

Fall 2012 Exam
with better scoring student answers

Question 1 (worth 40% of grade). Your answer should not exceed 1500 words.

Grupo Pantalones (GP) is incorporated and has its principal place of business in Mexico City, Mexico. It manufactures various kinds of pants and sells them in Mexico. It does not sell any pants in the U.S. One of its employees, a Mexican citizen, brings suit against it in federal court in Texas alleging that in 2008 the company tortured him in Mexico to try to intimidate him from organizing a labor union for employees at the company's Mexico City factory. For purposes of this question, assume that the plaintiff's claim is a recognized cause of action under a federal statute, the Torture Victims Protection Act. Assume also that subject matter is not an issue in this case as it comes within the scope of the court's federal question jurisdiction.

GP also owns a great deal of commercial real estate in Texas (nearly \$100 million dollars), mostly in Houston and Dallas. The real estate business is entirely separate from its pants manufacturing business in Mexico. To support its real estate business, it employs many people in Texas, has extensive dealings with local law firms, real estate agents and title companies, and does a great deal of advertising throughout Texas. Over the years, senior officials from the company have made frequent and regular trips to Texas to manage and oversee its real estate holdings and transactions. They continue to do so.

Assume Texas has a long arm statute that reads as follows:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state; or
- (3) Causing tortious injury by an act or omission in this state.

(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Company moves to dismiss the complaint against it on the ground that it is not subject to personal jurisdiction in Texas. How do you evaluate the strength of any arguments, statutory or constitutional, that it may make in favor of its Rule 12(b)(2) dismissal motion?

Better Scoring Student Answers
to Question 1

START OF EXAM

-->Question -1-

Does the federal court in Texas have personal jurisdiction over GP?

Requirement for PJ and SMJ

Federal Courts do not have the power to enter a judgment against a person without having personal jurisdiction over the defendant and subject matter jurisdiction over the dispute. As the question states, subject matter jurisdiction is proper because the claim is brought under Federal Law.

Establishing personal jurisdiction ("PJ") requires that (1) give the defendant proper notice of the suit, (2) that the court has statutory authorization to exercise PJ, and (3) that exercising personal jurisdiction is constitutional-- that it will not offend due process of law under the 14th amendment. I will assume that the notice requirement was met by proper service of process, and analyze only the court's statutory and constitutional bases for PJ.

Statutory Analysis: (3 types of long arm statutes).

Federal courts establish statutory amenability by looking to a state's long-arm statutes. If the state long arm statute does not allow the court to exercise personal jurisdiction over the defendant, the constitutional inquiry is never made. The question is whether Texas' long arm statute here allows the Federal Court to exercise jurisdiction over GP.

States' long-arm statutes fall into 3 categories. Some explicitly limit PJ to a list of certain claims. Some grant personal jurisdiction consistent with the full range of due process. Others do not grant the fully constitutional

breadth of PJ, but have been interpreted by the state's courts to do so.

Here, Texas' long-arm statute does not explicitly grant jurisdiction to the full extent of the constitutional maximum. Whether the statutory basis depends upon whether Texas courts have interpreted this statute to extend to the full bounds allowed under the constitution. If the statute extends to the constitutional limit, the analysis here ends and the court will only consider the constitutional permissibility of PJ.

If Interpreted More Narrowly than Constitutional Max

Courts generally look to the letter of the statute to determine if personal jurisdiction is statutorily amenable. Here the statute authorizes PJ for the **type** of injury that plaintiff suffered (a tortious injury) but it fails the second part of the sentence because the injury was not caused by an act or omission in Texas. He alleges that the torture happened in Mexico and no part of it can be attributed to Texas.

The statute also permits PJ if the Defendant is "transacting any business in the state." GP is certainly transacting business in Texas with its real-estate transactions. However, the statute only authorizes PJ if the plaintiff's cause of action "aris[es] from" the transaction of business. So while the statute would allow PJ for a cause of action related to the real estate business, it explicitly prevents PJ for an unrelated tortious injury. A strict reading of the statute weighs strongly against exercising PJ over GP.

Section (B) of the statute states that when the long-arm statute is invoked,

it allows PJ only for causes of action listed in the section. This language seems to strongly imply that the legislature did not intend to extend PJ under the long-arm statute to the full reaches of the constitution. Given this, it seems very unlikely that statute would have been interpreted by Texas courts to extend to the full constitutional limit on PJ. On the other hand, we don't know how this statute has been interpreted. I will assume for the constitutional analysis that the statute has been interpreted to extend to the full constitutional limit.

Constitutional Analysis - Pennoyer

A defendant could traditionally be brought within a court's PJ by being served with process while in the state, being domiciled in the state, through an agent, express consent (such as a contract provision), implied consent (as was considered to be the basis for motorists crossing state lines), or waiver by failing to object. It's possible that GP, given the amount of business they're doing in Texas, has an agent here for service of process. However the question does not mention this, or any other bases for traditional PJ, so I'll proceed to the modern bases for PJ.

Expansion of PJ in the wake of Int'l Shoe

In *International Shoe*, the court ruled that constitutionally sound PJ could be established on non-residents of a forum if they conduct activities within a state. Because they enjoy the protections of the state laws, they purposefully avail themselves of the benefit of the state's laws. The court in *Shoe* suggested that there was a difference between the "minimum contacts" necessary to establish PJ for a claim related to activities in the state (Specific

Jurisdiction) and for a claim unrelated to in-state activities (General Jurisdiction). The court in *Burnham* disagreed over whether this test also applies to the *Pennoyer* traditional bases of jurisdiction or whether the traditional bases need not meet the *Shoe* test.

Specific Jurisdiction

Specific Jurisdiction is appropriate under *Shoe* whenever a person's contacts within a state, though minimal, are highly related to the cause of action. Here, the cause of action was related to GP's pant production business, not their real-estate transactions. Because the claim is unrelated to the contacts, the court needs general jurisdiction over GP for this claim to be constitutionally proper.

General Jurisdiction

General Jurisdiction exists whenever the level of activities that a defendant conducts are so "continuous and systematic" that they can fairly be said to be "at home" in the forum, and should anticipate suits being brought against them for any cause of action, even one unrelated to the forum.

The number of contacts that GP has with Texas would arguably not be sufficient for the court to find general jurisdiction. In *Goodyear*, the court stated that the "paradigm" places for a corporation to be subject to general jurisdiction in their place of incorporation or their principal place of business. Here, the question states that GP's PPB and place of incorporation are in Mexico.

On the other hand, *Goodyear* was about a foreign subsidiary, which had few or

no direct contacts with the forum state. GP, on the other hand, is **itself** conducting business in Texas. The ties could fairly be said to be "continuous and systematic" because of the **extent** of their operations in Texas. GP might be more like Perkins, where the company was held to subject to general jurisdiction by conducting its wartime activities in Ohio. GP's activities are certainly extensive: they own \$100 million worth of property in Texas, employing many people, having extensive dealings with local law firms, real estate agents and title companies, and do extensive advertising in Texas. Their agents frequently oversee operations here. Altogether, these contacts are far greater than those present for Goodyear.

