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Section A:
3-4:10 p.m. Wednesday-Thursday
1-2:10 p.m. Friday

Section B:
11 a.m.-12:10 p.m. Wednesday-Thursday
RDB 2008

Puzzles

Pleading

Joinder of Claims and Parties

• Consider whether FRCP 18(a), FRCP 20(a), and *Ford* are satisfied in *Morgan*, *Godin*, and *VOA*.

• Imagine BSO had used VOA photos without permission for a different season 10 years ago. Could VOA include that claim in its current action against BSO?

• Imagine Krista Millea bought a defective microwave from Walmart. Could she include that claim against Walmart in the current action? Could she include that claim if she did not also have her Consortium claim?

• Imagine Jones was injured in an accident with a different Walmart truck, driven by a different driver, one month after the Morgan accident, on a different stretch of the New Jersey Turnpike. Could Jones join in the *Morgan* action?

• Consider how all joinder rules might be used in the following:

• A, a cis-gender girl, sues the state High School Athletic Association over its policies allowing athletic participation according to an athlete's gender identity and presentation; A claims the policies constitute sex discrimination. A finished second in a race to X, a trans-gender girl. A seeks an injunction ordering the Association to re-write the state record books to remove X as the winner and record A as the winner. How can X be involved in the litigation?

• Zacek came away with an historic home run ball at a baseball game. Matus claims to have caught the ball, but that Zacek grabbed him and wrestled the ball out of his hands. Davidov claims he was the first person to control the ball until he was mobbed by a group of people and lost control of the ball (it ended up with Matus, then Zacek). Matus and Davidov agree that Zacek unlawfully took possession of the ball, although

each believes he enjoys sole ownership of the ball. Both would like to pursue claims of conversion and quiet title against Zacek.

- Consider how preclusion applies to the second lawsuit in the following:
  - Naruto sues Slater only. The court decides that non-human animals do not enjoy copyrights. Naruto files a new lawsuit against Blurb.
  - Naruto sues Slater only. The court decides non-human animals do enjoy copyrights. Naruto files a new lawsuit against Blurb.
  - Godin sues Metta foe defamation; the court decides Godin abused the students and enters judgment in favor of Metta. Godin sues the Board for breach of contract.
  - Godin sues the Board for breach of contract and loses. Godin sues Nicely for defamation.
  - Godin sues the Board for breach of contract and loses. Godin sues the Union for breach of contract.
  - VOA brings its copyright claim against BSO; it proceeds to final judgment. VOA files a second lawsuit against BSO for breach of contract.

Responding to a Pleading: *Motions*

- ***A v. X*:** Consider whether X can make the following moves:
  - X files a 12(b)(5) motion; the court denies. X serves an Answer including (b)(2) and (b)(7).
  - X files a 12(b)(3) motion; the court denies. X files and serves an Answer; then X files a 12(b)(1) motion.
  - X files and serves an Answer with no 12(b) defenses. 4 weeks pass. X files and serves an Amended Answer with (b)(2) and (b)(6) defenses.
  - X files a 12(b)(1) motion; the court denies. X files a 12(b)(6) motion. [For this, consider the question of whether the defense is waived and whether X can raise the defense in this motion. Be ready to argue both sides on this, based on the text of the rules and other considerations].

How Much Detail: ***The Idea of Notice Pleading***

• Consider how a court should resolve a 12(b)(6) in the following cases.

• Godin includes in her complaint allegations that she hit students.

• A, an African American non-attorney, applies for a position as an attorney in a law firm. The firm sends him a rejection letter reading, "We are not hiring you because you are not an attorney and because you are African American." A sues under an anti-discrimination law; the plaintiff must show race was a but-for cause for his non-hiring (that is, he must show that he would have been hired but-for the protected characteristic).

Responding to a Pleading: ***Responsive Pleading***

Affirmative Defenses:

• Consider how pleading is affected by whether facts are part of the claim or the defense in the following cases:

Debt: 3 facts: 1) Money borrowed; 2) Money due; 3) Money paid or not

Sexual Battery: 1) Sex; 2) Consent or not

Additional Claims:

• ***Holmes v. Clear Code*****:** Work through the following (expanding on Glannon pp. 246-47).

Map out all the claims, decide what type they are, and whether they must, can, or cannot be brought. Everything arises from the deal between Holmes and Clear Code under which Clear Code would produce some code for Holmes. Consider the first procedural steps in all of this.

• Holmes against Clear Code for breach of contract for failing to provide working code.

• Holmes against Cosgrove (Clear Code's former president) for fraud in the inducement for inducing Holmes to enter into the contract

• Clear Code against Holmes for non-payment on this contract.

