

## Question 2

Copyco, Inc. (“Copyco”), a maker of copy machines, was incorporated in State A. Most of Copyco’s employees work in State B at its sole manufacturing plant, which is located in the southern federal judicial district of State B. Copyco also has a distribution center in the northern federal judicial district of State B.

Sally is a citizen of State B. Sally was using a Copyco copy machine at Blinko, a copy center within the northern federal judicial district of State B, when the machine started to jam. When Sally tried to clear the jam, she severely injured her hand. She underwent several surgeries at a nearby hospital. Her physician believes she may never recover the full use of her hand.

Sally filed a lawsuit against Copyco as the sole defendant in the State B northern district federal court. Her complaint alleges that Copyco was negligent and that she has suffered physical injury, and also seeks damages of \$100,000, exclusive of costs and interest.

The federal court has subject matter jurisdiction to hear Sally’s lawsuit on the basis of diversity of citizenship. Copyco, however, moved for a change of venue to the southern federal judicial district of State B. The court denied Copyco’s motion.

Sally wishes to obtain from Blinko a copy of the maintenance records for the copy machine that caused her injuries.

Questioning the extent of the injuries Sally alleged, Copyco wishes the court to compel Sally to appear for an examination by both a physician and a psychologist of Copyco’s own choosing.

1. Was the federal court correct to deny Copyco’s motion for change of venue? Discuss.
2. (a) Is Sally entitled to a copy of the maintenance records? Discuss.  
(b) If so, how must she proceed to obtain them? Discuss.
3. (a) Is Copyco entitled to an order to compel Sally to appear for an examination by a physician and an examination by a psychologist chosen by Copyco? Discuss.  
(b) If so, how must it proceed to obtain such an order? Discuss.

## **Answer A to Question 2**

### 1. Change of Venue

#### Proper Venue

Under the federal rules of civil procedure, venue is proper in any district where (1) all defendants reside or where a substantial portion of the claim arose, (2) there is subject matter jurisdiction over the claim, and (3) there is personal jurisdiction over the parties. If there are multiple defendants and they reside in different districts, the venue may be satisfied in any district where one of the defendants resides.

#### Residence of Corporations

A corporation is subject to special rules with regard to its residence for venue purposes. Unlike a person, who is a resident of whichever district that he/she is domiciled in, a corporation is considered a resident of any district where there is a personal jurisdiction over the corporation. Personal jurisdiction may be specific or general. General jurisdiction requires substantial, continuous and systematic contacts with the forum. Specific jurisdiction requires that the defendant have sufficient minimum contacts with the forum so as not to offend traditional notions of fair play and substantial justice.

Copyco (C) will argue that venue is not proper in the northern district (ND) of State B because it lacks personal jurisdiction over C. This argument will likely fail, however, because C arguably has substantial, continuous and systematic contacts with ND by the fact of its distribution center. C's contacts are clearly continuous and systematic because C maintains a permanent presence in the district and presumably the distribution is an integral part of C's overall business operation. Thus, the only real question is whether C's presence in ND is substantial. The better argument is that C's permanent physical presence in ND,

which presumably requires it to transport materials in and out of the district on a daily basis, is substantial.

Moreover, even if ND does not have general jurisdiction over C, the court will in all likelihood conclude that it has specific jurisdiction. Specific jurisdiction requires minimum contacts, which consist of purposeful availment and foreseeability, and basic fairness, which requires relatedness. Here, C purposefully availed itself of the ND by establishing a distribution center there. That C could be sued in ND is clearly foreseeable because it regularly transacts shipping/distribution operations there. Thus, the minimum contacts prong is satisfied. On these facts, the relatedness prong of the test may be debatable as it is difficult to determine if C actually sells any of its copy machines to businesses or consumers in the ND. Blinko may have obtained the copy machine outside C's normal chain of retail/distribution, in which case the relatedness inquiry may cut in C's favor. However, even where this [is] the case, if C took any action in ND to advertise its copy machines or otherwise availed itself of customers in ND, then relatedness is satisfied.

