

Fall 2016 Exam

With better scoring student answers

## **PART I**

This first section of the exam contains two essay questions.

### **Question 1 (worth 45% of final exam grade)**

James Ainsworth, was run over and killed by a forklift while he was working at Wayne Poultry Farms in Ovet, Mississippi. On September 29, 2010, his wife, Mary Ainsworth, filed in the Southern District of Mississippi a wrongful death action against Cargotec USA, Inc. and Moffett Engineering, Ltd.

The forklift was designed and manufactured by Moffett, an Irish corporation with its principal place of business in Ireland. Pursuant to an exclusive sales and distribution agreement between Moffett and Cargotec, it was sold to Wayne Farms by Cargotec. Cargotec is a Delaware corporation with its principal place of business in Ohio. Moffett and Cargotec are separate companies that do not share any common officers or directors

Pursuant to the sales and distribution agreement, Cargotec is the exclusive marketer and distributor of Moffett's forklifts throughout the United States. Cargotec is Moffett's only customer in the United States; Moffett does not sell forklifts directly to other customers in the United States. Cargotec marketed Moffett's forklifts throughout the entire United States.

Cargotec sells or markets Moffett products in all fifty states. From 2000 through September 2010, Moffett sold 13,073 forklifts to Cargotec, worth approximately \$254,000,000. Cargotec sold 203 of those forklifts, worth approximately \$3,950,000, to customers in Mississippi. Those Mississippi sales accounted for approximately 1.55% of all of Moffett's United States sales during that same period.

Moffett sells many different types of folklifts. The forklift that Wayne Farms purchased was a forklift that Moffitt had specifically designed for poultry-related uses. Mississippi is the fourth largest poultry-producing state in the United States.

Moffett filed a motion to dismiss for lack of personal jurisdiction. How should the court rule?

# Better Scoring Student Answers To Question 1

START OF EXAM

-->Question -1-

Question 1

The issue is whether the court should grant Moffett's motion to dismiss the case for lack of personal jurisdiction (12(b)(2)).

To determine whether a court can exercise personal jurisdiction over a non-resident defendant the court must examine: (1) was there proper notice; (2) is the defendant statutorily amenable to suit; and (3) is the exercise of jurisdiction over the defendant constitutional?

1) Was there proper notice?

A district court's authority to assert personal jurisdiction in most cases is first linked to service of process of a defendant "who is subject to a court of general jurisdiction in the state where the district court is located. Fed. R. Civ.P. 4(K)(1)(A). Thus, I will assume that the service of notice was effected correctly.

2) Statutory Amenability

Next, did the state of Mississippi authorize its courts to hear this case. There is no long-arm statute listed, but Mississippi could have say that it authorizes its courts to hear cases up to the extent of the due process

clause of the fourteenth amendment. If that is the case, then the only analysis required is a constitutional analysis. On the other hand, Mississippi might have a long-arm statute that is purposefully less than the constitution and act as a "laundry list" on the types of actions that it authorizes its courts to hear. In that case, the statute would have to be read on its face to see if the claim against Moffett is allowed. Some states have long-arm statutes do not explicitly go to the full extent of the constitution but have been interpreted to go to the full extent.

Thus, if the Mississippi long-arm statute does not allow the case to be heard, the personal jurisdiction analysis would stop there and Moffett's motion to dismiss would be granted.

However, I will assume that Mississippi allows its courts to hear this case within its long-arm statute.

### 3) Constitutional Amenability

The due process clause of the U.S. Constitution forbids states from "depriving any person of life, liberty, or property, without due process of the law." U.S. Const. Amend. 14. The modern interpretation of this clause is the source of a person's liberty interest: the right to not be subject to unfair judicial judgments when the person has no meaningful connection to that forum.

The traditional ways that a court could exercise jurisdiction, the "power theory" ( presence of the defendant in the state, consent, domicile, or in rem/ quasi in-rem) will not apply, as Moffett is a foreign corporation

based in Ireland. However, recognizing that corporations don't have a true "presence" coupled with changes in the national economy involving greater volumes of interstate and national commerce, jurisdiction over a non-resident defendant can still be exercised.

The modern test for constitutional amenability to personal jurisdiction is found in *International Shoe v. State of Washington*. The plaintiff must prove that the defendant has sufficient "minimum" contacts with the forum state and that the exercise of personal jurisdiction comports with "fair play and substantial justice."

#### Step 1: Sufficient "Minimum" Contacts

When a defendant has sufficient minimum contacts, those contacts must be purposeful and substantial such that the defendant should reasonably anticipate being called into court there. First, however, the court should ask whether the plaintiff's cause of action arises out of or relates to the defendant's contacts in the forum? If the answer is yes, then the court will analyze the shoe test with a specific jurisdiction test, where the defendant's contact with the state is closely related to the plaintiff's damage. If the answer is no, then the court will use a general jurisdiction analysis.

