

**Federal Civil Procedure Two
Final Examination**

**Prof. Slomanson
Spring 2008
Exam# _____**

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Memorandum

May 14, 2008

To: Applicant for Associate Position
Fm: J.J.F., Managing Partner
Re: Instructions

After reading this instructional Memo, you might next peruse the “Issue(s),” as you digest the facts in the enclosed litigation FILE concerning the case of *Jeffers v. Deftco Publications*.

See the enclosed LIBRARY for sources which may bear upon your analysis. They are not the only legal rules which you might draw upon when responding to this scenario. Do not assume that every scrap of information in the FILE and LIBRARY will be relevant to some issue.

Plaintiff “TJ” purchased a product that was advertized on the defendant Deftco’s website. Its website is located on the servers in Deftco’s Information and Technology Department at its corporate offices in Florida. A print copy of the relevant webpage is included in the enclosed FILE.

Note that there are “**More Facts**” on pages 5, 6 and 7. Please advise me on Issues #1--#7 in the enclosed FILE. When there are two sides to the issues presented, you should address the relative merits, but do give me your reasoned conclusion.

Do not use any *subsequent* event in this case to analyze an *earlier* event. For example, that the case ultimately goes to trial should not be used in any jurisdictional analysis.

Good luck,
Jumpin’ Jack Flash
Managing Partner

FILE

Tommy Jeffers) v.) Deftco Publications)	United States District Court Southern District of California Civil Action No. 654321-SOB COMPLAINT Fraud and Misrepresentation
<p>1. Plaintiff Tommy Jeffers (hereinafter “TJ”) is domiciled in California. Defendant Deftco Publications, Inc. (hereinafter “Deftco”) is incorporated in Florida.</p> <p>2. Deftco sells its legal publications to law students throughout the United States. Upon starting law school in San Diego, Plaintiff “TJ” purchased and read Deftco’s electronic book entitled <i>Legal-Ease in a Nutshell: Learning Law While You Sleep</i>. Notwithstanding the seller’s webpage guarantee, plaintiff did not succeed in law school.</p> <p>3. Wherefore, plaintiff “TJ” seeks:</p> <ul style="list-style-type: none">(a) \$100,000.00 in damages for loans incurred for his law school studies; and(b) \$100,000.00 for the pain and suffering he incurred, because of defendant Deftco’s fraudulent misrepresentation that TJ would succeed in law school if he purchased and read the above-referenced <i>Legal-Ease</i> book. <p style="text-align: right;">Signed: <i>Jumpin’ Jack Flash</i> Dewey, Cheatem, Bilkem & Howe Attorneys for Plaintiff</p>	

Tommy Jeffers) v.) Deftco Publications)	United States District Court Southern District of California Civil Action No. 654321-SOB ANSWER by DEFTCO
<p>Defendant Deftco Publications (hereinafter Deftco denies the plaintiff’s entire Complaint, with the exception that plaintiff Tommy Jeffers (hereinafter “TJ”) purchased <i>Legal-Ease in a Nutshell: Learning Law While You Sleep</i>.</p> <p>While TJ did not succeed in law school, for obvious reasons, hundreds of other law students who have read <i>Legal-Ease</i> have succeeded in law school. This is especially so in California—where Deftco sells 25% of its overall product inventory in the state that contains one-fourth of the nation’s law schools.</p> <p style="text-align: center;"><u>Defenses</u></p> <p>(a) The court lacks subject matter jurisdiction (SMJ) over TJ’s Complaint. (b) The court lacks personal jurisdiction (IPJ) over Deftco.</p> <p style="text-align: right;">Signed: <i>Jenny Mejagger</i> Last, Only & Chance Attorneys for Defendant</p>	

Issue #1: Does the trial court have SMJ over TJ’s Complaint?

Issue #2: Does the trial court have IPJ over Deftco?

Issue #3: Deftco raised the above issues via motion. The trial judge decided that she had jurisdiction, as to both defenses (a) and (b). She also expressed her unassailable belief that these jurisdictional decisions could not possibly be reversed. Is the ruling on defense (b) now be appealable, prior to final judgment?

