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1)

Exam Number

Essay Question 1

1. Why Phyllis' federal lawsuit in Eastern District of CA can or should be dismissed or resisted by defendants

To determine whether the lawsuit should or should not be dismissed by defendants, we must examine and see whether there is personal jurisdiction, subject matter jurisdiction, and venue over each defendant. We must also look to see whether there was proper service to each defendant. If one of these requirements is not met, then dismissal will be proper.

Dubois

Personal Jurisdiction (PJ)

Long Arm Statute

First, the CA long arm statute must be examined to see whether it can be used to gain pj over DuBois. Long arm statute is used to get pj over out of state defendants. Whether Dubois is an out of state defendant or not is discussed infra. The statute has two parts:

a. CA courts will have pj over any business that causes injury within the

state

Plaintiff will try to argue that Dubois' business caused injury to her in CA. Dubois makes erotic low budget videos from the basement of his grandmother's Los Angeles home and this might qualify as a business for purposes of the long arm statute. Since she felt the harm while in CA, then the injury was caused within the state.

Dubois will try to argue that making erotic videos is simply a hobby and he did not cause injury within CA but rather over the internet because he sent out the movie trailer to all of plaintiff's facebook friends who reside all over the world. Since he has not made any videos that have been commercially released, he cannot qualify as a business if he does not make any money from the videos he releases.

The court will most likely find that Dubois' low budget erotic film making is not really a business because he does not seem to be benefitting from the making of these movies financially. Though most likely, the court will find that he did cause injury in CA. Just because he released the video over the internet, he should not be left off the hook. The effect of his actions caused injury to plaintiff who resides in CA. (Calder). Since he knew where plaintiff lived, he knew his actions were directed to that state. A reasonable person would agree that releasing embarrassing footage of someone who has not given permission would cause some sort of a harm. For these reasons, the court might find that in fact Dubois erotic video making is a business and he did cause injury to plaintiff for public policy

reasons to deter this sort of sleazy actions by others.

b. Ca Courts will have Pj over any person that harms the business itnerests of anyone in the state

Plaintiff will argue that Dobois did harm her business interests because she uses Facebook to sell used cell phones. When Dubois sent out those embarassing videos of her, her clientele was most likely influenced by this footage and the prudes among them might decide not to have any future dealings with her because of her sleazy behavior. (Though it was not her fault she was secretly taped). Also, she spent 75000 removing those videos. That money could have been been spent purchasing used cell phones or other things necessary for her business. Instead, because of him, she used it to remove those videos.

Dubois will try to argue that he did not cause any harm to her business because he merely sent out a movie trailer to her friends. Her facebook friends are not necessarily her clientele.

The court will most likely side with Plaintiff here since it's a very strong argument that Dubois harmed her business interests since she uses facebook to do her business. had she not used facebook but another website to do her business, the court would most likely decide that her business interests were not harmed in that case.

Using either the first or second portion of the long arm statute, the court will gain pj over Dubois. Now, we must examine to see whether it's fair to

practice pj over Dubois under the minimum contacts tests as set forth by I-Shoe.

Minimum Contacts/Due Process/Fairness

General Jurisdiction

Dubois' ties with CA are substantial and pervasive and systematic and continuous because he has been residing in CA for the last five years and he has some sort of a business he may or may not be commercially benefitting from. Just because he has not released a movie commercially does not meet that he has not profitted from his erotic videos. he could have sold them to his friends or other people.

He might try to argue against these contacts saying he doesn't really have a business but this argument is weak because he has been benefitting from CA for the last 5 years.

Traditional Bases:

Presence

Plaintiff will argue, using Scalia's argument in Burnham that because Dubois was served in CA, there should be personal jurisdiction over him since Pennoyer v. Neff has not been overruled. Dubois willingly and voluntarily agreed to meet Phyllis in San Francisco for one last date when he didn't have to. It was his own choice. No one physically coerced him to go to San Francisco. Also, he resides in Los Angeles, so one way or another, presence jurisdiction could be had over him if she served him Los

Angeles. (whether service proper infra).

Defendant will argue that he was tricked into going to San Francisco for that date. Also, using Brennan's concurrence in Burnham, presence alone is not enough to establish pj over a defendant. There must be minimum contacts. Discussion Infra.

Consent

Dubois would most likely not want to be sued in Sacramento but prefer to be sued in Los Angeles. It is unlikely that he will give his consent.