#### A. General Jurisdiction?

General jurisdiction allows a court to exercise jurisdiction over the defendant not because of his conduct related to the suit, but because his contacts are so substantial and of such a nature that he is essentially at home. A general jurisdiction approach is not appropriate, because to exercise general jurisdiction over a corporation it must be where that corporation is

incorporated or where the corporations personal place of business is. In this case, both of those places are in Ireland, not Mississippi. The Supreme Court has left the door open to maybe exercising jurisdiction over foreign corporations when the corporations affiliations with the state are "so continuous and systematic" as to render them essentially at home in the state. However, Moffett has an exclusive sales and distribution agreement only with Cagotex, a Delaware corporation with its principal place of business in Ohio. Additionally, not many of its product (1.55%) of sales was done in Mississippi. Thus, a court is likely not to find this rises to the level of so "continuous and systematic" that Moffett is essentially at home.

subject of such a nature

#### B. Specific Jurisdiction?

However, a specific jurisdiction approach is appropriate. The cause of action arises out of the defendant's conduct with the forum state, but the plaintiff will need to show that the Moffett sufficiently "purposefully availed" itself to the state so that it could foresee being haled into court in Mississippi.

##### 1. Purposeful Targeting of the Forum?

Moffett may argue that it did not purposefully target Mississippi because it contracts solely with Cargotec. In *McIntyre v. Nicastro*, another stream of commerce and products liability case, the court found that the principal inquiry is whether the defendant's activities manifest an intention to submit to the power of a sovereign by targetting the forum, it is not enough that the defendant might have predicted that the goods will reach the forum. (Kennedy plurality). Thus, Moffett's best argument is that it did not target

Mississippi specifically, but was instead targeting the entire United States. It did not initiate the sale, nor sought to market its goods specifically in that state.

However, the Breyer concurring opinion in *Nicastro* suggests that while a "single sale of a product in a state does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant", there needs to be "something more" to indicate a purposeful attempt to target the forum." Justice Breyer was concerned that if a product ended up in a forum and caused injury, a small manufacturer who sells its products to a national distributor might be sued for a single injury. This would require every manufacturer "large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different states apply the law." (CM 339).

However, unlike in *Nicastro*, this case does involve the sale of a single product. Indeed, Moffett sold 203 forklifts in Mississippi. On the other hand, Moffett might argue that these sales are miniscule compared to its sale of forklifts in other states, only 1.55% of U.S. sales. However, the "something more" may include a special state design, advertising, advice, or marketing towards. We know Moffett does not do any marketing, or advertising as that is what Cargotec duty is under their arrangement. However, the forklift that was sold was a forklift "specifically designed for poultry-related uses." As the fourth largest-poultry producing state in the United States, it seems that one of these forklifts was designed with a customer like Mississippi in mind.



Indeed, *Nicastro* can be distinguished in this case even further, *Nicastro* involved a single-sale of a metal recycling machine, and Breyer agreed that McIntyre did not purposefully target New Jersey (where the machine was sold) so the exercise specific jurisdiction failed. However, Breyer did not concur with Kennedy's "intention to submit to the power of the sovereign" approach because he feared that in instances where purposeful direction of activity should be found (such as selling products over a website, hiring a middle-man to market the product, the use of popup advertisements it knows will appear in the forum) then it would be potential plaintiffs who will suffer as the companies can avoid jurisdiction by hiding behind intermediaries or claiming they didn't "intend" to target the state. (CM 337).

Indeed, this was Ginsberg's point in her dissent. While her opinion is not authoritative or binding, Ginsberg notes that if the facts in *Nicastro* had been properly presented, (New Jersey is the fourth largest scrap metal market in the U.S.), then it an intent to target the New Jersey market should have been found. The court should heed the policy warnings that Ginsberg was worried about, a company engaging a U.S. distributor can escape personal jurisdiction when one of its products sold causes injury or even death to a local user. (CM 341). Indeed, Breyer suggests that personal jurisdiction could have been found in this case with just "something more" to show intent to target the market, despite only one scrap metal machine being sold in the state by *Nicastro*. If the facts in *Nicastro* had included the facts Ginsberg had researched had been included in the record, and that's enough for

purposeful availment, then this case should also find enough for personal availment. For example, New Jersey was the fourth largest scrap metal market in the U.S., and Mississippi is the fourth largest poultry market in the U.S. How could Moffett not intent, by its actions to target the national U.S. market, to sell its "poultry-related" forklift to Mississippi.

