MONTEREY COLLEGE OF LAW

Civil Procedure

Midterm Examination

Fall 2017

Prof. B. Cooper

Instructions:

There are three (3) questions in this examination. You will be given three (3) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Civil Procedure
Fall 2017 Exam
Prof. B. Cooper

QUESTION #1

Radder, a citizen of New York, was employed by a Brooklyn, NY, company engaged in the business of manufacturing and selling electric skateboards to businesses in Florida and South Carolina, only. Radder took a business trip to South Carolina during which he went to a boat trade show and saw a custom carbon-fiber canoe made by Todd, a South Carolina citizen. Todd sold his canoes by traveling to various boat trade shows up and down the eastern seaboard.

While at the boat show, and after discussing Radder's custom specifications for the canoe, Radder and Todd entered into a written contract with Radder agreeing to pay Todd $8,000 cash upon pick up of the completed custom canoe. Radder agreed to pick up the canoe at Todd's South Carolina workshop, in part because Radder was fond of the area, having attended college nearby. Over the past 18 years, Radder has returned to South Carolina approximately 12 times to attend alumni and fraternity functions.

Approximately a month after his return to Brooklyn, Radder sustained serious personal injuries due to a bicycle accident. His doctors informed him we would be unable to paddle a canoe for at least a year, perhaps longer, and that he would require extensive, and costly, physical therapy for the next 6 months. In turn, Radder called Todd and canceled the contract. However, the day prior to Radder's call, Todd completed the canoe.

Todd sued Radder in South Carolina state court for $8,000 under a breach of contract theory. Radder was personally served with a summons and complaint in Brooklyn under South Carolina's long arm statute which authorized personal jurisdiction subject to only Constitutional limitations (i.e., a "max" long-arm statute).

Provide a thorough analysis as to whether South Carolina has in personam jurisdiction over Radder with respect to Todd's breach of contract action.

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QUESTION #2

Otter, a citizen of California, was employed by Big Thyme, Inc. ["BTI"], a Delaware corporation engaged in the business of manufacturing organic gourmet marinades and seasonings. As a senior sales officer, Otter traveled frequently throughout California and Nevada (primarily, Las Vegas) which, incidentally, are the only two states in which BTI does business. BTI has two warehouses; one in California (where the test lab and executive offices are located) and one in Nevada (where manufactured goods are stored).

In late June, having completed all of his sales meetings in the first 4 days of a planned 5 day sales trip, Otter decided to purchase a custom motorcycle to impress fellow members of his motorcycle club, "Weekend Warriors". He visited Las Vegas Highland Cycles "[LVHC"] and, after having his measurements taken, ordered a high-end custom motorcycle which was expected to be completed in seven months. He signed and returned the sales contract, which was mailed to his residential address, and paid a $10,0000.00 deposit. The contract called for Otter to personally return to LVHC to pick up the motorcycle at which time the saddle and handlebars would be modified for a custom fit - all of which is included in the sales price of $82,000.00.

Six months later, Otter's wife filed for divorce. This capped off a bad week for Otter, who was terminated from his employment with BTI a few days prior. As a result of these unfortunate events, Otter sent an e-mail to LVCH unilaterally cancelling the sales contract. That same day, and without yet having read Otter's e-mail, the owner of LVHC proudly e-mailed Otter to inform him that the motorcycle had been completed a month ahead of schedule. Otter responded to this e-mail by typing "Please see my correspondence to you of earlier today".

Question 2 continued....

Three months later, LVHC filed suit in Federal District Court (Nevada) against Otter and BTI for Breach of Contract, seeking either specific performance or monetary relief in the equivalent to the amount they would receive via specific performance. The Complaint does not allege BTI was a party to the subject contract. After refusing to sign and return a proper waiver of service of summons and process sent by LVHC's counsel, Otter was served a copy of the summons and complaint when his soon-to-be-estranged wife was handed a copy of the papers at the front door of the residence they continued to share out of economic necessity. BTI was served when the papers were: 1) delivered, first class mail and return receipt requested, to the Nevada warehouse; and 2) delivered personally to the actor that plays "Chef Cheffy" in BTI's targeted Facebook video advertisements.

1. Otter filed a Motion to Dismiss predicated on Federal Rule of Civil Procedure 12(b)(1) and 12(b)(5). Provide a thorough explanation, with citation to the appropriate Federal rule and/or statute(s), as to how the District Court should rule on Otter's motion.

2. BTI filed a Motion to Dismiss predicated on Federal Rule of Civil Procedure 12(b)(5). Provide a thorough explanation, with citation to the appropriate Federal rule and/or statute(s), as to how the District Court should rule on BTI's motion.

3. Two days after filing BTI's Motion to Dismiss, BTI's counsel wakes up in the middle of the night in a panic, realizing he failed to include two additional grounds, pursuant to Federal Rule of Procedure 12, upon which the Court may dismiss the pending Complaint against BTI. What are those two "additional grounds", and why was BTI's counsel in a panic over failing to include the same?

4. Provide a short paragraph, with citation to the appropriate Federal rule and/or statute(s), regarding the pros and cons to all parties due to Otter's failure to execute and return the service waiver issued by BTI's counsel.

