

MONTEREY COLLEGE OF LAW

Civil Procedure

Midterm Examination

Fall 2016

Prof. B. Cooper

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

QUESTION #1

Bobby, a citizen of Connecticut, was employed by a Greenwich, CT, company engaged in the business of manufacturing selling anti-theft shopping carts to businesses in Florida and South Carolina, only. Bobby took a business trip to South Carolina during which he went to a boat trade show and saw a custom carbon-fiber kayak made by Timmy, a South Carolina citizen. Timmy sold his kayaks by traveling to various boat trade shows up and down the eastern seaboard.

While at the boat show, and after discussing Bobby's custom specifications for the kayak (i.e., hull length of 21 feet and width of 18 inches), Bobby and Timmy entered into a written contract with Bobby agreeing to pay Timmy \$8,000 cash upon pick up of the completed custom kayak. Bobby agreed to pick up the kayak at Timmy's South Carolina workshop, in part because he was fond of the area having attended college there. Over the past 18 years, Bobby has returned to South Carolina approximately 12 times to attend alumni and fraternity functions.

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

Timmy sued Bobby in South Carolina state court for \$8,000 under a breach of contract theory. Bobby was personally served with a summons and complaint in Connecticut 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 Bobby with respect to Timmy's breach of contract action.

QUESTION #2

For the past 10 years, Jane made holiday cookies which she gave away as gifts to her friends, neighbors and the local senior citizens' center in Smithville, Idaho. She bought all necessary ingredients at her local supermarket, baked the cookies in her home kitchen, and spent countless hours decorating the cookies 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 cookies that she should consider starting her own home business by setting up a website where customers could custom order cookies for birthdays, weddings and other special events. After much consideration, and given her limited social security income, Jane did exactly that. Jane has no plans to leave Smithville, where she grew up, continues to reside and remains actively involved in the community.

To her surprise, Jane's custom cookie business became a rapid success. She quickly realized that her old, small oven which she had used to make cookies for the past 20 years was not big enough to make enough cookies per day to keep up with the custom orders. Accordingly, Jane went to Oven Company, also located in Smithville, to purchase a new, larger oven for her home kitchen. The oven cost \$1,500.00, including taxes. Jane 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.

Unfortunately, Jane'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 affidavit to the Smithville 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, Jane 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.

Question 3

Patty was injured in a car accident in South Dakota. A car driven by Daniel Driver blew a stop sign while Patty was driving through the intersection. At the time of the accident, Daniel was working for Dave's Deliveries, Inc. Daniel is a resident of South Dakota, and Dave's Deliveries, Inc., is incorporated in Delaware with its corporate office and only warehouse in South Dakota.

Patty is employed as a law school professor at UCLA in Los Angeles, where she lives with her husband and children. She has been in South Dakota for two years on a sabbatical, studying conflict resolution practices of the Oglala Sioux. The accident put Patty in the hospital for two months.

Patty filed an action in Federal District Court in Delaware, naming Daniel and Dave's Deliveries, Inc., and alleging \$150,000 in damages for personal injuries sustained due to Daniel's negligent operation of a vehicle. After being served with the suit, Daniel explained to his employer that the stop sign was obscured by the tall bushes on the property at that intersection. Dave's Deliveries then impleads the resident-property owner Zinnia, on a state law claim for contribution/indemnification.

After joining Zinnia by impleader, Dave's Deliveries, Inc., files a motion to transfer venue to the District Court in South Dakota.

Assume all parties have been properly served.

1. Does the Federal District Court have subject matter jurisdiction over Patty's complaint? Fully analyze all possible bases of subject matter jurisdiction.
2. Does the Federal District Court have subject matter jurisdiction over Dave's Deliveries, Inc.'s impleader action? Fully analyze all possible bases of subject matter jurisdiction.
3. How should the Court rule on Dave's Deliveries, Inc.'s motion to transfer venue?