Accordingly, this case should be distinguished from *Nicastro* and a court should find that Moffett has sufficient "minimum" contacts with the state because there is more than one sale to Mississippi of Moffett's forklifts, and that Breyer's "something more" is found by the sale of a forklift specifically designed for poultry related uses, which would naturally be targetted at poultry producing states such as Mississippi.

## 2. Fairness Test

Next, assuming that the court agrees that Moffett satisfies the "minimum" contact prong of the *Shoe* test, a court must consider whether the exercise of jurisdiction would comport with "traditional notions of fair play and substnatial justice."

For this part of the test, the Court in *Burger King v. Rudzewicz*, explained that the burden shifts to the defendant and that he must prove a "compelling case" that the exercise of jurisdiction is so unfair that it must be dismissed. The court will consider several factors: (1) the forum state's interest in adjudicating the case, (2) the plaintiff's interest in obtaining convenient and effective relief; and (3) the interstate judicial systems

interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

In the history of the use of the modern test for personal jurisdiction, there has been only one case where the court found that the exercise of personal jurisdiction would offend "fair play and substantial justice" and that was in *Asahi Metal Industry Co. vs. Superior Court*. Asahi is similar to this case, in that it is another products liability case, however, unlike this case the issue the court heard was an indemnity claim by a Japanese tire manufactuer and a tire joint manufactuer from Taiwan.

Generally, courts are hesitant to dismiss personal jurisdiction based on this factor because there are many ways to accomdate the defendant's concerns over fairness. Yet, jurisdictional rules cannot be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. *Burger King. Corp. v. Rudzewicz*.

Of the four factors, factor one is probably given the most weight by courts. In this case, Ainsworth should have no difficulty in showing that Mississippi has an interest in this case, as one of its citizens died while at work at Wayne Poulter Farms in Mississippi. Additionally, as a major poultry producing state, the other forklifts that might have ended up here that Moffett manufacutered could very well be the exact same "special poultry-

related model."

Additionally, Ainsworth is a native of Mississippi, and having the case heard in the Southern District of Mississippi would be convenient and effective. The last two factors, are more minor, and it will be difficult for Moffett to argue that it is inconvenient to appear in Mississippi. After all, Moffett is a wealthy company--it sold \$254,000,000 worth of forklifts in the country from 2000-2010. Moffett would struggle to compare themselves to Asahi's situation as well. While Asahi was a foreign corporation, the claim was for indemnity between two foreign groups. In this case, the claim is local and for damages of a Mississippi. Additionally, in Asahi, there was a great legal difference between Japanese law and American law, and there was no argument that the case could not be heard back in Japan or Taiwan. Thus, because the original Californian plaintiff had settled, the United States had no real interest in adjudicating the case. Thus, because the injury occurred in Mississippi and was suffered by a Mississippi citizen, Moffett is unlikely to present a "compelling" case that it would be unfair to exercise jurisdiction over it.

#### Conclusion

In sum, Moffett has established sufficient "minimum" contacts with Mississippi because of its efforts to serve, albeit indirectly, the Mississippi poultry market with its specially designed forklifts. This effort

was purposeful and substantial, and should have allowed Moffett to anticipate being haled into court there. Additionally, the exercise of personal jurisdiction over Moffett does not offend "traditional notions of fair play and justice," as this is a very high standard to overcome and Moffett has the means to appear in court in Mississippi, and Mississippi has an interest in adjudicating this case.

Therefore, the court should deny Moffett's motion to dismiss for lack of personal jurisdiction and allow the case to proceed.

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START OF EXAM

-->Question -1-

Moffett files a motion to dismiss for lack of personal jurisdiction. How should the court rule?

Does the court have PJ?

Personal jurisdiction is required to enter orders that bind the parties in question. There is a three-part analysis regarding whether the exercise of PJ over a defendant is proper: (1) adequate notice; (2) statutory amenability; and (3) constitutional amenability. Assuming proper notice (as it is not mentioned anywhere in the problem), the first question is whether the state legislature in Mississippi has authorized its courts to hear a dispute such as this one; the burden is on the party seeking to establish jurisdiction, the plaintiff Ainsworth in this case, to prove statutory amenability. Again, since Mississippi's long-arm statute is not mentioned, I will assume statutory amenability, or that Mississippi grants jurisdiction to the full extent of the Constitution. ✓

Constitutional Amenability -- Traditional Bases

The first question to ask is whether any of the traditional bases of PJ apply. This is not a tag jurisdiction problem, nor one of voluntary consent or involuntary waiver. D is not domiciled in the forum (per *Goodyear*, a business is domiciled in its place of incorporation or its PPB -- neither of these is Mississippi in Moffett's case). After eliminating the traditional bases, the next inquiry is the two-step test articulated in *Shoe*.