More Facts:

Deftco makes a Motion for Summary Judgment as to TJ's claim. Both Deftco and TJ's lawyers submit the same Deftco website webpage (immediately below) in support of—and in opposition to—Deftco's motion:

<input type="text" value="http://www.DeftcoPublishing.com"/>	■	<input type="text" value="Search:"/>
DEFTCO PUBLISHING WEBSITE 1234 Umpty-Scrunch Lane Jacksonville, Florida		
<p>You have now arrived at the website for Deftco, Inc. Welcome! We appreciate your pursuit of excellence, as demonstrated by your googling us from your home or work computer.</p> <p>You will soon see why we do not have to advertize our best selling products for law students. Your performance in law school will improve, especially if you now purchase your password to access our leading online 1L product "<i>Legal-Ease in a Nutshell: Learning Law While You Sleep.</i>" We can virtually guarantee that if nothing else, you will find this resource to be far more useful than those hefty casebooks written by Byzantine law professors.</p> <p>Please continue to click on our other web pages to see not only a complete description of <i>Legal-Ease</i>, but also to explore our valuable inventory of related products. Have your credit card handy, and be prepared to add new life to your law school experience.</p> <p>For further details, click here. [No other Deftco web pages are included in this examination.]</p>		

Issue #4: How should the Court rule on Deftco's Motion for Summary Judgment?

More Facts:

During the discovery stage, Deftco's lawyer is anxious to depose TJ's expert, if TJ's lawyer has one. **Issue #5:** Can Deftco do that? (Identify any further information you would need to answer this question.)

Assume that Deftco's private investigator learns the identity of TJ's only consultant, whose name is Dr. Verity. Verity has *not* been designated as plaintiff's trial expert. Deftco's lawyer privately interviews Dr. Verity, without any notice to the plaintiff. Assume that the plaintiff's lawyer finds out about this clandestine meeting. After firing Dr. Verity, TJ's lawyer then files the following document with the court and serves it on the defendant's counsel:

Tommy Jeffers) v.) Deftco Publications)	United States District Court Southern District of California Civil Action No. 654321-SOB PLAINTIFF'S MOTION for SANCTIONS
<p>***</p> <p>1. Defense counsel, Jenny McJagger, employed egregious litigation tactics in this case. She could not ethically interview plaintiff's consultant, Dr. Verity, without obtaining permission from plaintiff's counsel. Such permission was never given to either Dr. Verity, nor to defense counsel Jenney McJagger.</p> <p>2. Ms. McJagger nevertheless obtained this privileged information in violation of the federal work product doctrine. <i>Hickman v. Taylor</i>, 329 U.S. 495 (1947).</p> <p>3. Wherefore the plaintiff herein requests a terminating sanction against the defendant Deftco, Inc., which will result in: (1) striking the defendant's Answer; and (2) and an award of damages against Deftco of \$250,000.00, payable to the plaintiff in this action.</p> <p style="text-align: right;">Signed: <i>Jumpin' Jack Flash</i> Dewey, Cheatem & Howe Attorneys for Plaintiff</p>	

- Issue Group #6:** (a) How should the trial judge rule on plaintiff's Motion for Sanctions?
(b) Assume that the court grants the sanctions motion. The trial judge thus decides to strike Deftco's Answer, and to render judgment for plaintiff in the amount of \$250,000.00. Did the judge violate proper default judgment procedure?

More Facts:

Assume that the defense lawyer subsequently files a successful Motion for Relief from Judgment. The case is thus re-opened for further proceedings. The case is now in trial. The following testimony is elicited:

**Deftco’s Cross-examination of Plaintiff TJ by Defense Counsel Jenny McJagger
in the case of Tommy Jeffers v. Deftco Publications, Civil Action No. 654321-SOB:**

Q: And you testified that you did not speak with anyone at Deftco’s offices, correct?

A: Yes.

Q: And you further testified that no Deftco employee or representative contacted you at any time—is that also correct?

A: Yes.

Q: So your fraudulent misrepresentation claim in this case against Deftco are based solely upon the supposed “guarantee” you found on the first page of its website?

A: Yes.

Q: Your Honor, the defense now offers into evidence, as Defendant’s “Exhibit A,” a copy of the first page of Deftco’s website [FILE, p.5], which the jury should later consider during its deliberations.