CIVIL PROCEDURE
FALL 2016 EXAM

ANSWER: QUESTION #1

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, Bobby CT resident]

3. Physical presence when served [not present, Bobby served in CT]

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 Bobby 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 Bobby'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 anti-theft shopping carts. 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 Bobby in SC.

However, Bobby did agree enter into a contract in SC with the performance of both Bobby [pick up and payment] and Timmy [building of the kayak, receipt of payment of the kayak] 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 Timmy'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, Timmy. The completed kayak, and any witnesses who can attest to the completion of the custom order prior to the cancellation by Bobby, are located in SC. On the other hand, evidence of Bobby's anticipated and likely unsuccessful defense of excused performance rests in CT. Yes, it is inconvenient to Bobby 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.

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 repossess 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 bond 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 affidavit "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 lend 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 affidavit 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.

Closing thoughts: This exam question also provides a mechanism to touch on elements of "modern pleading" with respect to sufficiency of pleading allegations by way of a side reference to FRCP 8 by exceptional students.

Civil Procedure - Fall 2016 Answer Outline: Question 3

1. *Subject matter jurisdiction of Patty vs. Daniel and Dave's Deliveries, Inc.*
 - A. *Arising Under/Federal Question? No. Negligence is a state law claim*
 - B. *Diversity of Citizenship? Yes, §1332*
 - i. *The parties are diverse*
 - a. *Plaintiff Patty is a resident of California – discuss domicile*
 - b. *Defendant Daniel Driver is a resident of South Dakota*
 - c. *Defendant Dave's Deliveries, Inc., is a resident of Delaware and South Dakota*
 - ii. *The amount in controversy is satisfied, as Patty's complaint alleges more than \$75,000 in damages, which amount appears to be in good faith given these facts*
2. *Subject matter jurisdiction of the impleader action – supplemental/ancillary*
 - A. *No federal question subject matter; the impleader action is based on state law*
 - B. *No diversity jurisdiction; Dave's Deliveries, Inc., and Zinnia are both residents of South Dakota.*
 - C. *Normally, every claim asserted in federal court must satisfy subject matter jurisdiction. Under § 1367(b), in diversity claims the court shall not have supplemental jurisdiction over claims of a plaintiff against later-joined parties if those joined parties destroy diversity of citizenship. Here however, the District Court in Delaware can exercise ancillary/supplemental jurisdiction because the action arises out of the same common nucleus of operative fact as the underlying action, AND the impleader action is asserted by the defendant Dave's Deliveries, Inc., not the plaintiff, thus no violation of 1367(b)*
3. *Defendant Dave's Deliveries motion to transfer venue*
 - A. *Subject matter jurisdiction is the power of the Court to hear a case; venue relates to which geographic location.*
 - B. *Under the venue provisions of § 1391(b), venue is proper in*
 - i. *a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; or*
 - ii. *a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or*
 - iii. *if no other district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction*

Here, although the District Court in Delaware appears to have subject matter jurisdiction over Patty's claim as diversity is satisfied and Dave's Deliveries, Inc., is a resident of Delaware by reason of if being the state of incorporation, that Court is the incorrect venue as not all defendants are residents of

1)

Civil Procedure

Question ONE - Timmy (T) v. Bobby (B)

In Personam Jurisdiction (IPJ) is the extension of the Court's jurisdiction (JD) over a person. IPJ may be extended over a person via Traditional Basis; if no Traditional Basis exist, then in order for the Court to extend IPJ over a person, there must be a statute, called a Long Arm Statute (LAS). The all encompassing principle is that any court action comport with Due Process - Notice and an Opportunity to be heard before a Neutral Magistrate or Jury.

Traditional Basis:

The Court may extend IPJ over T under Traditional Basis if T is served with process in the forum, consents to jurisdiction in the forum (implied or express), is domiciled in the forum, or waives JD (Pennoyer).

T is suing B in a state court in So. Carolina, but B was served with process outside of the forum.

There is no indication that B consented to JD in the forum. If B attends the initial court hearing as a general appearance, IPJ will be waived. He may appear specially, which will limit mean that he has not waived IPJ, but he must arrange the special appearance ahead of time.