Purposeful Availment & Foreseeability

The court might adopt the purposeful availment view used in stream of commerce cases. The nature of their real estate business provided them extensive benefits in Texas that might justify general jurisdiction here. They've dealt with local law firms, clearly desiring to invoke the benefits of Texas laws. And the sheer quantity of the property they own here, combined with their use of Texas' real estate laws, seems to make their activities continuous and systematic. Ultimately, the test is whether their contacts render it foreseeable that they can be brought to suit in Texas for causes of actions unrelated to their Texas contacts. Because their activities are on such a broad scale, they can probably be called "systematic." And because the senior officials continue to manage and oversee operations, it's clear that their operations are "continuous." Considered as a whole, their contacts are more similar to Perkins than to Goodyear. So an expansive view of general

jurisdiction would probably allow it to be applied to GP.

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Fairness Factors

Even if the plaintiff is able to establish general jurisdiction in Texas, GP may be able to show that the fairness factors listed in *Asahi* make the forum unconstitutionally inconvenient and justify not exercising PJ for this particular case. The court will consider the forum's interest in adjudicating the dispute. This interest is slight, because the plaintiff and GP are both Mexican citizens, whose rights Texas has no interest in vindicating. The burden to the defendant will be greater in Texas too, because they'll have to bring all witnesses and attorneys to Texas in order to fight the case. The Plaintiff's interest in obtaining relief weighs heavily only if he can't bring a suit in Mexico, which he probably can. The interstate judicial system's shared interest in furthering fundamental substantive social policies is the only strong factor in the plaintiff's favor, because of our strong social policy against torture.

Taken together, the fairness factors weight strongly toward rejecting GJ over GP in this suit.

Conclusion

Because PJ over GP is probably not permitted by the statute, is only constitutionally permissible by a broad reading of "continuous and systematic" and is likely against "traditional notions of fair play & substantial justice" enumerated in the fairness factors, GP has strong

arguments in favor of its motion to dismiss for lack of personal jurisdiction.

Question 1 Word Count = 1497

Character Count = 9350

Line Count = 156

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START OF EXAM

-->Question -1-

Issue: Does a federal court in the state of Texas have the power to assert a binding judgment onto Grupo Pantalones (D) through personal jurisdiction (pj)?

Rule: In order for a court to have pj over a d, the plaintiff (p) must give the d notice of the suit, so the d knows what they are defending against. There must be sufficient statutory amenability allowing pj. States can have statutes that limit the constitutional powers they have been granted. The statutes can go to the full extent of the constitution, or the statute may be limiting in its language but has been interpreted by the court to go to the full extent of the Constitution. There must also be constitutional amenability under the Due Process clause that gives the state power to exercise its authority over the D. PJ comes in two flavors: general jurisdiction, where the defendant has continuous and systematic contacts within the state so that due process is met and specific jurisdiction where the cause of action must arise out of or be related to the d's activities within the state to not offend d's due process rights.

Analysis:

Notice: For the purposes of this analysis, we can assume that notice was properly served on the defendant.

Statutory Amenability: The Constitution limits pj, but states also have

the ability to put their own limits on who they will exercise authority over through statutes created by the legislature. A legislature may choose to limit pj even further than the constrictions the Constitution has placed the state. They can create express statutes that allow pj to the full extent of the Constitution. Some states have not expressly given jurisdiction to full extent of the Constitution, but the state's courts have interpreted the statute to mean that it does in fact go to the full extent of the Constitution. State statutes that allow a state to exercise personal jurisdiction over non-residents are called long arm statutes.

This is an enumerated long arm statute with a laundry list of when a court will have personal jurisdiction; however, the courts may have interpreted it to go to the full extent of the constitution, but this is unclear from the facts. If it has been interpreted to go to the full extent of the Constitution, then this court might have jurisdiction over D, so long as this court's exercise of pj over the D is constitutionally amenable. If the court has not interpreted this case to go to the full extent of the Constitution, then this court probably does not have personal jurisdiction over the D, because subsection B of the long-arm statute states that "when jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in the section may be asserted against him" and all of the acts in the statute must occur "in this state". While the language of this statute only addresses "persons" a corporation can usually be considered a person; however, none of the claims that the plaintiff (p) has set out arise from actions that occurred in TX. All of the alleged acts occurred at the company's factory in Mexico City; therefore, the court probably

does not have pj over the D under a narrow reading of this statute.

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Constitutional Amenability: There are some traditional models of pj. Pennoyer established the concept that "if you are in (the forum), you are in; and if you are out, you are out". The concepts of personal jurisdiction that were established by Pennoyer and persist today are being served in the state (Burnham), being domiciled in the state, served through an agent of a business, express consent, waiver, and business incorporated in the forum. None of these traditional models apply to the case at hand.

The Modern test is that courts' power over non-residents has been expanded under the modern test of International Shoe. In order for a court to be able to exercise pj over a non-resident, the defendant needs to have "such minimum contacts with the forum that the exercise of jurisdiction would be fair and reasonable".

General jurisdiction arises when a corporate defendant engages in sufficiently continuous, systematic, and substantial activities within the forum such that Due Process is met. The court has only ever said that a company met the general jurisdiction standard was in *Perkins*, where a Phillipino company because an Ohio company. The D in this case has done no such thing, it owns a substantial amount of commercial real estate in the forum, but this is probably not enough to meet the strict *Perkins* standard. *Goodyear* stated that the contact with the forum must be so continuous and systematic that the company is essentially at home within the forum. The

elements used to evaluate whether or not a d has met this "at home standard" are: principal place of business (PPB), advertising directed in the forum, number of products sold in the forum, and foreseeability of litigation in the forum. The d's PPB is in Mexico City, but they have had frequent trips to the forum and it does a great deal of advertising in the forum. The plaintiff will argue these points and say that these factors are enough to meet the at home test. The corporation needs to have so many contacts that the court cannot ignore their presence in the state.

The P will argue that frequent and regular trips to TX by senior officials, the "many people" employed in TX, as well as the facts stated above, make it such that the court cannot ignore the company's presence. The D will argue that since it does all of its manufacturing in TX, and is incorporated and its PPB is in TX, that it does not meet the standard of being "at home". Since general jurisdiction is so rare combined with the aforementioned arguments of the D, it is unlikely that the court could grant general jurisdiction.

Furthermore, *Helicopteros* states that "merely making purchases and doing business in the forum does not grant pj. In this case, the D got money for a transaction from a TX bank, and it bought \$4 million in helicopters from a TX company, but this did not constitute continuous and systematic. The D has done more business than the D in *Helicopteros*, but I do not think that the court would find that there is general jurisdiction. The D could also argue that it was not foreseeable that it would be subject to suit in TX for a case where one of its pants manufacturing employees is alleging tortious acts.

In intentional tort cases, like this case, there is an "effects test" where the court emphasized in *Calder* that the d "aimed their efforts at the forum"; P could make an argument that through its business dealings, the D aimed its efforts at TX; however, the court and *Calder* said that the D aimed its efforts at the forum because it is where the p would suffer the most harm. This is not the case here because the p lived in Mexico.

