

# HAMLIN UNIVERSITY SCHOOL OF LAW--CIVIL PROCEDURE I

Professor Pielemeier

2010-2011

## Initial Syllabus

### Advance Assignment

For our first class on Monday, August 23, read the first eight pages of this Syllabus and the material assigned for Unit One, noted on page 8.

### Required Course Materials

(1) Civil Procedure, by Rowe, Sherry, and Tidmarsh (Second Edition, 2008), published by Foundation Press. ISBN: 978-1-59941-393-8

(2) 2010 Supplement to item (1) above. ISBN: 978-1-59941-820-9. (Expected availability according to the West Academic web site is 07/30/2010.)

(3) TWEN. I will be setting up an electronic course web site on TWEN (“The West Education Network”) to facilitate communication outside of class. All students in the course must sign on to the web site and provide an e-mail address no later than our second class session. To access TWEN, you will need a Westlaw password, which will be provided to you during orientation or, at the latest, during our first class. You can sign on by going to <http://lawschool.westlaw.com> and clicking on TWEN courses. Then click on Add/Drop Courses and you should then see all Hamline courses that have a TWEN page, where you can add this course.

(4) Supplemental materials. From time to time I will have some supplemental notes and other materials included as part of an assignment. An initial photocopied packet [this one] will be placed in your message box in the law school before our first class. Later supplemental materials will be posted on the course TWEN page under the link entitled “Assignments and Supplemental Course Material.” There is no charge for these supplemental materials, and you may print them out or download them as you wish.

### Office Hours and E-Mail

Office hours are posted on my office door (Room 225W), and I will usually be in during those hours. In addition, I am normally here throughout the day on many days, so feel free to ask questions at other times as well. My preference, however, is not to be disturbed during the hour preceding one of my classes.

You can reach me by E-Mail at:  
[Jpielemeier@gw.hamline.edu](mailto:Jpielemeier@gw.hamline.edu)

I am in the process of constructing a Civil Procedure page behind my "Home Page" on Hamline's World Wide Web Pages. It contains links to litigation oriented resources, and recent old examinations. You may access this web page at <http://www.hamline.edu/personal/jpielemeier/civpro.html>. I will also provide a link on the TWEN home page for this course.

### Supplemental Reading

It is not necessary to do any reading beyond that assigned. In fact, thoughtful consideration of the assigned materials is preferable to seeking other material, and I would not encourage extensive reference to outside materials. For those who want to go beyond the assigned materials, there is no single text or hornbook to recommend. Three that may be helpful are: (1) Shreve and Raven-Hanson, *Understanding Civil Procedure* (LexisNexis, 4<sup>th</sup> edition, 2009) (2) Friedenthal, Kane and Miller, *Civil Procedure* (West, 4th ed., 2005); and (3) Clermont, *Principles of Civil Procedure* (Thomson West, 2d edition, 2009). In addition, an occasional brief reference to *Moore's Federal Practice* (available on Lexis) and Wright, Miller, and Cooper's *Federal Practice and Procedure*, both multi-volume treatises, may be helpful. Also, the articles and books cited in the casebook have been carefully chosen and should afford a good discussion of the various questions at issue if you desire to read further. I would suggest that you refer to a law dictionary if you see a word in the assigned material that you do not understand.

### Learning Outcomes for the Course

The basic goals and objectives of this course are to develop an understanding of the issues, rules, and policies involved in the process of civil (as opposed to criminal) litigation. They are also to develop proficiency in legal methodology and problem solving.

Coverage in this Fall Semester course in Civil Procedure I will include material covering the topics mentioned in the course description, "a study of the constitutional and legislative grants of authority to the state and federal judicial systems, including questions of personal jurisdiction, subject matter jurisdiction, notice required by due process of law, and venue." We will probably also cover one additional significant topic, to be determined by me depending on how much time we appear to have remaining in the semester.

There are over a dozen published Civil Procedure casebooks and each is organized somewhat differently. The most significant divide is between casebooks that begin with coverage of personal and subject matter jurisdiction and casebooks like yours, which covers those topics in later chapters. Thus, most of the material assigned for this semester will be drawn from Chapters, 1, 9, and 10. The chapters are sufficiently discrete that proceeding in this manner should not pose any barrier to your learning the material.

## Course Expectations

### *HUSL Policies on attendance, lateness and preparation*

The program of instruction at the School of Law is based on an active and informed exchange between instructor and student and between student and student. Regular, prepared class attendance helps develop skills essential to the competent practice of law. A student who violates the attendance policy, including the instructor's specification of class expectation described below, may lose his or her right to take the exam in the course, to receive course credit or may receive other penalties described below and in Academic Rule 108. Persistent or frequent lateness or unpreparedness may also be the basis for reduction of the grade awarded in a course. See Academic Rule 108 for further details.

### Preparation and Attendance

You are expected to be prepared for discussion of the materials assigned for each day. If you are called upon and are not well-prepared, this will result in a waste of your classmates' time as well as your own. Thus, if for any legitimate reason, you are not well-prepared, please let me know *before* class begins, and you will not be called upon during that class period.

As the Academic Rules and Attendance Policy provide, regular and punctual class attendance and preparation are required. As a general rule, I consider absences in excess of five class hours per semester to be excessive. Potential sanctions for failure to meet these requirements are set forth in the HUSL Academic Rules. If the permitted number of absences is exceeded, opportunities to pursue "make-up work," as opposed to sanctions, will not be granted absent a strong justification for the excessive absence, such as incapacitating illness or injury, death in the family, childbirth, or analogous circumstances. Such make-up work, if permitted, will ordinarily be in the form of a required paper.

At my discretion, lateness to class may be deemed an absence. Please be on time (subject to snow emergencies) and remain in the classroom during each class session unless illness requires that you leave.

### Technology Policy

You may use laptop computers or other electronic devices in class to take notes and access course related materials. You should not use your laptop or electronic devices for other purposes.

In addition to the usual courtesies due to your classmates, refrain from text-messaging and email, using cell phones, pagers, or any other communication device. Refrain also from displaying wallpaper, screen savers, or other material on your computer screen that can reasonably be expected to distract your classmates.

### Grades:

First year Civil Procedure consists of a two credit course in the fall and a three credit course in the spring. A separate written examination and grade for the allocated number of credits will be given each semester. In Civil Procedure I, the final examination will be the exclusive basis for your grade. The focus on the exams will be on topics covered during the semesters they are given.

As you will see, however, topics covered throughout the course will have various degrees of relationship with each other. Because some topics covered during the spring semester require some understanding of topics covered during the first semester, the spring exam will assume that you have a competent understanding of topics covered during the first semester.

### Assignments:

In Civil Procedure I, supplemental materials such as these will contain the assignments for several “units” of the course. Units after those included in this initial handout will be posted on the TWEN page under the link labeled “Assignments and Supplemental Materials.” I used to call these “units” “classes.” That, however, was misleading because the amount of time given in class to each unit varied. The units are now grouped more by subject matter than by the amount of time likely to be spent on them.

I will let you know at the end of each class session the actual assignment for the next class.

