

## **ESSAY QUESTION NO. 1**

### **Answer this question in booklet No. 1**

Paul owns and operates a one-airplane air charter business in Alaska. At an aviation convention in Seattle he comes across the booth of a Washington corporation, Dragless Air Kits (“DAK”), that specializes in installing kits designed to enhance small planes’ performance. DAK’s brochure proclaims its “20 years as the Pacific Northwest’s premier outfitter of high performance planes.” Paul asks DAK’s president, Davis, if its kits can handle the demands of Alaska’s rugged flying. Davis assures him that they can, and says that DAK has installed kits on at least 5 airplanes for Alaskan customers.

Paul decides to have DAK install a kit on his plane. While still at the convention, Paul and Davis sign a written contract for installation of a DAK kit. Davis also tells Paul that “we stand by our work” and promises that if Paul experiences any problems DAK will send a mechanic to Alaska and fix the plane, free of charge. Paul later flies his plane to Seattle, DAK installs the kit, and Paul wires money from his bank in Alaska to DAK.

When Paul is at DAK’s hangar in Seattle, he asks to borrow one of its company cars to go see a friend. Davis initially tells him no, that they can only be used by company employees, but eventually relents. While driving Paul tries to stop but the brakes are worn and he hits a guardrail at low speed and feels a small “pop” in his neck.

A few days later Paul is back in Alaska flying his plane when the wing begins to shudder. He lands and a post-flight inspection shows that the kit was improperly installed. Paul calls Davis and demands that DAK send a mechanic to Alaska to fix it, but Davis refuses.

Around this same time Paul’s neck starts causing him pain and he goes to a doctor. After examination and discussion of Paul’s medical history, the doctor tells him that he appears to have suffered damage to his vertebrae when he was driving DAK’s company car.

Paul files suit in Anchorage superior court against DAK. Count one claims breach of contract based on DAK’s improper installation of the kit and refusal to fix the problem. Count two claims that DAK’s negligent maintenance of its company car caused injuries to Paul’s neck, and seeks damages.

Paul’s counsel properly serves a copy of the summons and complaint on DAK via certified mail. Davis signs the return receipt when the summons and complaint arrive in the mail. DAK timely answers and admits that it installed a kit on Paul’s plane and that it lent him its company car, but otherwise denies

Paul's legal claims. DAK's answer asserts lack of personal jurisdiction as a defense to the claims in both counts of Paul's complaint.

1. Discuss DAK's lack-of-personal-jurisdiction defense as to the breach-of-contract claim.
2. Discuss DAK's lack-of-personal-jurisdiction defense as to the tort claim.
3. Assume the following change to the factual scenario set out above -- DAK asserts lack of personal jurisdiction as a defense in its answer, but only as to the tort claim regarding the company car. However, its next action is to quickly file a motion arguing that Paul's claims fail on their substantive merits. Discuss (i) whether DAK properly preserved the lack-of-personal-jurisdiction defense as to the tort claim and (ii) the impact of the motion on the court's ability to assert personal jurisdiction over DAK as to the tort claim.

## GRADER'S GUIDE

### \*\*\*QUESTION NO. 1\*\*\*

#### SUBJECT: CIVIL PROCEDURE

#### 1. Discuss DAK's lack-of-personal-jurisdiction defense as to the breach-of-contract claim. (50 points)

##### General Principles of Personal Jurisdiction

The Supreme Court in *Pennoyer v. Neff*, 95 U.S. 714 (1878), recognized that the Fourteenth Amendment's due process clause acts as a constraint on the ability of state courts to exercise personal jurisdiction over non-resident defendants. The Court articulated a theory of personal jurisdiction which was territorial in nature, holding that "every State possesses exclusive jurisdiction and sovereignty over persons and property within the territory" and that conversely "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722. The Court thus recognized three bases for exercising personal jurisdiction – (1) residence/domicile, (2) a non-resident defendant's personal presence in the jurisdiction, accompanied by service of process, and (3) a party's consent to the court's exercise of jurisdiction. *Id.* at 722-36.