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QUESTION #3

For the past 10 years, Barbara made holiday brownies which she gave away as gifts to her friends, neighbors and the local senior citizens' center in Fairville, Idaho. She bought all necessary ingredients at her local supermarket, baked the brownies in her home kitchen, and spent countless hours decorating the brownies using the skills she obtained from art classes at the local community college. She was told numerous times by those fortunate enough to be gifted a batch of her brownies that she should consider starting her own home business by setting up a website where customers could custom order brownies for birthdays, weddings and other special events. After much consideration, and given her limited social security income, Barbara did exactly that. Barbara has no plans to leave Fairville, where she grew up, continues to reside and remains actively involved in the community.

To her surprise, Barbara's custom brownie business became a rapid success. She quickly realized that her old, small oven which she had used to make brownies for the past 20 years was not big enough to make enough brownies per day to keep up with the custom orders. Accordingly, Barbara went to Oven Company, also located in Fairville, to purchase a new, larger oven for her home kitchen. The oven cost $1,500.00, including taxes. Barbara made a $500 down payment and agreed, by way of an interest free installment contract with Oven Company, to make monthly payments in the amount of $100 per month for the next 10 months.

Question 3 continued....

Unfortunately, Barbara's talent for running a small business did not match her excellent baking and artistry skills, and she immediately fell two months behind in her payments to Oven Company. Oven Company commenced writ of attachment proceedings under Idaho statute Section 2487. The statute authorized the pre-judgment seizure of goods by a credit seller Plaintiff upon the filing of a sworn affadavit to the Fairville County Court generally alleging that the Defendant buyer was in default of the installment contract. Under the statute, the credit-seller Plaintiff was also required to attach a copy of the installment contract at issue. Upon such showing, the Court Clerk was authorized to issue a writ of attachment authorizing the Sheriff to seize the goods without requiring the Plaintiff to post a bond and without advance notice of any kind to the Defendant. The statute did provide for a post-seizure hearing within 5 court days of the seizure at the request of the Defendant, otherwise the seizure would be deemed final. However, the statute also stated that the Court Clerk was not required to schedule such a hearing until a bond in the total amount remaining under the installment contract was posted with the Court by the Defendant.

Oven Company secured a writ of attachment of the oven under Statute 2487 and the Sheriff seized the oven. The following day, Barbara consults you, a local attorney, for advice. Thankfully, her friends lent her the money to post the necessary bond to secure a hearing.

Thoroughly analyze the Constitutionality of Statute 2487, bearing in mind Due Process concerns.

CIVIL PROCEDURE
FALL 2017 EXAM

QUESTION #1

Radder, a citizen of New York, was employed by a Brooklyn, NY, company engaged in the business of manufacturing selling electric skateboards to businesses in Florida and South Carolina, only. Radder took a business trip to South Carolina during which he went to a boat trade show and saw a custom carbon-fiber canoe made by Todd, a South Carolina citizen. Todd sold his canoes by traveling to various boat trade shows up and down the eastern seaboard.

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Approximately a month after his return to Brooklyn, Radder sustained serious personal injuries due to a bicycle accident. His doctors informed him we would be unable to paddle a canoe for at least a year, perhaps longer, and that he would require extensive, and costly, physical therapy for the next 6 months. In turn, Radder called Todd and canceled the contract. However, the day prior to Radder's call, Todd completed building the canoe.

Todd sued Radder in South Carolina state court for $8,000 under a breach of contract theory. Radder was personally served with a summons and complaint in Brooklyn under South Carolina's long arm statute which authorized personal jurisdiction subject to only Constitutional limitations (i.e., a "max" long-arm statute).

Provide a thorough analysis as to whether South Carolina has in personam jurisdiction over Radder with respect to Todd's breach of contract action.

ANSWER:

The goal of this exam question is to cause the students to engage in a personal jurisdiction analysis, commencing with the traditional basis of IPJ [Pennoyer], while recognizing the statutory limitations of such analysis [long arm] and overarching Constitutional limitations [due process].

I. In Personam Jurisdiction

A. Long Arm Statute

1. Max statute, meaning anything permitted under the US Constitution

B. Traditional Basis of IPJ [Pennoyer]

1. Consent [not present]

2. Domicile [not present, Radder NY resident]

3. Physical presence when served [not present, Radder served in NY]

C. Minimum Contacts Analysis [Shoe]

Examine the: 1) the level of contacts with the forum state, 2) the relatedness of those contacts to the cause of action, and 3) whether the exercise of jurisdiction would be fair, taking into account private and public considerations.

1. Level of Contacts

Did Radder purposefully avail himself to the privileges and benefits of South Carolina such that it was foreseeable that he would be haled into court there, meaning are Radder's contacts with SC sufficient to warrant him amendable to suit in SC? If so, under general or specific jurisdiction?

Attended college at least 18 years ago and returned for 12 alumni and fraternity functions over past 18 years. He was on a business trip in South Carolina but made a "frolic of his own" while there to attend a boat show which has no logical connection to the business of making and selling electric skateboards. Argue these facts taken alone, and in the absence of a traditional basis of jurisdiction (see above), are not sufficient to render him amendable to suit in SC. This in turn suggests there can be no general jurisdiction over Radder in SC.