There is a second type of pj, *specific jurisdiction* which applies to cases where the cause of action arises out of or relates to the defendant's contacts with the forum. This is not a specific jurisdiction case because the D does not manufacture or sell any pants in the forum and the cause of action is that the company tortured a pants manufacturing employee to try to intimidate him from organizing a labor union. The d's contacts with the forum deal solely with their commercial real estate.

Conclusion: The court should rule in favor of the D's Rule 12(b)(2) dismissal because the D is not "essentially at home in the forum" so it is not subject to general jurisdiction. Additionally, if the forum's statute regarding pj is narrowly read, TX most likely does not have pj over the D.

Question 1 Word Count = 1325

Character Count = 7614

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START OF EXAM

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To establish proper jurisdiction, three criteria must be sufficiently established: notice, statutory amenability, and constitutional amenability.

Notice:

To establish proper notice on a corporation, a federal court may use the states statute it is situated in on service of process pursuant to Federal R4 (e)(1) or pursuant to 4(h)(1) and its guidelines for proper service of a business. According to *Mullane*, "notice must be reasonably calculated under all the circumstances to apprise the party of the proceeding." Assuming notice has been properly established, the analysis will next focus on the statutory amenability of Texas' long arm statute (LAS).

However before jumping into the LAS analysis we should check to see if there are any traditional bases for jurisdiction over the Grupo Pantalones (GP) which are grandfathered down from *Pennoyer*. These include: TAG jurisdiction (j/d), consent to the j/d of the forum, waiver of objection to j/d in the forum. In this case, it appears GP owns a real estate business (biz) in Texas, where it owns a great deal of commercial real estate. Because the facts are not clear on whether they have been served within the forum and whether or not the real estate company is a subsidiary or not of GP, we should not conclude that a traditional bases of j/d has been met. even if it had, we should continue with the Minimum contacts test set forth in *Shoe* since the Court has been undecided ever since *Burnham* on whether or not the Shoe test supplants or merely supplements the traditional bases of j/d.

Statutory Amenability:

In order to exercise j/d over GP, there must sufficient statutory authority allowing personal jurisdiction (PJ) pursuant to R4(k)(1)(a). Constitutional power is not self executing; there **must** be an enabling statute to hail a non - resident defendant into their forum on a Shoe test basis. The first kind of these statute are ones which goto tthe full extent of the Due Process const. limit, aka a California longarm. the second type is a laundry list type that enumerates several things that will subject a non resident to j/d but that is facially short of the due process limit, however the interpretation of the statute is read to goto the full extent. The third type is a laundry list that reads short of the full due process limit and is interpreted as short of the due process limit as well. For the purposes of this PJ, we will proceed with the Texas LAS which in this exam is of the third type, and is short of the due process limit. While it could be argued that the language of section (3) could be strechted much like the illinois court did in *Gray*, (which was then a LAS of the second type -- interpreted to goto full due process limit), section (B) of the texas LAS seems to ensure that this LAS should be read at face value and therefore is short of the full limit. Proceeding forward I will use this interpretation.

However, the employee may be wise to also implement an Attachment statute enacted by the Tx legislature allowinng a QIR II attachment of GP's real estate and thus ensuring he will not be denied recovery if this is the only grounds for which he ends up getting a grant of relief. In this instacne,

without an attachment, the Employee (EE) may wind up like the outcome in Pennoyer where the judgement was without compensation because they did not attach the property at the outset of litigation. However, the EE must show that GP, not his property would pass a Shoe test for Minimum contacts when asserting the attachment of his land. Here it most likely would since he has directed a huge amount of activity towards TX from Mexico (Mx) over this specific, related issue, the real estate.

Constitutional Amenability:

Assuming the statutory bases for PJ over GP is sufficient, we must next determine whether or no j/d over GP in this circumstance would be constitutional. We must proceed with the test set forth in *Shoe* to ensure constitutionality of PJ. We cannot have two federal judicial systems. *Shoe* asks whether GP has purposefully availed itself of the privilege of conducting activities within the forum state thus invoking the benefits and protections of its laws imposing certain obligations on the state in such a way that they could reasonably foresee being haled into court in that state? Since *Shoe*, a number of other cases (*Asahi*, *Burger King*) have distilled this framework into a broad two-part test. 1) Minimum contacts and 2) Reasonableness of hailing the D into the forum.

Minimum Contacts:

This protects the D from the burdens of litigating in a distant and/or inconvenient forum. Are there continuous and systematic ties with the forum?

Purposeful availment:

Was there an intent to do biz or direct products into the forum?

Since GP is a manufacturer we must look at the contacts GP had with the forum. They sell all their pants in Mexico, and they have no direct sales in the US. However, they have a huge company deliberately affiliating with TX, buying land, sending employees to TX, communicating with other Texas biz, law firms, real estate, and most likely creating contracts with these companies in TX. They have also paid for, established Ads for the furtherment of their biz in TX and presumably benefit from this intentional engagement with TX forum.

This is a perfect time to analyze whether or not GP will be liable under what kind of j/d, General or Specific? General is implemented when there are a massive amount of contacts in the forum, but they do not relate to the claim being filed in the forum. Specific is implemented when the claim asserted against the D is extremely related with the D's contact in to the forum.

Specific j/d

Here there may be a case for Specific jurisdiction over the tort claim if the EE could argue that GP pant manufacturer intended the pants to be worn by Mexican citizens, however, that GP knows many Mex. citizens immigrate (unilateral act of consumer not Stream of Commerce *WWV*) to TX, a neighboring border state. Thus they could argue they have spec. j/d because the Pant manufacturer knew of this. However, this would still not be related to the tort claim, and would rather be of claims arising out of pant malfunctions/hazards or real estate issues. Because the TVPA claim at most

only incidentally "arose out" of GP's contacts,

General j/d

Here there may be a case for general j/d over GP because of the nature of their "continous and systematic ties with the forum", thus EE will attempt to bring a claim against D whether or not it is related to the forum (*Helicopteros*). This has been established in *Perkins* where a filipino company moved to ohio during WWII and the ohio location became their "nerve center" of operation, thus they were subject to general j/d. In a recent case, *Goodyear* the Court determined that to be subject to General j/d the company must be "essentially at home" and gave a few examples of what that means: Principal place of Business (PPB) or where they are incorporated. Since the facts provide that GP is incorporated in mex. and its PPB is in Mex, the EE will have a tough time adding another definition of what "essentially at home" means. However, the fact that GP has such an incredible amount of contacts and presumably revenue from TX, the EE may argue that GP is subject to j/d in texas since they frequently have company officials there. The facts suggest they have been doing this "over the years" which in connection with the fact that they've amassed over 100 million dollars suggests they've been doing this for a long time and have created numerous long term ties with Texas. Furthermore, the fact GP has contracted "a great deal of advertising" However, GP headquarters will most likely point to the decision in *Goodyear* that stated a subsidiary companies contacts, establishment, "essentially-at-home-ness", does not count for the parent companies "essentially at home" analysis. While the facts do not elucidate whether the Real estate Co has its own place of

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incorporation or PPB, GP will argue they are just like the french parent co. in *Goodyear* and real estate GP the Carolina goodyear subsidiary.