### Shoe Test

Before applying this test, the question must be asked whether the cause of action arises out of or relates to the defendant's contacts in the forum. If yes, it is a specific jurisdiction case. If no, it is a general jurisdiction case. This c/a *does* arise out of defendant Moffett's contacts in the forum, so it will be analysed as a specific jurisdiction case. ✓

Under the *Shoe* test, the D must have such minimum contacts with the forum that the exercise of PJ will not "offend traditional notions of fair play and substantial justice." Step 1 is minimum contacts, and step 2 is reasonableness -- PJ is predicated on a finding that the D has minimum contacts such that it purposefully avails itself to the forum such that it is reasonably foreseeable that the D could be haled into court there. The burden is on the P to prove minimum contacts, and on the D to prove that reasonableness factors show that it would be unconstitutional to exercise jurisdiction over him/her in the forum.

### Step 1 -- Minimum Contacts

Has D purposefully directed his activities at the forum state? Under *Worldwide*, if a manufacturer or distributor seeks to serve, directly or indirectly, the market in the forum state, and if P is injured in that forum, the minimum contacts exists. The trouble is in deciding what "seeks to serve" means. In *J. McIntyre Machinery Ltd. v. Nicastro*, a factually analagous case to this one, a divided bench proposed had separate theories ✓

for evaluating whether purposeful availment exists: the Kennedy plurality, the Breyer concurrence, and the Ginsberg dissent. If analysed solely under the auspices of the plurality, there does not seem to be purposeful availment by Moffett, but things appear differently in the light of the concurrence and dissent.

### Kennedy Theory

The plurality opinion acknowledged and agreed with the *Worldwide* statement that seeking to serve equates to minimum contacts. Kennedy wrote the PJ is proper where the defendant targets the forum, but no targeting can be found if all the D did was predict that the goods would reach the forum. Kennedy further narrowed by saying that it is not enough to target the United States as a whole, the D must target the specific forum state. He also stated that a D purposefully avails itself by invoking the benefits and protections of its laws such that the D's activities manifest an intention to submit to the will of the sovereign -- this "will of the sovereign idea" did not seem to be shared by the majority.

In *McIntyre*, the court rejected PJ, because they did not find that McIntyre engaged in conduct purposefully directed at New Jersey, saying "indeed...the D does not have a single contact with New Jersey short of the machine in question ending up in this state." The distributor agreed to sell machines throughout the entire U.S., there were no McIntyre offices in NJ, they didn't pay taxes or employ any people there. The court found that these facts indicated an intent to serve the American market, but not purposeful



availment of the NJ market.

Similarly in this case, Cargotec is Moffett's U.S.-wide marketer distributor. Cargotec is Moffett's only American customer in the U.S.; Moffett does not sell forklifts directly to other customers. This case is different in that while only one McIntyre machine ended up in NJ, 203 Moffett machines ended up in Mississippi. But, this accounts for only 1.55% of Moffett's sales in a certain period. Just like McIntyre, these facts indicate an intent to serve the American market in general, but they do not indicate purposeful availment of Mississippi.

#### Concurrence + Dissent

In McIntyre, Breyer and Alito agreed with the Kennedy plurality, saying that they wanted "regular and anticipated flow" (from the Brennan theory in *Asahi*) to find PJ. They also found that there was no "something more" that made the product state-specific, like special state-related design, advertising, marketing, or advice (this language comes from the O'Connor theory in *Asahi*). They rejected jurisdiction, because they did not think that just because a manufacturer knows its products are being distributed nationwide and might end up in the forum, there should be jurisdiction. They found fault in the strictness of the plurality though, positing that if NJ had had a large market for scrap metal, perhaps, that that would indicate purposeful availment. Put differently, if there was a large potential market in NJ, then it would be likely that a manufacturer's products given to a distributor to sell anywhere in America would end up in NJ -- that would be

"seeking to serve."

In her dissent, Justice Ginsburg states that purposeful availment is satisfied if the D places a product into the stream of commerce *intending* it to end up in the forum state. She stated that McIntyre availed itself of the American market as a whole, and in doing so, there was no way that McIntyre could *not* have intended to sell its products to NJ, the fourth largest import destination and largest scrap metal destination in the U.S.

If we analyse the facts of this case in the frame of the concurrence and the dissent, things shake out a little differently. While it is true that there was no "+" in Moffett's purposeful availment (no state-specific marketing or ads, etc.), it can be said that Moffett availed itself of the American market as a whole, and in doing so, it must have intended that some of its poultry forklifts would end up in Mississippi, the fourth-largest poultry market.

Overall, and in my opinion, I do not believe that Moffett sought to serve Mississippi specifically; the plurality makes the rule, after all.