However, Radder did agree enter into a contract in SC with the performance of both Radder [pick up and payment] and Todd [building of the canoe, receipt of payment of the canoe] to be performed in SC which makes him amenable to specific jurisdiction in SC arising out of disputes over the contract which is precisely what is at issue in Todd's complaint.

In contract case, court may look to:

1. Prior negotiations;
2. Contemplated future consequences;
3. Terms of the contract;
4. Parties actual course of dealing;
5. Cause of action arising from contract or attenuated?

2. Relatedness of Contacts [General v. specific jurisdiction]

See above.

3. Fairness Factors

1. Forum state interest in adjudicating dispute/providing relief to citizens;
2. Plaintiff's interest in obtaining convenient & effective relief;
3. Interstate judicial system's interest in obtaining most efficient resolution of controversies;
4. Shared interest of the several states in furthering fundamental substantive social policies;
5. Inconvenience to Defendant.

In addition to the above performance analysis, SC has a valid interest in providing redress to its citizen, Todd. The completed canoe, and any witnesses who can attest to the completion of the custom order prior to the cancellation by Radder, are located in SC. On the other hand, evidence of Radder's anticipated and likely unsuccessful defense of excused performance rests in NY. Yes, it is inconvenient to Radder to defend suit in SC, particularly given his injuries and presumed travel-related difficulties, however there are insufficient facts to suggest such inconvenience outweighs [i.e., offends traditional notions of fair play and substantial justice] the otherwise sound SC specific jurisdiction.

CIVIL PROCEDURE
FALL 2017 EXAM

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   ANSWER: 12(b)(1) [Lack of SMJ], diversity, state law claim, 1332, not Fed Q 1331 [must mention], requires DOC & AIC, DOC ok, AIC lacking, $72K in

controversy whether spec. performance or equivalent. Grant this part.

12(b)(5) [Insuff Service of Process]: FRCP 4(e)(B): Leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there. She still resides there, service likely upheld absent allegation of "she never gave it to me" which is always a possibility and perhaps more so during dissolution proceedings. Deny this part.

Net result: Granted and denied in part.

2. BTI filed a Motion to Dismiss predicated on Federal Rule of Civil Procedure 12(b)(5). Provide a thorough explanation, with citation to the appropriate Federal rule and/or statute(s), as to how the District Court should rule on BTI's motion.

ANSWER: 12(b)(5), FRCP 4(h)(B), by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant.

Lots of fodder here, looking for discussion of technical versus material default, knowledge of the suit, prejudice, etc... I would argue that there is not technical compliance with the law, and we are not clear if the receipt was ever returned. Additionally, the SAC was sent to the non-PPB warehouse which I would argue tips the scales in favor of granting the motion. CC clearly not a managing agent.

Net result: Good argument either way, technically not good service but modern trend is to overlook technical issues where the practical notice is not challenged by D.

3. Two days after filing BTI's Motion to Dismiss, BTI's counsel wakes up in the middle of the night in a panic, realizing he failed to include two additional grounds, pursuant to Federal Rule of Procedure 12, upon which the Court may dismiss the pending Complaint against BTI. What are those two "additional grounds", and why was BTI's counsel in a panic over failing to include the same?

ANSWER: 12(b)(6) given lack of prima facie allegation against BTI which will almost certainly be given time to amend; 12(e) re: same, possibly with leave to amend. Both are waived if not asserted in initial responsive pleading, hence the panic.

Opportunity for superior students to be creative here.

4. Provide a short paragraph, with citation to the appropriate Federal rule and/or statute(s), regarding the pros and cons to all parties due to Otter's failure to execute and return the

service waiver issued by BTI's counsel.

ANSWER: 4(d), waiver, service fees. (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses. No effect re: BTI (absent respondeat superior considerations which are not in play under these facts; Otter loses additional time to respond and exposes himself to service fees and attorney fees associated with collecting those service fees.

CIVIL PROCEDURE
FALL 2017 EXAM

QUESTION #3

For the past 10 years, Barbara made holiday brownies which she gave away as gifts to her friends, neighbors and the local senior citizens' center in Fairville, Idaho. She bought all necessary ingredients at her local supermarket, baked the brownies in her home kitchen, and spent countless hours decorating the brownies using the skills she obtained from art classes at the local community college. She was told numerous times by those fortunate enough to be gifted a batch of her brownies that she should consider starting her own home business by setting up a website where customers could custom order brownies for birthdays, weddings and other special events. After much consideration, and given her limited social security income, Barbara did exactly that. Barbara has no plans to leave Fairville, where she grew up, continues to reside and remains actively involved in the community.

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Unfortunately, Barbara's talent for running a small business did not match her excellent baking and artistry skills; and she immediately fell two months behind in her payments to Oven Company. Oven Company commenced writ of attachment proceedings under Idaho statute Section 2487. The statute authorized the pre-judgment seizure of goods by a credit seller Plaintiff upon the filing of a sworn affadavit to the Fairville County Court generally alleging that the Defendant buyer was in default of the installment contract. Under the statute, the credit seller Plaintiff was also required to attach a copy of the installment contract at issue. Upon such showing, the Court Clerk was authorized to issue a writ of attachment authorizing the Sheriff to seize the goods without requiring the Plaintiff to post a bond and without advance notice of any kind to the Defendant. The statute did provide for a post-seizure hearing within 5 court days of the seizure at the request of the Defendant, otherwise the seizure would be deemed final. However, the statute also stated that the Court Clerk was not required to schedule such a hearing until a bond in the total amount remaining under the installment contract was posted with the Court by the Defendant.

