

## Long Answer Essay Question

(worth 50% of grade on final):

Tomlinson filed a suit for damages in Oklahoma state court against H&R Block, Inc. As the basis for personal jurisdiction, Tomlinson alleged that some or all of defendant's wrongful acts and conduct occurred in Oklahoma and that defendant operates out of more than nine thousand tax offices and ninety-eight financial centers in the United States and offers franchise opportunities, seminars, and training sessions to teach people the tax preparation business. She claimed that she used defendant's services to prepare her income tax return and enrolled in income tax courses offered by defendant. The complaint does not indicate where Tomlinson was living when she allegedly used the tax services and enrolled for the course. She is currently a resident of Oklahoma.

In Count I of her complaint, she alleged that H&R Block, Inc. made false and deceptive statements by using her social security number in educational seminars and tax preparation training courses after it had published a privacy policy stating it protects personal information. In Count II, she alleged that defendant misappropriated her social security number for its financial advantage by using it in tax preparation courses, apparently in a "2002 Student Work book" that was otherwise unidentified.

Defendant first objected before the state judge that service had been improperly effectuated on the general manager of one of its franchise operations in Oklahoma and that this manager was not a designated agent for service of process. The state court denied its motion to quash service on the ground that under Oklahoma common law service on "any managerial or executive official" of a company is deemed to be constructive service on the company, even if such a person is not designated by the company as its proper agent for service of process and even if, under the relevant business statute, the only persons that a company may appoint to accept service of process are "a president, a general counsel or an outside lawyer designated by the company to receive service."

Instead of appealing the denial of its motion to quash service, defendant removed the case to federal court under 28 U.S.C. §1332, asserting that it is a New York corporation with its principal place of business in New York and that diversity exists because at the time suit was filed Tomlinson's state suit indicated that she was a resident of Oklahoma. Defendant also noted that plaintiff's state suit sought damages in excess of \$75,000. Thereafter, defendant filed a motion to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). In support of its motion, defendant filed several affidavits averring the following: (1) that H&R Block, Inc., is solely a holding company; (2) that it never conducted business or training or published educational or promotional materials for use in Oklahoma; (3) that it did never had a physical presence, bank account, or phone listing in the state; and (4) that in regard to the website on which Tomlinson relies to try to demonstrate jurisdictional amenability, defendant notes that the

website contains the following disclaimer which shows that the holding company, H & R Block, lacks sufficient contacts in Oklahoma:

H&R Block, Inc. is a holding company which has no employees. Any goods or services that may be offered for sale through this Web site or a link hereto are offered by operating subsidiaries of H&R Block, Inc., and not by H&R Block, Inc.

In response, Tomlinson submitted two exhibits. The first exhibit was a portion of a training manual for an Oklahoma Income Tax Course that stated it was "an annual publication of H&R Block, Region 37." The second exhibit was a single page from an unidentified book indicating that it was copyrighted by "H&R Block Tax Services, Inc." Plaintiff provided no additional information establishing from what document the page was annexed, but in her responsive brief her counsel argued that "the page came from the '2002 Student Work book."

Tomlinson also argued that Oklahoma may assert general jurisdiction over the defendant because the H&R Block website indicates that H&R Block, Inc., serves over 18.7 million tax clients in the United States. She argued that the court should infer from the exhibit that some of those clients are in Oklahoma.

Analyze what relevant legal issues are raised by this situation and discuss them fully.

The first issue to address in this case is the removal to federal court of the case. H.R. Block removed the case under 28 USC 1332 for diversity and it appears that diversity is good in this case because we take a snapshot in time at when the suit was filed and not when the acts alleged occurred. Assuming that Tomlinson did indeed indicate in her pleading that at the time of filing she was a resident of Oklahoma and also assuming that H.R. Block was correct when they said that they are a New York company with principle place of business in New York, then diversity would be present in this case. However, H.R. Block would likely not be allowed to remove this case to federal court because under 28 USC 1446 they have already submitted to the jurisdiction of the state court and asked for affirmative relief.

When H.R. Block filed the motion for 12(b)(5) insufficiency of service of process they asked for affirmative relief from the Oklahoma state judge in asking him to dismiss the case. They are not then allowed to decide that they do not like his answer and then remove the case to federal court. The only affirmative relief that can be asked for is a special appearance can be made to argue for 12(b)(3) improper venue. Because of this error as long as the plaintiff files a motion to remand within 30 days of the removal the case should be remanded back down to the state court.