## Step 2 -- Reasonableness

Assuming for the sake of discussion that minimum contacts have been met, the second step of the *Shoe* test is assessing whether reasonableness factors demonstrate whether it would be unconstitutional to exercise PJ. The burden of proving unreasonableness is on the defendant. The factors are (1) burden on the D, (2) the forum state's interest, (3) P's interest in convenient and effective relief, and (4) shared interest of the states.

In *Asahi*, the burden on the defendant indicated hardship rising to the level of due process deprivation, because the litigation was thousands of miles from home. Here, Moffett is an Irish company with its PPB in Ireland. I cannot say that transatlantic travel would rise to the level of depriving due process, but Ireland and Mississippi are certainly not within a stone's throw of each other.

Secondly, forum interest. The litigated issue in *Asahi* would not be determined with reference to CA law, and D in that case was not a CA citizen. Here, I assume that P is suing under Mississippi's wrongful death statute, so presumably, there is forum interest in the dispute.

Third is P's interest in convenient and effective relief. In *Asahi*, there was no clear interest because both party's were foreign. Here, P is from Mississippi, so there is a clear interest in relief that is both effective and convenient.

Fourth is shared interest of the states. Is this case similar to *Asahi*, in that there is an interest in preventing the state courts from deciding international disputes? Here, plaintiff is Mississippian, and the injury took place in Mississippi.

This case is not as clearly unreasonable as *Asahi* was, but I do not believe that a determination of reasonableness is strictly necessary when minimum contacts were not successfully established.

#### Overall Conclusion

Because I do not believe that Moffett sought to serve the forum state, I

do not believe that minimum contacts were established; as such, I believe that court should decline to extend PJ over Moffett.

## Question 2 (worth 35% of final exam grade)

Jacqueline Marren worked for Alamo Travel from 2009 through June 4, 2014. Alamo Travel classified her as an “employee” from 2009 through June 8, 2012; thereafter, coinciding with her relocation from San Antonio to Las Vegas, Alamo Travel reclassified her as an “independent contractor.” Marren performed the same duties in Las Vegas as she had in San Antonio but, as a result of her reclassification, was denied previous benefits she enjoyed, such as being able to contribute to the company’s 401(k) retirement plan, and paid vacation leave.

Worried that she was violating the law by paying federal income taxes as an independent contractor rather than an employee, on May 5, 2014 Marren filed with the IRS what is known as an “SS-Determination— Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.” Approximately one month later, on June 4, 2014, Alamo Travel fired Marren. On November 11, 2015, in connection with the SS-Determination filed by Marren, the IRS concluded that between June 2012 and June 4, 2014, Marren had in fact been an employee of Alamo Travel and that additional taxes were due from her and from Alamo Travel. Alamo Travel has separately appealed the IRS’s determination. That administrative appeal remains pending.

On June 1, 2016, Marren filed suit in the 438th Judicial District Court of Bexar County, Texas, against Alamo Travel. Her sole claim was a state law claim for wrongful discharge under what is known as the *Sabine Pilot* doctrine. The *Sabine Pilot* doctrine prohibits employers from firing employees based solely on their refusal to perform an illegal act. *Sabine Pilot* requires a plaintiff to prove that: (1) she was required to commit an illegal act that carries criminal penalties; (2) she refused to engage in the illegality; (3) she was discharged; and (4) the sole reason for her discharge was her refusal to commit the unlawful act. Marren alleged that as a result of her wrongful termination, she was damaged by loss of the health and welfare benefits, past wages, and future wages and mental anguish.

On June 26, 2016, Alamo Travel timely removed the case pursuant to 28 U.S.C. § 1441(b), arguing that the federal district court has federal question jurisdiction because “the gravamen of Plaintiff’s claims is that Defendant failed to abide by its statutory duty under the Federal Insurance Contributions Act, 26 U.S.C. §§ 3101-3128 to classify plaintiff as an employee.”

Marren filed a motion to remand. How should the court rule?

## Better Scoring Student Answers To Question 2

Question 1 Word Count = 2121

Character Count = 13304

Line Count = 226

-->End of Question 1

-->Question -2-

#### MOTION FOR REMAND BACK TO STATE COURT

The sole issue on these facts is whether the defendant improperly removed the state law case to federal court on the basis of a federal question. The court should rule that the case was improperly removed to federal court and should be remanded to state court.