Although on occasion specific rules or statutory provisions will be stated as part of the next assignment, I will usually only assign page numbers in the Casebook. You should assume that rules, statutes, and constitutional provisions focused upon in the assigned pages are also part of the assignment, and you should therefore study them as well. (Such provisions appear in your 2010 Supplement: item number (2) of the required materials.) You do not need to read the Advisory Committee Notes to any of the Rules in your Supplement unless I explicitly assign some.

The remainder of this document contains additional introductory material, as well as the assignments for the first six Units..

For our first class session on Monday, August 23, prepare for the material assigned later in this handout for Unit 1.

## A Note on The Federal Rules

A great portion of the course will be devoted to a study of the application and interpretation of the Federal Rules of Civil Procedure. These are the rules applied in the Federal Courts. The Federal Court system is a separate system which exists in addition to a separate system of State Courts in each State. In many cities, the Federal Courts are in a building just down the street from where the State Courts are sitting. In several situations, a party may have a choice whether to file a lawsuit in State Court or Federal Court. During portions of the first semester, we will be studying the "types" of cases that may or must be filed and determined in Federal Court.

Although most lawsuits are in fact filed in the State Courts, we will be focusing on the Federal Rules for two reasons. First, they apply to Federal Courts sitting in all the states and therefore will be pertinent regardless of where a student decides to practice. Second, while there are often some minor differences, a majority of the states have adopted Rules of Procedure to be applied in their State Court System that are modeled after the Federal Rules. As such, a study of the Federal Rules is the best means by which to discuss procedural issues which will arise in both Federal and virtually all State Courts.

Although they will not be extensively discussed because of wide variations, you should be aware that almost all Federal Courts (both District Courts and Courts of Appeals) have promulgated local rules which supplement (usually only in minor respects) the Federal Rules. The same holds true in many State Court systems in that in addition to following a set of Rules of Civil Procedure that has statewide application, courts within a more limited geographical area (such as all those within a given city) may have a set of local rules which supplements the state rules and which applies only to lawsuits filed in courts within that area. (Minnesota also has an additional set of "General Rules of Practice for District Courts," which are of statewide application and establish some of the more practical details involved in litigation). In addition, in some areas individual judges have issued "Standing Orders" which describe some of the more specific details of practice before an individual judge. An attorney should not practice before any Court without determining whether such local rules or standing orders exist and their effect.

Furthermore, at times special rules will be applicable to special types of proceedings. For example, a separate system of rules is used in federal Bankruptcy proceedings, even though such proceedings are in fact "civil" actions which are determined by the Federal Courts. Such special rules can normally be found by reference to the statutes that govern the type of proceedings involved, and they supersede the general procedural rules on those matters that they cover.

In addition to "Court Rules" which generally are printed in pamphlets such as the one you have purchased for this course, many procedural matters are governed by statutes and, less often, a constitution. Such statutes can usually be found by referring to the names of various "chapters" of state statutes or statutory index references to the subject matter involved. In pursuing any course of action, an attorney should always consult the statutes of the state in which he or she is practicing (or, if a federal claim is involved, the federal statutes) to determine whether any such statutes are applicable.

Many of the assignments in this course will include a reading of one or more Federal Rules, more so in Civil Procedure II than Civil Procedure I. However, you should be aware of the fact that we will not be covering all of the rules. Rather, we will focus on the more major issues involved in civil procedure and the rules and statutes that are pertinent to these issues. Even though some of the rules will not be specifically assigned, however, you should at some point during the year skim through all of the rules.

### Sample Documents

A separate packet accompanying this document contains a number of sample documents. We will not discuss these samples extensively in class, although we may refer briefly to some later with a critical eye. However, you should look them over briefly no later than the end of the first two weeks of classes.

They are included to provide you with examples of what some documents used in litigation "look like." They are more simplistic than one would ordinarily see in substantial litigation, but they generally would be deemed sufficient and should serve the purpose noted above.

The documents, while reflecting a hypothetical case filed in a federal court in Minnesota, are in a form that is typical in federal courts throughout the United States. Slight variations in the way things are done exist from state to state (and even among different courts in the same court system within a given state), but such variations can easily be ascertained by consulting local court rules and local attorneys. These documents include some brief "NOTES," which elaborate on their use and purposes.

## INTRODUCTION

One possible definition of a Civil Procedure course is "A Study of the Mechanics of a Civil Law Suit." In a sense, however, this definition is misleading in that the means by which the substantive rights and duties of litigants are implemented, through the courts or otherwise, are not mechanical in the sense of being predetermined by rigid rules. Rather, the "rules" of civil procedure provide only a framework within which an attorney representing a client in litigation must work. In general, the manner in which a lawsuit will proceed is determined by the attorneys for the litigants, not by the rules themselves. The rules are merely tools which an attorney may or may not use or invoke, depending on the facts and circumstances of a given case.

This course will focus primarily on the procedure used in the courts. Less formal procedures (generally referred to as Alternative Dispute Resolution, or "ADR" Processes) are also often used to resolve disputes. We will touch on these processes briefly in this course, but be aware that Hamline offers several other courses that focus more specifically in this area.

The procedural mechanisms utilized in alternative dispute resolution systems often differ to a great extent from those used in the court system, in part because it has often appeared that the procedure used in the courts is not the best method of resolving certain types of problems. In fact, Rule 114 of the Minnesota General Rules of Practice for District Courts, first adopted in 1994, requires that the parties to many actions filed in court make an *attempt*, before extensively proceeding with the normal litigation process, to resolve the matter through ADR processes. When studying the materials in this course, you should query whether there might be better ways than those actually employed to resolve the dispute at hand. Questions of this sort have led to the establishment of less cumbersome alternative dispute resolution systems.

Notwithstanding the existence of these other mechanisms, the most typical way of resolving disputes that are not informally settled is through the use of the courts, and it is for this reason that "court" procedure will be the focus of our study. Because most cases that are filed are settled before an actual trial, resulting in the vast majority of the litigator's time being spent on issues that arise during that time period, most of the course will be devoted to such pretrial issues.

The importance of a solid knowledge of Civil Procedure to the practice of law cannot be understated. Even if an attorney never gets *directly* involved in the handling of a lawsuit (and many with various specialties do not), it is the rare attorney who never comes into *some* contact with litigation, and a knowledge of procedure is essential to an understanding of what is taking place and communicating with the attorneys who are handling the litigation. A good understanding of procedure is also frequently necessary to understand fully cases that set forth legal principles in numerous areas of the law. It is even more important to persons who will be directly involved with litigation.

As was stated earlier, the "rules" of procedure are a framework within which the attorney involved in litigation must work. They are starting points and tools for the resolution of

disputes. However, often the manner in which a given rule should be interpreted or applied in a given case is not clear. As such, you should concentrate upon learning the purposes of the rules and developing the skills of arguing how the rules should be applied. In doing so, think about what goals we should seek to attain (those mentioned in Rule 1 and others) in building a system for the resolution of disputes, taking into account the constitutional structure of the United States.

### **ASSIGNMENTS AND SUPPLEMENTAL MATERIALS**

For our first class session on Monday, August 23, prepare for the material assigned below for Unit 1.

#### **Unit Number 1: A general introduction.**

**Assignment: The materials in this supplemental packet to here, Note 1 below, and pages 1-24 of the Casebook.**

1. Before we begin our coverage of this subject, it will be helpful to reflect on what some of the goals of our dispute resolution system should be. Assume you are one of the pioneers in setting up a new society. You have concluded that one aspect of that society should be a governmental mechanism, or system, for resolving disputes that persons seem unable to resolve through informal discussion and compromise among themselves.