Reasonableness: (fairness factors)

Assuming minimum contacts general j/d is established, fairness of bringing GP into TX must be analyzed. The court will weigh: burden on the D to show j/d is gravely inconvenient, the interest of the forum state in adjudicating suit, P's interest in obtaining relief, efficiency in bringing the action, Judicial systems interest in efficiency, Wealth of parties doesnt matter.

Noting that *Asahi* was the only case to ever be shot down for fairness factors, if Min. Contacts are found, it is likely GP will be hailed into TX forum, since they are neighboring states, the advertise there, and send company officials there often.

Conclusion:

It is unlikely EE can exercise PJ over GP because they "essentially at home" definiton of goodyear has not given us other definitions besides PPB and incorporation, which are not present in TX on these facts.

Question 1 Word Count = 1535

Character Count = 8988

-->End of Question 1

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Question 2 (worth 40% of grade). Your answer should not exceed 1500 words.

Plaintiff brings a complaint in federal district court. She alleges the following:

1. On June 8 2010, Plaintiff was severely and permanently injured when she fell at Dollar General Store at 171 Ambriar Plaza in Amherst County, Virginia. The store was operated by Defendant Dollar General.
2. Plaintiff fell due to the negligence of Defendant and its employees who failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn Plaintiff of the wet floor. Defendant, through its employees, breached its duty to warn Plaintiff of the dangerous wet floor.
3. As a direct result of Defendant's employee's negligence, acting in the scope of their employment, Plaintiff was severely and permanently injured. She has incurred medical and hospital bills and suffered great pain. Also, her ability to earn an income has been hindered.
4. Plaintiff seeks a judgment in the amount of \$300,000 against Defendant Dollar General.

Defendant moves to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In its motion, Defendant argues that the complaint lacks any allegation of how the liquid came to be on the floor and that it does not allege that Defendant knew or should have known about the liquid in advance of the plaintiff's alleged fall.

Under Virginia law, store owners owe their customers the duty to exercise ordinary care as their invitees upon their premises. Ordinary care is not met as to an owner who knew or should have known of a dangerous condition on the premises and failed to exercise due care to warn others of the dangerous condition or remove it within a reasonable time. However, a landowner is under no duty to a person reasonably expected to be on the premises to warn against an open and obvious condition on the premises.

How should the court rule?

Better Scoring Student Answers
to Question 2

-->Question -2-

To determine whether the complaint P filed in federal district court will survive the 12(b)(6) motion, we must first look to the statute dictating the notice pleading standard, and then to case law interpretations of the statutes refining the tests for whether a complaint states a claim

Rule 8's Pleading Standard

The pleading standard for federal courts is listed in Rule 8(a)(2). It requires that the pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The FRCP heighten this pleading standard in some cases, such as the Rule 9 requirement for pleading Fraud or Mistake with particularity. Congress may also provide for laws with heightened pleading standards. Neither of these cases seem to be applicable here because this is a state law claim not involving fraud or mistake. Rules 8(b) and (c) don't apply either because the defendant's answer is not in question. However, Rules 8(d) and (e) are relevant--requiring that allegations be simple, concise, and direct (no technical form required) and that pleadings be construed so as to do justice.

Rule 8(a) also requires that the plaintiff plead the grounds for jurisdiction and make a demand for the relief sought. Here the demand for relief sought is included in element 4. I'll assume that the plaintiff made a short and plain statement of the grounds for the court's jurisdiction.

Rule 12(b)(6)'s Means of Having Cases Dismissed

Rule 12(b)(6) allows a defendant to move for dismissal of the plaintiff's complaint if the complaint fails to state a claim upon which relief can be granted. This can occur because the plaintiff (1)pleads a cause of action that doesn't exist, (2)pleads the cause of action improperly, as in failing to allege an element, and (3)pleads themselves out of court, as in admitting that the claim lacks a required element.

In *Conley*, the court expressed the standard under a 12(b)(6) motion under the "no set of facts" standard. The court opined that a pleading was only insufficient if no set of facts could exist giving rise to possible relief. This standard was consonant with the liberalized pleading under the federal rules--it permitted cases to survive MTDs if any possible factual scenario could give rise to relief, allowing the case to proceed to discovery (where that set of facts might emerge). Unscrupulous or unsupportable claims could be screened during MSJs. In *Conley*, the court stated that Rule 8 required the Plaintiff to give the defendant **fair notice** of what the claim is and the grounds upon which it rests. This comports with Form 11's sample pleading language: "on [date] at [place], the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured..."

The Supreme Court offered a stark reinterpretation of the Rule 8 standard in recent years with their decisions in *Twombly* and *Iqbal*. These cases introduced new standards of striking conclusory allegations and then evaluating the **plausibility** of the plaintiff's remaining allegations. Notably, the court claimed **not** to be imposing a heightened pleading standard and **not** to overrule *Swierkiewitz* or *Conley* (except stating that the "no set of facts" standard was never taken literally). To evaluate whether P's complaint should survive the MTD under 12(b)(6), we must go through the two steps set out in *Twombly* and *Iqbal*: striking conclusory allegations and evaluating the plausibility of the plaintiffs remaining allegations.

In order to reconcile the outcomes in *Twombly* and *Iqbal* with earlier notice pleading cases, the "short and plain" language in Rule 8, and the brief description in Form 11, plausibility might be assessed differently in different types of cases. The court supported this determination by stating that the court use "**judicial experience and common sense**" in determining whether a complaint's non-conclusory allegations plausibly give rise to a claim for relief.

Step 1: Strike Conclusory Allegations.

Conclusory allegations are those which are "threadbare recitations of the elements of a cause of action." or other legal conclusions devoid of

supporting factual allegations. Here the cause of action is negligence, usually containing 4 elements: duty, breach, causation, and injury.

Under Form 11, the complaint may not even **need** to allege as much as it does. 
The causes of action are the same: negligence. A possible argument against using the extremely brief Form 11 model for **this kind** of negligence is that here we have a different sort of fact pattern that might beg more factual specificity in order to put the defendant on notice (per *Conley*) or to push the allegations across the line from "conceivable" to "plausible."

Statements in the complaint that seem to be legal conclusions are the use of the terms "negligence" and "negligently" in paragraphs 2 and 3. Assuming that the court does not strike entire sentences, only the conclusory parts of them, when these are removed, Paragraph 2 begins: "Plaintiff fell [because] D and its employees failed to remove the the liquid from the floor and had failed to place warning signs to alert and warn P of the wet floor."

Arguably, the second paragraph's statements that the injury was a "direct result" could be seen as a legal conclusion. However, the statement isn't

devoid of factual enhancement, because paragraph 1 describes how P was injured when she fell. If the court looks at the allegations line-by-line they might remove this. If not, it would probably stay. Either way, the first paragraph satisfies the **causation** and **injury** elements.