#### 12(b)(2) Waiver of Certain Defenses

Since the case is likely back down in the state court now, the 12(b)(2) motion for lack of jurisdiction over the person has been waived because all 12(b) least favored motions must be filed at once according to 12(g) and 12(h) provisions relating to waiver and consolidation. This would likely be the same even if the defendant were allowed to remain in the federal court because he would not have reserved a personal jurisdiction argument in the state court when they made their service argument. Now that they would be in federal court it would likely be ruled too late to try again. It is possible, however, that the state judge's ruling would be ignored since it would had to have been in order to stay in Federal court in the first place and since it is essentially a new trial at this point in the federal court the judge would allow a first 12(b) argument on personal jurisdiction. However, this seems unlikely since the purpose of the federal judge in this scenario is to simply act in the place of the state judge to remove possible prejudice.

**Personal Jurisdiction: International Shoe Test**

If, for some reason however the 12(b)(2) motion is not ruled as waived then it will have to be analyzed using the Oklahoma state long arm statute and the International Shoe test. Since we do not know the Oklahoma state long arm statute I will assume for these purposes that it is either met in this case or that it extends to the same lengths as the constitutional limits.

In looking at this case with the two part test of International Shoe we first look at the minimum contacts portion. The first question we are posed with here is how to analyze this, is H.R. Block to be looked at simply on its own as a holding company or with its various subsidiaries to show minimum contacts? It would seem strange to look simply at the shell since no investor would buy stock in H.R. Block if it did not have its subsidiaries and it is impossible to have a company with no employees, it would have no purpose without its subsidiaries. There is an argument here, however, that the plaintiff has not done enough to prove that H.R. Block is the same company as the subsidiaries. Though 12(b)(2) is a defense and so the burden rests on the defense how heavy is that burden? Did the defense discharge their burden simply by stating that they are different and reading some language off of the company website? I think that they would probably not in this case since we are still in the initial pleading stages and this is a very liberal time for the plaintiff.

Pleading standards are very liberal because we want plaintiffs to be able to get to discovery in order to find out more to prove their cases before we hold them to a higher Rule 56 standard. If we were to impose a very low burden on the defense here then the plaintiff would have to know quite a bit more at this stage than we require with the liberal 8(a) plain and simple standard expressed in Conley v. Gibson. So the defense probably does have to show more than just a website blurb to force the plaintiff to come up with documentation proving they are one company. If not then there would be an argument over whether or not the plaintiff then provided enough with her two documents to which to answer is possibly yes because they may have provided the court with issues that were genuine and material.

**Minimum Contacts**

Now that we know what companies we are looking at we look at their contacts in Oklahoma to judge their amenability to personal jurisdiction under the constitution and International Shoe.

First we ask if this a test of specific or general jurisdiction. The plaintiff seems to think that it is a

specific jurisdiction test. She alleges that some or all of defendant's wrongful conduct occurred in Oklahoma. So depending on what acts these were and what contacts HR Block's subsidiaries had in Oklahoma would determine whether they met Intl Shoe's minimum contacts test. If, for instance, plaintiff alleges that they used the 2002 document in Oklahoma purposefully and HR Block had offices which used that document and courses which copied it and used it in classes then the Keeton v. Hustler case which covers impacts in the forum that were purposeful would probably encapsulate that case. If, however, she took the course in Oklahoma then it would probably be enough if there were HR Block centers in Oklahoma where she attended courses and training.

If, however, this is a case of general jurisdiction because she did not take the course in Oklahoma and the 2002 document was not used in Oklahoma then the situation may be tougher. Helicol makes it seem that general jurisdiction sets a higher bar than does specific jurisdiction. So the contacts with Oklahoma would have to be very high to reach the Helicol personal jurisdiction bar. In this case plaintiff's assertion that of HR Block's alleged 18.7 million tax clients in the U.S. some must be from Oklahoma and that is enough for general jurisdiction is probably not enough. Helicol says that there must be substantial revenue, because that company made large purchases from the helicopter company in Dallas and that was not enough, so just doing business in the state will not meet the standard. The plaintiff would probably have to show large earnings from business in the state and the company purposely putting themselves in Oklahoma and using Oklahoma's laws and resources.

#### Fair Play and Substantial Justice

Then after minimum contacts we move on to fair play and substantial justice factors. The first is the state interest. Oklahoma's interest in this case is high because one of their own citizens is suing a company that does business in their state. It could be higher or lower depending on how much business but it will always be high because the plaintiff is an Oklahoma citizen. Next is the plaintiff's interest. This is fairly high because we do like to disturb the plaintiff's choice of forum, and we do not know exactly where else the plaintiff may be able to file suit. However, it is possible for the plaintiff to at least file suit in New York if no where else. Next we look to the efficient resolution from the perspective of the interstate justice system. This is fairly low, there is only one defendant so the case would not be split and there would only be one trial no matter where it is held.

So to recap, the defendant would likely be back in state court and would be unable to argue dismissal for lack of personal jurisdiction, if they were able to argue personal jurisdiction they would probably lose if it were a specific jurisdiction question and lose if it were a general jurisdiction question, based on the scant information available.

