

FALL 2018 FINAL ESSAY FACT PATTERN: THE GREEN PHONE & BUNNIFER 2.0

Atticus Dog
Victim



Shelly Turtle
Smartphone manufacturer



Luci Rabbit
Hacker (a/k/a Bunnifer 2.0)



Shelly Turtle loved Hawaii. He had been born in California and lived there with his parents until he reached adulthood, and in 2016, at the age of 21, he moved to Hawaii to pursue his dream of building the world's best green smartphone company. He designed and built all his smartphones himself and called them SHELLPHONES. Shelly advertised his SHELLPHONES through direct mail advertisements that he sent all over the United States and Canada. Unfortunately, few people bought Shelly's smartphones. Of the phones that Shelly made (100), 85 were sold directly to customers in convenience stores in Honolulu, Hawaii, five were sold via direct mail order to people in California who liked green things, and nine were sold to a guy named Bill who lived in Canada. Shelly kept the 100th SHELLPHONE for himself, because it was "you know, green!"

Because Shelly did not know much about software programming, his phones used a smartphone operating system software designed by Luci Rabbit, who was a citizen of California. Luci was a very good programmer, who designed operating systems that were widely used by smartphone manufacturers. Shelly and Luci agreed that he would use Luci's LAGAMORPH smartphone operating system for his phones. The contract between Shelly and Luci said that in the case of any problems with the software, Luci would indemnify Shelly for up to \$50,000.

Unfortunately, Shelly did not know that Luci was *also* a notorious hacker and cybercriminal known as "Bunnifer 2.0." Without Shelly's knowledge, Luci installed "secret backdoor trojan virus" programs into her LAGAMORPH operating system that allowed her to steal information from any smartphone running LAGAMORPH, and from any computer that had been connected to a smartphone using LAGAMORPH. That meant that anybody who was unfortunate enough to purchase a SHELLPHONE was subject to having their private information and identity stolen and misused by Luci.

Atticus Dog, a citizen of California who lived in Los Angeles, was one of those unfortunate victims. When you look at the facts carefully, you'll agree that Atticus came to own a SHELLPHONE only by a very strange chain of events. Atticus was among the tens of thousands of people that Shelly sent direct mail advertisements to in the United States and Canada in the summer of 2017. The ads said: "New! Safe! Green! SHELLPHONES!" However, Atticus never actually saw Shelly's ad because his mommy Helen threw the ad away before Atticus read it.

Some months later, on Jan. 1, 2018, Atticus flew to Honolulu, Hawaii for a long-overdue vacation. As Atticus's mommy told him, "Every dog has his day!" On Jan. 2, Atticus spent hours under the sun on Waikiki Beach, and got a nasty sunburn on his nose. "My poor nosey-posey," Atticus howled in pain. Needing suntan lotion, Atticus went into a nearby convenience store. Next to the suntan lotion was a blister pack containing a pre-paid SHELLPHONE smartphone on closeout sale for \$10. Atticus liked the design on the green SHELLPHONE (as it reminded Atticus of his favorite afternoon treat), and he therefore purchased one. Later that day, Atticus installed a banking application on the phone, so that he could pay bills and monitor his money with the phone.

A few days later while still in Hawaii, on Jan. 5, Atticus checked his bank account on his phone. To his horror, the account was **empty with \$0.00!** Mere hours earlier, Atticus' account had \$250,000 in it. Being a good boy, Atticus immediately contacted his bank (Furst Federal from Arizona), but the bank insisted that the transaction had come directly from Atticus' phone and the bank therefore refused to refund Atticus' money. Atticus was horrified that he had been robbed, and he blamed the SHELLPHONE for his losses.

On March 1, 2018, Atticus filed suit against Shelly in the United States District Court for the Central District of California (in Los Angeles) against Shelly, alleging counts for breach of warranty and common-law products liability, seeking \$250,000. Shelly initially learned that he had been sued because he read a newspaper article in the *Los Angeles Times* on March 13, 2018 with the headline *Green Phones Steal Greenbacks*, saying that an unfortunate Mr. Dog had sued the manufacturer of the SHELLPHONE for identity theft. Shelly was in Los Angeles at that time because he grew up there and visited his friends and family in California regularly. Shelly was also a long-time fan of the Los Angeles Lakers and for years systematically attended their games in Los Angeles. Service of the summons and complaint on Shelly took place in Hawaii on April 1, 2018, when Shelly was personally served at his offices in Honolulu.

ESSAY QUESTION ONE (45 minutes)

On April 15, 2018, Shelly filed a timely motion to dismiss, arguing that the court lacked personal jurisdiction over him. You work for the district court judge. She has asked you to tell her whether she should grant Shelly's motion. Discuss any and all bases for personal jurisdiction that are reasonably raised by the facts, regardless of your conclusion for any particular basis. Do not negative issue spot or discuss bases that are frivolous under the facts or the law.

