

Sample Answers

Question 1:

First, we must consider whether the district court's order is appealable and thus whether we have jurisdiction over the appeal. Ordinarily, only final judgments are appealable and the granting of a motion to dismiss is not the entry of a judgment. In this situation, however, where the court entered an order, the plaintiff sought reconsideration, and the court then entered a further order denying that motion, it seems that the plaintiff and the district court both thought they had exhausted the possibilities in that forum. We will consider the order as if it were the entry of a judgment, but we caution all future plaintiffs who have motions to dismiss entered against them, that we will not consider the grant of the motion the equivalent of entry of judgment absent exceptional circumstances.

Next, we need to determine whether the instant action is barred by preclusion as a result of the prior action in New Jersey. That action was dismissed for lack of personal jurisdiction over the defendant and did not adjudicate the merits of the dispute. It can only be preclusive as to what was litigated and thus stands as no bar to the current litigation.

With regard to the motion to dismiss itself, we note that there is some confusion in the record about how the affidavits and other materials presented by the parties should be treated. The defendants appear to have made a straightforward motion based on the lack of materiality of the misrepresentations alleged. When the plaintiff then responded with affidavits and other materials, the defendants likewise inserted their own documentation. At this point, if the district court were to consider any of this material, the motion should have been converted into a Rule 56 motion for summary judgment. We cannot determine from the current state of the record whether that occurred. Therefore, we will ignore all that material and deal only with the motion to dismiss as an attack on the face of the complaint itself. For that purpose, the allegations of the complaint, as well as all inferences that could reasonably be drawn from the allegations, must be accepted as true so that we can determine whether the complaint states a claim upon which relief could be granted.

With regard to pleading fraud with sufficient particularity, the complaint sets out specific statements made by the defendants and particular elements of their knowledge that these statements were inaccurate. It is difficult to imagine how a plaintiff could be much more particularized in the allegations of fraud. The purpose of the rule is to prevent generalized claims of fraud that will damage a business during the pendency of litigation while the plaintiff rummages in the defendant's records to determine what they said and what they knew. That is not at all the situation here and this aspect of the motion should have been denied.

With regard to the statute of limitations, unless the complaint itself showed that it was time-barred, this issue would be a matter for summary judgment when the defendants point out the date (or dates) on which the claim (or claims) arose and the date on which the complaint was filed. In this instance, the dates on which fraudulent statements were made may be in the complaint but it is not clear when the plaintiff came to rely on them to his detriment. In the current state of the record, the applicability of a statute of limitations is too dependent on further evidence to be a matter of 12(b)(6) dismissal.

Finally, the defendants' principal arguments are that their statements were mere opinion and that any reliance by the plaintiff on the defendants' representations would have been unreasonable. These issues are matters for determination by the trier of fact and not questions of law for a motion to dismiss.

Reversed and remanded with directions to deny the motion to dismiss.

Question 2.

An action filed in state court is removable to federal court if it would have been within the original jurisdiction of the federal court, except that if that jurisdiction is based on diversity, then the action cannot be removed by a citizen of the state in which it was filed. It is likely from the information available that SNEL and the individual defendants are all citizens of Massachusetts and could not remove to federal court. When a nonresident plaintiff sues a resident defendant, the question of whether to risk the presence of any prejudice in the state courts is up to the plaintiff - the defendants are not the ones at risk.

Question 3.

The New Jersey court could have exercised personal jurisdiction over the nonresident defendants (who appear to be from Massachusetts) if they had sufficient contacts with the state to satisfy traditional notions of fair play and substantial justice. Originally, nonresident defendants could be sued in the forum only if they were found there or had consented to suit there. As the conduct of business and other transactions expanded across state lines, and as transportation and communication became easier, the courts began to recognize that presence could be equated with the conduct of business that affected those within the state. Thus arose the idea of minimum contacts to satisfy due process (the fairness of bringing the defendant to the forum to answer for his or her conduct).