The territorial theory of jurisdiction set out in *Pennoyer* over time proved difficult to reconcile with an increasingly mobile society with large numbers of individuals and corporations engaged in interstate travel and commerce. Eventually the Supreme Court was forced to reconceptualize personal jurisdiction and did so in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), setting out the basic standard that still governs today – due process requires that before a court exercise personal jurisdiction over a party there must be "certain minimum contacts with [the forum] state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting prior authority). This standard is not a unitary formulation but rather reflects a two-part test – the court must satisfy itself that "minimum contacts" with the forum state exist before moving on to consider whether maintenance of the lawsuit would offend "traditional notions of fair play and substantial justice." 16 *Moore's Federal Practice 3d*, § 108.42[5][b], at 108-76.6 – 108-76.7 (2008) (citing cases). (Although Alaska's courts have authority to construe Alaska's due process clause (Alaska Constitution article I, section 7) more broadly than the Fourteenth Amendment, personal jurisdiction is one area where the Alaska Supreme Court has declined to do so and has adhered closely to federal precedent. *See Parker v. Dept. of Revenue, CSED*, 960 P.2d 586, 587 n.2 (Alaska 1998). Federal cases

and materials will thus be cited interchangeably with Alaska cases in this grader's guide.)

The Supreme Court has further refined various aspects of the “minimum contacts” standard. It has made clear that, in particular as to non-resident defendants, “there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In other words, “the contacts connecting the defendant to the forum state must be the foreseeable result of the defendant’s own purposeful conduct, not simply that of the plaintiff or of third parties.” 16 *Moore’s Federal Practice 3d*, § 108.32, at 108-40. Moreover, the Court has recognized that the quantity and quality of the defendant’s contacts with the forum state may affect the type of personal jurisdiction a court can exercise over a non-resident defendant. “General jurisdiction” arises when a defendant’s contacts with the forum state are so pervasive that the defendant may be fairly called to answer in that state’s court even for matters unrelated to the defendant’s contacts with the forum. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 & n.9 (1984). Contacts must be “continuous and systematic” to warrant general jurisdiction. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952). “By contrast, *specific jurisdiction* is jurisdiction to adjudicate claims arising from the defendant’s contacts with the forum state.” 16 *Moore’s Federal Practice 3d*, § 108.40, at 108-43. It “may be available when the defendant has few contacts, or even a single contact, with the forum state, if the claim arises directly from the contacts,” *id.*, and is the result of the defendant’s purposeful activity directed at that forum. See also *In re Fields*, 219 P.3d 995, 1008 (Alaska 2009), and *Parker* 960 P.2d at 588 (both recognizing distinction between general and specific jurisdiction).

If the “minimum contacts” test is satisfied, the court must still evaluate whether exercising personal jurisdiction over a defendant comports with “traditional notions of fair play and substantial justice.” In making this determination courts look at “several factors, including: the burden on the defendant, the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the states in furthering fundamental social policies.” *Polar Supply Co., Inc. v. Steelmaster Industries, Inc.*, 127 P.3d 52, 57 (Alaska 2006). If the minimum contacts test is satisfied, the defendant bears the burden of presenting “a compelling case” (in light of the factors set out above, or any other relevant factor) that exercise of jurisdiction over him would be “unreasonable” and offensive to considerations of fair play and substantial justice. *Id.*

The minimum-contacts/fair-play-and-substantial-justice test set out by *International Shoe* only concerns a party's *amenability* to a court's jurisdiction. As to defendants, there is a second primary due process requirement for personal jurisdiction – service of process. 16 *Moore's Federal Practice 3d*, § 108.90, at 108-118. Alaska's long-arm statute, AS 09.05.015(a), also requires that a defendant be "served in an action according to the rules of civil procedure." *Kuk v. Nalley*, 166 P.3d 47, 51-52 (Alaska 2007).