In order for the federal court to have the ability to hear Marren's claim they would need to have subject matter jurisdiction. Subject matter jurisdiction concerns the ability of the court to hear a case. Federal courts, in accordance with the US constitution, are courts of limited jurisdiction. Thus, the repercussions of a court without subject matter jurisdiction are severe- the decision is not valid. Under Article 3 Section 2

of the Consitution there are two primary sources of jurisdiction for the federal courts: when the controversies are between citizens of different states or when the claim contains 'a civil action arising under the Constitution, laws, or treaties of the United States (28 U.S.C 1331). On these facts, we have no reason to believe the claim is able to be sustained in federal court on the basis of diversity, as such only the second option presents a viable method of SMJ for the defendant. A claim may 'arise under' these federal laws in several ways- either express Congressional granting of original jurisdiction or private rights of action (or variants therein), or with the satisfaction of the federal question doctrine- namely, that the dispute involves 'substantial questions of federal law, and thus justifies "resort to the experience, solliciturde, and hope of uniformity that a federal forum offers on federal issues" (*Grable*).

In accordance with Justice Holmes' 'creation test' (as articulated in *American Well Works*), if the cause of action arose under federal law there is a starting presumption that it is a federal question. Conversely, if the cause of action arose under state law, the starting presumption is that it is not a federal question. In order to get into federal court, Alamo needed to remove the case on the basis that Marren 'artfully pleaded' her complaint



such that it was a proper federal claim that was artfully crafted as a state claim as to avoid congressional intent of jurisdiction.

In order to remand back to federal court, Marren must show that her presumption was proper and that her claim was a well pleaded state claim- i.e. that it properly stated a state claim that did not artfully contain any federal issue. If the federal question does not arise out of a well pleaded complaint, it is not able to be brought in federal court (*Mottley*).

The proper test for determining jurisdiction over federal issues embedded in state-law claims between non-diverse parties stems from *Grable* and asks: "Does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities?"

The test can be broken down into two primary steps, each of which will be analysed in turn.

**STEP ONE: Is the federal issue (a) substantial, (b) necessary to the**

determination of the case, and (c) actually in dispute?

(a) Is the federal issue substantial?

The defendant on these facts argued that the federal issue is the interpretation and application of a federal statute- namely, the Federal Insurance Contributions Act ("FICA").

The sole claim in the plaintiff's case is wrongful discharge. Wrongful discharge, under a Texas common law doctrine which requires a plaintiff to prove (1) she was required to commit an illegal act that carries criminal penalties; (2) she refused to engage in the illegality; (3) she was discharged; and (4) the sole reason for her discharge was her refusal to commit the unlawful act.

The defendants are asserting that this common law doctrine claim is essentially 'artfully pleaded' to disguise the plaintiff's true claim under FICA for a wrongful classification of employee. However, there is no evidence that this federal law grants original jurisdiction to the federal courts, nor that, so far as it is even relevant to Marren's common law claim, it wouldn't

be able to be interpreted and applied by state courts under concurrent jurisdiction.

In essence, there is no reason to suggest only federal courts may interpret and apply this statute and that it is substantial enough to warrant federal jurisdiction.

**(b) Is the federal issue necessary to the determination of the case?**

While FICA may be relevant to the determination to the case (perhaps moreso to the defendants if it grants any sort of safe harbor or good faith defenses), it is assuredly not *necessary* to the determination of a purely state law common law claim. In *Grable*, the federal issue was the sole and only determinable issue in the case (in that instance, whether proper service had to be personal service or constructive service), here several issues will need to be determined: while whether Marren was an employee is indeed an issue, it must also be determined whether the act was illegal, whether it carried criminal penalties, etc. etc. Furthermore, there is nothing to suggest that a state court couldn't determine that she was an employee absent

this statute- i.e. the courts may find she was an employee under a similar state or common law interpretation- the finding under this federal act is not necessary to the determination of this case. This is similar to the finding in Merrill Dow wherein the court found that the state law issues (here the state common law doctrine) could be resolved without settling the federal labelling issue (here the federal employee classification issue).

**(c) Is the federal issue actually in dispute?**

In order for the federal issue to be in dispute, it must actually be in dispute- here the dispute is actually governed by a separate administrative appeals process wherein the defendant is already disputing the finding that Marren was an employee in the administrative appeals tribunal. Thus, that issue is already being determined in a separate process and the determination of the IRS appeals process will settle this dispute for income tax purposes. The claim here rests on the illegality of Alamo's actions leading to damages- thus, the issue relating to FICA is not actually in dispute on these facts.

STEP TWO: If step one is met, would the federal court hearing this case upset the federalism balance?

Step two asks us to consider Congressional intent in ensuring that only cases that are properly federal be brought in federal court and that a determination that the state court lacked subject matter jurisdiction in this instance would not prompt an unsettling of precedent in that it may encourage a large number of state cases to be transferred to federal court.