By the Court: There being no objections, the web exhibit is now a part of the record. You may continue with your cross-examination Ms. McJagger.

A: Thank you, Your Honor.

Q: Mr. Jeffers, did you have any academic problems in law school before reading the defendant’s publication *Legal-Ease in a Nutshell: Learning Law While You Sleep*?

A: Yes.

Q: And what were those problems?

A: I was desperate. I sought the advice of upper-division students about my study habits. They said to buy the *Legal-Ease* booklet, because it had rescued them from those horrendous case studies in their casebooks. They also said that there was....

By Mr. Flash: Objection, Your Honor—calls for heresy, I mean, hearsay.

By the Court: Sustained. Ms. McJagger, can you rephrase?

By Ms. McJagger: Thank you, Your Honor. That will not be necessary. No further questions.

Issue #7: Assume that the defense evidence corroborates TJ’s testimony: that TJ had not spoken to any representative of Deftco at any time; and that TJ’s case was based exclusively on the guarantee he claimed to exist on Deftco’s website. The jury renders a verdict for plaintiff TJ. Deftco’s lawyer then files a post-verdict Motion for Judgment (within the ten-day period permitted for such motions). Should the Court grant Deftco’s motion?

[end of FILE]

LIBRARY

CASE

GREENUP v. RODMAN

Supreme Court of California, 1986.

42 Cal.3d 822, 231 Cal.Rptr. 220, 726 P.2d 1295.

Court's Opinion: MOSK, ASSOCIATE JUSTICE.

As a sanction for wilful and deliberate refusal to obey discovery orders, the trial court in this case struck the answer and entered a default judgment in an amount exceeding the prayer of the complaint. We granted review to consider whether a default judgment entered as a discovery sanction is excepted from the general rule that "if there be no answer" filed, the plaintiff's relief "cannot exceed that which he shall have demanded in his complaint ***."

Following unsuccessful demurrers, defendants answered and plaintiff commenced discovery. Rodman was recalcitrant throughout this process, actively resisting both document production and deposition.

On ***, plaintiff moved to strike the answer and enter a default judgment. The court ordered defendants to pay \$1,000 in sanctions (adding \$500 to an earlier sanction that Rodman had failed to pay) and to appear at the office of plaintiff's counsel with the requested documents on December 23, 1981. When Rodman again refused to comply, plaintiff renewed her motion, demanding that a default be entered.

In effect, plaintiff maintains that defendants entered irreversibly into an adversarial contest by filing a sufficient answer; having crossed that threshold, they may no longer claim the protection of section 580. In this way, plaintiff attempts to exclude answers stricken for discovery violations from the long line of precedents viewing a failure to answer as including the case in which an answer is filed but is later stricken by the court.

STATUTES

28 U.S.C. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state

* * *

California Code of Civil Procedure § 410.10

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 12 (b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19.

FRCP 26 (a) Required Disclosures

(1) Initial Disclosure.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) Disclosure of Expert Testimony.

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence ***.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

* * *

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or

agent).

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If * * * [there is] a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.

FRCP 37(b)(2) Sanctions in the District Where the Action Is Pending

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent * * * fails to obey an order to provide or permit discovery the court where the action is pending may issue further just orders. They may include the following:

(iii) striking pleadings in whole or in part ***.

FRCP 50(b) Renewing the Motion After Trial; Alternative Motion for a New Trial

If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment *** the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. ***

Rule 55 Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) Entering a Default Judgment. *** [T]he party must apply to the court for a default judgment. *** The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial ***.

FRCP 56 Summary Judgment

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FRCP 59 New Trial; Altering or Amending a Judgment

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court ***.

FRCP 60(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(4) the judgment is void ***.