Oven Company secured a writ of attachment of the oven under Statute 2487 and the Sheriff seized the oven. The following day, Barbara consults you, a local attorney, for advice. Thankfully, her friends lent her the money to post the necessary bond to secure a hearing.

Thoroughly analyze the Constitutionality of Statute 2487, bearing in mind Due Process concerns.

ANSWER:

Goal: Test command of applied Due Process.

This "Notice & Opportunity to be Heard" exam question is designed to test command of the Constitutional (i.e., Due Process) analysis mandated by the Supreme Court with respect to depriving a person of life, liberty or property - in this case, property.

Here, the student should start with identifying that this is a "Notice & Opportunity to be Heard" question commencing with Mullane v. Central Hanover Bank & Trust Co. (1950), the Due Process clause requires notice and opportunity to be heard prior to deprivation of life, liberty or property. The notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections in front of a neutral magistrate. The notice must be of such nature as to reasonably convey the required information and it must afford a reasonable time for those interested to make their appearance.

The memo should then identify "factor test" arising under Sniadach and its progeny with respect to pre-judgment seizures. In Sniadach (1969), the United States and California Supreme Courts held the traditional prejudgment seizure remedies are unconstitutional except in special situations. The Sniadach line of cases requires analysis of the following factors:

1. Who is the decision maker;
2. Whether party seeking writ has a pre-existing interest in the property;
3. Whether seizure is pre or post hearing, and availability of immediate post seizure hearing;
4. Whether applicant must show probable cause/factual allegations under sworn testimony, or file a bond, and whether controversy can be resolved via documents;
5. Whether seizure is for security purposes and if so, whether exceptional circumstances such as destruction of an asset are present.

In proceeding through the above analysis, exceptional students will compare and contrast the below cases.

Fuentes v. Shevin (1972), which held invalid the Florida and Pennsylvania replevin statutes which permitted a secured installment seller to reposses the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the clerk of the court at the behest of the seller. There, that the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. 'The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and

without opportunity for a hearing or other safeguard against mistaken repossession they were held to be in violation of the Fourteenth Amendment.

Mitchell v. W.T. Grant Co. (1974), where the Court upheld a Louisiana sequestration statute which permitted the creditor to obtain a writ on an ex parte application without giving the debtor either notice or a prior opportunity to be heard. There, the issue was overdue balance on installment contract for personal property. Risk of wrongful taking minimized by: 1) Vendor's interest in not wasting the property; 2) Judicial authorization of the writ (as opposed to clerk, above); and 3) Immediate availability of post seizure hearing.

North Georgia Finishing v. Di-Chem (1975) attempts to explain the distinction between statutes invalid under Fuentes and Mitchell. Georgia statutes permitting a writ of garnishment to be issued by an officer authorized to issue an attachment or a court clerk in pending suits on an affidavit of the plaintiff or his attorney containing only conclusory allegations, prescribing filing of a bond as the only method of dissolving the garnishment, which deprives the defendant of the use of the property in the garnishee's hands pending the litigation and making no provision for an early hearing, violated the Due Process Clause of the Fourteenth Amendment. Di-Chem did not establish inflexible requirements for summary creditors' remedies but instead held that resolution of these issues requires analysis of the governmental and private interests affected (i.e., going through the Sniadach factors, above).

PROPOSED MODEL ANALYSIS:

1. Who is the decision maker;

The Smithville County Court Judge, this factor trends towards constitutionality.

2. Whether party seeking writ has a pre-existing interest in the property;

Yes as to Oven Company, they have an economic ownership interest in the oven until it is paid off in full. This factor trends towards constitutionality.

3. Whether seizure is pre or post hearing, and availability of immediate post seizure hearing;

This is a pre-hearing seizure, however the buyer is required to post a bond whereas the seller is not. More importantly, no hearing may be had without the posting of such bond by Jane. Since Jane could not remit her first two $100 monthly payments, she is extremely unlikely to be able to post a bond in a higher amount to secure such a hearing which may well result in a de facto denial of her Due Process rights. The inequity of this statutory provision, coupled with the fact that the Clerk was not required to set a hearing until a bond was posted by Jane meant a probable denial of any hearing at all for Jane, trends against constitutionality. In addition, the 5 day time frame leaves little time to secure counsel and must a defense. Lastly, it appears the statute vests the clerk of court with discretion to set a hearing absent posting a bind which also trends against constitutionality.

4. Whether applicant must show probable cause/factual allegations under sworn testimony, or file a bond, and whether controversy can be resolved via documents;

The statute requires only that the sworn affadavit "generally alleging" that Jane was in default. While the statute does require that the purchase contract be attached, a student should argue that without specific supporting allegations as to the alleged default, the attachment of the purchase contract does little more than establish that a purchase contract exists, or existed. On the other hand, the alleged default should lends towards resolution via documents, namely, the existence of the contract and lack of evidence of payments made by Jane under the contract. However, because Jane is unlikely to be able to secure a hearing during which she can present evidence of payment under the terms of the contract, and because the statute is silent with respect to Jane's ability to submit a post-seizure affadavit setting forth such information should any such evidence exists, this factor should trend against constitutionality.