Domicile

Plaintiff will try to argue that Dubois' domicile is in France. If she does this, it will help her get into court through diversity jurisdiction (discussion of fed. question claim infra). Unless Dubois actively changed his domicile from France to CA, he can still be considered to be domiciled there.

Plaintiff will say while his residence is in CA, his subjective intent in the indefinite future is to go back to France. She would need to show proof that it really is his intent to go back to France. She might bring in evidence that because he is unemployed, is not seeming to make it in the business of erotic videos (is not profiting much), he definitely will want to go back to France since he cannot live in his grandmother's house forever.

Defendant will argue that he is domiciled in CA because he resides in Los Angeles and most likely, his subjective intent is to remain in Los Angeles

for the indefinite future because he is operating his low budget erotic film business in LA and since he called himself a "very succesful Hollywood Movie Producer and Director" shows some sort of desire to make it in the business. Perhaps he is planning to invade Hollywood and for this, he has to remain in CA. The reason he would want to do this is to defeat diversity jurisdiction. If he defeats diversity jurisdiction, the case has to be dismissed from federal court. (Discussion of federal question claim infra)

Most likely, court will conclude he is domiciled in CA unless plaintiff shows specific proof that he is intends to go back to France, such as a plane ticket or some sort of plan to go back to France.

Specific Jurisdiction--relatedness of contacts to subject of lawsuit

If unable to get pj over Dubois with general jurisdiction or traditional bases, the court can attain pj through specific jurisdiction by examining the relatedness of his contacts to the subject of the lawsuit.

Purposeful Availment

Foreseeable that he will be haled into court/Voluntarily connects with state

Plaintiff will argue that it is foreseeable that he will be haled into court in the state in which he resides. And he voluntarily connects to this state because he benefits from its departments, such as fire, police, hospital.

Defendant will try to argue that it is not reasonable for him to be haled into court in the Eastern District. He resides in the central district so he should be haled into court there.

Court will find that he did purposefully avail of the state's benefits but whether the Eastern district is the right place to sue him is questionable and will be discussed infra.

Stream of Commerce

Plaintiff will argue that Dubois took part in the real stream of commerce. He shot the film, produced the video, and released it to consumers. He did this in CA and since this is the real stream of commerce as talked about in Asahi and not the fake stream of commerce as talked about in Worldwide, Brennan's four and Scalia's four would agree that he did indeed take part in the stream of commerce and his act of filming her and releasing this film is directly related to the subject of the lawsuit, violation of Federal Privacy Act, then court can have sj over Dubois.

Defendant will argue that this is not the stream of commerce. Yes, he shot the film, made it, and released it, but he did not make money from it. In fact, he only released the trailer over Facebook.

Defendant's argument is strong that this is not the stream of commerce because he is not seeming to make any money from this. It really was a trailer and not even the whole video. Therefore, the court will find that the

stream of commerce theory does not apply.

Reasonableness

Plaintiff will argue that it is reasonable to have the suit in Eastern District because she is from there and it is obvious that defendant can travel there since he came to San Francisco, which is an hour or so away from Sacramento. He is also from CA and it's not like this is a different State's court.

Defendant will try to argue that it is not reasonable to hale him into court in the Eastern District because he is unemployed and cannot afford gas money/plane tickets, hotel costs, food costs, etc while defending suit because he is unemployed and lives in his grandmother's house.

Defendant's argument is strong because it does seem like he is under a heavy financial burden to litigate in the Eastern district, but because his activities are deplorable, to send him and other people like him a message, will decide that it is indeed reasonable to have the suit in the Eastern District. Though it depends on the court.

Interest of court to litigate this type of lawsuit and provide forum for these plaintiff/defendants

The court has a strong interest to litigate this lawsuit because one of its citizens was harmed. It is a good forum to provide relief.

PJ will easily be established over Dubois one way or another.

Proper Service

Defendant was not properly served. He may try to argue that he was tricked into going to San Francisco under false pretenses (another chance with Phyllis), but most importantly, he was not served properly. He can file a pre answer 12(b)(4) insufficiency of service and 12(b)(5) insufficiency of service of process motions. 12b4 because he was tricked and 12b5 because he must be served by a non party over 18 years of age. He was personally served by plaintiff who is a party. For this reason, the case would be dismissed and plaintiff would have to serve him properly to get started again.

