC and SC.
      - It’s irrelevant that Tiger Foods is organized under NC law and has stores in other states. These facts were included as distractors.
    - UBC is a corporation, so it is a citizen of Delaware (state of incorporation) and NY (principal place of business)
      - Both states count for purposes of diversity jurisdiction.
    - Kaplan and Lewis are individuals, so their citizenship is based on domicile.
      - The problem says Kaplan resides in California and Lewis resides in SC. There aren’t any facts relevant to their intent to remain there (or return elsewhere). It was sufficient to assume that they each intend to remain in their current state of residence.
  - Complete diversity
    - Tiger Foods and Lewis are both citizens of SC, which destroys diversity
      - The lack of diversity between Tiger Foods & Lewis means there is no diversity jurisdiction over any of the claims against any of the defendants.
      - The court may not simply dismiss the claim against Lewis and then take diversity jurisdiction over the claims against UBC and Kaplan.
2. Amount in Controversy
  - The problem says that Tiger Foods is seeking \$1 million in damages against all three defendants jointly and severally
    - \$1 million is obviously more than \$75,000.
    - Since Tiger seeks that amount against the defendants jointly and severally, the requirement is satisfied as to each defendant.

- In a case of alternate or joint & several liability, you don't divide the total amount by the number of defendants. The point is that each of them is potentially liable for the whole amount.
- Assuming the applicable law would allow Tiger Foods to recover more than \$75,000 (even if not \$1 million), the requirement will be satisfied.
  - The court wouldn't inquire into the likelihood that Tiger Foods really lost \$1 million in revenue. The only question would be, assuming they did, would the law allow recovery of that amount?

Since there is not complete diversity, there is no diversity jurisdiction, even though the amount in controversy requirement is satisfied.

## Federal Question Jurisdiction

Rule: State and explain the requirements for jurisdiction under 28 USC § 1331

- The plaintiff's claim must arise under federal law
  - Federal question must appear on the face of the plaintiff's well-pleaded complaint.
    - No federal question jurisdiction based on a federal defense or counterclaim.
- The "creation" test resolves most cases
  - Where federal law creates the cause of action (i.e. directly gives plaintiff the right to sue), there is federal question jurisdiction.
    - There are a few special exceptions that you don't need to know for this course (and I doubt they'd ever be tested on the bar exam).
  - Where state law creates the cause of action, there is normally no federal question jurisdiction
- The "essential federal element" standard applies where a federal issue is raised as part of a state law claim.
  - Requirements
    - The federal issue is an "essential" or "necessary" part of the plaintiff's claim
      - i.e. the plaintiff's ultimate entitlement to relief will depend on the interpretation of some issue of federal law in this case.
        - In Grable, to decide the quiet title claim, the court would have to decide whether Grable received proper notice of the tax sale as required under federal law.
        - In Gunn, to decide the attorney malpractice claim, the would have to decide whether an "experimental use" argument (which the attorney failed to raise in the underlying patent infringement suit) would have been successful under federal patent law.
        - In Merrell Dow, to decide the product liability claim, the court would have to decide whether federal law required a warning about potential birth defects (making the failure to warn negligence per se).
      - Still has to be part of plaintiff's claim, not a defense.
    - The federal issue must be "actually disputed" in the case.

- For example, in *Merrell Dow*, if the defendant conceded that their label did not comply with federal regulations, but argued that this didn't amount to negligence (either per se or otherwise) under state law, there would be no actual dispute over federal law in the case.
- The federal issue must be "substantial" in relation to federal interests.
  - It doesn't matter that the federal issue is central to the plaintiff's theory of recovery under state law. The question is whether the interpretation of federal law in this case will impact federal interests more generally.
  - The federal issue will typically be regarded as substantial where the plaintiff is using a state law cause of action to vindicate a right that the plaintiff has under federal law.
    - In *Grable*, federal law gave *Grable* the right to notice before a tax sale, but provided no direct remedy for an alleged breach. So *Grable* merely used a state quiet title claim as a way to enforce its federal right.
  - But the federal issue will typically not be regarded as substantial where the plaintiff is merely relying on some federal legal standard to establish a breach of the defendant's duty under state law.
    - In *Merrell Dow*, the real issue was whether the defendant's failure to warn was negligent. That's a duty imposed by state law. Federal law was relevant merely as evidence of what warnings a reasonably prudent manufacturer would give.
      - The relevant federal law didn't give the plaintiff any individual rights at all.
      - The outcome of the tort suit would not directly determine the defendant's potential liability under the federal law.
  - In *Gunn*, the real issue was whether the attorney's handling of the underlying patent suit breached the attorney's duty of care toward his client under state law. Federal patent law was relevant merely as evidence of what arguments a reasonably prudent attorney would have raised and whether they would have been successful.
    - The outcome of the malpractice case wouldn't alter the underlying patent rights.

### Analysis

- In this case, the plaintiff asserts claims for defamation, which is a cause of action created by state law.
  - Even if the defendants had some defense based on federal law (e.g. the 1st Amendment or FCC law) that would not confer federal question jurisdiction.
- The requirements for federal question jurisdiction under *Grable* are not satisfied here.
  - The federal issue here concerns the allegedly defamatory statement that "Tiger Foods repackaged and relabeled spoiled and past-date foods in violation of state and federal law."

- As the plaintiff, Tiger Foods must prove that statement was false.
- To decide whether the statement was false, the court may have to interpret federal law (to decide whether it really prohibits repackaging/relabeling of spoiled or past-date foods)
  - On the other hand, Tiger Foods might prove the statement false by proving they never repackaged/relabelled any spoiled or past-date foods, in which case, it wouldn't really matter whether doing so violates federal law.
- But even assuming the federal issue is “necessary” or “essential” and is actually disputed, it is not “substantial” within the meaning of Grable.
  - Tiger Foods is not suing to enforce any right it has under federal law, nor to hold the defendants liable for breach of any duty they have under federal law.
    - Like in Merrell Dow and Gunn, the federal issue arises here only indirectly and hypothetically, to decide whether the allegedly defamatory statement was false.
    - Even if the court found that the statement was true, that would not directly subject Tiger Foods to liability under federal food safety laws, nor would this case be binding in any action against Tiger Foods under those laws.
  - The fact that UBC is federally regulated is irrelevant and was included here as a distractor.
    - Some students raised the possibility that Tiger Foods might be alleging that UBC violated some FCC regulations in airing the defamatory broadcast. Analysis of that possibility under Grable (which would be essentially the same) received credit.

## Problems & Pointers

- One problem that a few students had was conflating the requirements of diversity and federal question jurisdiction.
  - These are two separate and independent bases for subject matter jurisdiction. As long as a claim satisfies one, it doesn't have to satisfy the other.
  - Federal question jurisdiction does not depend on the citizenship of the parties, and has no amount in controversy requirement
- Many students either overlooked the Grable analysis altogether, or did not adequately explain how it applied to the problem.
  - In particular, many did not explain what “substantial” means in the Grable context, or why the federal issue here is not substantial in that sense.
- Several students missed points in addressing diversity jurisdiction because they didn't state the rules for determining citizenship of the various parties.
  - This was most common in regard to the individual defendants, where many students (correctly) said that Kaplan is a citizen of California and Lewis of SC, but neglected to state that an individual's citizenship is based on domicile, or neglected to explain that domicile = residency + intent to return/remain.



- More generally, be sure you state and explain the rules, before giving your analysis & conclusion under the facts of the problem. The most important thing on a law school exam is not giving the correct answer. It's showing that you know why that answer is correct. You need to state the rule so that it's clear why (and that you understand why) the conclusion is correct.