5. Whether seizure is for security purposes and if so, whether exceptional circumstances such as destruction of an asset are present.

Students should point out that in Jane's case, she is a long-time Smithville citizen with deep community ties. She is unlikely to "flee" with a large oven, and that unlike sensitive electronics (camera, laptop), the oven is both difficult to move and unlikely to be significantly damaged pending a pre-seizure hearing. In addition, she put a 1/3 down payment on the oven meaning she has a vested financial interest and incentive not to damage the oven. On balance, this factor should trend against Constitutionality.

1)

Q1 Outline

Personal JD

I. 3 Types:

A. IPJ - ROG calls for IPJ analysis

B. In Rem

C. QIR

II. Traditional Analysis (Pennoyer v. Neff)

A. Citizenship (individual, business)

B. Domicile

individual

Business

III. Statutory Limitations

A. Long Arm Statutes

1. Limited

2. Max - allows PJ so long as it does not violate notions of fair play and substantial justice

Specific JD - CoA arises from the contacts with forum state

General JD - CoA in forum but injury did not arise from contacts with forum state - central nuclei of operative fact

IV. Constitutional Limitations - cannot violate due process

III. Modern Analysis (International Shoe) = Minimum Contacts + Notice

A. Min contacts

1. Purposeful Availment

- K in SC, availed himself to SC K law

2. Foreseeable

- bought canoe in SC
- Todd is SC resident, PPB in SC

3. Fairness Factors
4. Other factors
   i. Contract - Burger King

K factors re: rel address to contracts.

IV. Notice

A. Summons
   1. Individual
   2. Business

B. Complaint
   Rule 4 and 8

QUESTION 1

In the case at hand, South Carolina would be able to successfully assert in personam jurisduction (IPJ) over Radder for breach of contract with Todd.
In order to have jurisdiction, a court must have jurisdiction over the Defendant in the case (personal jurisdiction); the court must also hold jurisdiction over the subject matter at issue (subject matter jurisdiction), and the case must be brought in the proper venue.

PERSONAL JURISDICTION

For a court assert control over a case at hand, a court must have jurisdiction over the defendant (D), which is known as personal jurisdiction. There are three types of personal jurisdiction: (1) in personam jurisdiction (IPJ); (2) in rem, and (3) quasi in rem (QIR). IPJ exists when there is a state statute ("long-arm statute") that grants the court authority to assert jurisdiction over an individual in another forum, as long as the assertion would not

violate notions of fair play and substantial justice. In rem jurisdiction is when a court cannot assert PJ over an individual under a state statute, but uses the party's interest in property they own that forum state to establish the individual's contacts with the forum. Finally, QIR can be asserted by showing an individual's interest in in property or another item that they may or may now own to establish an individual's interest in the forum state.

In Personam Jurisdiction

Statutory Limitations - In order for a court to assert IPJ over a defendant, there must be a state statute granting the court authority to reach out beyond the borders of the forum state, known as a long arm statute. There are two types of long -arm statutes: limited, or maximum. Limited long arm statutes are statutes that states adopt that allow assertion of IPJ over out-of-state defendants, but with some limitations applied. Maximum long arm statutes have no such limitations except the limitations of the constitution; the only limitation on a max long arm statute is that it must not violate due process. The South Caroline statute used to assert IPJ on Radder is a max long arm statute, because it was "subject only to Constitutional limitations."

served w/process?

Constitutional Limitations - There are two ways to determine of IPJ can be asserted over a D. The traditional method, outlined in *Pennoyer*, looks at traditional means of determining the proper court for a D to be personally brought to suit in: the citizenship of the person or business, where the person or business is domiciled, and where the person or business is given notice. The modern method, as set forth in the case of *International Shoe*, requires that a D have had minimum contacts with the forum state, and assertion of JD in that state must not offend traditional notions of fairplay and substantial justice.

consent & waiver of app?

Traditional Method - Citizenship and Domicile *(Pennoyer)*

(1) Citizenship for an individual is based on where they are domiciled. For individual citizens, the domicile is where they currently reside, with the intent to continue residing there in the future.
(2) The citizenship of an incorporated business is both where the company is incorporated, and where their primary place of business (PPB) is located.

As an individual, Radder is a citizen of New York. His skateboard business is not explicitly stated to be incorporated, but we can infer that it is incorporated in New York, and has its PPB in New York, as that is where Radder, the owner/operator, lives and runs the business from. South Caroline or Florida, where Radder sells his skateboards, would not be the location of the PPB, because they are merely the states targeted by Radder's business. Radder is a citizen of NY, and his company is operated out of NY, so under the traditional method, the appropriate forum to assert IPJ over Radder would be New York, not South Carolina. Therefore the traditional method could not be applied here to allow SC to assert IPJ over Radder or his business.

Modern Approach *(International Shoe)*
In the case of *International Shoe,* the court set forth a new method of determining whether IPJ is proper, as the traditional method of analysis was becoming less applicable in the modern era of international commerce and expanding technology. Under *Shoe*, in order to be subject to IPJ, the D must have had substantial contacts with the forum state, and the D must receive proper notice.