Dream Dates

Personal Jurisdiction

Long arm statute

Long arm statute is used to get pj over out of state defendants. They have their place of business in CA so we wouldn't really look at this statute. Though if we had to, we could argue that they caused injury within the state because they didn't monitor their site and as a result, a leach like Dubois was released upon plaintiff who was harmed by his sleazy video.

General Jurisdiction

Their ties with CA are systematic and continuous and substantial and

pervasive because they have their place of business in CA. They make money in CA (15 dollars to use their services). This benefit is enough to attain pj over them in CA.

Traditional Bases

Dream Dates (DD) is a corp. so it has two domiciles for purposes of pj. Its place of incorporation, Oregon, and its place of business in CA (San Diego). Using domicile, pj. can be attained over DD in a CA court. A waiver was sent to them in Oregon and they signed it, which does not mean they waived pj. They were not personally served in CA so there can be no presence jurisdiction. Unlikely that they would consent to pj in Eastern District in CA because their contacts in CA are located in SD, CA.

Specific Jurisdiction

Stream of Commerce

Stream of commerce doesn't really apply here because they are not making some sort of a product. They are simply offering a website to which consumers choose to use.

Purposeful Availment

They voluntarily made their business in CA, so it is foreseeable that they would be haled into court in CA. (Disregarding their clause discussed infra)

Reasonableness

Because they have their place of business in CA, it is reasonable to hale

them into court in CA. Though defendant will argue that it is not reasonable to hale them into Sacramento court since they are solely located in San Dieog.

DD's argument is strong but court will take into consideration that they are a business and it would not be too much of a financial burden to defend suit in the same state.

Service

Service was proper under FRCP 4 because plaintiff sent the waiver to defendant. Since they were properly notified, they had to answer the complaint. Whether it qualifies that the receptionist signed it is questionable. Did the higher ups see this summons and complaint or did she just sign it herself not knowing or understanding what it was.

Can case be dismissed for lack of subject matter jurisdiction?

Subject Matter Jurisdiction (smj)

S. 1331--Federal Question

If her well pleaded complaint arises under a federal question, then fed court would have smj to hear the case. She claims that Dubois violated the Federal Privacy Act of 2010. Any relief she receives will arise under this federal question. Therefore, the court has smj over this claim. She has sued DD for negligent supervision of its site, which is a state claim. We can't use supplemental jurisdiction in this case because s 1367 is used to join state claims by defendant who is in fed court based on fed question.

This is a different defendant and the three rings must be satisfied separately. If DD is a necessary party (Rule 19) or permissive party (rule 20) makes a difference. If the court finds that DD is necessary for this claim to be fairly litigated, then DD must satisfy all three rings. Since DD does not satisfy SMJ, we must look to Rule 19(b), when joinder is not feasible. Since we can establish pj over DD (discussion of venue below--we could use 4(k) 100 mile bulge rule to satisfy venue), and we can't establish smj, then the court must decide whether to dismiss the whole case or litigate without this necessary party. It must be decided whether it would be equitable for plaintiff and remaining defendant to continue with the lawsuit. It is unclear what sort of damages she is claiming from DD. The court might decide that that the majority of her harm came from Dubois posting the video and DD's part in the whole thing is minimal. This argument is plausible. DD can file a 12(b)(1) lack of smj and even a 12(b)(6) motion because it does not seem that plaintiff has stated a claim upon which relief can be granted. and get out of litigating the case.

S. 1332--Diversity

Citizenship

Plaintiff is a citizen of CA and if either of the defendants is a citizen of CA, then diversity is defeated. Since one of DD's domiciles is CA, it is a citizen from CA and therefore, no diversity. Dubois' citizenship of CA is questionable. He does not seem to be a permanent resident alien of CA, and he is a citizen of France. If the case were between Dubois and plaintiff, and amount of controversy was met, there would be diversity. But plaintiff against both defendants, there is no diversity.

Amount of Controversy

Plaintiff spent 75000 dollars removing the videos from the internet.

Unclear whether she's asking for more (perhaps more money for emotional distress), it is unlikely that amount in controversy is met. There is no evidence of how much she is claiming in damages from DD. If more than 75000 from both parties, then amount in controversy is met. If not, it is not met.

Fed court would not have subject matter jurisdiction over this claim if she claimed diversity.