The allegation that the employees were "acting in the scope of their employment" could be seen as conclusory. P will argue that this is apparent from the nature of the event, and is an allegation of fact rather than a legal conclusion. Dollar General could argue that it is a legal conclusion about their actions, and that their actions need to be further described. I'll assume that this part is not conclusory because Dollar General hasn't brought this argument in it's motion.

Step 2: Do the remaining allegations still give a plausible ground for relief?

After screening the conclusory allegations, Paragraph 1's statement seems to plausibly show injury because it describes her fall. Paragraph 3 supports this because it describes the nature of the injuries. Paragraph's 1 and 2 also show causation between the breach of duty and the injury, linking the fall to the alleged breach of duty by showing that she was injured because of water left

on the floor without a warning sign.

Paragraph 2 seeks to show that Dollar General breached a duty. Dollar General will argue the the absense of a description of how the liquid came to be on the floor shows that the plaintiff has not shown the essential element of duty. They will argue that plaintiff failing to describe how the water got on the floor makes the breach of duty implausible. This will likely fail though, as it doesn't matter **how** the water got on the floor, the D had a duty to keep the place free from dangerous conditions of which it knew or should have known.

Dollar General will also argue that, under Virginia law, they are only liable if they knew or should have known of the presence of the dangerous condition-- the liquid. D will claim that this is analogous to the situation in Twombly--- where the P alleged a conspiracy because of parallel business conduct. They will argue that, as a consequence, this claim lacks support for a crucial element--duty.

P will counterargue that Form 11's bare-bones pleading example, and the standard pleading requirement (not heightened) shows that duty need not be

alleged with specificity. They will say that the description of the presence of liquid on the floor is sufficient for a judge to infer "using judicial experience and common sense" that the store knew or should have known of the liquid. They will distinguish this from Twombly, stating that their allegations reach the plausibility standard because it is **plausible** that a store knew or should have known of the presenc of liquid on its premises.

Beacuse Conley and Swierkiewitz have not been overruled, the court will likely ask whether the complain, with the conclusory statements removed, gives the defendant fair notice of what the P's claim is and the grounds on which it rests. Here, the D clearly has notice of the grounds of the complaint--A customer fell on the floor, on a certain day, beacuse some liquid was on the floor that (presumably) the store employees should have known about.

Conclusion

The court should deny the MTD because without the conclosory statements, relief here is still plausible.

Question 2 Word Count = 1425

Character Count = 8659

 c
12

 r
12

24

Line Count = 147

-->End of Question 2

-->Question -2-

The issue here is whether the plaintiff (P) met the minimum pleading standard in her complaint.

A complaint must assert: **grounds for jurisdiction, a statement of a claim,** and a demand for relief under FRCP 8. In this case, P demanded relief in her 4. Assuming she set for grounds for jurisdiction, the issue is whether her claim was legally and factually sufficient. Negligence is a legally recognized cause of action under Virginia law, so the claim is probably legally sufficient.

FRCP 8 requires a **short and plain statement of claim showing the pleader is entitled to relief.** The Rule attempts to balance access (keeping cases in that belong in) and efficiency (keeping cases out that belong out). The claim must provide the defendant fair notice. In this case, P would likely argue that her complaint put the defendant on notice of her claim: she provided the date, the place and kind of the danger, and the scope of her resulting injury. She would argue that Rule 8 is meant to be generous, and she certainly met the relatively low standard of a "short and plain statement."

D, on the other hand, would likely argue that P's complaint did not do enough the "[show] [her] [entitlement] to relief."

Historically, Rule 8 was interpreted as a liberal and simplified pleading standard; in *Conley*, the SCOTUS held that the rule does not require a claimant to set out in detail the facts upon which he bases his claim. However, SCOTUS seemed to implement a more stringent pleading standard in *Twombly* and *Iqbal*. These cases set forth a two-step process to determine if the plaintiff met the minimum pleading standard. With the **Twombly Two-Step**, the court disregards all conclusory allegations and then evaluates the plausibility of the claim.

Conclusory

First, **the court must disregard all conclusory allegations**. Allegations must be more than just labels and conclusions, and merely parroting the language of the law and formulaic recitations would likely be considered conclusory. The more detail, presumably, the better off in avoiding the label of conclusory. In evaluating, the court goes allegation-by-allegation and evaluates each individually. P's first statement is recitation of the facts (the date, place, and store), and would not be found to be conclusory.

P's second statement, however, may be conclusory in part. Alleging that P fell "due to the negligence of D" seems to be a label or conclusion, and D would likely argue that this is similar to the price fixing allegation in *Twombly*.

There, the Ps argued that the Ds engaged in price fixing, but the court found that the allegation was conclusory as it merely parroted the law without factual support. The D here would probably argue that P's allegation here is similar b/c P failed to allege how the liquid came to be on the floor or whether the D knew or should have known about the liquid before P's fall. In *Twombly*, SCOTUS held that if conclusory statements were allowed, dismissal under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) would be rendered useless. D would argue that the conclusory language in D's second allegation should be stricken on that notion.

The beginning of P's third statement may also be conclusory, seemingly reciting the law of torts (namely, causation in negligence). D would argue that the language "as a direct result of D's employee's negligence..." merely parrots the law and should also not be considered in evaluating the sufficiency of the complaint. The remaining part of 3. is facts, and would not be considered conclusory.

P, on the other hand, would probably cite FRCP Form 11, which is very similar to P's complaint. Form 11 is meant to be used for complaints for negligence, and only says: "On date, at place, the defendant negligently drove a motor vehicle against the plaintiff." It then goes on to say that as a result, the

plaintiff was injured. P's complaint follows Form 11 almost exactly. She alleges that defendant acted negligently to her, and then goes on to say that as a result, she was injured.

Plausibility

Second, the court must evaluate the remaining allegations to determine if they make the claim plausible (more than just possible or conceivable). The court has the responsibility to look at the alleged explanation for conduct and determine if it is the most plausible or if another explanation is more plausible. This is not a probability standard, but mere possibility is not enough, and allegations merely consistent with unlawful behavior are not enough. Here, D would probably argue that P's allegations are similar to those in *Twombly* and *Iqbal*.

In *Twombly*, the court found that the assertions of parallel pricing, while consistent with unlawful anti-trust violations, was not the most plausible explanation. The court found that the market could easily explain the parallel pricing, and the plaintiffs must have alleged additional facts that tended to exclude independent self-interest as an explanation. Similarly, in this case, D would probably argue that P's allegations merely consistent or

possible, but the more plausible explanation is that D did not know of the liquid or the liquid was recently spilled by another guest, so D did not breach any duty.

In *Iqbal*, the court found that it was more likely that the US government employees did not discriminate, and the P did not allege enough facts to move discrimination from merely conceivable. The D could make the same argument here, arguing that the P did not include enough facts to "show" her entitlement to relief.