I beleive on these facts if this case were to be allowed it would indeed bring about a huge number of proper state claims into federal court just by virute of the presence of a federal interpretaiotn of something as simple as a statuory duty to classify an indepedent contractor properly as an employee. (similar to Merrill Dow's labelling issue). This is assuredly something that state courts are competetent to discern, and as such finding that this raises a substantial federal question as to be removed to federal court is improper and the case should be remanded to state court.

Character Count = 21046

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-->End of Question 1

-->Question -2-

Question #2: Subject Matter Jurisdiction in Federal Courts, artful pleading

In order to decide if the motion to remand should be granted, we must assess the claim that the plaintiff's state claim turns on federal law.

Article III, Section 2 of the U.S. Constitution grants Constitutional Authority to federal courts in cases arising under the laws of the united states

Before looking to the legislature, constitutional amenability must be established.

Federal courts are granted the power to hear cases involving federal questions in Article III, Section 2 of the U.S. Constitution: "the juridical

power shall extend to all cases...arising under this Constitution, the Laws of the U.S....or which shall be made, under their Authority."

Given that the Constitutional limit serves as an outer bound, within which Congress has the ability to delegate authority to the courts, we must now turn to the statute.

28 U.S.C. 1331 grants the Statutory Authority to Federal Courts to have power over civil actions arising under the laws of the U.S.

28 U.S.C. 1331 addresses the issue of subject matter jurisdiction over federal questions by stating that "the district courts shall have original jurisdiction of all civil actions arising under the...laws of the U.S."

Finally we must turn to how the courts have interpreted this language before deciding how it applies to our facts.

The starting presumption of the Holmes Creation Test is that if a state claim

is brought in state court, it does not arise out of the laws of the U.S.

For subject matter to be proper, a federal question must be included as a part of a plaintiff's well-pleaded complaint (Mottley). An asserted or anticipated defense cannot be used to establish a federal question. *Id.* Federal question jurisdiction is usually invoked when a plaintiff has pleaded a cause of action created by federal law (Grable p.438). When a plaintiff brings a state claim in state court, the starting presumption is that the case does not arise out of 28 U.S.C. 1331 (Holmes Creation Test, *American Well Works* p.303).

Here, we have a state claim for wrongful discharge brought in state court.

Therefore, the starting presumption is the one state above.

However, this may be overcome if "artful pleading" can be demonstrated.



There is no complete pre-emption by a federal statute.

Complete pre-emption contemplates that the federal question completely pre-empts or takes precedent over the state law claim. We are given no information that suggests that this is the case.

Therefore, we will analyze the facts according to the two-step test arising under the substantial federal question doctrine.

The substantial federal question doctrine [DOES/DOES NOT] show artful pleading via Grable's Two-Step test

The presumption of the Holmes Creation Test may be overcome if artful pleading can be shown via the substantial federal question doctrine.

Aside from a plaintiff pleading a cause of action created by federal

law, a federal question may arise where plaintiff makes state-law claims that implicate significant federal issues (Grable p.438). The court, in Grable, developed a two-step test. The first step looks for a federal issue that must be substantial, necessary to determination, and actually in dispute (Grable). The second step, independent of the results of the first, looks to how hearing the case at hand in Federal Court would affect the balance of federal and state judicial responsibilities.

Step one, A: There likely is a substantial federal question under these facts.

To meet the first requirement of the Substantial Federal Question doctrine, we must first identify a substantial federal issue.

The courts have found that the federal issue involved in the case must be "a substantial one", indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum". (Grable, 439). The

court must have to do more than merely applying federal law to the raised state claim. *id.* Rather, the federal issue must "really and substantially involve a dispute or controversy respecting the validity of the construction or effect of federal law" (*Grable*).

In *Grable*, the court found a substantial federal issue was at hand as they determined that the meaning of a federal tax provision is a substantial federal law. They concluded that government had a direct interest in making a federal forum available to "vindicate its own administrative action" when it comes to collecting delinquent taxes.

This situation is like the case in *Grable*, where the plaintiff's claims turned on the interpretation of federal law, because the first element of the Sabine Pilot doctrine rests on the fact that something illegal was done. Here, that "something illegal" was a federal crime. The federal courts would have an interest in resolving this dispute, as the interpretation of federal

statutes would be required to resolve the dispute. The federal courts would have an interest in resolving these disputes and coming to a conclusion which correctly interprets not only these laws, but also the findings of the IRS.

However, unlike Grable, the issue has been, in essence, resolved once by the IRS, and we are only waiting on the results of an administrative appeal. Also unlike Grable the federal courts here would not be vindicating the actions of the government in any way.

Despite the fact that the opposition's argument is not without merit, it is likely the courts will decide that this is a substantial federal issue.

Step One, B: The substantial federal issue is necessary to determination

The second question to consider in determining whether the first requirement of the Substantial Federal Question doctrine has been met, is

whether the issue is necessary to determination of the dispute.