What should be the goals of that system? In thinking about this, bear in mind that in many situations, the persons involved may have disagreements about the underlying facts leading to the dispute, as well as disagreements as to how the applicable substantive law applies in its resolution.

Rule 1 of the Federal Rules of Civil Procedure (in your 2010 Rules Supplement) suggests that the just, speedy, and inexpensive determination of legal controversies should be goals of the system. Few, if any, would dispute that notion. But can we be any more specific? See if you can think of three more specific characteristics or goals of a system for resolving disputes that you think would be appropriate. We will have some discussion of these goals in class.

**Unit Number 2: A few more pages on characteristics and goals of the system, then on to Personal Jurisdiction--Early Principles**

**Assignment; Casebook pages 24-28, Casebook pages 407-415 (to the case), the brief excerpt from Hall's Specialties, below, notes 1-10 below, Article IV, Section 1 and Amendment XIV, section 1 of the U.S. Constitution, and 28 U.S.C. section 1738 (I will give you the page numbers to find these provisions in our first class session--these provisions are all pertinent to Pennoyer, the primary case assigned for today), then read and prepare for discussion of pages 415-420 of the Casebook, followed by reading note 11 below.**

**HALL'S SPECIALTIES, INC. v. SCHUPBACH**

**758 F.2d 214 (7th Cir., 1985)**

EVANS, District Judge.

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An Indiana resident read an ad in an Indiana publication that offered a specific item (a 1963 Trinity propane anhydrous ammonia tanker transport) for sale. The ad stated that the seller was from Illinois. Mr. Indiana, in direct response to the ad, telephoned Mr. Illinois to discuss the tanker, and Mr. Illinois sent pictures and literature about the tanker to Mr. Indiana. Mr. Indiana traveled to Illinois, examined the tanker, decided to purchase it, did so, and transported it back to Indiana. The tanker soon proved to be defective (the fact that it ultimately blew up is not important on the jurisdictional issue), and this suit essentially for breach of warranty and rescission of the sales contract was born.

Now, one would think that in a rational system, especially one that seeks (or should seek) clarity and definiteness, experienced lawyers could simply and with conviction unanimously answer Mr. Indiana's question: "Can I sue the guy who sold me the tanker here in Indiana?" But alas we know, to our embarrassment, that the only honest answer the lawyer can probably give is a "Gee, I can't say for sure."

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**NOTES**

**1.** The short excerpt from Hall's Specialties, which you just read, is included simply as a "warning"--to encourage and reinforce your tolerance for some uncertainty, which you'll need in your study of this and many other topics. Be advised, however, that the last six words of the excerpt are not, standing alone, an adequate answer to an exam question.

**2.** Four potential issues are involved in determining whether the court where a case is filed is a court that can hear the case: (1) subject matter jurisdiction, (2) personal jurisdiction, (3) venue, and (4) service of process (adequate notice). The existence of each of these four matters is a

prerequisite to a court's ability to hear a case. Note, however, that lack of any of the last three prerequisites can be waived by a party who might otherwise contest their existence. Lack of subject matter jurisdiction, however, cannot be waived.

3. Our focus during the next few class sessions will be on personal jurisdiction. Generally speaking, we will be asking, "In what state, or states, can a lawsuit be brought?" Often there will be more than one state in which a suit can be brought. The focus in the cases, however, is whether the particular state in which the suit was brought has personal jurisdiction.

Personal jurisdiction involves the question of the authority of a court in a given state over the parties to the lawsuit. A court will not have the power to render a judgment that is legally binding on a party if the court lacks personal jurisdiction over that party.

Generally, we are concerned only about whether the court has personal jurisdiction over defendants. As is noted on page 407, caselaw suggests that, by filing the lawsuit, plaintiffs have consented to personal jurisdiction by the court where the suit was filed.

4. When a potential plaintiff comes into your office, thinking he or she has a valid claim against someone from a different state, you will need to consider where the potential defendant or defendants can be sued. Generally, plaintiffs will prefer to sue in their own home town and state, if for no other reason than convenience. However, if you believe that personal jurisdiction over the potential defendants is unavailable or shaky in the plaintiff's home state (and that a motion to dismiss on that ground is therefore likely to be granted), you may need to advise your client to retain an attorney (through you or on the client's own) in another state that is more likely to have personal jurisdiction over the defendants.

In addition, even if you think courts in your client's home state can assert personal jurisdiction over the defendants, you may, in rare cases, conclude after research that the law of another state (which you think may also have personal jurisdiction) may be more favorable to your client than its home state's law, suggesting at first blush that it may be better to sue elsewhere.

(This brings up the following, which is something of a side point but which is something to be aware of in connection with this issue. In some instances, state courts will not apply their own state's law, but rather will apply the law of another state to a suit before them. For example, a traditional, but no longer universally-applied rule, is that a court, wherever located, will apply the law of the state of the accident in ordinary tort suits. Which state's law a court will apply depends on a body of law covered in a three-credit upper class course entitled Conflict of Laws).

If you conclude, however (1) that another state's law would definitely be more favorable to your client than its home state's law; (2) that the other state would apply its more favorable law, and the home state would not; and (3) that other state can probably assert personal jurisdiction over the defendant, then you may well advise your client that it would be better off suing in that other state.

5. In any event, you will want to bring suit in a state where you believe the court can assert personal jurisdiction, because if the defendant successfully moves to dismiss on the ground that

the court lacks personal jurisdiction, your client will have to begin over again in another state, assuming it still can (assuming, for example, that the statute of limitations has not run before the second suit is filed).

6. We will be spending a substantial amount of time on personal jurisdiction, for essentially three reasons: (1) the area gets a bit complex; (2) coverage of the area is a good exercise in reading, analyzing, and synthesizing cases, and developing the ability to do these things effectively is an appropriate goal during one's first semester in law school (bear in mind that although they cover several years, most of the cases we will study are still viable precedent--you should focus on how the cases build upon each other and blend together to form the current body of the law of personal jurisdiction); and (3) motions to dismiss for lack of personal jurisdiction are in fact quite frequent.

7. Our primary focus will be on constitutional limitations on the exercise of personal jurisdiction. Note, however, that there are also statutory limitations. Generally, these statutory limitations are in the form of "long-arm statutes," which exist in each state. Such statutes spell out the circumstances under which each state's courts are authorized to assert personal jurisdiction over defendants served outside the state. As you will see, in most situations the power of a federal court to assert personal jurisdiction is the same as that of the courts of the state in which the federal court is sitting. Thus, the personal jurisdiction of the federal courts is also limited not only by the Constitution, but also by the state's long-arm statute. We will touch on such statutes when we get to pages 434-436 of the Casebook.

The upshot of all this is that two questions are involved in resolving any issue of personal jurisdiction, at least when one is dealing with an out-of-state defendant. The first is whether jurisdiction is permitted by statute (i.e. has the legislative branch given its courts power to exercise jurisdiction over this non-resident?).

If the answer to this first question is "no", then a court doesn't even need to address the constitutional issue. Its governing statutes don't give it the power to assert jurisdiction over the defendant, and that's the end of the matter, even if the court could assert jurisdiction consistently with the United States Constitution. (The U.S. Constitution generally limits the powers of states--nothing says they must exercise all the powers they can exercise).