Additionally, the D could argue that P's claim of negligence was not plausible b/c she failed to allege one of the essential elements of the claim: that D knew or should have known of the condition, so the claim may actually not be legally sufficient. Under Virginia law, which would be applied here in federal court b/c of the Erie doctrine, store owners owe a duty, which is breached if the owner knew or should have known of a danger and failed to warn or remove the danger within a reasonable time. The D would argue that b/c P failed to allege that D knew or should have known of the liquid, or how long the liquid had been there, that she failed to allege that D breached its duty, once the conclusory language is stricken.

D might also argue that P failed to allege that the liquid was not an open and obvious condition so that landowner had the duty to warn. However, P would probably cite *Swierkiewicz*, and argue that Rule 8 is not meant to be an evidentiary standard, and *McDonnell Douglas* shouldn't apply.

The P, on the other hand, would probably once again point to Form 11. Additionally, the P might argue that the standard here is not an evidentiary standard. P shouldn't have to provide full facts or evidence prior to discovery, b/c that could severely limit access to the legal system. Moreover, although *Twiqbal* seems to be a higher pleading standard the Court held in *Iqbal* that the standard applies to all civil actions, *Swierkiewicz* held that pleading satisfies the requirements of Rule 8 if it gives the respondent fair notice of the basis for the claim, and *Swierkiewicz* has not been overruled. As the simplicity of Form 11 suggests, it is usually very difficult to determine a breach of duty prior to discovery in negligence cases. A party may not even know who is responsible, which is reflected in the usually longer statute of limitations as opposed to intentional torts (the court wants to allow time to research). Although the two-part test applies to all cases, it may be applied differently, and it seems that negligence may

call for a slightly more liberal application. The issue is not whether P will ultimately win, but whether she should be entitled to offer evidence to support her claim, and P will argue that she should be entitled to offer evidence.

Based on *Leatherman*, P could argue that b/c FRCP 9 lays out a heightened pleading standard required for claims of fraud and mistake, and, because those are set forth specifically, other claims do not require any such heightened pleading standard.

Although, D has a strong argument for dismissal based on *Twiqbal*, it seems that the court should rule against the motion to dismiss b/c of Rule 11 and b/c of the nature of the negligence cases. Although some language may be conclusory, it seems that remaining language is still enough to infer negligence as a plausible explanation, and the P should have access to discovery. Unlike *Twombly*, in which the discovery was bound to be extremely expansive and expensive, it seems like such a negligence case would require much more limited discovery (such as reviewing surveillance video that many retail stores often have available, today), so that does not seem that it would prevent the court from denying a motion to dismiss the claim.

Question 2 Word Count = 1491

Character Count = 8841

Line Count = 147

-->End of Question 2

$$\frac{c}{10}$$

$$\frac{p}{11}$$

21

-->Question -2-

Overview:

The meta-issue in this case is whether the court should grant the D's 12b6. A 12b6 is appropriate when the P fails to state a claim for which relief should be granted. In order to answer this question, we need to look to rule 8.

A pleading that states a claim for relief must contain a short and plain statement of J, a short and plain statement showing that the pleader is entitled to relief, and a demand for relief.

Short and Plain Statement of J

In the instant case, I will assume that complaint meets this requirement. Even if it didn't, P could amend the complaint to include a specific statement of J and filing the 12b6 acted as a waiver to the lack of PJ defense. There is likely SMJ here too assuming that P is a citizen of a state other than VA or that D is not a citizen of VA (this information is not given, but, assuming that they are citizens of the same state, D could get out of federal court through a dismissal using 12b1).

Short and Plain Statement Showing Entitled to Relief

The issue is whether the complaint satisfies 8a2. There are two parts to this: (1) legal sufficiency and (2) factual sufficiency.

Legal sufficiency: A pleader must assert a claim for a cause of action that exists. If no cause of action exists, a court can dismiss sue sponte or through the 12b6 motion.

In the instant case, a cause of action exists because P is suing D for negligence. The remaining question is whether she has pleaded enough facts to make out the negligence claim.

Facutal Sufficiency: Factual sufficiency requires that the pleader make a short and plain statement showing the entitlement relief. This can be viewed as two distinct steps: (1) short and plain statement and (2) showing.

A court will likely find that P satisfied the **short and plain statement**. The court in Conley emphasized that a P can use any set of facts to support her claim. Here, P alleged facts relating to the water on the floor, the general types of injuries suffered, etc. Similarly, the court in Swierkiewicz (Sw) pointed out that an evidentiary standard is not applied when evaluating the facts unless it may be that recovery is impossible or the facts are not in existence. The quality of the evidence is not disputed here either since there is not a disagreement regarding the existence of the water on the floor.

The **showing** test requires the Twiqbal two-step and analyzing whether the pleading properly **shows** that the pleader is entitled to relief. This two-step

is accomplished by crossing out conclusory statement and then evaluating the remaining complaint for plausibility.

Conclusory --

A conclusory statement consists of any vague or formulaic recitations of the elements of a cause of action, legal conclusion, or mere parroting.

Applying this to the complaint, there is likely to be no issue with Paragraph (PP) 1. This statement is more informative and contains several factual enhancements.

D will argue that the court should red pen the language about the fall being proximately caused by D's negligence. The assertion of negligence is a mere recitation here because, in order to satisfy the Virginia common law, a P would be required to show actual or constructive knowledge of the underlying condition. The failure to assert those facts in PP2 or 3 suggests that the mere failure to act itself was constructive knowledge sufficient for creating the inference of negligence. However, this is not different than the Twombly conspiracy theory that the baby bells had entered a non-compete agreement because they failed to compete with each other (failure to act being evidence of action or knowledge). Moreover, this doesn't look very different than the Iqbal allegation in PP 96 of the complaint where Iqbal alleges that a head of an organization authorized disparate treatment based solely on race,

religion, national origin, ect.

D will also attempt to strike the part of the complaint about failing to place signs to alert P regarding the wet floor claiming that it looks like a parating of the failure to warn component of the common law.

P will try to counter these arguments by relying on Sw. In Sw. The P made allegations of discrimination in which he concluded several of the allegations with language indicating wrongful termination. The Iqbal court favorably cited Sw, probably under a theory that they contained sufficient factual enhancements. Here, the claim contains several factual enhancements, such as what caused the injury, when, and the impact the damage caused. Moreover, P will argue that she exceeded Form 11 from the FRCP by providing lots of factual details regarding the accident. Lastly, relying on 8e, P will argue that the court must construe the pleading so as to do justice, and justice would require allowing the risky elements of the complaint to go through because the D is adequately on notice and would have the ability to prepare a defense.

A court would likely agree with D in this matter, especially on the failure to provide signage. While it looks like there are good factual enhancements, these enhancements merely mask the parating language which is what really drives the complaint. Therefore, the language about the fall being due to negligence,

the failure to put up a sign, and the employees acting within scope of their employment would be struck.

Plausible --

The remaining allegations need to be evaluated for plausibility. IN order to survive a motion to dismiss, the remaining complaint must include enough facts to nudge the claim from merely conceivable to plausible.