The facts state that B is a citizen of Connecticut. Citizenship is determined by a person's domicile. Domicile is presence in the forum, or residing in the forum, with the intent to remain indefinitely. There are no facts that indicate that B has moved to the forum (S. Carolina).

As none of the Traditional Basis apply to this case, T may not hale B into court via Traditional Basis.

Long Arm Statute:

In order to extend its jurisdiction over a person that does not have a traditional basis for IPJ, the state must have a statute that can "reach out" and grab the Defendant, in this

case B, into the court. The court is limited to the confines of the Statute, and the statute can be minimum (set limits) or max. A max Long Arm Statute allows the court to "reach out" and grab the Defendant with the only limitation being constitutionality.

Here, So. Carolina has a Max Long Arm Statute, so the court is allowed to extend IPJ over B IF the Constitutional Test is met.

Constitutionality:

For extension of the Court's jurisdiction over B to be constitutional, B must have such minimum contacts with the forum that exercise of the court's JD (maintenance of the suit) do not offend traditional notions of fair play and substantive justice (*International Shoe*). There must be minimum contacts, relatedness, and fairness.

Minimum Contacts:

___ Purposful availment - the D must have purposefully availed himself of the benefits and privileges of the forum. Here, B availed himself of the craftsmanship and custom work of T for a non-nominal price - \$8,000. By buying an out-of-state (out is B's state) kayak, T can argue that B availed himself of the roads that it takes to get there, and of the protection of the court if T were to sell B a shoddy kayak. Note that according to *McGee*, a single contact with the forum is sufficient for IPJ if the act was purposeful and the Defendant benefits from it.

Foreseeability - In order for minimum contacts to be constitutional, B must have foreseen that he could be haled into the forum to defend against a lawsuit. As B has only been in the forum 12 times in the last 18 years, only to attend college alumni functions, it is not foreseeable that he would be haled into the forum, with the exception of perhaps being involved in an auto accident (assuming he drives there). However, T can successfully argue that B would have foreseen that canceling a WRITTEN contract - which is stronger than a verbal contract, then he should have at THAT TIME anticipated that he would be haled into the forum for breach of contract (K) when he signed the K and when he canceled the K.

Contract:

Under the *Burger King* contract case, Justice Brennan set out some factors to consider when deciding whether contacts arising under a K are sufficient for it to be constitutional to bring the Defendant into the forum. They are: 1) prior negotiations; 2) terms of the K; 3) considered future consequences of the K; and 4) actual conduct of the parties.

1) The negotiations were not extensive, nor detailed. However, they were made between two savvy adults (B is a business man) and T is a craftsman (used to making custom orders). They were however memorialized in a written contract, which shows that the parties were serious and understood what they were getting into. B should have been on notice that is not a Walmart Kayak on sale, but rather a work of functional art. *v. good.*

2) Terms - the terms do not speak to ongoing contacts, but rather a one time pick up and payoff. However, as discussed above, the terms put B on notice that T would invest significant time and effort.

3) Here, T can argue that since B was probably a kayak enthusiast, the K would lead to B calling him for slight modifications on the Kayak, which would mean more contacts between the parties.

4) The actual conduct of the parties are: 1) T completed his end of the deal and 2) B breached the K by cancelling. Even though it would take a year to be able to use his awesome kayak, he would still be able to use it.

Relatedness:

___ If B's has continuous, pervasive and significant contacts with the forum such that he is "at home" in the forum, T may sue B for any claim arising anywhere under General Jurisdiction. The facts indicate that B does NOT have continuous and Significant contacts as coming everh 18 months to a college activity and one business trip (that's all we know of), and one contract to buy a kayak are hardly pervasive. There is no General JD over B.