If the answer to the first question is "yes," however, then one needs to consider whether the assertion of jurisdiction would violate constitutional limitations.

Sometimes the statutory issue will require virtually no analysis. For example, some long-arm statutes explicitly say that a state's courts may assert personal jurisdiction to the extent permitted by the Constitution, and several others have been construed to that effect. Occasionally, however, a long-arm statute might not permit jurisdiction, even though its assertion would be constitutionally permissible.

8. Although Pennoyer v. Neff (page 415) is more than 100 years old, one can trace its roots even further back. In medieval England (the country from which much of our system developed), a civil lawsuit was begun by the sheriff arresting the defendant and putting him in jail awaiting

trial. People eventually concluded that this wasn't particularly appropriate in civil cases, and this method eventually gave way to having the sheriff simply serving the defendant with a summons commanding him to appear for trial.

But in both situations (arrest or summons), the sheriff's authority was limited to the boundaries of his county or shire. Finding the defendant in the county or shire and serving him there gave the court jurisdiction over him.

As you should glean from Pennoyer, this sort of territorial limitation on the ability of the court to assert jurisdiction carried over to an extent to American law and still has some impact today. Although we're not concerned with jurisdictional limitations on counties or shires anymore, we are concerned with jurisdictional limitations on the states, which Pennoyer deals with. It sets forth the accepted rules of jurisdiction as of the date of its decision, and is an appropriate starting point for any study of personal jurisdiction.

**9. Some terminology.** (This note constitutes some elaboration on the paragraph spanning pages 414-415.) Pennoyer makes distinctions, to an extent, between a state's jurisdiction over persons and its jurisdiction over property. In reading the opinion, you will see some reference to terms like "personal judgment," "suits in personam," and "proceedings in rem." To get some handle on the meaning of these terms, it may be helpful to be aware of the three basic historical types of actions or types of jurisdiction, which are as follows.

**a. In personam** (or personal): This is the sort of jurisdiction involved in your ordinary lawsuit and will be the focus of the vast majority of our time. A court will be asserting (or may be unable to assert) jurisdiction over the "person" of the defendant. An "in personam" action is one to determine the personal rights and obligations between the parties. (E.g., It may be an action to determine that defendant owes plaintiff certain damages, that defendant has no interest in a certain piece of property, that defendant should be enjoined from certain conduct--an in personam action can involve virtually any alleged rights and obligations between the parties). For example, the first suit in Pennoyer was one for attorney fees. If, in such a case, the court has personal jurisdiction over the defendant and the plaintiff obtains a judgment, that judgment will be binding on the defendant personally, and the plaintiff can have the judgment enforced ("executed") against any of the defendant's property (so long as it's not exempted from execution by state law). In addition, other states must recognize and enforce a judgment of a court with such jurisdiction pursuant to their full faith and credit obligations (Contained in the statutory and constitutional provisions you'll read shortly).

**b. In rem.** "In rem" actions are actions in which the court is determining rights to certain property, and the court is asserting jurisdiction over that "property." A true "in rem" action will be binding on the "whole world." For example, in some states an action may be brought to "register" property--to sort out who has what interests in a certain piece of property. Such an action will result in the issuance of a certificate listing all the interests the court has determined to exist in the property, and if anyone subsequently claims he or she had an interest in the property at the time of the certificate and that interest is not reflected on the certificate, they will be precluded from successfully asserting that interest--they have lost it because it wasn't proven in the registration proceeding. The proceeding determined what rights everyone in the entire

world had in the property, and it is binding on everyone. Generally, true "in rem" actions are provided for by statutes that have very extensive notice provisions.

**c. Quasi in rem.** This is the type of jurisdiction the court in Pennoyer is talking about when it speaks of jurisdiction "in rem" or jurisdiction based on the attachment of property. It is an action involving the determination of personal rights and obligations between the individual parties (for example, it could be a suit for attorney fees, like in Pennoyer, or it could be an action directly related to the property, like an action to enforce a lien on the property). However, even though the rights being asserted are the same as might be asserted in an in personam action, the court does not have personal jurisdiction over the defendant. Instead, it only has jurisdiction over certain property of the defendant. In a sense, the plaintiff is suing the property for the obligations of its owner (although the pleadings will generally name the owner as the defendant). A quasi-in-rem action will determine the rights to the property as between the parties. No-one else will be bound by the judgment (in contrast to a true "in rem" action which binds the whole world). And, if there was no personal jurisdiction over the defendant, the judgment is effective (binding) only to the extent of the property. The plaintiff cannot enforce the judgment against any other property, and it is not binding on the defendant to any extent beyond determining its interests in that specific property. As the court in Pennoyer does, many courts have often used the shorthand term "in rem" to describe both true in rem and quasi in rem actions.

**10.** Now read the constitutional and statutory provisions contained in the assignment and prepare for class discussion of pages 415-420 in the casebook.

In addition to discussing the facts, holding, and reasoning of the case, our class discussion of Pennoyer will include the following two questions, the answers to which you should attempt to ascertain from the case.

(1) At the time of the decision, under what circumstances could a court permissibly assert in personam jurisdiction over a defendant?

(2) Under what circumstances could a court permissibly assert jurisdiction over a defendant's property?

(Note: The Supreme Court held that the requirements for neither type of jurisdiction were met in the case.)

Read note 11, below after you have completed the assigned pages in the Casebook.

**11. Fleshing out the law of personal jurisdiction in 1878.** The most important portions of Pennoyer are those in your edited version in the casebook. In the actual case, however, the Court ended its opinion with the following three paragraphs, which reflect some potential "exceptions" to the principles set forth in your edited version. They are worth considering as some elaboration on the law of personal jurisdiction at the time.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *Status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involve authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the State, a dissolution may be granted, may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress.

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. . . . Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one State, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

95 U.S. at 734-736.

### **Unit Number 3: Personal Jurisdiction--International Shoe--the modern formulation**

**Assignment: Note 1 below, and Casebook Pages 420-425.**

1. International Shoe (page 420) is thought of as a watershed case in the area of constitutional limitations on the exercise of personal jurisdiction. It is really the starting point for modern analysis of the issue. What is the Court's test? Imagine you are an attorney litigating a personal jurisdiction issue just after the case was decided. Does the opinion suggest any "factors" that the Court deems pertinent to whether its test is met, which you should take into account in arguing your jurisdictional issue?

### **Unit Number 4: The modern state of jurisdiction over property**

**Assignment: Note 1 below, Casebook pages 425-434, Note 2, below, and Cable News Network, below.**

1. International Shoe reflected a significant change from Pennoyer in how the Supreme Court has analyzed "in personam" jurisdiction over persons, corporations, and other types of defendants. The materials assigned for this unit deal with development of Pennoyer's principle that states can assert jurisdiction over property in the state, at least if it's brought under control of the court at the commencement of the suit. Was this sort of jurisdiction over property still permissible in the wake of International Shoe and its progeny? For several years, a number of courts and authorities considered the answer to be yes. As you will see, in Shaffer v. Heitner (page 425), the lower courts considered the defendants' lack of contacts with the forum state to be unimportant because jurisdiction was based on the court's seizure of property considered to be in the state.