In this situation, the defendants solicited business from New Jersey residents. That would probably not be enough unless that solicitation were “purposeful,” if the defendants “availed” themselves of the privileges of New Jersey law or sought specifically to tap into NJ markets. For example, merely responding to a request to send a catalog to New Jersey might not be “purposeful availment” but sending a personal letter to a potential student might be. After World-Wide Volkswagen, we can confidently say that a business that relies on obtaining customers in the forum state is amenable to suit there, while a business that does not seek customers in the forum is not, but that does not answer the question of what to do with a business that seeks customers from the state to leave the state and engage in transactions in the defendants' home state.

The closest analogy in the Supreme Court's cases may be *Helicopteros* but the parties there agreed that the contacts with the forum were unrelated to the claims in the case and the Supreme Court found those contacts insufficient for “general” jurisdiction. Here, the claims were related to the solicitation and it is possible to argue that the claim of fraud actually “arose out of” the activities in New Jersey. On the other hand, the fraud may not have existed until the unlikelihood of achieving accreditation became apparent later during the plaintiff's period at school. On that view, the claim did not arise in New Jersey and the single solicitation in New Jersey might well not be enough to establish jurisdiction there.

Question 4.

Impleader would not be proper if the defendants are trying to argue that the failure of accreditation were the fault of the ABA and thus that the ABA caused the harm to occur. This is a simple matter of defense in which the defendants are arguing that they did not cause the plaintiff's harm. Impleader is for situation in which the third party is responsible to the defendant. If the defendants are arguing that they were somehow coerced by the ABA into making statements that they knew to be false, then impleader could be possible. Logically, this seems unlikely. If SNEL lied, then it is hard to see how the ABA is liable to SNEL. If SNEL did not lie to the students, then there is no fraud even if the ABA lied to SNEL. In other words, the issue is what the defendants believed, not what the ABA did.

If impleader is otherwise permissible, then the citizenship of the third-party defendant (ABA) would not be considered a jurisdictional defect. Supplemental jurisdiction extends to any party who forms part of the same case constitutionally. In *Gibbs*, the Court described the constitutional reach of the federal courts to

cover all claims arising out of the same “nucleus of operative fact.” Because impleader necessarily involves derivative liability for the same circumstances, then supplemental jurisdiction covers claims against parties of the same citizenship.

If the ABA were brought into the case, then Rule 14 allows the plaintiff to add claims against the third-party defendant. Section 1367(b), however, when jurisdiction is based on diversity, explicitly prevents the plaintiff from adding claims against a nondiverse third party defendant. Thus, if the ABA were a New Jersey citizen, then the New Jersey plaintiff could not file claims directly against the ABA. (The plaintiff must be a New Jersey citizen or the federal court would not have jurisdiction in this matter to begin with.)

Question 5.

I would first seek by interrogatories to obtain answers to questions about the number and location of documents reflecting the following:

- a. defendants' beliefs about the likelihood of obtaining accreditation,
- b. the ABA's statements to SNEL about that likelihood,
- c. both internal and external communications about this subject.

Then by document request, I would seek all letters, e-mails, diary or journal entries, and any other communications related to accreditation. Finally, on the basis of all that information, I would be able to depose the individual officers of the school to examine the times at which they formed certain beliefs or awareness of the likelihood of obtaining accreditation and how those beliefs were reflected in communications to the students at the school.

If I can show that the school officials stated to my client that accreditation was likely to be obtained at a time when they communicated with themselves or others a belief to the contrary, then I win. The standard on summary judgment is whether there is a material issue of disputed fact. If the documents are not subject to dispute, the standard would be met. On the other hand, if there is no “smoking gun” in the school's records, and I have to rely on inferences to be drawn from those records, then the facts may be in dispute. As the moving party who also has the burden of proof, I have to negative any possible inference that could be drawn for the other side. In other words, I have to show that no reasonable jury could find for the defendant. That means that the defendants only have to show that a reasonable jury could find in their favor, and then the case must go to trial. So summary judgment depends on whether I can find evidence in their own records that they were making statements that they knew to be false when made.