• Clear Code against Holmes for non-payment on a prior job

• Cosgrove against Clear Code for indemnification of any judgment Cosgrove must pay to Holmes.

• Cosgrove against Clear Code for wrongful termination (Clear Code fired him after the Holmes deal went bad).

• Clear Code against Cosgrove to enforce a non-compete, to stop Cosgrove from working for a competitor

• Clear Code against its insurance provider, for indemnification under their insurance contract.

• Clear Code against Jasper for making bad code (Clear Code sub-contracted the Holmes job to Jasper).

• Jasper against Clear Code for non-payment.

• Jasper against Clear Code for non-payment on a past job.

• Jasper against High Tech for selling a defective computer (which caused Jasper's bad code).

• Jasper against Holmes for Quantum Meruit (to recover the value of the work done on the project)

• Jasper against Holmes for Defamation (Holmes told people Jasper was a bad coder)

• Holmes against Jasper for Tortious Interference with his original deal with Clear Code.

• ***Bose Corp. v. Consumers Union*****:** Analyze whether the counterclaims are permissive or compulsory:

Consumers Union publishes Consumer Reports Magazine. CR publishes a negative review of some stereo products made by Bose. Bose holds a press conference to announce plans to sue Consumers Union for trademark infringement, then files the lawsuit, asserting one claim.

Consumers Union wants to assert two counterclaims: Defamation (arising from false statements at the press conference) and Abuse of Process (alleging that the trademark claim is so frivolous as to be tortious).

Amending Pleadings and Relation Back

- What should the last document be called?
  - A files a complaint
  - X files an answer
  - A files a complaint
  - X files an answer
  - A files a complaint
  - X files _____

- What should the last document be called?
  - A files a complaint
  - X files a 12(b)(6)
  - A files a complaint
  - X files a 12(b)(6), which the court denies
  - X files an answer
  - A files a complaint
  - X files an answer
  - A files a complaint
  - X files an answer
  - X amends to file a _____

Complaint → Leave to Amend → Amend matter of course (5 days)

Discovery

***Coca Cola*:** Prepare to argue both sides:

Coca Cola Bottling Co. (Bottling) contracts with Coca Cola Co. (Coca) to bottle Coca Cola. Coca sends pre-mixed syrup to the bottler; the bottler mixes the syrup with carbonated water, bottles it, and ships it. The contract sets a price at which Bottler purchases syrup for "Coca Cola." The formula for Coca Cola is among the best-kept trade secrets in American business, particularly the composition of the mystery ingredient known as "Merchandise 7X." Two people in the company at any time know the forumla for Merchandise 7X. The written formula is locked in a bank vault that can be opened only on resolution of the company Board of Directors (which requires a meeting and a vote, which takes some time but is not burdensome).

Coca introduces "New Coke" and "Diet Coke" as new products. The secret ingredient in those products is "7X-100." As with 7X, two people in the company know the 7X-100 formula, the written formula is locked in a vault and opening the vault requires a resolution of the Board of Directors.

Coca sells the syrup for New Coke and Diet Coke to Bottler, but at a substantially higher price than the contract price.

Bottler sues Coca for breach of contract, arguing that Coca must sell New Coke and Diet Coke syrup at the contract price for Coca Cola.

Bottler seeks to obtain discovery of the formulae for Merchandise 7X and 7X-100; Coca does not want to turn this information over.

Be ready to discuss:

- Was Coca Cola required to disclose under 26(a)?
- How can Bottler seek the formula and how can Coca resist?
- Must the formulae be provided and on what terms?
- What can Coca Cola do if the court orders it to provide it? What can the court do in response?
- How might the FRCP 26(f) discovery conference eliminate much of this dispute?

Summary Judgment

• Return to the case of the Black Non-Attorney who was denied a job as a lawyer and received a letter saying "We are not hiring you because you are not an attorney and because you are African American."

• Under the substantive law of "mixed-motive" discrimination, the plaintiff must show that race played a role in the decision, then the burden of production shifts to the defendant to show it would have made the same decision regardless of race. The plaintiff has the burden of persuasion.

• How could each party move for summary judgment in this case? What are the two material facts the parties will fight over? What would each party need to do to support its motion on each issue?

• ***Salazar-Limon v. City of Houston*:** Argue both sides of the SJ motion:

Salazar-Limon sues the City of Houston on a Fourth Amendment excessive force claim arising from an officer shooting him during a traffic stop. Under the Fourth Amendment, an officer's use of force is justified if he reasonably feared an imminent threat to his life or safety. Courts have held that an officer can infer an imminent threat if a suspect reaches for his waistband.

Defendant moves for summary judgment.