But before reading Shaffer, you should be aware of another example of how jurisdiction over property worked. The following example may sound a bit surrealistic, but such things actually occurred. It is an elaboration based on the case of Harris v. Balk, 198 U.S. 215 (1905), which appears or is described in many Civil Procedure casebooks. A reference to it has been deleted from your version of Shaffer. The second sentence of the first paragraph on page 429 reads in full as follows: "For the type of *quasi in rem* action typified by Harris v. Balk and the present case, however, accepting the proposed analysis would result in significant change."

Here is the example. Assume Alfred lends \$1000 to Jane in Minnesota. She owes him \$1000 and conceptually, her "debt" to him is his property. (In thinking about this, it may be helpful to analogize to a bank account. When you put money in the bank, you're basically loaning the bank your money. It owes you the amount you have in the account, and if you ask for it (by writing a check or whatever), it has to give it to you. It has a debt to you in the amount in your account--but I suspect most of you would think of the money you have in a bank as being your property).

Assume Jane then goes to Florida. Under quasi-in-rem jurisdiction principles, Alfred's property (Jane's debt to him) was there (just as if Jane had taken Alfred's airplane and flown it there).

As a result, even if Albert had never set foot in Florida (and had no other contacts sufficient for the assertion of personal jurisdiction), if someone in Florida had a claim against Alfred (let's say a weak tort claim), they could commence a lawsuit against him there (really a suit against his "property," although he would be named as defendant) by attaching his property (the debt, at least if it's due) there.

How would the plaintiff do that? Typically; the plaintiff would serve a "garnishment summons" on Jane, which would be a document saying essentially "Jane, you have property of Alfred's, pay it into court; as the Florida courts have jurisdiction over his property in this state and are going to dispose of it in this lawsuit." (Normally there would also be notice to Alfred that this had been done and of the suit).

If this was done, the Florida court in which the suit was filed would have obtained quasi-in-rem jurisdiction over the property (debt). And if Albert didn't hire a lawyer in Florida to defend the suit, but instead defaulted, judgment would be entered for the plaintiff and the money (\$1000, "property") would be paid to him (if, instead of the debt, tangible or real property of Alfred had been attached, it would be sold and the proceeds paid to the plaintiff).

And, as Pennoyer said, that judgment would be binding to the extent of the property--Alfred's right to "it" has been adjudicated--"it" has been awarded to the plaintiff and Alfred no longer has a right to it. Jane no longer has a debt to him--she's paid it as the court ordered. But the judgment is binding only to the extent of the property. If the Florida plaintiff had asked for \$10,000, the court in its default judgment had stated Alfred owed the plaintiff \$10,000, but the property attached as the basis for quasi-in-rem jurisdiction was only \$1,000, other states wouldn't have to recognize the judgment in a suit to enforce it for the other \$9,000 against other property. The judgment based on quasi-in-rem jurisdiction wasn't binding on Alfred personally (because there was no personal jurisdiction over him) and wouldn't effect any of his other property. But the property that did form the basis of quasi-in-rem jurisdiction (the \$1,000 debt) has been affected. Alfred has lost any enforceable claim to it.

And Florida's power to dispose of this property stemmed from the fact that the property was in Florida, and Pennoyer's premise that a state has jurisdiction over persons and property within the state.

Now after International Shoe and similar cases had been decided, some people began arguing, believe it or not, that this was all just a bit unfair to Alfred. He'd never had anything to do with Florida, yet if he didn't show up to defend the lawsuit he'd surely lose his property. Such a scheme effectively forced him to defend a lawsuit in a state with which he had no contacts, on pain of losing his property if he didn't.

Eventually the Supreme Court agreed to hear a case in which these sorts of arguments were being made, Shaffer. How did Shaffer change the law? Why did the Court make the change?

**Note 2.** Footnote 39 of the court's opinion in Shaffer has been omitted from your casebook, but is worth seeing. It appeared at the end of the sentence preceding Part IV on page 430, and states, "It would not be fruitful for us to re-examine the facts of cases decided on the rationales of

Pennoyer and Harris to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.”

## CABLE NEWS NETWORK v. CNNEWS.COM

162 F. Supp. 2d 484 (E.D. Va. 2001)

ELLIS, District Judge.

At issue on a threshold dismissal motion in this *in rem* action brought under the Anticybersquatting Consumer Protection Act<sup>1</sup> ("ACPA") are the following questions:

- (1) Does an ACPA *in rem* action comport with due process where, as here, the registry is located in this jurisdiction, but the absent registrant is a Chinese entity that has no minimal contacts with any state in the United States and uses the infringing domain name in connection with a website that is wholly in the Chinese language and directed to persons in China?
- (2) Is a showing of bad faith a jurisdictional requirement for maintaining an ACPA *in rem* action?
- (3) Does Rule 19(b), Fed.R.Civ.P., require a plaintiff in an ACPA *in rem* action to join parties claiming an interest in the allegedly infringing domain name?
- (4) Does a plaintiff properly effect service of process in an ACPA *in rem* action where, as here, it has published notice of the action in accordance with a court order and has sent notice of the matter to the registrant of the domain name at the address the registrant provided to the registrar?

### I.

Plaintiff, Cable News Network L.P., L.L.L.P., is a Delaware limited liability limited partnership with its principal place of business in Atlanta, Georgia. It is engaged in the business of providing news and information services throughout the world via a variety of electronic media. It is also the owner of the trademark "CNN," which plaintiff has registered in this country and dozens of others, including China. Since at least 1980, plaintiff has used its registered CNN trademark in connection with providing news and information services to people worldwide through a variety of cable and satellite television networks, private networks, radio networks, websites, and syndicated news services. Some of these services are accessible in China and provided in the Chinese language. Since adopting the CNN mark, plaintiff has used the mark "CNN" in the

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<sup>1</sup> 15 U.S.C. § 1125(d) (2001).

names of all of its broadcast networks, the best known of which include CNN Headline News, CNN En Espanol, CNN SI, CNN FN, and CNN International. Plaintiff's services are also accessible worldwide via the internet at the domain name "cnn.com." There can be no doubt that plaintiff's CNN mark is famous.

Maya Online Broadband Network (HK) Co. Ltd. ("Maya") is a Chinese company that is a subsidiary of a second Chinese company, Shanghai Online Broadband Network Co. Ltd. On November 12, 1999, Maya's general manager, Heyu Wang, registered the domain name "cnnews.com" with Network Solutions, Inc. ("NSI"), a domain name registrar and registry,<sup>4</sup> located in Herndon, Virginia.<sup>5</sup>

Maya operates the cnnews.com website, which is designed to provide news and information to Chinese-speaking individuals worldwide. This website is part of Maya's comprehensive on-line services system that includes video on demand, broadband services, and a variety of e-business services. The cnnews.com website is one of many sites linked to Maya's main website, cnmaya.com. The "cn" prefix apparently refers to "China," where the characters "cn" are widely used and understood as an abbreviation for the country name "China." The top level internet domain for China is "cn." Given this, Maya, the respondent in this action, asserts that its choice of the domain name cnnews.com was entirely reasonable and that it did not select or use this domain name in bad faith. And Maya further points out that most people who access the cnnews.com website in China likely have never heard of CNN, as most Chinese citizens lack access to plaintiff's television stations and websites.