Minimum Contacts - When analyzing whether a defendant has had sufficient minimum contacts with the forum state, we must determine if the contacts were such that the D (1) *purposefully availed* themselves to the benefits and protections of the forum state, and (2) was it *foreseeable* that the D would be called to court in the forum state as a result of his minimum contacts. In this case, there are ample facts pointing to the conclusion

that Radder had sufficient min contacts with the forum of South Carolina, both as an individual, and in his capacity as a business owner selling his product, thus showing that he purposefully availed himself to the benefits and rules of SC.

In his business capacity, SC was one of only two states that Radder's products were sold to. The skateboards were sold wholesale to other retailers in SC, showing that Radder and his company availed themselves to the rights and privileges of the state by putting a product into the stream of commerce with the intent of directly targeting residents of SC *(Asahi).* We also know that Radder took business trips to SC, as it was on one of these trips that he purchased the canoe from Todd, a resident of SC.

However, even though Radder was on a business trip when he entered the contract with Todd for the purchase of the canoe, Radder was acting in his capacity as an individual when he did so. He was in the business of selling skateboards, which are completely unrelated to boats; therefore Radder's contacts with SC in his individual capacity are more important and indicative to examine to see if minimum contacts were met. Again, there are ample facts to indicate Radder had sufficient contacts with SC, both in quantity and level of import. Radder had contacts with SC for many years, as he attended college there, and returned a dozen additional times to maintain his contact with SC by attending alumni and fraternity gatherings.

Foreseeability (Contracts) - Additionally, and more significantly, SC is where Radder entered into a binding written contract with Todd, the owner of a SC-based business. Contracts, and subsequent breach of contract suits, are typically governed by state law, so by entering into a k with Todd in SC, Radder undoubtedly met the minimum contacts threshold. When Radder canceled the k after Todd had substantially performed his duties under the contract, and thus causing Todd to likely experience detrimental reliance, Radder was also meeting the *purposeful availment* standard, because when one purposefully avails themselves to the benefits derived from a forum state, they are also availing themselves to the responsibilities and consequences of the forum state. So by

entering into a contract in SC, it is highly *foreseeable* that any resulting legal claim arising from that contract would be heard in SC. When Radder subsequently allegedly breached that contract, it would be *foreseeable*, especially to businessmen like Radder and Todd, that SC would be the most appropriate place for Radder to be brought to court to answer Todd's breach of contract claim.

General v. Specific Jurisdiction - The act or occurance that leads to the cause of action will make the assertion of IPJ be either specific jurisdiction, or general jurisdiction. *General jurisdiction* is formed when the CoA did not arise from D's activities in the forum state. Because there is more attenuation between the causing factor and the reason the parties are called to court, there are stricter due process requirements that must be met to ensure fairness and justice are maintained. *Specific Jurisdiction,* on the other hand, is created when the CoA is a direct result of D's actions in the forum state.

While at first glance it seems the triggering incident in this case is Radder's bicycle accident, it is actually Radder's act of cancelling the contract that gave rise to the current breach of contract claim. Because the contract was formed in SC, and was a direct result of Radder's visit to the forum of SC, this would be a *specific jurisdiction* case.

Fairness Factors - In addition to meeting the minimum contacts standard, another element for asserting IPJ that came out of *Shoe* was the idea that not only does a defendant need to have minimum contacts with the forum state, but it also must be examined whether asserting IPJ over a defendant would conform with the ideas of fair play and substantial justice - in other words, would asserting IPJ in the forum state promote fairness and equity for the involved parties? To address that question, there are five "fairness factors" that should be examined. Meeting or not meeting one or more of these factors is never a determinative element, as there can be no IPJ asserted if minimum

contacts have not been met. The fairness factors are simply additional tools to use to analyze personal jurisdiction. These factors are:

(1) Interests of the parties
(2) interests of the states
(3)
(4)
(5)

Notice

In addition to minimum contacts, the requirements for providing notice and opportunity to be heard must also be met, as outlined in FRCP rule 4 and 8, as well as the Supreme Court holding from *Mullane*, There are components of the Notice requirement: the summons, and the complaint.

Summons - Rule 4 outlines the what must be contained in the summons paperwork, and rule 4(e) lays out the rules for serving an individual. (Because the claim arose from Radder's actions in SC in his capacity as an individual, not a company owner, the rules for serving an individual would govern). Radder was personally served the summons and complaint in Brooklyn, NY, which we know is where his employer is located. As an individual, if served by direct service, should be served at his domicile. We are not given any indication of where his domicile actually is within the state of NY, so there could potentially be an issue with the method of service, if Brooklyn is not where he is domiciled.

CONCLUSION:

Based on the information presented, SC would likely be able to assert IPJ on Radder. However, the method of service of summons is a potential issue. ✓

overall, excellent.

2)

Question 2:

1. Otter filed Motion to dismiss 12b1 (lack of SMJ) and 12b5 (improper service of process). How should District Court Rule?
The District Court should grant Otters 12b1 motion to dismiss for lack of SMJ and deny his 12b5 motion to dismiss for improper service.