UNITED STATES CONSTITUTION

Amendment VII. Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

[End of LIBRARY and examination]

PROFESSOR's ISSUE OUTLINE

#1: Subject Matter Jurisdiction

Complaint-> no FQ alleged
"CA v. FL corp"
corp dom = Inc + PPB
Answer ¶2-> 25% product CA 1 of 50 states
PPB arguably CA ∴ lack Div SMJ
Amt-> good faith/legal certainty test
100k one year & 100 P&S buy book

#2: Personal Jurisdiction

MC/PA/RA (no office & e-book not "sent" to forum)
Web cases-> active/passive web presence
Webpage: TJ googled Deftco TX
Memo: website located servers TX
General IPJ if CA (25%) = PPB (MC)
1/4 nations' law schools (PA/RA)
L.A. §-> outer limits Due Proc

#3: Pre-judgment Appeal

Policy piecemeal v. too important to delay
if too important, *all* IPJ decisions appealable
IPJ = C.O.
not "merits," b/c IPJ
SCt stingy extending *Cohen*
1292(b) interloc/elements
elements applied (not heart case)
diff opinion? -> Internet sales
joint discretion: tc-> not possibly reversed
Writ route
No adeq remedy
Extraordinary? If so, all IPJ orders writable

#4: Summary Judgment

Rules pitch: no gen iss mat'l fact
mat'l fact = nature guarantee
inferences non-moving
Case pitch: no reas jury
Affidavit(s) -> same affidavit
-> admissible? (any argument incl hearsay)
-> conflict? (diff interpretations)
Website negate TJ's guarantee claim?

- > reas jury prob not hold for TJ
- > webpage “guarantee” not actionable

#5: Work Product

scope disc
 define W.P.
 distinguish two types “expert”
 assuming “consultant,” conditional W.P.
 pierce immunity requisite showing need
 other consultants available?
 if not, cost share

#6: Sanctions/Default

Range: \$, interim level sanctions, dismiss offender’s pleading
 Serious b/c ethics breach

(a) R 37(b)(2) sanctions-> not an “order disobedience” sanction (pre-order ethics prob)
 issue sanction/\$ more appropriate
 connection b/t harm & punishment?

(b) R55 two types default
 amt not > prayer Complaint
 @ = 200k
 penalty default sanctions > 250k
 not permitted nws D’s having answered (*Greenup*)
Greenup -> both types default preclude award > prayer @
 not visit sins lawyer on client (post-*Link* regime)
 no evidence *Deftco* involvement ethics breach

#7: Motion for Judgment

pre-verd Mo Jmt = cond precedent
 not know if made
 MoJo attacks trial evidence
 no res jury hold responding party
 inferences favor respondent
 cross-exam (and P’s direct) = supposed guarantee on website
 website = “virtually guarantee more surfable than textbooks”
 jury could not hold for P (buy, sleep, learn)

Student Answer

1. Does the trial court have SMJ over TJ's complaint?

Subject matter jurisdiction (SMJ) is the power of a court to hear a particular case. There are two ways by which the federal courts may have SMJ: federal question and diversity jurisdiction.

Federal question?

For SMJ to arise under a federal question, the defendant's conduct must fall within a federal statute. Here, there is no federal statute given that Deftco's conduct allegedly violates; this is a claim for fraud and misrepresentation. As such, SMJ will not arise under federal question.

Diversity jurisdiction?

For SMJ to exist under diversity jurisdiction, two elements must be met: domicile and the amount in controversy.

Domicile?

For diversity jurisdiction to exist, no plaintiff and no defendant may be domiciled in the same state. A natural person has only one domicile, and it is determined by the person's presence in that forum state and his or her intent to remain there. A corporation has up to two domiciles: the state in which it is incorporated and the state in which it has its principal place of business. Here, plaintiff TJ is domiciled in California, per paragraph 1 of the complaint. He attends law school there. Although simply attending school in a state does not domicile a person in that state - for example, TJ could have moved to California for school from his home state - there are no other facts given that suggest TJ is only temporarily in California without intent to remain there. Deftco (D) is incorporated in Florida, so it is domiciled there. The facts do not reveal where D has its principal place of business (PPB). However, D does do 25% of its total business in California, where 1/4 of the nation's law schools are located. It is certainly possible that California is the state in which D has its PPB, based on those facts, but more information would be needed on where D does the other 75% of its business.

In conclusion, then, if D has its PPB anywhere other than in California, then diversity of TJ and D's domiciles exists, and this element will be met. However, if D has its PPB in California, diversity will be destroyed, as both D and TJ will be domiciled in California, and this element will not be met.

Amount in controversy?