The record on summary judgment shows the following:

Undisputed Facts:

• Plaintiff was shot in the back

• Plaintiff did not have a gun.

Plaintiff Deposition:

I was walking away from the officer. He shot me immediately after or within seconds of commanding me to stop. I did not turn or have a chance to turn before I was shot; the shot came right after the command. I did not have anything in my waistband.

Officer Deposition:

The suspect raised his hands as if he were reaching for his waistband. I shot after he made the motion with his hands towards his waistband.

Subject Matter Jurisdiction

Diversity Jurisdiction

- Consider whether there is complete, minimal, or no diversity in the following:
  - A (FL) v X (FL)
  - A (FL) v. X (NY)
  - A (FL) v. X (NY) & Y (FL)
  - A (CA) v. X (NY) & Y (MN)
  - A (NY) & B (FL) v. X (NJ) & Y (FL)
  - A (NY) & B (FL) v. X (NJ) & Y (IL)
  - A (NY) & B (NY) v. X (CA) & Y (CA)
  - A (NY) v. Audi (Ger) & VWA (NJ) & WorldWide (NY) & Seaway (NY)

- Identify the statutory basis for jurisdiction (or lack of jurisdiction) of the following:
  - A (PR) v. X (DC)
  - A (Cuba) v. X (FL)
  - A (Cuba) v. X (Venezuela)
  - A (TX) & B (China) v. X (Taiwan)
  - A (TX) & B (FL) v. X (Taiwan) & Y (FL)
  - A (Cuba/Lawful permanent resident domiciled in FL) v. X (FL)
  - A (NY) v. X (US Citizen domiciled in France)

- Consider whether there is jurisdiction (and on what bases) in the following cases:
  - A, Inc (DE/DE) v. X, Ltd. (NJ/Canada)
  - A LLC (NY/Mexico) v. X, Ltd. (NJ/Canada)

Supplemental Jurisdiction

- Does § 1367(b) limit supplemental jurisdictional in the following (assume joinder is proper in all):
  - Metta wants to file a crossclaim against Nicely.
  - A (IA) v. X (NE). X (NE) impleads M (IA). A wants to file a new claim against M.
  - A (FL) v. X (NY) and Y (FL)
  - A (NJ) & B (DE) v. Walmart (DE/AR). (See the discussion in Glannon (p.270) on this problem, especially as to the amount in controversy)

Removal

• A, Inc. (IL/IL) sues X, Inc. (PA/PA) in state court in Pennsylvania. The day after filing but before anything else happens, X removes to federal court. Under § 1441(b)(2), is removal proper?

Personal Jurisdiction

• ***Clemens v. McNamee***

• Clemens (TX) sues McNamee (NY) for defamation Texas state court; the amount in controversy exceeds $ 75,000. You are McNamee's attorney

You do not believe McNamee is subject to personal jurisdiction in Texas. Your forum preferences, in order, are: 1) anywhere other than Texas; 2) federal court in Texas (if stuck in Texas); 3) state court in Texas (where he now is).

What is your procedural strategy to obtain the most preferable forum?

• ***Robinson v. World Wide Volkswagen***

Robinson (NY) sues Audi (a German company), Volkswagen of America ("VWA") (the US subsidiary, a NJ corporation with PPB in NJ), World-Wide Volkswagen (the regional distributor, a NY corporation), and Seaway (local dealer, a NY corporation).

Robinson sues in Oklahoma state court. Audi and VWA are subject to PJ in Oklahoma but prefer federal court. How can they make that happen?

Also, Robinson and his family were driving through Oklahoma as part of a permanent move from NY to Arizona; Robinson had a new job and the family planned to stay in Arizona permanently. Why is Robinson a NY citizen?

PJ Review: *Clemens v. McNamee*: Prepare the *Shoe* analysis for the following case

Clemens (TX), a former MLB pitcher, sues McNamee (NY), his former personal trainer for defamation in Texas state court. McNamee removes and moves to dismiss for lack of personal jurisdiction.

McNamee made a series of statements about administering performance-enhancing drugs to Clemens. He made the statements to MLB investigators in New York and to a reporter from Sports Illustrated during an interview in New York. The statements described administering the drugs to Clemens in New York and Toronto while playing for teams in those cities.

McNamee and Clemens had a long-standing relationship. Over the years McNamee traveled to Texas more than 35 times to work with and train Clemens.

Texas has the same catch-all long-arm statute as California.

Venue, Change of Venue, and Forum Non Conveniens

- Consider whether venue is proper in *VOA*
- Consider: How would the personal jurisdiction and venue analyses differ in the following:
  - Case I: Burger King is sued in S.D. Fla.
  - Case II: Burger King is sued in M.D. Fla.