If the cause of action arised solely under B's contact with the forum, B may be sued only for a cause of action arising from or under the contacts. Here, if the constitutionality test is met, B may be sues for Breach of K since the breach arises from his K and contact with T. *Spec. J*

Fairness:

___ Even if minimum contacts are present, the court may consider reasonableness as it relates to fairness in hailing the Defendant, in this case B, into the forum to defend against a lawsuit (this speaks to "traditional notions of fairplay and substantive justice) - the court considers convenience of the parties, Plaintiff's interest in redress, State's interest in fair outcome for its citizens, judicial efficiency and economy, and interstate social policy. Here, B will likely raise Convenience.

Convenience - as B is injured, and requires "extensive physical therapy" for the next 6

months, he can raise a the issue of convenience - it is likely that physical therapy is local, several times a week, and specific to his therapist. Travelling out of his state of domicile may cause him to miss treatment sessions, and/or have to pay even MORE money than would be necessary in his home state. It is likely that the Court will carefully consider this argument, especially since it bears the weight of authority of he physician.

State Interest - T will argue that the State has an interest in him being a successful business man, drawing business to the state for the boat shows, collecting taxes on the sales, and is interested in a fair outcome for him - the State does not want outsiders coming in to order custom kayaks and then not paying for them.

Witnesses - there may be witnesses to the conversations between B & T, and the Court may consider whether they are in the forum - they may be form out of the forum, there for the boat show.

Where is the kayak, how hard to move? Remot but relevant consid.

B's Company:

As B went to a boat trade show "DURING" his business trip not as "PART OF" his business trip. B's company's contacts through sales of anti-theft shopping carts to the forum will not be discussed. B was "on his own" and out fo the scope of his employment. Had the facts stated that he went routinely to the forum, and stayed at hotels etc during which he had free time, that would be analyzed as contacts as well.

Conclusion:

It is likely that IPJ would be extended over B, but the court may make accomodations for his injuries.

gen/spec?

overall great job!

Strategy:

B may want to move to dismiss the claim under Federal Rules of Civil Procedure (FRCP) 12(b)(4) (improper service) IF there was a problem with the summons or complaint. 12(b)(5) (improper process of service) will not be used as the facts state that the process of service was personally served, and under FRCP 4 personal service is sufficient to be "reasonably calculated under a totality of the circumstances to put the Defendant on Notice" (*Mulane*). B may also want to move to dismiss under FRCP 12(b)(1), (lack of IPJ) since otherwise he will waive it. B should also move to dismiss under FRCP 12(b)(6) (failure to state a claim under which relief may be granted) under a defense of impossibility to complete K (because of his injuries) - this last one is a stretch, but as long as it is in good faith, he should move to dimiss. Note that the facts do not indicate

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that B received a waiver of service - therefore, he will need to file these motions within 21 days of receipt of notice.

2)

Civil Procedure Q2

Constitutionality of Statute 2487 - Jane's (J or D) Cookies

The 5th and 14th Amendments to the U.S. Constitution guarantee due process (DP) before the Government or anyone else may seize life, liberty, or property. These guarantees are summarized as Notice (of the action against you and the time of the hearing), Opportunity to be heard before a neutral magistrate or jury.

Mullane
Good.
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Is Statute 2487 Constitutional?

Under *Siandach* and progeny, in a writ of attachment (W-A) or garnishment (here we are only concerned with a writ of attachment), there are several factors to consider in order to determine if due process has been followed.

Who? does a Judge or a Clerk sign the order?

What? Was there a pre-existing interest/relationship in the property?

Why? For purposes of establishing Jurisdiction (JD) or for security purposes (to prevent, for example, destruction of the property)

How? What was the standard used? Probable Cause, A sworn affidavit, or sworn testimony? Bonds posted?

When? Did the writ of attachment/seizure occur before a hearing, and how soon after the seizure was a hearing on the merits scheduled?