Assuming that the domicile element is met, the amount in controversy must also be satisfied for diversity jurisdiction. The amount in controversy must exceed \$75,000, and it must appear to a legal certainty that the plaintiff's claim could not be worth more than \$75,000 for a federal court to dismiss the case for not meeting this element. Here, TJ has pled damages in the amount of \$100,000 for law school loans and \$100,000 for pain and suffering in paragraph 3 of his complaint. Law school is quite expensive, as most people know, and a claim of \$100,000 in student loans is certainly a reasonable representation of costs that TJ has incurred in attending school. TJ's claim for \$100,000 in pain and suffering, however, would probably be viewed by a court as excessive, and it's doubtful that TJ can prove such a high amount of general damages. In any case, though, because TJ's claim for student loans exceeds the required \$75,000 minimum amount in controversy, to a legal certainty, this element is likely satisfied.

In summary, if D does not have its PPB in California, then the trial court will have SMJ over TJ's complaint based on diversity jurisdiction. If D has its PPB in California, however, then the trial court will not have SMJ over TJ's complaint, because diversity will be destroyed, precluding diversity jurisdiction.

2. Does the trial court have IPJ over Deftco?

In personam jurisdiction (IPJ), or the power of a court over a particular defendant, is determined by two steps: (1) considering the forum state's long-arm statute (LAS), and (2) the minimum contacts test.

LAS?

D's conduct must fall within California's long-arm statute. California's LAS is found at CCP section 410.10, which states that "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Here, then, California's LAS permits jurisdiction over D to the extent that the U.S. and California constitutions do, so D's conduct is covered by the LAS. This element of IPJ will be satisfied.

Minimum contacts?

For a forum state to have IPJ over a defendant, that defendant must have minimum contacts with the forum. A court will look at whether the defendant has minimum contacts with the state, whether the defendant purposefully availed itself of the privileges and protections of the forum's laws, or whether the defendant could have reasonably anticipated being brought into court in that forum. Here, D sells its legal publications to law students throughout the United States. Specifically, D admittedly sells 25% of its overall product inventory in California, where 1/4 of the nation's law schools are located. Doing such a significant portion of its business with students in California alone would likely satisfy the minimum contacts test, and D should reasonably anticipate being brought to court in California if a student living there brought a lawsuit against D. This element is most likely met.

D would likely argue that, although it does business with students living in CA, D is incorporated in and has its corporate offices in Florida. D's servers on which its website is located are in D's information and technology department in Florida. D would assert that because it physically conducts its business in Florida, under Florida corporate law, that it could not anticipate being brought into court in any other state. D would state that just because it places products into the stream of commerce via its website, that that is not enough to create minimum contacts with other forums and force D to litigate there. This is an incredibly weak argument, though, because today electronic business conducted over the internet is international, and corporations can easily anticipate that their customers live in multiple states and could bring suit against D in those forums.

In summary, because California's LAS is satisfied and the minimum contacts test is more than likely met, the trial court would most likely have IPJ over D.

3. Is the ruling that the trial court has IPJ over D now appealable, prior to final judgment?

There are multiple ways by which a party may attempt a pre-judgment appeal of a decision or order in a case. These main ways are: FRCP 54(b) (a disposition of less than all claims); collateral order; interlocutory appeal; and writs.

Does FRCP 54(b) apply as a method to appeal pre-judgment?

54(b) is implicated when there is a disposition of a claim based on its merits, and it is a disposition of less than all claims in the suit. The trial judge must make an express determination that there is no just reason for delay of the appeal in order for an appeal based on 54(b) to proceed. Here, the judge's decision that IPJ over D exists is not a decision on the merits of this fraud/misrepresentation claim; rather, it is a procedural decision. Even if it were considered to be on the merits, the trial judge would likely not determine that there was no just reason to delay the appeal, because she stated her unassailable belief that this decision could not possibly be reversed. As such, 54(b) will not be a method by which D can appeal this decision pre-judgment.

Can this decision be appealed pre-judgment as a collateral order?