#### Where Injury Arose

Of course, venue is also proper because the Northern District is where S was injured in the district while using a C copy machine; thus, a substantial portion of S's personal injury claim arose in the Northern District.

#### Personal Jurisdiction

The Northern District has personal jurisdiction over C – see discussion above re residence of corporations.

#### Conclusions – Northern District is Proper Venue

Because (1) a substantial portion of the claim arose in the Northern District (and also because C is a resident of the Northern District), (2) the Northern District has specific jurisdiction and probably general jurisdiction over C, and (3) the facts

state the diversity subject matter jurisdiction is present, then venue in the Northern District is proper.

### Change of Venue

Where venue is improper, the defendant may move for dismissal of the plaintiff's claim. The court may grant the dismissal or order that venue be transferred (assuming there is a federal district court with proper venue) if the transfer is in the interests of justice. Here, C did not seek dismissal. Moreover, venue in ND is proper (see discussion above). When a defendant seeks to transfer venue from a proper forum, a three part test is applied: (1) the transferee court must have subject matter and personal jurisdiction; (2) the transfer must be convenient; and (3) the transfer must be in the interests of justice. District courts are afforded great discretion when deciding permissive venue transfer requests.

### *Jurisdiction*

The Southern District, where C seeks to have the case transferred, may assert both personal jurisdiction and subject matter jurisdiction. Subject matter jurisdiction is present because the district is the same state as where the plaintiff filed her lawsuit, and therefore there is no disruption of the requirement of complete diversity. Personal jurisdiction is also present because C has its principal place of business in the Southern District and therefore C satisfies the general personal jurisdiction requirement of substantial, continuous, and systematic contacts.

Note: On the facts present, it is unclear how the federal court may assert the presence of subject matter jurisdiction based on diversity of citizenship. Diversity required complete diversity – no plaintiff may be a resident of the same state as any defendant. S is a citizen of B. As a corporation, C is a resident of (1) the state of its incorporation, and (2) the state where it maintains its principal place of business (PPB). The PPB is determined using either the muscle center test (where most of the corporation's operations are located) or the nerve center test

(where most of the corporation decision making occurs). It would appear on these facts that C's PPB is in State B because that is where most of its employees work and where it maintains its sole manufacturing plant. Yet the facts state the federal court has subject matter jurisdiction based on diversity, so perhaps the court applied the nerve center test (assuming C's decision making occurs in A).

### *Convenience*

A court may transfer venue if it promotes convenience, and courts frequently focus the convenience issue on questions of witness availability. S will oppose the transfer and argue that convenience favors keeping the case in ND. That is the site of C's injury and is also where she received medical treatment. Thus, virtually all of the key witnesses, and presumably the plaintiff, are located. On the other hand, C will argue that [the] machine in question was manufactured in SD, and thus, there [are] a number of witnesses present in that district (presumably, witnesses who will testify regarding any design or manufacturing defect).

### *Interest of Justice*

Normally, a plaintiff's choice of forum is entitled to deference and should not be disturbed absent compelling reasons of fairness. At most, C has demonstrated that the convenience issue is a close call. Generally, a marginal difference in convenience will not be sufficient to overcome the deference afforded to the plaintiff's forum choice.

### Conclusion

Because C will be unable to demonstrate that [it] is significantly more convenient to try the case in SD or that fairness issues dictate transferring the case to SD, the court acted appropriately in denying the motion to transfer venue.

## 2. Maintenance Records

### (a) Relevant/Discoverable

Unlike the admission of evidence at trial, the test for what information is discoverable is extremely broad and is not limited to simply that information which is deemed relevant (defined as having any tendency to make a fact of consequence more or less likely than in the absence of the evidence). Information is discoverable if it is relevant or if it is reasonably calculated to lead to the discovery of relevant information.

S will argue that the maintenance records are directly relevant to whether the copy machine was maintained in a manner and on the schedule established by C, the manufacturer. She is likely [to] attempt to preempt any possibly defense by C of an intervening supervening cause for her injury – namely, the lack of maintenance by Blinko or negligent maintenance by Blinko or a third party service contractor. Thus, the information sought by S is discoverable and, indeed, C would likely not oppose the discovery. S is therefore entitled to the discovery subject to the discussion below re third parties.