Each part of the statute and its application will be analyzed:

Signed by Clerk, Not Judge

For DP to be truly fulfilled, it is better for a judge to evaluate the writ of attachment application and the evidence attached (or lack thereof) as the Judge understands the law, and does not merely process paper. Here, as the Clerk and not the Judge signed the W-A, this factor is in Jane's (J) favor - or rather in favor of the statute not being Constitutional

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No Advance Notice

A fundamental idea of fairness and DP is advance notice prior to the seizure of

property - the "Seizee" has not idea that it is going to happen, is not able to modify, amend, or fix the problem (for example, J could have borrowed money to pay the mere \$200 dollars in missed two months payment, especially as she has friends who lent her the money to post the bond, show could have made an arrangment to pay less this month and catch up, etc.). She could also have spoken with an attorney had she been on notice. In *Fuentes*, the court found that a writ of attachment seizing a house prior to a hearing for a battery tort was UNCONSTITUTIONAL. Therefore Notice is paramount. There is an exception(s):

If there are extraordinary circumstances in the public interest, or because of the chance that the property will be destroyed or alienated, Notice may be suspended, but then DP and fundamental fairness would require that there be a hearing very soon after the seizure. There is no evidence that the public or government interest would be harmed by J not having the oven. Furthermore, it is highly unlikely that she will destroy the oven, as it is her source of livelihood, beside the limited Social Security Benefits she receives. Furthermore, she appears to be a well liked member of the community (who wouldn't like someone who gives away cookies? and whose friends give her money to post a bond?). Therefore, it is likely she would not have a motive, nor a past history of destorying property or alienating it (i.e. selling it off).

good
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Here, the fact that the statute does not require notice, puts it more on the Unconstititutional Side, as there are no "extraordinary circumstances" to merit lack of prior notice. It appears that the "Why?" is to establish JD.

Defendant Has to Post a Bond, but At-interest Plaintiff Does Not

The Sniadach factors and DP look, again, to fairness. If BOTH parties have to post a bond, it will be more fair and therefore Constitutional. The Plaintiff posts a bond to be sure that if Plaintiff loses, the Defendant can recover the property. The Defendant posts to bond to cover Plaintiff costs Defendant Loses. Here, once against, since only the D has to post a bond, the P is in an advantage over the P. This goes against the Consitutionality of the Statute.

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to save the hearing

Pre-existing Interest

This Sniadach factor is met, as the P has a pre-exiscting interest in the property - that of the credit seller, who may retake the property if it is not paid for, as long as DP is met.

Pre-judgment Seizure

As pre-judgment seizure has the advantage of securing the P's property; in the insterst of greasing the wheels of commerce, DP goes both ways - not just for the cookie-making Grandma, but for the business as well. If there is a pre-judgment seizure that is constitutional (with notice, probable cause, opportunity for a hearing on the matter of seizure, opportunity to answer the facts alleged against the D), then how long or soon after the seizure is the Merit Hearing held? The sooner, the more constitutional it is.

Hearing in 5 days AFTER seizure

The fact that the hearing (the "When?") is only five days after the seizure goes toward the fairness and Constitutionality of the statute. However, the statute ONLY allows a Merit Hearing in 5 days IF the D posts a bond - and remember that P does NOT have to post a bond. This puts D at a disadvantage - what if she was unable to get the money together? Would there be a default judgment? Would she never be able to come up with the money? (especially since she needs the oven to cook her cookies, which is how she would make the money to post the bond).

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Note that this type of situation is quite different than when longer notice is needed - such as in *War Eagle* When an eviction notice gave the D only 7 days to prepare - usually, a D wants time to move to dismiss, file a responsive pleading, or prepare for the hearing. Here, since property is being seized, and taken AWAY from the D, Due Process and fairness require an expedited hearing as it effects the life and sactity of the businesses/home/property - it is a really big deal to have a Sherrif, without notice, come to your door and in front of your neighbors detatch and take away a tool of livelihood such as J's oven. That is why a State's Statute must be Constitutional, to avoid inequal protection.