Maya asserts that the target audience of its online services, including cnnews.com, is located entirely within China. Maya also asserts that it does not advertise any of its services outside of China, sells no products or services to persons outside of China, does not ship goods outside of China, or accept payments from any source outside of China. In confirmation of these assertions, Maya proffers statistics reflecting that 99.5% of the registered users of Maya's websites are located within Chinese cities. It appears, moreover, that all of Maya's business is conducted in the Chinese language and that it transacts no business in the United States.

Plaintiff acted promptly on discovering that Wang had registered the cnnews.com domain name with NSI and that Maya had posted news information on that site. First, plaintiff notified Wang

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<sup>4</sup> The functions of a "registrar" and "registry" are distinct. A registry "is the single official entity that maintains all official records regarding registrations in the TLD (top level domain)...." Thus, there is only one official registry for each TLD, such as ".com," ".org," and ".edu." By contrast, a registrar "is one of several entities, for a given TLD, that is authorized by ICANN [Internet Corporation for Assigned Names and Numbers] to grant registration of domain names to registrants."

<sup>5</sup> At that time, NSI served as both registrar and registry for all .com domain names, including cnnews.com. NSI has since been acquired by Verisign Global Registry Services ("Verisign"), also located in Herndon, Virginia. Verisign continues to operate as one of a number of domain name registrars and is the sole and exclusive registry for certain TLDs, including the TLD ".com."

of its service mark rights and demanded that he transfer the domain name *cnnews.com* to plaintiff. Plaintiff also warned that it would pursue an ACPA *in rem* action in the Eastern District of Virginia to acquire control over the *cnnews.com* domain name if he failed to comply. Maya responded to plaintiff's communications with Wang, indicating that it did not intend to comply with plaintiff's demands. Next, plaintiff suggested that Maya change the domain name of its news website to "*cn-news.com*" and use the new domain name only in Chinese characters. Maya rejected this proposal and plaintiff subsequently filed this complaint.

With respect to service of process, plaintiff filed a motion seeking a waiver of the ACPA's requirement for service by publication<sup>9</sup> on the ground that Maya already had received actual notice of this action. This motion was denied. Plaintiff, however, served a copy of this motion on the attorney for Maya and Wang. Although the attorney responded that he lacked authority to accept service of process on behalf of Maya or Wang, he sent plaintiff a copy of the WHOIS record<sup>10</sup> for the *cnnews.com* domain name, which listed the address of Maya and Wang. The WHOIS record also revealed that after this controversy had arisen, but before plaintiff filed its complaint, Wang had changed the registrar for the *cnnews.com* domain name from NSI to Eastern Communications Company Limited ("Eastcom"), a Chinese registrar. Notwithstanding this change of registrars, Verisign continues to be the registry for the *cnnews.com* domain name, as it is for all ".com" websites.<sup>11</sup> Additionally, plaintiff learned that Wang had also changed the registrant of the domain name from himself to Maya, but kept himself as the administrative contact.

After filing its amended complaint,<sup>12</sup> plaintiff sent a copy of this complaint by e-mail and FedEx to Maya and Wang at the contact address listed in the WHOIS record. The FedEx package was

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<sup>9</sup> See 15 U.S.C. § 1125(d)(2)(A)(ii)(II)(bb) (To effect service of process, the owner of a mark must, *inter alia*, "publish[ ] notice of the action as [a] court may direct....").

<sup>10</sup> "WHOIS" is the Verisign data base consisting, *inter alia*, of registrants' names and addresses. This data base includes the contact addresses Maya and Wang provided to NSI and to Eastcom.

<sup>11</sup> Thus, the change in registrars for *cnnews.com* had no effect on the situs of the power to transfer the domain name, as that power remained with Verisign. By exclusive contract with the United States Department of Commerce and ICANN, Verisign is the *exclusive* registry for all domain names in the ".com" top-level domain, including *cnnews.com*. As such, Verisign maintains the root zone file for the ".com" top-level domain. This file is compiled from all registrations in the ".com" top-level domain submitted by all authorized registrars and contains the domain names in the ".com" top-level domain and their corresponding Internet Protocol ("IP") numbers or "addresses." These addresses are normally assigned by the registrars for the domain names. Yet, because Verisign controls the entries in the root zone file for the ".com" top-level domain, it has the ability to change the IP number matched with a particular domain name in the ".com" top-level domain. This effectively enables Verisign to transfer control of a domain name by matching the domain name with a different IP address in the root zone file.

<sup>12</sup> Plaintiff filed an amended complaint to notify the court of the fact that Maya had become the registrant of the disputed domain name.

returned as undeliverable because neither Maya nor Wang was found at the WHOIS address. Given the denial of a waiver of service by publication, plaintiff filed a motion requesting permission to serve process by publication pursuant to 15 U.S.C. § 1125(d)(2)(B). Plaintiff attempted to serve a copy of this motion on Maya and Wang by e-mail and FedEx. Neither Maya nor Wang filed an opposition to plaintiff's motion, and the motion was granted. Plaintiff thereafter completed service by publication by printing notice of the action for five consecutive days in Chinese, in the Hong Kong newspapers *Sing Tao* and *Apple Daily*, and in English, in the Hong Kong newspaper *South China Morning Post*.

During the course of this litigation, Eastcom, the current registrar for the cnnews.com domain name, and Verisign, the registry, agreed to transfer control of the cnnews.com domain name to this Court by depositing a registrar certificate for the cnnews.com domain name with the Court, as the ACPA requires. This Certificate, by its terms, "tenders to the Court complete control and authority over the registration for the cnnews.com domain name registration record."

Maya's dismissal motion advances four arguments. Specifically, Maya argues that dismissal is required because

- (I) the ACPA's *in rem* provisions, if applicable here, do not provide a constitutionally permissible basis for jurisdiction;
- (ii) bad faith is a jurisdictional element of an ACPA *in rem* action that plaintiff has failed to plead and prove;
- (iii) plaintiff has failed to join Maya as an indispensable party as required by Rule 19(b), Fed.R.Civ.P.; and
- (iv) plaintiff's service of process is fatally defective.

For the reasons that follow, these arguments fail.

## II.

At the outset, it is necessary to confirm that this action meets the ACPA criteria for an *in rem* action. These criteria, found in 15 U.S.C. § 1125(d)(2)(A), make clear that the owner of a mark, like plaintiff, may maintain an *in rem* action against an infringing domain name (I) if the action is brought in the jurisdiction where the registrar or registry of the infringing domain name is located, and (ii) if *in personam* jurisdiction over the registrant does not exist. This action fits squarely within these criteria. The registry for the allegedly infringing domain name is located in this jurisdiction and it is clear on this record that there is no *in personam* jurisdiction over

Wang or Maya, the former and current registrants of cnnews.com.<sup>16</sup> Thus, *in rem* jurisdiction is proper.

But the analysis cannot end here, for if it is clear that this action meets the ACPA criteria for an *in rem* action against a domain name, it is less clear that such an action comports with due process in light of *Shaffer v. Heitner*, 433 U.S. 186 (1977). Put another way, the question is whether judicial disposition of an absent registrant's substantive rights to an infringing domain name in an ACPA *in rem* action is consistent with due process.