A collateral order is any order or decision that is separate from the merits of the claim. The order must be extremely important, such that immediate appeal is justified. If an order is classified as a collateral order, it can be automatically appealed. Here, the judge's decision that IPJ exists over D is collateral to the merits of this fraud/misrepresentation claim; it has nothing to do with the actual case itself. D would argue that this is a very important issue that cannot wait to be appealed; the very survival of the case in federal court depends on the IPJ determination. However, the Supreme Court, since bringing about the collateral order issue in Cohen, has been very stingy about what kinds of orders it actually considers to be collateral orders within the meaning of that judicial case. It is unlikely that the issue of IPJ would be considered a collateral order within Cohen. Although it is possible that D could appeal the IPJ decision pre-judgment as

a collateral order, it is not likely, and D will probably have to pursue another avenue of appealability.

Can this decision be appealed pre-judgment as an interlocutory appeal?

A decision may be appealable as an interlocutory appeal if three elements are satisfied: (1) it must involve a controlling question of law, (2) substantial grounds for a difference in opinion must exist, and (3) the appeal must materially affect the ultimate disposition of the litigation. In addition to these three elements, both the trial court and the appellate court must approve the matter for appeal.

Controlling question of law?

To be a controlling question of law, the matter at hand must be a really big deal. Here, the issue is IPJ over D, which is a controlling question of law because it determines whether the case can be in federal court at all, or if TJ would have to refile his complaint in state court. As such, the IPJ issue is likely to be considered a controlling question of law.

Do substantial grounds for difference of opinion exist?

There must be substantial grounds for a difference in opinion between the trial court and the appellate court for a matter to be appealable as an interlocutory appeal. Here, the trial judge expressed her sentiment - her unassailable belief - that this jurisdictional decision could not possibly be reversed. We don't know whether the appellate court would have a difference in opinion on the IPJ matter, but because IPJ can be a convoluted, debatable issue, and the minimum contacts test is not a black-and-white test but is rather subjective, there is probably a substantial ground for a difference of opinion here. More than likely, despite the trial judge's own opinion, there could be substantial grounds for difference of opinion here.

Would the appeal materially affect the disposition of this case?

The appeal must have a sizable impact on the ultimate result of this case. Here, the decision

whether IPJ over D exists, as discussed above, will either allow this suit to continue in federal court, or it will kill the case and force TJ to relitigate in state court. If the appeal is allowed now, it will allow D to wage the war against TJ on two fronts, the trial court and the appellate court level, and the ultimate disposition of the claim will naturally take longer. However, because it this issue would have such a decisive impact on the case, it's likely that it would be considered to materially affect the case's ultimate disposition.

Would the trial court and appellate court approve this matter for interlocutory appeal?

As referenced above, we don't know whether the appellate court would likely approve this matter for appeal, but we do know the trial judge's thoughts. The trial judge expressed her unassailable belief that this jurisdictional decision on IPJ over D could not possibly be reversed. Certainly, the trial judge does not believe there is a substantial ground for a difference of opinion on IPJ here. The trial judge is not going to approve this matter for interlocutory appeal, which will preclude D from appealing this decision pre-judgment as an interlocutory appeal.

Writs

The appellate courts have the discretion to issue any writs that will assist in their jurisdiction. A party can ask the appellate court for a writ if there is no other adequate remedy at law available to the party, and if the party has no other basis for appealability. Here, based on the discussion above, it's likely that D has no other basis for appealability, because 54(b), collateral order, and interlocutory appeal appear to be of no help to D. D also probably has no other adequate remedy at law on the IPJ issue if it's not appealable now. TJ's claim will go forward now, with the trial court asserting IPJ over D, and once the case is tried and decided, D won't be able to appeal the IPJ decision. As such, D is most likely to be successful in its pre-judgment appeal by going the writ route, and the IPJ decision is likely appealable via this method.

4. How should the court rule on D's Motion for Summary Judgment (MSJ)?

For an MSJ to be properly granted, there must be no genuine issue as to any material fact in the

case. The case law standard for granting an MSJ is that no reasonable jury could hold for the responding party. This "reasonable jury" would consider both facts and reasonable inferences from those facts, with all inferences being resolved in favor of the responding party.