12b1 Lack of SMJ.
Does the District Court of Nevada have SMJ over this Breach of Contract action?
Federal District Court may obtain Subject Matter Jurisdiction in one of 2 ways: Diversity J or Federal Question J.

Federal Q (28 USC 1331):
Claim must arise under federal law - Claim must enforce a federal right. In this case, the action is for breach of contract. This is not enforcing a federal right. Breach of contract is an issue of NV state law.
LVCH may try to claim that it has some defense based on a federal right, but it is the Cause of Action / Claim that must arise under federal law, not any defense.
Well-pleaded complaint rule: for federal Question J, complaint must arise under federal law.
Conclusion: NV Fed District Court does not have Federal Q J over this claim.

So what about...
Diversity (1332):
There must be Complete Diversity of parties (Strawbridge v Curtis)

Defendant Otter is a citizen of CA. Defendant BTI is a citizen of Deleware (its state of incorporation) and CA (its PPB - based on presence of executive offices - nerve center). BTI is possibly a citizen also of NV but probably not since its nerve center is in CA. A corporation can have citizenship in one PPB and in every state where incorporated.

Plaintiff LVHC is a citizen of NV.

Since no D is a citizen of the same state and any P, there is complete diversity in this case. That leaves the Amount in Question...

Amount in Question must be over 75k:

In this case, LVHC is seeking specific performance of the contract or the monetary equivalent of the performance, which would be...72K (82k minus the 10k Otter already paid as deposit).

72k is less than 75k, so it seems the NV DISTRICT COURT DOES NOT HAVE SMJ OVER THIS CLAIM because the amount in question does not exceed 75k. good.

Therefore the District Court should grant Otters 12b1 motion to dismiss for lack of SMJ.

Supplemental J based on Diversity (1367)

ok if COMMON NUCLEUS OF OPERATIVE FACTS / SAME TRANSACTION OR OCCURENCE (Gibbs), but aggregation isnt even an issue here.

So what about...

Otter's motion to dismiss based on 12b5 (improper service of process)

Well, LVHC first attempted to serve Otter improperly by mailing the papers along with a waiver request (FRCP4D3). Otter was within his rights to refuse to accept improper service, and LVHC would then be required to serve Otter properly (although Otter would

be responsible for the costs). Subsequently, LVHC did serve Otter properly by way of "Substituted Service," when his wife was handed the papers (presumably the summons and complaint). All good according to FRCP4.

Otter may argue that this doesn't count because his wife was soon to be estranged and only living with him out of economic necessity, but Rule 4 only requires that Sub Serve be accomplished by serving the papers to an individual, over 18, of suitable age and discretion, whose residence is at the abode. She lived at the house, is presumably over 18, and so this sub-service was good. I suppose we could make an argument about here "discretion" if we had more time, but it wouldnt be a strong one anyway.

Conclusion:
Otter was properly served and so the Court should deny his 12b5 motion to dismiss for lack of proper service.

2. How should the court rule on BTI's 12b5 motion to dismiss for improper service of process? The court should grant the motion.

First of all, BTI was served in two ways, both improper.

1) Papers delivered first class mail and return receipt requested to BTI's Nevada warehouse. Ok.
A corporation can be served by serving one of its Officers, Managers, even someone who has the duty of accepting service and delivering it to the Officers/Managers. Many businesses have a specific office / agent for receiving service of process. All we know about BTI's nevada warehouse is that manufactured goods are stored there. We have no reason to believe that any Officer, Manager, office or agent for receiving service of

process is located at the NV warehouse. And neither does LVHC. If we consider the standard set by Mullane, that Notice must be reasonably calculated, under the circumstances, to apprise all interested parties of the pending action, allowing them to present objections, it would seem that LVHC did not even reasonably calculate this notice / service of process to reach BTI.

This was improper service and the court should grant BTI's 12b5 motion to dismiss for improper service of process.

2) BTI was also served by delivering papers personally to the actor that play Chef Cheffy in BTI's facebook video advertisements. We have no indication that Chef Cheffy is an Officer, Manager, agent for service of process, or that he has any duty whatso ever to deliver these papers to the Officers / Management of BTI.

Both of these were improper service and the court should grant BTI's 12b5 motion to dismiss for improper service of process.

3. BTI's counsel was panicked because he forgot to include two 12b motions to dismiss in his initial rule 12 response.

He would only be panicking if he forgot to include 12b2-5, since these are the motions that must be included in the initial rule 12 response, or else they are WAIVED.

He would not be panicked about 12b1, motion to dismiss for lack of SMJ, because this IS NEVER WAIVED. This can even be brought up for the first time on APPEAL.

12b6 and 7 (motions to dismiss for failure to state a claim of which relief can be granted and failure to properly join party under rule 19) do not have to be included in the first rule 12 response, but they cannot be used on appeal.

12b6 ↑ RE b/c no allegation BTI party to K, variable dots, now must proceed to MSJ = $

So it must be 12b2-5 that has counsel all in a panic. We know that BTI has already used 12b5 (improper service), so that leaves 12b2 LACK OF PJ, 12b3 IMPROPER VENUE, 12b4 Insufficient PROCESS. But this question says he only panicked over 2 of these...