### III.

More than twenty years ago, the Supreme Court, in a close and controversial decision, cast doubt on the constitutionality of certain *in rem* proceedings. See *Shaffer v. Heitner*, 433 U.S. 186, (1977). Properly understood, *Shaffer* is no bar to an ACPA *in rem* action.

In *Shaffer*, the Supreme Court held unconstitutional a Delaware statute that provided *in rem* jurisdiction by allowing the sequestration of stock of a Delaware corporation so as to compel the personal appearance of nonresident corporate managers who owned shares of the stock and were facing a shareholders' derivative lawsuit in Delaware state court. In *Shaffer*, *in rem* jurisdiction was invoked solely to compel the appearance of the defendants in a matter unrelated to the property upon which *in rem* jurisdiction was based.

To understand *Shaffer*, it is necessary to distinguish three types of *in rem* actions, ... and then to understand *Shaffer's* effect on each type. The first of the three, usually called simply "*in rem* " or "true *in rem*," arises when a court adjudicates the property rights corresponding to a particular *res* for every potential rights holder, whether each rights holder is named in the proceeding or not. ACPA *in rem* actions, including the case at bar, are of the "true *in rem* " genre because they involve the rights of a disputed mark for every potential rights holder. The second type of *in rem* action is the "quasi *in rem* " or "quasi *in rem* I" action, which allocates property rights as against particular named persons. Examples of this type of litigation include actions to remove a cloud on a land title or actions seeking quiet title against another individual's claim. The third type of *in rem* proceeding, "quasi *in rem* II," concerns the rights of a particular person or persons in a thing, but is distinguished from quasi *in rem* I claims because the underlying claim in a quasi *in rem* II matter is unrelated to the *res* that provides jurisdiction. *Shaffer* was a quasi *in rem* II matter because the suit itself (a shareholders' derivative action alleging misconduct against a corporation's directors and officers) was unrelated to the *res* that established jurisdiction (the stock certificates owned by the managers of the corporation).

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<sup>16</sup> From this record, it appears that the only contacts either Wang or Maya has had with any American jurisdiction are those incident to the initial registration of cnnews.com with NSI. It is sensibly settled that these contacts do not provide a constitutionally adequate basis for the exercise of *in personam* jurisdiction. See *America Online, Inc. v. Huang*, 106 F.Supp.2d 848, 855-60 (E.D.Va.2000); *Heathmount A.E. Corp. v. Technodome.Com*, 106 F.Supp.2d 860, 865-66 (E.D.Va.2000).

*Shaffer* clearly holds that quasi *in rem* II and *in personam* proceedings require the same minimum contacts so as to satisfy due process, as discussed in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). It is less clear, however, how, if at all, *Shaffer* affects true *in rem* and quasi *in rem* I cases. To be sure, there is language in *Shaffer* that could be read to require that all *in rem* cases conform to the same due process constraints as *in personam* cases. For instance, the *Shaffer* opinion states that "[t]he standard for determining whether an exercise of jurisdiction over the interest of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*." Some courts, therefore, have held that *Shaffer* commands that all types of *in rem* actions must have the same minimum contacts as required for *in personam* actions. Yet, the greater weight of (and more persuasive) authority holds that the language of *Shaffer* requires minimum contacts only for quasi *in rem* II-type cases. Indeed, *Shaffer's* language regarding true *in rem* and quasi *in rem* I matters was unnecessary to the holding and is therefore non-binding dicta. See *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (holding that dicta may be followed if it is sufficiently persuasive, but it is not binding). Because neither a true *in rem* case, nor a quasi *in rem* I case was before the Supreme Court in *Shaffer*, the case's holding does not reach those categories. Furthermore, despite the *Shaffer* decision, it remains generally accepted that when "property is found within the forum state and other prerequisites to *in rem* jurisdiction are satisfied, courts have routinely (if not unanimously) exercised jurisdiction over competing claims to the property without any hint of a due process problem." Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 Wash.L.Rev. 97, 142 (2000). Finally, to hold that *Shaffer* requires the same minimum contacts in all *in rem* cases as for *in personam* cases would run counter to historical practice and common sense. In sum, *Shaffer*, properly construed, holds only that quasi *in rem* II actions require the same minimum contacts as *in personam* jurisdiction actions. Thus, where, as here, the action is properly categorized as "true *in rem*," there is no requirement that the owner or claimant of the *res* have minimum contacts with the forum. More particularly, in an ACPA *in rem* action, it is not necessary that the allegedly infringing registrant have minimum contacts with the forum; it is enough, as here, that the registry is located in the forum.

The result reached here is consistent with three district court opinions that have addressed constitutionality issues regarding the ACPA's *in rem* provisions, none of which has even suggested that it might be unconstitutional to establish *in rem* jurisdiction in the district where the domain name's registry is located. *Fleetboston* and *Mattel, Inc. v. Barbie-Club.Com* each held that there is no constitutional basis for *in rem* jurisdiction when the adjudicating court merely has possession of the certificate of the domain name, but the registrar, registry, or other domain name authority is not located in the court's district. See *Fleetboston*, 138 F.Supp.2d at 128-35; *Mattel, Inc. v. Barbie-Club.Com*, 2001 WL 436207, at \*2 (S.D.N.Y.2001). And, *Caesars World* held that *in rem* jurisdiction is constitutionally proper when a court sits in the same district in which the registrar is located. See *Caesars World*, 112 F.Supp.2d at 503-05.

In sum, this *in rem* action may proceed because it is sufficient under the ACPA and the Constitution that the registry for *cnnews.com* is located within this district. The constitutionality of this action is further strengthened by the current Chinese registrar's decision to transfer the domain name certificate for *cnnews.com* to this Court. Thus, it may be said that the domain name's situs is here. See 15 U.S.C. § 1125(d)(2)(A). See also *Caesars World*, 112

F.Supp.2d at 504 (holding that "[e]ven if a domain name is no more than data, Congress can make data property and assign its place of registration as its situs").

Maya argues further that *in rem* jurisdiction is improper because there is no contractual relationship between Verisign, the registry, and Maya, the registrant. Yet, this argument misses the crucial difference between *in rem* and *in personam* actions. What matters in an *in rem* case is not the contractual relation that may exist between a registrant and a registrar, but rather the nexus that exists between the registry, Verisign, and the domain name, cnews.com. It is this nexus that matters for ACPA *in rem* actions. Thus, because Verisign serves as the registry for all ".com" domain names, including cnews.com, and controls the entries in the root zone file for the ".com" top-level domain, it is able to transfer control of a domain name by matching the domain name with a different IP address in the root zone file. Because Verisign is located within this district and has control over the cnews.com domain name, *in rem* jurisdiction in this case is therefore constitutional.

#### IV.

Maya argues that plaintiff in this ACPA *in rem* action must plead and prove a registrant's bad faith to withstand a threshold jurisdictional challenge. This argument fails, for it confuses a jurisdictional requirement with a substantive element of a cause of action. The bad faith requirement in Section 1125(d)(1)(A)(I) is, at most, the latter, but in no event, the former.

While courts have debated whether the ACPA's bad faith requirement applies at all to the statute's *in rem* actions, no court has held that a showing of bad faith is or could be a jurisdictional requirement. ...