Sworn Affidavit - But Only to State that Defendant is Generally at Fault

The Sniadach factors look at HOW the decision to sign the W-A made, what has to be shown by the P, and what that standard is. Sworn testimony, affadavits, and a showing of Probable Cause favor constitutionality. Here, the P did have to file an affadavit - but mere form is no substitute for substance - the affadavit is conclusory, and only states that J is "generally at fault" - there are no facts stated - if there were a computer print-out or a log book showing payments, and that two payments were missing, this would be more substantive and probable cause.

13

Copy of Contract (K) Attached

The statutory requirement for including a copy of the K only shows that there is a

pre-existing interest in the property on part of the P, and that D is in fact in privity to pay for the property. However, as argued immediately above, it does not show any Probable Cause or Factual statements, that D needs to be put on notice and in order to have a meaningful opportunity to a hearing.

Conclusion:

Because there was no prior notice, only J (the D) had to post a bond, because a bond was required to "buy" a Merit hearing in 5 days, because the sworn affidavit required was conclusory only with a general statement of default (rather than details that J needs to be on notice of the claim against her), and because of the pre-judgment seizure without extraordinary circumstances, this STATUTE IS UNCONSTITUTIONAL.

Matthews Test

To determine if due process is complied with in an administrative hearing, such as one that cuts off social security benefits, the Matthews Test (from *Matthews v. Elridge*) test is applied - 1) Party interest; 2) Likelihood of erroneous deprivation; 3) Government Interest

Party Interest: Here, J's interests are vastly affected by the seizure of her oven without due process - she lost her source of income (other than Social Security) for several days, she had to borrow money to post the bond, and she had to consult with an attorney, costing her money she doesn't have. Her interest in her position and reputation in the community are also important to her, and the pre-judgment, no-notice seizure was likely embarrassing.

Erroneous Deprivation: here, the chance or likelihood for erroneous deprivation is high, since, as discussed above, the statute is unconstitutional. The burden on the court to change the process to be more in compliance with DP is low, since all that is necessary is advance notice, Judge review and signature, having both parties post a bond (this should be in the court's interest - the court won't have to have collection hearings!), requiring a Probable Cause statement (which the P creates, so it is not a burden on the court).

Government Interest: The Government has a heightened interest in assuring that W-A are constitutionally sufficient, in compliance with the 5th and 14th Amendments of the United States Constitution.

Conclusion under Matthews:

Under the Matthews test, the process is unconstitutional, and the Court has a Legislature

has a duty to bring Statue 2487 into Constitutional Compliance.

3)

Civil Procedure Q3

Patty (P) v. Dave (D) & Dave's Deliveries (DD)

ROG 1:

Subject Matter Jurisdiction (SMJ) - does the court have is over Patty's Complaint?

Federal Question

Federal Courts have original jurisdiction over civil claims arising under the United States Constitution, United States Laws, and U.S. Treaties [USC 28@1331(a) - Federal Question]. Federal Courts also have original jurisdiction over civil claims arising under treaties with Native Nations (such as the Oglala) and on Sovereign Indian Land [USC 28@1331].

Federal Question may arise IF the accident occurred on the Oglala Sioux Reservation/Nation, but the facts only state that the accident occurred in South Dakota, and while P is completing her sabbatical studying Oglala Sioux conflict resolution, that does not mean that she was on the reservation - so with no assumptions, it appears as if Federal Question is not a basis for SMJ as it is unknown the Personal Injury (PI) and Negligence claim arose on the Reservation - therefore, Diversity will be examined. *good*

Diversity:

Federal Courts have jurisdiction over Diversity Cases. For Diversity, no Plaintiff and Defendant may be citizens of the Same State (*Strawbridge, USC 28@1332*), and the Amount in Controversy must be met, which is a good faith claim excluding costs and interest that exceeds \$75,000.

Citizenship of Parties:

Parties are citizens of the state where they are domiciled. Where a **person** is present or resides, with the intent to remain indefinitely, is the domicile. Here, although P has lived in S. Dakota for two years, she is doing research on a sabbatical from her job as a professor at UCLA. She therefore is a citizen of CA, the state that contains Los Angeles. *good.*

D is a citizen of South Dakota, according to the facts.