The case law and principles cited above only set out the relevant constraints on an Alaska court's ability to exercise personal jurisdiction, and do not provide a positive basis of authority for courts to do so. Such authority is found in Alaska's long-arm statute, AS 09.05.015. Because of its length this statute is appended to the end of this guide.

### Application to This Case

The first question is whether there is general jurisdiction or specific jurisdiction, which requires an analysis of the quantity and quality of contacts with Alaska. If there is general jurisdiction over DAK the court could exercise jurisdiction over DAK as to both of Paul's claims.

*Minimum Contacts.* DAK's brochure boasted of its "20 years as the Pacific Northwest's premier outfitter of high performance planes," and some people loosely think of Alaska as part of the Pacific Northwest region. Davis, however, indicated that DAK had put kits on only 5 Alaskan planes. As Professor Moore's treatise points out, courts are reluctant to exercise general personal jurisdiction, and the standard of "continuous, substantial, and systematic contacts" with the forum state is demanding. 16 *Moore's Federal Practice*, § 108.41[3], at 108-49 – 108-50. Putting 5 kits on Alaska-based planes, especially for a company that has been in business for over 20 years, is simply too sporadic and insubstantial to serve as a basis for general jurisdiction.

However, DAK's conduct meets the standard for asserting specific jurisdiction over the breach-of-contract claim. Davis did not negotiate or sign the contract in Alaska. But DAK had put kits on other airplanes for Alaskan customers, held itself out at the trade show as the premier outfitter of high performance planes in the Pacific Northwest, and the facts suggest that it knew (through its president, Davis) that Paul's plane was going to be used in Alaska. Davis told Paul that DAK would fix the plane if there were any problems, thus establishing an on-going relationship with an Alaska resident. DAK took payment from an Alaska bank. These contacts are sufficient minimum contacts to warrant the exercise of specific jurisdiction over DAK as to Paul's breach-of-contract claim. *Polar Supply*, 127 P.3d at 56-57; *Alaska Telecom, Inc. v. Schafer*, 888 P.2d 1296, 1300-01 (Alaska 1995); *Jonz v. Garrett/Airesearch Corp.*, 490 P.2d 1197, 1198-1200 (Alaska 1971).

*Traditional Notions of Fair Play.* The next consideration is whether it would offend “traditional notions of fair play and substantial justice” to exercise jurisdiction over DAK, using the factors outlined in *Polar Supply*, 127 P.3d at 57. It is DAK’s burden to show that it would be unfair to exercise jurisdiction over it, and it must make a “compelling case.” These facts do not demonstrate such a compelling case. Alaska has a strong interest in adjudicating disputes involving injuries to persons and property inside Alaska, and Paul as an Alaska resident has a strong interest in obtaining relief from such injuries in the courts of his home state. DAK is a corporation in a neighboring state, only one quick plane flight away. “Because ‘modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,’ it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.” *Alaska Telecom*, 888 P.2d at 1301 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183 (1985)). See also *American Nat’l Bank & Trust Co. v. Int’l Seafoods of Alaska, Inc.*, 735 P.2d 747, 754 (Alaska 1987).

*Alaska’s Long-Arm Statute.* In addition to the constitutional analysis, it is necessary to evaluate jurisdiction under Alaska’s long-arm statute. Alaska Statute 09.05.015(a)(4) provides jurisdiction in an action “claiming injury to person or property in this state arising out of an act or omission out of this state,” when “(B) products, materials, or things processed, serviced, or manufactured by the defendant were used or consumed in Alaska in the ordinary course of trade.” This would appear to cover a tort claim against DAK, but the court said in *Polar Supply* that it is unclear whether this language covers breach-of-contract claims. 127 P.3d at 55. But an examinee could also argue that AS 09.05.015(a)(5)(A), (C), (E) provide for jurisdiction over DAK as to the breach-of-contract claim. And in any event, AS 09.05.015’s catch-all provision in subsection (c) provides that “The jurisdictional grounds stated in (a)(2)-(10) of this section are cumulative and in addition to any other grounds provided by the common law.” The Alaska Supreme Court has repeatedly recognized that this provision authorizes Alaska’s courts to exercise personal jurisdiction to the fullest extent permitted by the Fourteenth Amendment’s due process clause, regardless of whether a particular claim can fit within one of the specific statutory jurisdictional provisions in AS 09.05.015(a)(2)-(10). *Polar Supply*, 127 P.3d at 54-55 (citing cases).