A state-law claim can give rise to a federal question if it necessarily raises a stated federal issue (Grable). The right to relief in such a case necessarily depends on the application or construction of a federal law. (Grable quoting Smith).

In Grable, the court found the federal question necessary to the determination of a case, where the claim was premised on the notion that the IRS had not given the plaintiff adequate notice as defined by federal law.

Here, the situation is similar to that in Grable, in that the court would need to classify the plaintiff as an employee according to Federal definitions in order to come to a conclusion on the claims.

However, unlike Grable, we have the added feedback from the IRS

determinations, which could guide the states interpretation of the federal law, and therefore, it might not actually be necessary to determination at all.

Despite this point, the federal law standards would still be necessary, even if considering the IRS feedback.

It is more likely that the court would find the issue is necessary to determination.

Step One, C: The substantial federal issue, necessary to determination, is actually in dispute

The final point to consider in determining whether or not the first step of the Federal Question Doctrine is met, is whether or not the federal issue

was actually in dispute.

In order for subject matter jurisdiction to be proper, a state-claim must necessarily raise a federal issue, and that federal issue must actually be disputed (Grable, 440).

In Grable, the court determined that the meaning of the federal statute was actually in dispute. In fact, they determined that the federal issue was "the only legal or factual issue contested." Id.

Like in Grable, the issue as to whether or not Marren was an employee as classified by federal law is what is actually in dispute in this case. Had it not been for the fact that she believed she was doing something illegal, she would not have a claim under the Sabine Pilot doctrine. Therefore, Alamo

Travel is actually disputing her assertion that she was doing something illegal by paying federal taxes as an independent contractor.

The opposition could again argue that this point is not at all in dispute, given that the IRS has already determined that she should have been classified as an employee.

However, the IRS has not yet ruled on the appeal, and therefore, the issue remains in dispute. While the initial IRS determination could serve as evidence, the fact that it is being assessed again on appeal leaves it open to dispute.

Therefore, it is more likely the court will find that this issue is actually in dispute.



Having established that the court would likely find that this is a substantial federal issue, necessary to determination of the case, and actually in dispute, we must now consider the second step of the Federal Question Doctrine Test.

Second Step: Balance of Federal and State Judicial Responsibilities would likely persuade the court to not grant Federal Jurisdiction

Even when all of the factors in step one are met, we must consider whether trying this case in federal court would disrupt the federalism balance intended by congress.

The determination as to whether or not a federal issue will ultimately

qualify for a federal forum is made based on federal jurisdiction being consistent "with congressional judgement about the sound division of labor between state and federal courts (Grable, 440). The potential disruption of the balance of federal and state judicial responsibilities caused by the exercise of jurisdiction must always be considered. Id.

In Grable, the court found that this balance was not disrupted because it is not common for state-title cases to raise issues of federal law. Id. Given that the intrusion of federal questions in such cases is rare, resolving this particular matter in Federal court would not disrupt any division of labor between the federal and state courts intended by congress.

In Merrell Dow, the court found federal jurisdiction unavailable, in a case that required the application of federal law. The court considered a

state tort claim whose decision rested, in part, on the interpretation of a federal prohibition. Congress had not provided a cause of action for the violation claimed.

This case is similar to *Merrell Dow*, in that it is an action brought for wrongful discharge, a run-of-the-mill claim only turning on the interpretation of a federal issue. As the court noted in *Merrell Dow*, allowing for such an action to be heard in court would open the flood-gates of litigation. Unlike *Grable*, where it would be a rare occasion that the intrusion of federal questions was rare in actions such as the one that was brought, here we have something that would be a fairly common issue in wrongful discharge suits. There are many instances of companies

misclassifying employers as independent contractors, and each one of those instances would entail the interpretation of federal law.

Therefore, allowing for this case to be heard in court would disrupt the balance of power intended by congress.

The 1447 motion to remand should be granted, without the award of attorney's fees.

Despite having met step one of the test, failing step two would be enough for the court to determine that federal question jurisdiction would not be proper.

28 U.S.C. sec. 1447 grants that a motion to remand a case may be made within 30 days after a notice of removal has been filed (1447(c)). If the grounds for the remand consist of a subject matter jurisdiction defect, there is no time limit. Id. Section 1447(c) also provides that attorney's fees may be awarded when a case is ordered for remand back to state court. Such an award should be considered only when it would be "just" to do so. The courts have interpreted this to mean that the determination to grant the award should be made based on whether or not the motion to remove was reasonable (Martin).

Here, given that the facts survived the first step of the Grable test, we can assume that the court would find that the motion to remove was reasonable.

Therefore, the motion to remand should be granted, without any award of attorney's fees.

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