Here, both D and TJ's lawyers have submitted the very same D website webpage in support of - and in opposition to - D's MSJ. The webpage states that, "Your performance in law school will improve, especially if you now purchase your password to access our leading online 1L product 'Legal-Ease in a Nutshell: Learning Law While You Sleep.'" It further states that D can "virtually guarantee that if nothing else, you will find this resource to be far more useful than those hefty casebooks written by Byzantine law professors." The website tells the reader to "be prepared to add new life to your law school experience." In reading this material, TJ believed that he would succeed in law school if he purchased Legal-Ease in a Nutshell, and he believed that D was giving a guarantee to this effect. D, however, based on this very same webpage, is evidently claiming that they did not make and did not owe any guarantee to TJ. D asserts that TJ did not succeed in law school for other reasons, and that hundreds of other law students who have read Legal-Ease have succeeded in law school. Because both TJ and D are relying on the same webpage to support their various contentions, it is obvious that there are grounds for a different interpretations of what the webpage was saying or guaranteeing. There exists a genuine issue as to a material fact- what the webpage's verbiage actually meant and implied to readers. A reasonable jury could possibly take TJ's interpretation and hold for him, the responding party. As such, because there is a genuine issue as to material fact here, and because a reasonable jury could hold for TJ, the court should deny D's MSJ.

5. Can D's lawyer depose TJ's expert, if TJ's lawyer has one?

During the discovery stage, the scope of discovery includes anything not privileged, relevant to any party's claim or defense, and admissible or reasonably calculated to lead to admissible evidence. This question involves the issue of work product, or privileged material.

Work product is anything prepared by an attorney in preparation for litigation. There are two types of work product: absolute work product and conditional work product. Absolute work product is absolutely privileged and includes the mental impressions of the attorney. Conditional

work product is conditionally privileged and includes the mental impressions of others, including consultants employed by an attorney. A court could order an attorney to share conditional work product, such as information generated by a consultant, if the party desiring that information can show a substantial need for the information and the inability to secure the substantial equivalent on its own without undue hardship.

Here, there is no information in the file indicating whether TJ's lawyer has retained an expert yet. We would need this information first. Further, if an expert has been retained, we would need to know if that expert has been designated as an expert witness, or if s/he has merely been retained as a consultant. If TJ has an expert and has designated that person as an expert witness, the conditional work product privilege is waived and opposing counsel has the right to depose that expert. Assuming, for purposes of this analysis, that TJ has retained an expert consultant, and that consultant has not been designated yet, D could only depose him or her if D can show that it has a substantial need for information from that expert, and that D cannot obtain the substantial equivalent of that consultant's expertise/documentation/information elsewhere without encountering undue hardship in the form of costs, etc. Because we not only don't know whether TJ has a consultant, but we also don't know what type of consultant he or she is, we cannot analyze whether a comparatively talented expert might exist in the area that D could consult. If it were determined that D had a right to depose TJ's expert consultant, based on the conditional work product doctrine, D would have to share with us in that expert's costs/fees equally.

In summary, if TJ has an expert not yet designated as an expert witness, D could only depose him or her by meeting the criteria discussed above. However, if TJ has an expert and has designated that person as an expert witness, D can depose him or her at any time. We need more information on whether an expert exists, whether s/he has been designated, and what type of expert s/he is.

6. (a) How should the trial judge rule on plaintiff's Motion for Sanctions?

A judge has the discretion to grant a motion for sanctions for various reasons, including when a party's inexcusable actions do great harm to the opposing party's case. Those sanctions

include, but are not limited to, ordering a fact to be taken as established, barring certain evidence or defenses, striking pleadings in whole or in part, staying proceedings, dismissing proceedings, and entering judgment against a party. Here, when D's lawyer broke discovery rules by secretly interviewing Dr. Verity, in violation of the federal work product doctrine, TJ's case was likely greatly harmed, as Dr. Verity was TJ's only consultant and had to be dismissed. As such, the trial judge can impose sanctions on D's counsel. TJ is requesting that D's answer be stricken and that an award of damages against D in the amount of \$250,000 be made to TJ. Certainly, the trial judge is within her right to strike D's answer and impose monetary sanctions for this egregious conduct. However, \$250,000 seems quite excessive in light of the fact that TJ only pled \$200,000 in damages in the complaint. Further, trial has not started, and although TJ's only expert consultant has been compromised, we don't have information on what type of consultant s/he was, and whether TJ could easily obtain an alternative, comparable consultant. Nevertheless, if Dr. Verity disclosed facts to D's lawyer about TJ's main arguments and defenses, it could be that TJ's case was irreparably damaged, regardless of whether an alternative consultant is available. Taking this all into consideration, the trial judge should likely grant TJ's motion for sanctions in part; she should strike the answer but enter a judgment in a lower amount, within her discretion and within the \$200,000 prayer of the complaint.