### (b) Third Party Discovery

Here, S seeks to obtain the records not from C, a party to the litigation, but rather from Blinko, who is a third party. As such, S is not entitled to many of the discovery devices set out in the FRCP, such as interrogatories or requests for production. Yet the rules do provide for limited discovery of third parties through use of a subpoena. Thus, a third party [may] be subpoenaed to appear for deposition. In this case, S seeks discovery of documents as opposed to live testimony. She must therefore serve a subpoena duces tecum to obtain the documents. Note that she does not have to seek court approval to serve the subpoena on Blinko, although she must include in the subpoena a list of Blinko's third party rights under the FRCP, including the right to file a motion to quash the

subpoena. The subpoena must specify a time and location when Blinko will make the requested records available for inspection and copying by S.

Ideally, S will serve a subpoena duces tecum on Blinko in which she requests that Blinko produce its records custodian at deposition along with the actual records. This way, S can examine Blinko under oath to establish both the authenticity of the documents and attempt to establish any exceptions under the hearsay rules (such as business records). Note that if S simply wishes to secure the authenticity of the documents, she can simply negotiate with Blinko to have the records custodian provide an affidavit certifying the authenticity in lieu of a deposition.

If Blinko objects to the subpoena, Blinko may file a motion to quash or may simply respond to the subpoena duces tecum with written objections along with a refusal to produce the records. In this case, the burden shifts to the moving party (S) to establish the need for the discovery. Although courts generally try to protect the interests of third parties to be free from discovery, the maintenance records are highly relevant to S's claims, and therefore, the court will in all likelihood overrule any objections to the discovery by Blinko.

Of course, S is always free to simply negotiate the production of the discovery with Blinko with the need to use any formal discovery devices.

### Conclusion

The maintenance sought by S is discoverable and she is entitled to use third party discovery devices, including subpoena duces tecum, to obtain the records.

### 3. Medical/Psychological Examination

(a)

C will be entitled to an order compelling S to a medical examination by a physician chosen by C because S, by the filing of her claim for personal injuries,

placed her physical condition at issue in her case. In personal injury cases, defendants have a right to examine the injured plaintiff upon a showing of good cause. In this case, C challenges the extent of S's injuries and therefore the good cause condition is likely met. However, S will probably not be able to establish good cause with respect to the need for S to submit to a mental examination. The issue depends on the extent to which S is alleging any special emotional/mental damages. Generally, courts will permit a party to recover for emotional distress as a result of physical injuries and will not require any special expert testimony on this issue, largely because a jury is competent to understand this issue. However, if S intends to offer any expert testimony regarding her mental/emotional distress, then C will be able to show good cause as to why it should be entitled to have its own expert examine S.

(b)

There is a specific rule under the FRCP which addresses requests by one party to conduct a physical/mental examination of the other party. Under this rule, the party seeking the examination [must] first serve a written discovery request on the party to be examined. The written request must identify the time and place for the examination as well, the amount of time the examination is expected to take, and the person who will be conducting the examination. The request must set forth good cause as to why the examination should be permitted to proceed. Preapproval of the court is not required. However, a party may object to the discovery request, in which case court involvement is necessary.

## **Answer B to Question 2**

### **1. Denying Copyco's motion for change of venue**

The first question to determine is whether the original venue was proper, because in federal court this determines which law the court should apply if a transfer is granted.

#### Original Venue in Northern District Federal Court

Venue in federal court is proper (1) in any district where any defendant resides if all reside in the same state, or (2) where a substantial amount of the action or the property involved in the lawsuit is located. If neither applies, then in a diversity case, venue is proper where any defendant is subject to personal jurisdiction, and, in all other cases, where any defendant can be found. In local actions venue is proper where the land is located.

Here, since the property involved in this location is located in the Northern Federal District, venue was originally proper.

However, if this wasn't the case, then we must look at the residence of C.