Citizenship of a corporation, such as DD, is the state(s) where incorporated and their PPB. They may have only one PPB. The PPB test is called the Nerve Center Test (*Hertz Rental Car*)- the Nerve Center is where management makes decisions. This test replaced the "muscle test." As DD has its corporate office and only warehouse in South Dakota, the nerve center test is satisfied.

DD is a citizen/resident of Delaware and South Dakota.

Conclusion: P is a citizen of CA, D is a citizen of S. Dakota, and DD is a citizen of both Delaware and S. Dakota. Diversity of Citizenship is therefore met.

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Amount in Controversy:

Here, P has sued both D and DD. A claim may be aggregated against two defendants if there is a single title or right. The test in this case is that if the Defendant's are held jointly liable, and one Defendant is dropped or no longer has to pay, the amount the other D(s) have to pay does not change (as in *Summers v. Tice*). If there is more than one plaintiff, then the converse is true. As D is being sued, and vicariously through him DD, there is one single claim.

Amount in Controversy is met - \$150,000 is more than \$75,000.

Conclusion:

The Federal District Court has Jurisdiction (JD) based on diversity, and as discussed above, possibly on FQ if the event occurred on Tribal Land.

ROG 2:

IMPLEADER of ZINNIA (Z)

Supplemental Jurisdiction:

When a state cause of action arises under a common nucleus of operative fact (this is satisfied if the claim arose under the same transaction or occurrence - *United Mine Workers v. Gibbs*).

There must be a claim in Federal Court. USC 28@1367(a) governs Supplemental JD.

road

Here, as the accident occurred on a road in South Dakota, because D blew through a stop-sign (which D admits, by not denying it was there, only that he could not see it because of Z's bushes), the cause of action arising under a state law

(contribution/indemnification) may be heard by the Federal District Court. The occurrence was P being hit by a D, and D was working within the scope of his employment. The bushes allegedly obscured his view and contributed to his hitting P, so it there is a common nucleus of operative facts.

The court has SMJ over DD's Impleader Action because the interpleaded claim arises under state law and under the same transaction/occurrence, and because there is an existing case in Federal Court.

Compulsory Cross Complaint - if there is a cross complaint that may be raised that arises from the substantially the same transaction, occurrence, or conduct as that that forms the basis of P's cause of actions against a D, the D must cross complain (this may apply to Interpleaders?) or D waives his chance to do so. In this scenario, there is no need for an independent basis to be in Federal Court.

1367(b)

Takes away jurisdiction if the P brings in a subsequent Defendant who destroys diversity because of being a citizen of the forum. here, this does not apply as it is DD, not the P who is seeking supplemental Jurisdiction, and because diversity is not defeated as the DD is the only party that is a citizen of Delaware.

ROG 3:

Venue is where the court may hear a case. Venue is properly brought in a district where all Defendant's reside, or if all Defendants reside in the forum state venue may be brought in any district where any one Defendant resides, or where a substantial amount of the acts or omissions giving rise to the cause of action occurred, or failing that, where the Defendant is subject to Personal Jurisdiction (PJ) - USC 28@1391.

In order to be venue to be transferred, venue must have been able to be brought in the transferee venue (USC28@1404), and the transferor court considers convenience of the parties and interests of justice.

If Venue was improper, then the Transferor court may either dismiss the claim or transfer to proper venue.

Here, P originally brought venue in Delaware, where DD is a citizen via corporation - D resides in S. Dakota - therefore venue was improper as not all the Defendants resides in

the same district or the same state. Under 1406, the court should either dismiss the case or should transfer it to S. Dakota, where the actions giving rise to the cause of action arose, and where all Defendants reside - Z, D, & DD (through the nerve center test). P continues to be a citizen of CA, of course.

(17)

*call I question
how should the court rule on*

Side Note - I wonder if P ran into the Guardians of the Oglala Nation? (GOON) - if she did, I hope she writes a book!

the fact.

to transfer

by DD - great analysis.

END OF EXAM