*Service of Process.* Paul’s counsel validly served DAK by registered mail, pursuant to Civil Rule 4(h), and Davis signed the return receipt.

The court has personal jurisdiction over DAK as to the breach-of-contract claim.

**2. Discuss DAK's lack-of-personal-jurisdiction defense as to the tort claim. (35 points)**

As set out above, DAK's sporadic history of kit installation does not justify exercise of general jurisdiction over DAK (which would authorize exercise of jurisdiction as to the tort claim). It is therefore necessary to ascertain whether there is a basis to exercise specific jurisdiction over the tort claim. Exercise of specific jurisdiction must be analyzed on a claim-specific (and defendant-specific) basis. 16 *Moore's Federal Practice 3d*, § 108.42[1], at 108-54 – 108-55 (citing cases); *Glover v. Western Airlines*, 745 P.2d 1365, 1368 n.7 (Alaska 1987); AS 09.05.015(b). Other than the fact that Davis knew Paul was from Alaska when he lent him the car, there is little to support an argument that DAK (through Davis) purposefully directed its activities at Alaska just by lending him the car, and thus this second claim against DAK appears to fail the "minimum-contacts" test if use of the car is viewed as unrelated to the kit business. Thus, DAK's installation of the kit may justify the court in exercising personal jurisdiction over claims stemming from that, but it does not necessarily support exercising jurisdiction over Paul's claim regarding his neck injuries stemming from use of its company car, unless the use of the car can be viewed as sufficiently closely related to the kit business. See 16 *Moore's Federal Practice 3d*, § 108.42[7][a], at 108-78 – 108-84.1 (discussing divergent approaches to when a related activity bears a sufficiently close relationship to actions justifying specific jurisdiction, to also exercise specific jurisdiction over that related activity). Examinees could argue the point both ways. One could argue that Paul's use of DAK's car is unrelated to its kit business, in that Davis made clear that the car was strictly a company car, and relented only as a personal favor to Paul. But it could also be claimed that he did so to enhance his business relationship with Paul.

The only clearly applicable statutory basis for jurisdiction over this claim is the catch-all provision, AS 09.05.015(c). The same analysis regarding service of process also applies to this claim.

Given that service of process is valid and there is an applicable statutory basis for asserting jurisdiction, the examinee's conclusion as to whether there is personal jurisdiction over DAK as to the tort claim must turn on whether they conclude that (1) lending the car was sufficient to create specific jurisdiction, or (2) the use of the car was sufficiently closely related to the kit business to justify exercise of specific jurisdiction.

**3. Assume the following change to the factual scenario set out above -- DAK asserts lack of personal jurisdiction as a defense in its answer, but only as to the tort claim regarding the company car. However, its next action is to quickly file a motion arguing that Paul's claims fail on their substantive merits. Discuss (i) whether DAK properly preserved the lack-of-personal-jurisdiction defense as to the tort claim and (ii) the impact of the motion**

**on the court's ability to assert personal jurisdiction over DAK as to the tort claim. (15 points)**

Civil Rule 12(h)(1) provides that the defense of personal jurisdiction is waived if not joined with other claims in a 12(b) motion to dismiss (if the defendant files such a motion), or is not raised in either a motion to dismiss or in its answer. In other words, a defendant who does not file a motion to dismiss can ordinarily initially preserve the defense of lack of jurisdiction by raising it in its answer, as DAK did here, so the defense was properly preserved. However, a defendant can still later waive the defense by failing to press the point with the court. See, e.g., *Stauffenberg v. Committee for an Honest and Ethical School Board*, 903 P.3d 1055, 1061 (Alaska 1995) (analogizing lack-of-capacity defense to personal jurisdiction, and finding defense waived by defendant's post-answer failure to litigate the issue). By quickly moving on to the merits, without appearing to press any further objections to the court's ability to exercise jurisdiction over the tort claim, it could be argued that DAK has waived this defense and subjected itself to the court's jurisdiction.