#### Residence of Copyco

A corporation is a resident of any place where it is subject to personal jurisdiction. It is not like citizenship for the purposes of diversity, which is its principal place of business and its state of incorporation.

Thus, we must do a personal jurisdiction analysis.

## Personal Jurisdiction Over Copyco

Personal jurisdiction requires both that the state statute must allow jurisdiction and that it meet the constitutional requirements.

### Statutory Requirements

In general, states allow jurisdiction when (1) the defendant is domiciled in the state, (2) the defendant is personally served in the state, (3) the defendant consents, or (4) if the long-arm statute applies.

Here, Copyco is domiciled in State B because it has its sole manufacturing plant in State B, and this would be considered its principal place of business. It is unclear where C was served. It appears that C has consented to venue in State B since it is simply asking for a transfer to any other district in the state. The long-arm statute probably allows this as well.

However, the real question is whether it is domiciled in the Southern or Northern District. Although it has a distribution center in the Northern District, this might be a very small operation. The facts are not clear on this. But assuming that the state statute allows this, which it might, the next question is whether this is appropriate for the Constitution.

### Constitutional Limitations

This requires that the defendant have minimum contacts such that jurisdiction does not offend traditional notions of fair play and substantial justice. This requires (1) minimum contacts, which in turn requires (a) purposeful availment, and (b) foreseeability, and (2) fairness, which requires (a) relatedness of claim to contact, which can either be general or specific, (b) no severe inconvenience to defendant, and (c) weighing the interests of the forum.

However, the traditional bases have been found by the Supreme Court to satisfy this standard, and these are (1) domicile, (2) service in state, (3) consent.

As explained above, it is unclear if C is domiciled in the Northern District; thus we must do a minimum contacts analysis.

## 1. Minimum Contacts

### (a) purposeful availment

C has a distribution center in the Northern District; thus, it is making use of the privileges and protections of the law of the Northern District. And it likely had knowledge +, as explained immediately below, that its machines would end up in a place like Blinks or actually in Blinks, since it might have personally done the distribution to the shop, and the Supreme Court is unanimous that knowledge plus is enough for purposeful availment.

### (b) foreseeability

It was foreseeable that C might be haled into court in the Northern District since it sold machines to Blinks, which is in the Northern District, and thus they would probably sue there. The Supreme Court is split between knowledge and knowledge + requirement for PJ. It can be shown that C knew that B had some machines most likely, and C most likely purposefully sent them to Blinks or caused them to be distributed there; thus this was foreseeable.

## 2. Fairness

### (a) relatedness

This suit is directly related to the contact between C and the Northern District since this was the machine that was sold in the Northern District and Sally was injured there.

(b) inconvenience

It must be severely inconvenient for C to defend there; this seems unlikely unless State B is incredibly large.

(c) state's interest

The Northern District has an interest in protecting its citizens from defective products and the injuries they cause.

#### Conclusion

Original venue was proper in the Northern District.

#### Transfer of Venue

The court will transfer to another district in the federal court if (1) it could have originally been bought there, (2) the interests of justice and the convenience of the parties require it. The court has discretion to grant or deny the motion.

#### Could Have Been Brought

This requires (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) venue.

### Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. They can only hear diversity of citizenship jurisdiction cases and federal question cases. Diversity requires complete diversity of citizenship between defendant and plaintiffs, and that the claim exceed \$75,000, exclusive of interest and costs.

Here, the claim that Sally is asserting is negligence. This is a state law claim; thus, there is no federal question jurisdiction.

However, the facts stipulate that there is diversity of citizenship jurisdiction (although this seems questionable since C is incorporated in State A and seems to have its principal place of business in State B, and the facts state that Sally is a citizen of State B; thus, it would seem that there is not complete diversity between plaintiff and defendant; however, since the facts stipulate it, that is settled.) The amount in controversy is \$100,000, which exceeds \$75,000.

Thus there is a subject matter jurisdiction.

### Personal Jurisdiction

There is this over C; see above.

### Venue

See rule above.

As analyzed above, because C had its sole manufacturing plant in the Southern Federal Judicial District, there is personal jurisdiction over it in this district, and thus venue is proper.