#### V.

Maya argues, implausibly, that this action should be dismissed, for failure to name it as an indispensable party, as allegedly required by Rule 19(b), Fed.R.Civ.P. Yet, no authority supports the proposition that Rule 19 applies to actions brought *in rem*. The absence of such authority is hardly surprising because any requirement that the domain name registrant must be joined in an *in rem* action under the ACPA would defeat the purpose of the statute's *in rem* provisions. Section 1125(d)(2)(A)(ii) makes clear that *in rem* actions may be brought under the ACPA only if *in personam* jurisdiction over the domain name registrant does not exist. But if *in personam* jurisdiction over the registrant does not exist, then the registrant *cannot* constitutionally be joined as a necessary party. Thus, Maya's contention, if accepted, would require dismissal of all ACPA *in rem* actions for failure to join an indispensable party. No authority supports such a nonsensical result. In sum, in a case that meets the ACPA's requirements for an *in rem* action, the registrant of an allegedly infringing domain name is not an indispensable party for Rule 19 joinder purposes.

#### VI.

Finally, Rule 4(n), Fed.R.Civ.P., describes the proper manner for providing notice to potential litigants of an ACPA *in rem* action. The Rule provides that "[i]f a statute of the United States so

provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute...." Rule 4(n)(1), Fed.R.Civ.P.

Service of process under the *in rem* provision of the ACPA is governed by 15 U.S.C. § 1125(d)(2)(B), which provides that "the actions under subparagraph (A)(ii) shall constitute service of process." Subparagraph (A)(ii) imposes two requirements for proper service of process:

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; *and*

(bb) publishing notice of the action as the court may direct promptly after filing the action.

15 U.S.C. § 1125(d)(2)(A)(ii) (emphasis added). Although there is some disagreement regarding whether the language "may direct" found in Subparagraph (A)(ii)(bb) makes publication mandatory or confers on courts the discretion to decide whether publication is warranted, this point need not be addressed here. Indeed, plaintiff's motion to waive service by publication was specifically denied. Plaintiff was therefore required to conform to the service requirements of Subparagraphs (A)(ii)(aa) and (A)(ii)(bb) and the record confirms that it did so by sending at least two notices of this *in rem* action via FedEx and e-mail to the WHOIS address that Maya had provided to its registrar, Eastcom. While Maya claims that it did not receive such correspondence, the statute makes clear that proof of receipt is not required. *See* 15 U.S.C. § 1125(d)(2)(A)(ii)(aa).

Plaintiff also has met the publication requirement of Subparagraph (A)(ii)(bb). Indeed, plaintiff completed service by publication, in compliance with the Court's order, by causing notice to be published in the appropriate international newspapers. Thus, plaintiff has properly perfected service under the ACPA.

## VII.

For all of these reasons, Maya's motion to dismiss must be denied.

An appropriate order has issued.

## **Unit Number 5: Long-Arm statutes and the early progeny of International Shoe**

**Assignment: Read Rule 4(k) in your 2010 Supplement, Casebook pages 434-436 and consider the hypothetical in Note 1 below. Then read pages 436-439 of the Casebook.**

### **1. A long arm statute hypothetical.**

New York has a long-arm statute that is almost identical to section three of the Massachusetts statute quoted on page 435. The only significant difference is that the New York statute effectively adds the following language to the end of subdivision (d): “or expects or should reasonably expect the act to have consequences in this state and derives substantial revenue from interstate or international commerce.”

Assume the following case is brought in a court in New York (it was) and the defendant contends that the court lacks personal jurisdiction over him. Putting the constitutional due process issue aside for the moment, should the court find that jurisdiction is authorized by one or more of the provisions in New York’s long arm statute?

Plaintiff and his deceased spouse lived in New York. This is a wrongful death suit against a Vermont physician, alleging medical malpractice, resulting in the death of the spouse. The alleged malpractice was that the Vermont physician failed to recognize the cancerous nature of a nodule in the deceased’s left arm pit while it was still in a treatable stage.

The deceased was a patient of a New York HMO at a clinic in New York. Her primary physician there referred her to the defendant physician for consultation. The defendant physician saw the deceased at his office in Vermont on eight occasions during the course of a year. After each of these visits, the defendant physician contacted the deceased’s New York primary physician by mail or telephone with recommendations regarding the deceased’s medical treatment.

Although he is licensed to practice medicine in New York, the defendant physician does not maintain an office in New York, nor does he solicit business in New York. His practice is limited to Vermont, where he treats patients in his office and at a Vermont medical center. His office and the Vermont medical center are six miles from the Vermont-New York border and twelve miles from the deceased’s New York medical clinic.

The defendant physician frequently sees other New York patients referred to him by physicians at the deceased’s New York clinic, but he has contractual arrangements with neither those physicians nor with the HMO. He sees all his patients on a “fee for service” basis, under which his patients are primarily responsible for payment for his services.

## **Unit Number 6: World-Wide Volkswagen**

**Assignment:** Read Casebook pages 439-453. Read Note 1 below after you have finished the case. Read Note 2 below in connection with note 1 on page 449.

**Note 1.** A paragraph of Justice Brennan’s dissent, between the last two paragraphs on page 447 is omitted from your casebook. It reads as follows:

The Court accepts that a State may exercise jurisdiction over a distributor which “serves” that State “indirectly” by “deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” . . . It is difficult to see why the Constitution should distinguish between a case involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there. In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.

Justice Brennan says he cannot see a meaningful distinction between the two types of cases he posits. Can you articulate one?

**Note 2.** The note on Insurance Corp. Of Ireland (note 1, page 449) warrants a bit of elaboration. In that case, the defendants asserted the defense that the court lacked personal jurisdiction, but they resisted discovery requests and a court order to disclose facts that were pertinent to whether the defense was really valid. As a sanction for the defendants’ failure to comply with the discovery order, the court entered an order finding that personal jurisdiction existed.

On appeal to the Supreme Court, the defendants argued that the court lacked power to impose a sanction if facts supporting personal jurisdiction had not been established. The Supreme Court rejected the argument, noting that the requirement of personal jurisdiction represents an individual right that can be waived, and holding that failure to comply with a discovery order directed to jurisdictional facts can warrant a finding that it had been waived. The Court also noted that defendants can consent to personal jurisdiction.

In reaching these conclusions, the Court felt it necessary to reconsider its statements in cases like World-Wide Volkswagen that limitations on personal jurisdiction are based in part on concern for state sovereignty. In language preceding what is quoted on page 449, the Court explained,

The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. . . . The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements. Petitioners fail to recognize the distinction between the two concepts--speaking instead in general terms of "jurisdiction"--although their argument's strength comes from conceiving of jurisdiction only as subject- matter jurisdiction.

Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §§ 1.

Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, ... principles of estoppel do not apply, . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."

None of this is true with respect to personal jurisdiction. [The opinion then contained the language of the blocked quote in Note 1 on page 449. The opinion then elaborated in a footnote to the last sentence as follows;]

. . . [O]ur holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Should this apparent disavowal of concern for state sovereignty in the context of personal jurisdiction requirements alter the method of analyzing personal jurisdiction issues? For example, should we still be concerned with the burden on the defendant? Should we continue to impose the requirement of "purposeful availment?" (Are these considerations relevant to protecting a defendant's "individual liberty interest?") Should the "interest" of the forum state remain a significant concern?