Appendix – AS 09.05.015

**Sec. 09.05.015. Personal jurisdiction.** (a) A court of this state having jurisdiction over the subject matter has jurisdiction over a person served in an action according to the rules of civil procedure

(1) in an action, whether arising in or out of this state, against a defendant who, when the action is commenced,

(A) is a natural person present in this state when served;

(B) is a natural person domiciled in this state;

(C) is a domestic corporation; or

(D) is engaged in substantial and not isolated activities in this state, whether the activities are wholly interstate, intrastate, or otherwise;

(2) in an action that may be brought under statutes of this state that specifically confer grounds for personal jurisdiction over the defendant;

(3) in an action claiming injury to person or property in or out of this state arising out of an act or omission in this state by the defendant;

(4) in an action claiming injury to person or property in this state arising out of an act or omission out of this state by the defendant, provided, in addition, that at the time of the injury either

- (A) solicitation or service activities were carried on in this state by or on behalf of the defendant; or
- (B) products, materials, or things processed, serviced, or manufactured by the defendant were used or consumed in this state in the ordinary course of trade;

(5) in an action that

- (A) arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services in this state or to pay for services to be performed in this state by the plaintiff;
- (B) arises out of services actually performed for the plaintiff by the defendant in this state, or services actually performed for the defendant by the plaintiff in this state if the performance in this state was authorized or ratified by the defendant;
- (C) arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive in this state or to ship from this state goods, documents of title, or other things of value;
- (D) relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the order or direction of the defendant; or
- (E) relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to the carrier occurred;

(6) in an action that arises out of

- (A) a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or to protect, acquire, dispose of, use, rent, own, control, or possess by either party real property situated in this state;
- (B) a claim to recover a benefit derived by the defendant through the use, ownership, control, or possession by the defendant of tangible property situated in this state either at the time of the first use, ownership, control, or possession or at the time the action is commenced; or
- (C) a claim that the defendant return, restore, or account to the plaintiff for an asset or thing of value that was in this state at the time the defendant acquired possession or control over it;

(7) in an action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or a predecessor of the defendant to whose obligations the defendant has succeeded and the deficiency is claimed

(A) in an action in this state to foreclose upon real property situated in this state;

(B) following sale of real property in this state by the plaintiff; or

(C) following resale of tangible property in this state by the plaintiff;

(8) in an action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of the corporation while the defendant held office as a director or officer;

(9) in an action for the collection of taxes or assessments levied, assessed, or otherwise imposed by a taxing authority after April 10, 1968;

(10) in an action that arises out of a promise made to the plaintiff or some third party by the defendant to insure upon or against the happening of an event if

(A) the person insured was a resident of this state when the event out of which the cause of action is claimed to arise occurred;

(B) the event out of which the cause of action is claimed to arise occurred in this state; or

(C) the promise to insure was made in the state;

(11) in an action against a personal representative to enforce a claim against the deceased person represented if one or more of the grounds stated in (2)—

(10) of this subsection would have furnished a basis for jurisdiction over the deceased if living, and it is immaterial under this paragraph whether the action was commenced during the lifetime of the deceased;

(12) in an action for annulment, divorce, legal separation, or separate maintenance when a personal claim is asserted against the nonresident party if

(A) the parties resided in this state in a marital relationship for not less than six consecutive months within the six years preceding the commencement of the action;

(B) the party asserting the personal claim has continued to reside in this state; and

(C) the nonresident party receives notice as required by law.

(b) In an action brought in reliance upon jurisdictional grounds stated in (a)(2) - (10) of this section, there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the defendant as to the claim or cause to be joined.

(c) The jurisdictional grounds stated in (a)(2) - (10) of this section are cumulative and in addition to any other grounds provided by the common law.