### Interest of Justice and Convenience of the Parties

Here, the claim is for negligence. In order to prove the negligence there must be (1) duty, (2) breach, (3) actual cause, and (4) proximate cause. The defenses are (1) contributory negligence, (2) comparative negligence, and (3) assumption of the risk.

Here, the claim arose from a machine that is located in Blinko, a copy center in the Northern Federal District of State B. The property is thus located in the Northern District. All maintenance records and employees and witnesses to the use of the machine will likely be at or near the Northern District, since other customers might be called to testify as to whether they noticed anything or how Blinko maintained the machine. This is important because C will not be found liable if the defect was not present when the machine left its control; thus many Blinko employees might have to testify. Furthermore, S had her surgeries in a nearby hospital, and its staff and doctors might have to testify, and they likely live in the Northern District. It wasn't just one surgery, it was several; thus many doctors could be involved, and staff and they might all have to appear as witnesses.

On the other hand, C could argue that its sole manufacturing plant is located in the Southern District, and it will have to call its employees to testify as to their manufacturing procedures and how they check their products for defects. However, on balance, it seems likely most of the witnesses and the records will come from the Northern District; thus, it seems like the most appropriate place.

Moreover, the Northern District has a big interest here because this was a severe injury, and it does not want this to happen to others.

## Conclusion

Thus, the court did not err in denying the motion.

## Original Venue Law

Note that because the original venue was proper, the original venue law would apply if the court had granted the motion, i.e., the law of the Northern District of State B.

## Note

This is not a motion for forum non conveniens since the federal court can transfer to another federal court.

### 2. (a) copy of maintenance records

Discovery in federal court is allowed as to anything that is nonprivileged and relevant to a claim of defense. It does not have to be admissible in court; it just had to be reasonably calculated to lead to the discovery of admissible evidence.

Here, the maintenance records will be necessary for Sally to prove her negligence claim against C. If B has an excellent record for maintaining its machines, then this circumstantial evidence that her negligence claim is viable because the defect in the machine must have been there when it left C's control. On the other hand, the records could also show that the machine always had problems, which would also indicate that there was a defect from the start. However, if the machine had been tampered with by a customer, this would hurt her case. Thus, the records would likely lead to discovery of admissible evidence (customer names, maintenance company name). Note the records themselves are probably admissible as a business record.

(b) how can she obtain them

Since B is not a defendant, Sally will have to send a request to produce along with a subpoena duces tecum. This requires a non-party to produce documents in its possession.

It is not possible for this to be obtained by deposition or interrogatory since these are simply questions that are asked and interrogatories are just for [a] party.

3. (a) (i) physician

As above, discovery is allowed as to anything relevant to a claim of defense.

A physical examination will be relevant for C to disprove the amount of damages that S is claiming or to prove that she did not mitigate, or was perhaps herself negligent in seeking help for her injuries in a strange manner. Thus, an examination by a physician should be allowed by the court. While C can request that the court allow it to use a physician of its choosing, the court is not required to do this. The court is free to choose a neutral physician or to order the parties to decide together.

(ii) psychologist

A psychologist examination does not appear reasonably calculated to lead to the discovery of admissible evidence, and it does not appear relevant to any claim or defense by C. Here, Sally is not suing for emotional trauma; she appears to only be suing for her physical injuries. Thus, an examination by a psychologist will not determine the extent of her physical injuries. However, if Sally is claiming some pain and suffering or emotional scarring from the fact that she may never recover the full use of her hand, then a psychological examination would be appropriate.

(b) how does it proceed

Unlike in state court in California, where one physical examination is granted as a matter of right, if the physical condition of the party is in issue, in federal court, the requesting part must take a motion to the court to compel a physical examination and issue an order. The court then allows a hearing where both sides present their case, and decides whether it should issue an order. This is a form of discovery called a request for physical or mental examination. It must occur during the discovery period in accordance with the discovery schedule that the court has determined, although the court has discretion to allow it past the date if it would not prejudice the parties and the interests of justice don't require otherwise.