(b) Did the judge violate proper default judgment procedure?

There are two types of default judgments: standard default and penalty default. A standard default judgment may be entered when a party has failed to plead (answer) in an action within the required time frame. A penalty default may be entered if a party has failed to otherwise defend (diligently prosecute) a case. Said failures must be shown by affidavit or otherwise, pursuant to Rule 55. A judgment against a party may also be entered as a sanction.

Here, the judge struck D's answer and rendered judgment for TJ in the amount of \$250,000. The judge in essence, then, struck the answer, treated D as if D had not timely answered the complaint, and entered a default judgment in an amount in excess of the \$200,000 prayed for in TJ's complaint. In reviewing whether this was proper procedure, the trial court will be bound to precedent from the Supreme Court's Greenup v. Rodman decision. In that case, the Court reviewed the trial court's striking of an answer and entering of a default judgment in an amount

exceeding the prayer of the complaint. The plaintiff urged that cases involving answers stricken for discovery violations are not the same as cases in which the defendant fails to answer. Plaintiff argued that when the defendant properly answered, he entered irreversibly into an adversarial contest, and that, therefore, the trial court was not bound by the amount of the prayer of the complaint when entering its judgment. The Court noted that the plaintiff's theory ignored a long line of precedents viewing a failure to answer as including the case in which an answer is filed but is later stricken by the court. In other words, the Court ruled that if an answer is stricken for a discovery violation, it is the same as if no answer were filed, and the court is bound by default judgment rules to enter a judgment not in excess of the amount prayed for in the complaint.

Applying Greenup to this case, then, when the judge struck D's answer and entered a judgment against D for \$250,000, the judge violated proper default judgment procedure. The judge was confined to the amount TJ prayed for in the complaint, \$200,000, in issuing her judgment.

7. Should the Court grant D's post-verdict Motion for Judgment (RMFJ)?

As a precursor to the analysis of this RMFJ, it should be noted that in order for a party to make a viable RMFJ, that party must have also made a pre-verdict MFJ. Here, we do not have any facts indicating whether D made or did not make a pre-verdict MFJ. If D did not make one, then D's RMFJ will fail. However, if D made a pre-verdict RMFJ, the court will allow the RMFJ to be considered. For purposes of this analysis, we shall assume that D filed a pre-verdict MFJ.

For a court to properly grant an RMFJ, the standard that no reasonable jury could hold for the responding party must be met. In considering an RMFJ, the judge cannot weigh the evidence; s/he merely reviews the record for insufficient evidence to support the verdict, and thus considers the reasonable jury standard. Again, in considering this, all facts and reasonable inferences from those facts are taken into account, with all inferences being resolved in favor of the responding party. Here, D is making the RMFJ, so TJ is the responding party. Considering the entire record of the evidence in the file, we have the following information: the webpage itself; TJ's admission that he never spoke with or was contacted by any representative of D, and that his fraudulent misrepresentation claims are solely based on the guarantee on the website; and TJ's admission

that he had academic problems in law school before reading D's publication, Legal-Ease, and that he was desperate, seeking advice from upper-division students. The defense evidence corroborates TJ's testimony. It is clear that both sides, D and TJ, agree that TJ's claim against D is based solely on the information he got from D's website. However ridiculous it might seem to some for a person like TJ to rely on information supplied on D's website, a jury should still consider the issue of whether it was justifiable for TJ to rely on Legal-Ease to improve or succeed in law school. The website states that one's performance in law school would improve if you purchase Legal-Ease. We don't have information in the file as to whether TJ's law school performance improved, worsened, or stayed the same, but he did not succeed in law school. Because a reasonable jury could consider all of this evidence and infer that it was reasonable for TJ to rely on the information on D's webpage, and because the jury in fact did determine this and returned a verdict for TJ, D's RMFJ should not be granted.