#### Other Possibilities Open to Defendants

Also, the defendants should file a 12(b)(6) failure to state a claim upon which relief can be granted because the plaintiff failed in her pleading to state with specificity the fraud as required in rule 9(b) of the federal rules (assuming of course that Oklahoma's rule are the same). *Bower v. Weisman* says that fraud claims must state the time, place, and content of all fraud claims and it appears that this claim does not do this. The defendants are able to file this claim later because it is not least favored and so can be filed as late as at trial.

It would probably also be in the interests of the defendants to move for a motion on the pleadings according to rule 12(c) or summary judgment according to rule 56 as soon as possible since it appears that quite a bit is left out of this pleading and so it would probably be very easy for the defendants to argue in summary judgment that the plaintiff does not have enough evidence to win at trial as they are allowed to do under *Celotex*. It would then be up to the plaintiff to show evidence that showed a material and genuine issue for trial. It is very debatable if plaintiff can do that at this point because her exhibits may not raise issues that are both the subject of a debate and will affect the outcome since they appear to be so vague and general. However, it may be said that they will be attached at trial to the longer documents which bring up larger issues and raise fewer doubts and so like affidavits which only have to point to information which will be alright at trial these exhibits are sufficient.

In either case the plaintiff seems to be having a difficult time coming up with documents and so summary judgment to make her show HR Block her cards even if they could not get it dismissed would probably be to their advantage.

There are several relevant legal issues raised by the situation which include service of process, removal, subject matter jurisdiction, and finally personal jurisdiction. The defendant's first objection seemed to be one of improper service. Under the federal rules of civil procedure a defendant may raise an objection to insufficient service of process under rule 12(b)(5). After being denied the motion the defendant removed to federal court on the basis of diversity. According to 28 USC 1441(b) a case founded upon diversity may be removed to federal court only if none of the parties in interest are a citizen of the state in which such action is brought. Under 28 USC 1332(c) for the purposes of subject matter jurisdiction a corporation is deemed to be a citizen of its state of incorporation and its principle place of business. H&R Block asserted New York as its place of incorporation and principle place of business, and at the time suit was filed, Tomilson was a resident of Oklahoma. The defendant also noted that the plaintiff's suit sought damages in excess of 75,000 therefore, subject matter jurisdiction was proper under 28 USC 1332(a) and for the purposes of 1441(b) removal was proper.

The next legal issue hinges on the defendant's 12(b)(2) motion to dismiss for lack of personal jurisdiction in Oklahoma. The major issue here is the fact that the defendant filed a 12(b)(5) motion in state court. One plausible argument to this motion is that according to rule 12(g) when a party makes a motion under rule 12 it must join with it all other available motions. Rule 12(h) takes this a step further by asserting that if defense of lack of jurisdiction, among other motions, are omitted from a consolidated motion under rule 12(g) it is waived. The issue here is whether by making the 12(b)(5) motion in state court, the defendant waived his right to later assert his motion in federal court. The answer to this question hinges on the rules of Oklahoma. If Oklahoma has adopted the federal rules of civil procedure as their state rules, the plaintiff may argue that the defendant waived his right to assert a claim against personal jurisdiction later in federal court. However, there is nothing to infer that Oklahoma adopted the federal rules and thus the defendant should be allowed to assert his motion to dismiss. Another plausible reason not to waive the 12(b)(2) is the fact that the defendant was not bringing the motion in state court where his first motion was brought, but rather federal court and therefore the motion should not be waived.

Assuming the defendant did not waive his right to assert his 12(b)(2) motion we move to the issue of personal jurisdiction. Given the fact that there has been no information given about any long-arm statute for Oklahoma it is proper to go directly to the constitutional test to determine whether

Oklahoma had proper personal jurisdiction over the defendant. In order to meet the constitutional threshold of due process under the 14th amendment a defendant must have certain minimum contact in order to be haled to court in a different state. The defendant argues a lack of jurisdiction based on the facts that the company is solely a holding company, it never conducted business or training or published educational or promotional materials for use in Oklahoma, it never had a physical presence, bank account, or phone listing in the state, and that there is a disclaimer posted on the company's website that emphasizes the fact that the company is a holding company with no employees.

Defendant's first argument of the fact that they are a holding company is an attempt to disenfranchise themselves from any type of contact with the forum state. According to the defendant they have no employees but rather subsidiaries which are not operated by the company. If this argument is taken at face value and the defendant had no contacts or business at all within the forum it could be argued that they would not meet the minimum contacts test and therefore the 12(b)(2) motion should be granted. An argument against this could be that although not directly employed by H&R Block Inc., the subsidiaries are still a component of the H&R Block Inc. company and therefore, the employees of the different subsidiaries could be classified as agents of the company thus giving H&R Block contacts within the forum if any of these agents or subsidiaries were located in Oklahoma.