P's complaint, after read lining it, would read "PP1 + P fell due to liquid on the ground. P was severely and permanently injured. P has incurred medical and hospital bills... etc."

D will argue that it is only a mere possibility that fall was due to negligence. Looking to the underlying law, P cannot have a plausible claim when elements are missing. Here, the constructive knowledge element is missing and it is not clear from the pleading that the danger was not open and obvious. D would argue that the pleading fails to show that the injury occurred because of, not merely in spite of, its negligence. Looking to Iqbal, D will say that this claim looks like the allegation in PP 96, where the court determined that the P's treatment was in spite of the arab origin and not because of his arab origin (9-11 was a better rationale).

P will counter that there is notice here and that the court should use its

judicial reason to find a reasonable answer. The instant case centers on a dispute that is fairly common; slip and fall case. In fact, these cases are so prevalent that first year law students read them (if they read Prosser's torts book, which has three slip and fall cases). Sw. suggests, and this is supported in *Iqbal*, that the standard we should use when evaluating the plausibility of these claims should vary based on the case. Like Sw., P will argue that it is hard for a P to know how the liquid she slipped on actually made it to the area. This is no different than a P alleging discrimination and not actually pleading the specific facts that a manager displayed discriminatory animus. In both cases, the challenge in knowing the actual truth of the allegation absent discovery impacts the determination of plausibility. Based on the common judicial experience, looking at these facts, it is plausible that negligence could have caused the fall and that this is a question that should be left to the jury.

A court will agree with P in this case. The Sw. court explained that the real issue is not whether the P will ultimately prevail (she won't without more fact), but whether a claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of P's pleading that recovery is remote and unlikely, but that is not the test here. All that needs to be shown is that the right to relief exists beyond a speculative level. It is plausible that the slip and fall was caused by the failure to clean the water and put out warning signs. Construing the pleading for justice also weighs in

favor of providing this interpretation of the pleading. The fact that there is no indication of how the water got on the floor is not particularly relevant, since that may be a question that P could not answer without discovery.

Demand for Relief

In the instant case, this appears to be met via the demand for 300K in damages.

Conclusion:

The court should deny the 12b6. IN the alternative, the court could, sue sponte, require a 12e motion requiring the P to allege more facts regarding the incident. In the last alternative, the court could tell the P to amend under 15.

Question 2 Word Count = 1498

Character Count = 8676

Line Count = 150

-->End of Question 2

19

Question 3 (worth 20% of grade)

On September 1, 2012, P sues D in United States District Court for the Southern District of Texas for breach of contract regarding a piece of real property worth \$100,000. D is served with process that same day. P alleges he is a citizen of Texas and that D is a citizen of New York. P further alleges that the property that is the subject of the action is situated in Houston. Assume that P was in sole possession of the property and that D is without knowledge to confirm or deny P's allegation about the property's location in Houston.

On September 14 D files and serves her answer.

On October 1 P files an amended complaint. The only difference between the original complaint and the amended complaint is an allegation that the property that is the subject of the action is actually situated in Dallas, not Houston.

D wants to challenge venue as improper in the Southern District of Texas. Assume D does not want to see a transfer of venue, only a dismissal of the case on the ground that it has been filed in an improper venue, as is her right. Notwithstanding her previous failure to file a Rule 12(b)(3) motion, there are at least two arguments she can make that she may still raise the venue objection. Discuss those two arguments.

Better Scoring Student Answers
to Question 3

-->Question -3-

Venue is no longer proper in the Southern District of Texas because the property that invoked venue under 1391(b)(2) is not actually in that federal district. Because the D doesn't reside in the state(1391B1) and seemingly none of the events giving rise to the claim occurred here(1391B2), venue is no longer proper in the Southern District of Texas. When it became clear that the property was in Dallas, venue became proper in the Northern District of Texas under 1391B2, so the fallback provision in 1391B3 doesn't come into play.

Ds Choices

In order to argue that she may raise a venue objection, D can rely on 28 USC 1406(a) or upon her ability to amend her complaint under Rule 15. Her Amendment as a matter of course will likely succeed, while her effort to persuade the court to use 1406(a) may fail. She could also rely upon a reading of Rule 12(g)(2) along with Rule 12(h) as preserving right to bring motions that weren't available to a party.

Amendment as a Matter of Course

Rule 15(a)(1)A allows defendants one amendment as a matter of course (a freebie). For a Defendant to timely amend an answer, they must do so within 21 days after serving it. Here, only 2 weeks have passed and they are timely.

Rule 12 bars the least-favored defenses (12b2-5) under section 12(h)(1). Improper venue (R12b3) is a least favored defense under 12(h)(1). 12(h)(1) section says that the defenses are waived if the party fails to either make them by motion, or include them in a responsive pleading or in an amendment under Rule 15(a)(1) as a matter of course. Because P did not make any motions, and the time to amend as a matter of course has not expired, this defense has not been waived. She may include it in an amended pleading. If she waits another week and her time expires, she can seek leave to amend. However, Rule 12(h)(B)(ii) allows the least favored defenses to be later added **only** in amendments under Rule 15(a)(1)--amendments as a matter of course.

28 USC 1406

She may also object to venue, citing 28 USC 1406. Under this provision, the

district court, in a case where venue is improper, shall dismiss the case, or, if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

The judge might dismiss the motion, feeling that "justice" required that the P lose their opportunity to sue because they attempted to fraudulently assert venue. It seems more likely though, that the judge would see it as mere error and transfer the case to the northern district.

Rule 12(g) (2) could also be read to preserve the right to motions when they were not "available" to a party at the time they filed an initial answer. Because the rule states that it only applies to motions, this argument might fail. On the other hand, the purpose behind the "available" language is to ensure that a party is not prejudiced by not knowing that the objection was available to them.

Here, the purpose behind this rule is served by allowing her to make another motion. Because P was in sole possession of the property and D was without

knowledge to confirm or deny the P's allegation about the property's location, she was justifiably unaware of its true location--dallas. The policy behind the strict rules waiving the least favored defenses is that we want to get these things out of the way as soon as possible so that a case can proceed on its merits. This policy is only slightly hampered by applying 12(g)(2) to 12(h) and allowing the motion to be brought because it wasn't "available to the party" at the time that their original answer was filed.

Question 3 Word Count = 630

Character Count = 3585

Line Count = 64

-->End of Question 3

-- THE END --

Total Word Count = 3552

Total Character Count = 21594

Total Line Count = 367

-->Question -3-

The issue here is how D may challenge venue, even though she has already filed her answer.

Under 28 USC 1331, venue is proper in a judicial district where any defendant resides, if all defendants reside in the same state, or any judicial district in which a substantial part of the event or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated. Here, venue would be proper in NY where the D lives, or in the judicial district in which the property is (whichever envelopes Dallas). The Southern District of Texas is improper b/c the property in dispute is not located there and D doesn't live there.

Generally, improper venue may be waived, unlike subject matter jurisdiction. Venue is usually considered waived unless timely objection is made to the improper venue. B/c improper venue is a least favored defense, a party waives it by omitting it from a motion or failing to include it in an answer or amended answer.