Is Venue proper?

Because we are in court for 1331 federal question, we would look at 1391 (b)(1)-(b)(3) to see whether venue was proper.

1391(b)(1) states that venue is proper in any jurisdiction where defendants reside if they reside in the same jurisdiction.

Dubois resides in Los Angeles, Central District, and DD reside in San Diego, southern district. This portion can't be used.

1391(b)(2) states that venue is proper in any jurisdiction where substantial acts of omissions giving rise to the claim arose.

Venue for Dubois would be proper in Las Vegas, because he filmed her there, in Los Angeles, because he made the video there. And perhaps

even in Sacramento because plaintiff saw the video in Sacramento. Venue in the Eastern District for dubois is quite plausible.

Where exactly was the negligent supervision of the website? If it was where the headquarters are, Oregon would be proper venue. If it was in San Diego, the principal place of business, then the Southern District would be proper. But since DD does not have any ties to the Eastern District, both defendants could not be sued there.

1391(b)(3) If neither of the previous ones apply, then in any jurisdiction where any defendant may be found.

Both defendants do not seem to have any one particular

Venue would not even seem to be proper for DD because of the clause that said complaint must be filed in San Diego. By using the site, plaintiff agree to this clause. whether it was bargained for or not, as described in Carnvial's dissent is questionable. Since this site is voluntary and she had time to read the clause, then the court will most likely find that she agreed to the clause and for this reason, venue might not be proper for DD.

2. Whether DuBois' two counterclaims should be dismissed

If Duboi's counterclaims arise from the same case of controversy, it is a FRCP 13(a) Compulsory Counterclaim and should not be dismissed. If Dubois' counterclaims do not arise from the same case of controversy, judge has discretion to either hear or dismiss them. FRCP 13(b)

Permissive Counterclaim

The broken cell phone does not arise from the same case or controversy

because it was sold to him before the whole thing happened and has nothing to do with her claim that he videotaped her in her hotel room. If it was sold after and she sold him a broken phone out of spite, then it might be said that it is compulsory. Defamation is most likely compulsory because had he not invaded her privacy, the basis of her claim, she would not have defamed him. Though the act itself happened afterwards and might be argued that it does not arise from that same claim. In interest of judicial economy, the judge might decide to allow both claims because they involve the same parties and not allowing these counterclaims would just mean another lawsuit.

3. Whether DuBois' removal petition and motion to transfer the case to State Court in Arizona should be granted

Dubois could claim a s 1404 (proper court to proper court) transfer, 1406 (no venue to proper court), and 1631 (no personal jurisdiction to proper court) transfer from Fed Court in CA to Fed Court in Arizona. since there is pj over him in CA (supra) but venue does not seem proper, a 1406 transfer could be granted. Though his ties to Arizona are not discussed so we don't really know. Then, he could remove from Arizona fed court to Arizona state court. His motives for this move are quite unclear. Also, DD would have to agree to this and it is quite unlikely that DD would want to go from CA, where it has a Principal place of business to Arizona, where it has no ties, or none that we know of. For this reason, the court would not grant his motion because it does not make much sense and it would burden the other defendant, presumably.

Dubois could also claim forum non conveniens to transfer from Fed court in CA to Arizona state court. Public and private factors would need to be considered. Piper v Reynoso Private factors Such as costs, burden of getting witnesses, etc. And public factors--interest of Arizona state court in litigating this case. It might be possible that most of the witnesses who can talk about the defamation are in Arizona, or something of that sort. Most likely, the court will not allow this transfer/removal/FNC.

4. Whether Dream Dates must now pay for Phyllis' Service of Process of Dream Dates

DD had 30 days to sign the waiver and send it back from the day it received it and 60 days to file their answer. Since they simply signed it (no mention of an answer) and in 70 days, they did not follow the rules and therefore, must pay for the service that Phyllis made upon them.

2)

Essay Question 2

A. Conflicts of Law

Because her claim against Dubois is a federal question claim, CA federal procedural and CA federal substantive law would apply.

Because plaintiff's claim against DD is a state claim, negligent supervision of its site, CA Federal Procedural law and Texas state substantive law would apply.

Since she consented to the clause that says Texas substantive law must apply, therefore Texas substantive law must apply.

Ca conflicts of law states that law of the place of the wrong must be applied. where exactly was the place of the wrong is questionable.