The next defenses are that the defendant never conducted business or training or published educational or promotional materials for use in Oklahoma, and that they never had a physical presence in the state. The first defense centers around the purposeful availment component of the minimum contacts test. If the defense is true, H&R Block may be able to argue that they did not reach into the forum to solicit business nor did they place products into the stream of commerce within the forum and thus they would not meet the minimum contacts test because they did not subject themselves to the benefits of the forum state. An argument against this defense is the first exhibit offered by the plaintiff that provided a portion of a training manual for an Oklahoma Income Tax Course that stated it was a publication of the H&R Block Region 37. Assuming that region 37 is a part of H&R Block Inc the plaintiff can argue that the publication was a purposeful availment because the publication was created to be used within the forum. The defendant would benefit from profits it would incur from the revenue of the tax course held in Oklahoma.

The defense that the defendant was never physically in the state can also be defeated in relation to minimum contacts if the plaintiff argues that physical presence in the forum is not necessary to

meet minimum contacts. The plaintiff's argument can also be supported by the court decision in *Calder v. Jones* in which the court ruled that if the effects of a tortious or wrongful act are felt in a state where they are intended to be felt, the party that commits an act can be subject to personal jurisdiction of the courts in that state even if they were never physically in the state. Here the alleged wrongful act was the defendant's improper use of the plaintiff's social security number in a 2002 Student Workbook. A proper question to ask is where this event occurred. If the event occurred within the forum Tomlinson may be able to argue that it was foreseeable that the effects of the improper use in the Oklahoma publication would be felt in Oklahoma and it was foreseeable that the company would be hailed to court there. However, if the events occurred outside of the forum the plaintiff would have to prove sufficient contacts within Oklahoma that would warrant the exercise of personal jurisdiction over H&R Block. The plaintiff's evidence of the Oklahoma tax prep packet does show that the defendant solicited business in the forum, but the question that remains is, is that contact sufficient to personal jurisdiction if the claim did not arise out of said contact.

The final defense presented by H&R Block is in relation to a disclaimer placed on their website which shows that the company lacks sufficient contacts with the state. The disclaimer separates H&R Block Inc from their subsidiaries. This separation if true, would distinguish the acts of the subsidiaries from the acts of H&R Block Inc enough to defeat the minimum contacts test of personal jurisdiction. However, through exhibits offered by the plaintiff it appears that H&R Block Inc is connected to the subsidiaries, and rather than being separate companies they operate under the H&R Block name. This is presented through the use of H&R Block on printed materials. If this is true it can be inferred that the subsidiaries work as agents for the company and it would be reasonable for consumers to perceive their presence in different states as the presence of H&R Block Inc.

If minimum contacts are found, in order for personal jurisdiction to be proper, it must also be fair and reasonable to the defendant to appear in the forum state. The state has an interest in adjudicating the claim of one of its citizens, and the plaintiff of course would have an interest in being able to settle the claim in the place of their residence. The only matter that remains is any burden or inconvenience that may be felt by the defendant. Upon the facts of the case the defendant operates out of more than nine thousand tax offices and ninety-eight financial centers in the US, therefore it seems quite unlikely that traveling to Oklahoma would place an unbearable burden on the defendant.

On the basis of these arguments it appears that Oklahoma would not be extending their constitutional rights by exerting jurisdiction over H&R Block Inc on the claims of misuse of the plaintiff's social security number under the assumption that the social security number was used in Oklahoma materials provided and created by the defendant. The justification for this is that the defendant created a presence in the forum by producing and distributing the printed material within the forum that assumingly included the plaintiff's social security number, and it was foreseeable that the effect of the misuse would be felt in Oklahoma and further that the company could be hailed to court there. In following with the decision of *Calder v. Jones*, the fact that the defendant was not physically in the state would not defeat the application of minimum contacts and would be fair and reasonable. However, if the action did not arise out of the defendant's contacts within the state, personal jurisdiction is not proper and the 12(b)(2) motion should be granted.

The reason for this is the same reason that the plaintiff's request for general jurisdiction should be denied without further evidence. To assert general jurisdiction it must be shown that the defendant's activities within the forum are of such substance that they would suffer no inconvenience in defending there. In *Perkins* it was found that the defendant carried on a continuous and systematic supervision of company matters. The plaintiff has offered no form of evidence that would prove that the defendant here carries on such continuous and systematic activities in Oklahoma. To infer this and exert general jurisdiction over the defendant simply because they operate worldwide would exceed the constitutional rights of due process under the 14th amendment. Therefore, general jurisdiction should not be inferred upon the defendant unless it can be shown that the defendant carries on continuous and systematic activities within the forum such that the party would suffer no inconvenience in defending there. By offering evidence of one Oklahoma publication, and the fact that the defendant has offices across the nation the plaintiff has failed to meet the burden necessary to assert general jurisdiction.