Amended Answer

Although D did not include improper venue in his answer, he may be able to amend his answer to include the defense. Rule 12(h)(1)(B)(ii) says that the improper venue defense is waived if a defendant fails to include it in a responsive pleading *or in an amendment allowed by Rule 15(a)(1) as a matter of course.*

Under Rule 15(a)(1)(a), each party has the right to amend their pleading once as a matter of course, without permission from the court, no later than 21 days after the pleading is served or 21 days after the responsive pleading is served, if a responsive pleading is required. Generally, a responsive pleading is not required to an answer, so the D has 21 days after its original answer is served to amend it without leave from the P or from the court. D served his answer on 9/14, so he can amend his answer as a matter of course up until 10/5. Since, the P filed his amended complaint on 10/1, D can probably still file an amended answer to include the improper venue defense.

Denying P's Allegation in the Original Answer

Under Rule 8(b)(6), a party that lacks knowledge or information about the truth of an allegation must so state, and the statement has the effect of a denial. By D stating in his answer that he lacked knowledge about the truth of the allegation that the property was in Houston, he effectively denied that allegation in his original answer. D could argue that he, therefore, denied the jurisdictional grounds in P's original complaint (like a general denial would do under Rule 8(b)(3)). Additionally, D could cite Rule 8(e), which asserts that pleadings must be construed as to do justice. Here, D would argue that justice requires the allowance of the improper venue defense, b/c he was not aware of actual location of the property at the time he filed his original answer. The P alleged the wrong venue, and the D should not be penalized for that, so D could argue that justice requires the court to construe his original (in effect) denial of the location as a denial of grounds for jurisdiction/venue.

Sanctions

Under Rule 11(b)(3), by presenting a pleading to a court, an attorney is certifying that the factual contentions have evidentiary support, or will likely have evidentiary support after a reasonable opportunity for further allegation. D could argue that P's complaint is sanctionable b/c they factual contention that the land was in Houston was not support by factual evidence, effectively barring D's improper venue defense. D could notice P, and if, after notice and a reasonable opportunity to respond, the court determined that Rule 11(b) had been violated, the court could impose an appropriate sanction on P.

Local Action

Under *Livingston v. Jefferson*, D could argue that this is a local action b/c it relates to real property, and it must be brought in the district where the property that is the subject matter of the action is located; however, because of the Jurisdiction and Venue Clarification Act, there is no longer any such

thing as a local action in federal court.

Joining Motions

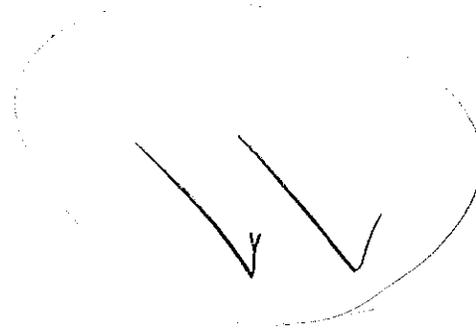
12(g)(2) does not seem to bar D's motion b/c he has not yet made a 12(b) motion, and the defense (improper venue) was not available to him at the time he filed his answer, b/c he didn't know the actual location of the land.

Question 3 Word Count = 743

Character Count = 4282

Line Count = 80

-->End of Question 3



-- THE END --

Total Word Count = 3733

Total Character Count = 21926

Total Line Count = 390

-->Question -3-

I. Overview

A case will be dismissed or transferred if venue is improper or inconvenient. The court has the option of selecting the appropriate remedy for improper or inconvenient venue. In addition, venue is purely a statutory matter.

The purpose of the venue statutes is to protect defendants from the risk that the plaintiff will select a forum that is too burdensome or inconvenient to the defendant.

Rule 12(b)(3) is the motion a defendant will make if they seek a dismissal for improper venue. The burden of proving venue is proper is typically on the plaintiff, however, all reasonable inferences will be drawn in the plaintiffs favor. The standard for establishing venue will be to a preponderance of the evidence.

Venue challenges are ordinarily waived if not asserted in a defendants first motion or answer [Rule 12(h)]. Venue is a least favored defense. On the surface, it seems that since the defendant failed to file the 12(b)(3) motion in a timely manner that the venue defense has been waived.

II. Argument 1: Amending the answer

The defendant can amend her answer as a matter of course. We need to look first to Rule 12, as it governs pleadings and motions in general. Here we find 12(h) which is waiving and preserving certain defenses. A party can waive a 12(b)(3) motion by failing to make the motion under Rule 12 or failing to include it in a "responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course."

Turning to Rule 15(a)(1), as the Rule tells us, we see that a party may amend its pleading "within 21 days after serving it." "As a matter of course" means that the party doesn't have to ask the permission of the court. The defendant filed her answer on September 14, and since it is now October 1, only 17 days has passed allowing the defendant to amend her answer within the 21 day time frame. The amended answer can thus include the 12(b)(3) objection upon which the defendant can later bring the motion to dismiss under 12(b)(3).

The plaintiff may say that the original answer does not contain the objection and thus the objection is waived, but the amendment is a matter of right and is fundamentally different from a supplemental pleading as it replaces the original. This argument must fail, and the defendant will prevail on this issue.

III. Argument 2: Rule 12(g)(2) doesn't apply

Looking again to Rule 12 we find Rule 12(h)(1)(A) which governs pleadings and when defenses are waived. This part of the Rule states that A party waives a 12(b)(3) defense by "omitting it from a motion in the circumstances described in Rule 12(g)(2)..." Thus we turn to Rule 12(g)(2) which gives a couple of irrelevant exceptions.

12(h)(2) is irrelevant because it deals with failure to state a claim or 12(b)(6) motion, as well as joinder by Rule 19(b), or failure to state a legal defense (in the answer) none of which apply as we are dealing with a 12(b)(3) motion.

12(h)(3) is about the non-waivable SMJ, which is not at issue here; venue is at issue. Thus, this exception is inapplicable.

However, 12(h)(1)(A) further states: "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection **that was available to the party** but omitted from its earlier motion." The key is that the 12(b)(3) venue defense was not available to the defense because, as the facts state, the defendant was "without knowledge to confirm or deny P's allegation about the property's location..."

The reason the property's location is key to the improper venue claim is that

the court's will hold that venue is proper: (1) where all the defendant's reside; (2) where a substantial part of the events occurred OR (3) where the **property is located**. The property location will trump the other considerations generally in venue disputes.

This defense will very likely prevail in court. The defendant will very likely successfully challenge venue on this ground.

IV. Conclusion

On the strength of the two arguments raised above, the defense can very likely bring the venue objection at this point in the lawsuit. The court will likely hold the venue objection to be valid. The court is not bound to grant the relief requested by the defendant and may instead grant a transfer to cure the venue defect. 28 USC 1406 governs rather than 1404 which deals with cases where venue is already proper.

Question 3 Word Count = 750

Character Count = 4352

Line Count = 80

-->End of Question 3

-- THE END --

Total Word Count = 3747

Total Character Count = 22097

Total Line Count = 411