Well he might have panicked over 12b6 or7 because the complaint didn't even allege BTI was a party to the contract. In that case he would just be panicking because he could have gotten this thing dismissed more quickly, not because he had waived a defense.

yes.

he goofed, resulting in $ to client.

But more likely he panicked over 12b2 LACK OF PJ because BTI has no contact with NV related to this claim. Otter did not enter the subject contract in any way related to his employment with BTI. We could say he was on a "frolic" from his job as well. BTI would have wanted to make this motion first thing so as not to waive it.

Counsel may also panic over failing to include 12b3 IMPROPER VENUE because venue is only proper where all D's have RESIDENCE (Otter is resident of CA, not NV), or where substantial part of claim occurred (ok then NV qualifies), or where the court has PJ of the D (but here the court wouldnt have PJ over BTI (no service in forum, no contact related to claim).

More likely though, in addition to 12b2 LACK OF PJ, counsel was panicked over failing to include 12b4, INSUFFICIENT PROCESS because, the complaint having not even alleged BTI was a party to the contract, **the complaint document itself was insufficient to apprise BTI of any action against BTI**.

Parties may always ask the court for permission to amend pleadings, even after their 21 days, etc, so maybe BTI's counsel can just ask the court pretty please to amend the 12b motions to include 12b2 and 12b4.

4. Pro and Con to all parties due to Otter's failure to execute and return SERVICE WAIVER issued by BTI's counsel.

Respectfully, the facts do not allege any waiver issued by BTI's counsel. Otter was sent a waiver by LVHC's counsel.

4D3 Waiver of service of process.
P - LVHC can serve complaint and summons along with 2 copies of waiver request and a self-addressed stamped envelop (for returning it). D - OTTER must Answer or make a Motion within 21 days, but if D - OTTER agrees to Waive proper service, D has 60 days to respond. (That would have been a benefit to Otter, a "pro.") If D - OTTER refuses to waive, then P - LVHC must properly serve D- OTTER (which LVHC did. I suppose this is a "con"), but, unless D- OTTER had a good faith reason for refusing, (we are not told of any) D-OTTER will have to pay for the service and any fees associated with collecting that money as well (a "con" for Mr. Otter).

3)

Question 3

Due Process requires notice and opportunity to be heard before being deprived of life, liberty, and possessions.

Proper Notice must be given to the defendant in accordance with rule 4.

In the present case, Barbara was not given notice at all based on Statute 2487.

Based on the cases of Sniadach, Fuentes, Mitchell, and Georgia v.___, the test of whether proper opportunity to be heard was given to the defendant is as follows:

1. Who signed the writ?

The Court Clerk issued the writ of attachment. This is unconstitutional because a judge should be the one to issue this type of writ. A judge would have a better understanding and discretion to realize that defendant's notice and opportunity to be heard were being violated.

What is the pre-existing interest?

Oven Company had a pre-existing interest of $1,000 because Barbara had already given them a down payment of $500.

When does the seizure occur? post- or pre-hearing?

The writ of attachment authorized seizure pre-hearing without notice to the defendant.

Probable cause - documents, bond, contract?

Statute 2487 required Oven Company to attach a copy of the installment contract at issue. However, Oven Company was not required to post a bond.

Why? Is there a risk of destruction?
Oven Company's fear of risk of destruction was unfounded. Barbara is an elderly lady with nowhere to go, limited income and a permanent resident of Fairville. An industrial oven designed for heavy-duty use is constructed to last for years and years. There is no basis for a fear that Barbara would destroy the oven.

Barbara's constitutional right of Due Process were severely violated by Statute 2487. This statute allowed a plaintiff to simply produce a document and an affidavit alleging that the defendant was in default. Barbara was not given any kind of notice that the Sheriff would seize the oven that she had already put $500 down payment, nor was she given an opportunity to respond. She could only request a post-seizure hearing within 5 court days of the seizure and only after she posted a bond in the amount of $1,000. She had to borrow the money from her friends because obviously if she did not have $200 for the past two months' payments, there was no way that she had the $1,000 to post the bond. However, Oven Company was not required to post a bond at all - and Oven Company should have at least been required to provide proof that they tried to mitigate their losses or tried to talk to Barbara to warn her of what was to come. Barbara was already on social security - a very limited, fixed income and the brownie business was her way of gaining additional income. This situation caused even more undue hardship for her. Statute 2487 was designed to set up people like Barbara to fail from the beginning of the writ process - a direct violation of her due process right.

In Fuentes, an elderly lady bought a stove on credit and fell behind on her payments. Firestone creditors had a writ, allowing it to seize the stove pre-hearing. Fuentes was not given any notice and her stove was taken away. The Supreme Court found that this was unconstitutional for it deprived Fuentes of her right of opportunity to be heard. At first it

was believed that Mitchell (where a writ of replevin was deemed proper) overruled Fuentes but actually it did not.
In Fuentes, a notice of replevin was signed by a clerk whereas in Mitchell, it was signed by a judge. Opportunity to be heard was properly given in Mitchell but not in Fuentes and the court recognized that the process that occurred in Fuentes was unconstitutional.

Statute 2487 is unconstitutional for it violates a defendant's due process right of notice and opportunity to be heard.

END OF EXAM