Negligent supervision could have happened in San Diego or in its hq or somewhere else. It's more than possible that it could have happened in CA.

Other state's conflicts of law principles state that substantive law of the state with the "most significant relationship" with the parties and with the dispute. So basically Texas conflict of law principle would lead to application of CA substantive law.

Because both conflicts of law lead to the application of CA law, then harmonization is possible and therefore, CA substantive law would be applied to plaintiff's claims against DD.

B.

Federal procedural law provides for a trial by jury 7th amendment and this conflicts with Texas law that says this type of cases must be tried in front of a judge only in a bench trial. Because trial by jury is a right provided by the US constitution, and Texas law seems to be violating it by not allowing for Dubois to have a jury trial, it cannot be harmonized and the Constitution wins because of the Supremacy clause. So Texas law should not apply to Dubois. but since DD chose for Texas substantive law to apply, in a sense, they consent to not having a trial by jury. They waive their Constitutionally granted right not to have a trial by jury.

Also, Texas substantive law says that the trial must be tried in Arizona. The state law is in conflict with Federal Venue Statutes. Can they be harmonized? It does not seem like it can be harmonized because either the trial will be held in Arizona or not. In looking at the source of the conflict, we see that it is Federal Statutes against state statutes. In this case, the federal statute would win in the interest of the parties. It would not be fair to have them go to Arizona to litigate the case. It might even be outcome determinative to have the trial in Arizona. What was the reason that Texas law states that these types of cases must be tried where the server is? Is it bound up with the state's interests? Most likely not since Texas probably enacted this statute to be used against its own citizens whose servers would most likely be located in Texas.

The federal statutes provide venue where all defendants reside if they reside in the same place, where the act that gave rise to the claim took place, or where there is pj over Defendants or where they may be found. The fed statutes are for fairness purposes and not to put undue burdens on defendants who are already being burdened by having to go to trial. In this case, the federal statutes would win over Texas substantive law because both seem to be dealing with procedure it seems like. The second portion of Texas procedure states where the case can be filed. Though it is substantive law, it deals with procedure. It is arguably procedural and federal rules of procedure win in this case.

1 is there a clear fed procedural law and state substantive law

2. can we harmonize

3. if we can't harmonize, we must look to see the source of the conflict

US Constitution--supremacy clause

Fed R. Civ Pro/Fed Statute v. State Statute

Fed common law v. State Statute

Erie Analysis

Outcome determinative

Bound up test

Fed gov's interest weighed against state interests in enacting the law.

3)

Essay Question 3

1. Hourly billing basis might be too burdensome on Phyllis and thinking that it is too expensive, she might not want to take the case to court at all. In that case, the attorney gets nothing if Phyllis decides she does not want to hire him/her.

If the case is taken on a contingency basis, then the attorney can recover a large percentage (30-40) of any amount Phyllis recovers.

If her recovery is too little, then the attorney may actually lose money on the case depending the amount of hours he spent preparing for it.

With hourly, he is sure to get paid for his work, but might not get this work if Phyllis decides that it's going to cost her a lot.

With contingency, he can get a bigger piece of the pie, but all this is contingent on them recovering, which is not a slam dunk.

2. Injunction is to stop someone/some corporation from doing or not doing something (such as if they are sexually harassing their female employees, an injunction could order them to not sexually harass. Or if they are not hiring women because they are sexist, an injunction could order them to hire women).

A declaratory judgment is when a plaintiff is not sure whether what they are doing is wrong so they can go to court to find out before they are actually sued or it becomes out of control.

3. Before Erie, if there was no state statute/law, the court did not even

consider state case law. Instead, it applied Federal Common Law. After Erie, court decided that State case law does count as law and therefore, when it's a diversity case, substantive law (whether statute or case law) should be applied. in fact, they did not have to "find law" as they thought they did, they could just look at the state's case law history.

4. A rule 14 cannot be filed if diversity is destroyed. Since both are from Arizona, cannot implead him because diversity is destroyed.

5. It would not be a removal but rather a transfer of venue. Must look at venue statutes 1404 (proper court to proper court), 1406 (no venue to proper court) and 1631 (no personal jurisdiction to proper court). Not sure about his contacts in Arizona to determine if Arizona court had personal jurisdiction or venue. It had subject matter jurisdiction because it was a federal question.