Additional relevant information and instructions:

- Regardless of the names, photos, and story, assume that Atticus, Shelly, and Luci are human.
- Shelly is the sole proprietor of his smartphone business. He does not own a corporation.
- The essay facts and questions may posit information about the law of various states of the United States. The law provided here may not be the actual law of any of the states in question, but assume that the law provided here is the relevant law for purposes of these essay questions.
- California's long-arm statute states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of . . . the United States." Calif. CCP § 410.10.
- Do not discuss stream of commerce. Do not discuss stream of commerce. I mean it.

ESSAY QUESTION TWO (45 minutes)

Regardless of your answer to question one, assume that the court denied Shelly's motion to dismiss. The case subsequently dragged on for a long time (two years, actually) because Shelly was somewhat slow, and Atticus was always sleepy. During the extended discovery phase of the case, Shelly hired a computer expert who determined that the cause of Atticus losing his money was most likely "secret backdoor trojan viruses" in the LAGAMORPH operating system that Luci Rabbit had installed on Shelly's SHELLPHONE smartphones.

Shelly reported this information to the FBI, which in turn raided Luci's home in California. The FBI determined that Luci was also the notorious hacker "Bunnifer 2.0." The FBI also learned that Luci's computers had copies of all information from every SHELLPHONE that Shelly had sold, along with the contents of Shelly's phone and home computer, which included copies of emails Shelly had sent to his lawyers in April 2018 about the suit Atticus had filed against Shelly. The emails included a PDF copy of Atticus' civil complaint against Shelly for products liability. The FBI determined that Luci had checked online daily for new victims of her LAGAMORPH trojan software, enabling her to engage in a huge scheme of fraud and identity theft. The FBI also confiscated a \$250,000 red Ferrari sports car that Luci had purchased with the money she obtained through her fraud and hacking.

On February 1, 2020, Shelly expanded the suit by filing a third-party complaint against Luci seeking \$50,000 indemnification pursuant to the indemnification agreement between them. On February 28, 2020, Atticus sought and was granted leave to amend his original complaint to add a claim against Luci seeking \$250,000 for computer hacking in violation of California statutes. Luci was promptly and properly served with the pleadings containing Shelly's and Atticus' claims against her.

On March 10, 2020, Luci—actually, Luci's lawyers Katie and Jenny, since Luci was now "crated" in federal prison awaiting trial—moved to dismiss Atticus' claim against her on the basis that the two-year statute of limitations for computer hacking had already expired.

Discuss whether Atticus Dog's claim for hacking against Luci Rabbit relates back to the filing of his complaint against Shelly Turtle.

Additional relevant information and instructions:

- Assume that without relation back, Atticus' claim against Luci would be untimely.
- The statute of limitations for all claims in the suit is two years.
- Do not discuss FRCP 15(c)(1)(A). It is not at issue. Do not discuss it. Seriously.

ESSAY QUESTION THREE (15 minutes)

Discuss the joinder scenarios for the claims from the essay facts, along with an additional new claim added below. Explain why joinder is or is not appropriate. Do not discuss subject matter jurisdiction. Hint: use subheadings for each of the claims for ease of writing and reading. Discuss the claims of:

- Atticus v. Shelly.
- Shelly v. Luci.
- Atticus v. Luci.
- Additionally, assume that Atticus again amends his complaint to add a claim against Luci for \$10,000 for negligence for an unrelated car crash taking place on the freeway in Los Angeles.

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SELECTED MULTIPLE-CHOICE QUESTIONS

(35 multiple-choice questions; suggested total time of 105 minutes)

[ONLY QUESTIONS 1-9 ARE PROVIDED; YOU CAN FIND EXPLANATIONS FROM MARIELA, SUZIE, OR MAITE – THEY MUST STAY IN THE SECRETARIES AREA]

For multiple-choice questions, you must write your answer with a Scantron & a #2 pencil.

Facts needed to answer multiple-choice questions 1 through 9 can be found in the essay facts. Additionally:

- Some of the multiple-choice questions below provide additional facts or change facts.
- Any additional or changed facts are relevant to that question only.
- Although facts of multiple-choice questions might build on the essay fact pattern, the converse is not true: additional or altered facts found in multiple-choice questions may not be used to answer essay questions.

Thus: Because some of these questions add or change facts from the essay facts, you are strongly encouraged to complete the essays before turning to these multiple-choice questions.

1. Was service of process over Shelly appropriate?
 - A. No, because he was not formally served in California.
 - B. Yes, because his corporation was served in Hawaii.
 - C. No, because he was not served at home.
 - D. Yes, because he was personally served.
2. Assuming Shelly timely objects to venue, is venue appropriate over the original claims of Atticus v. Shelly? (For this question, ignore the later claims against Luci.)
 - A. No, because the claims do not arise from substantial events in the district where the suit was filed.
 - B. Yes, because Atticus lives in the district where the suit was filed.
 - C. No, because Shelly lacks contacts in the district where the suit was filed.
 - D. Yes.

3. For purposes of this question only, assume that Atticus' complaint against Shelly was originally filed in California state court and then removed by Shelly to the U.S. District for the Central District of California. Would venue be appropriate over the case of Atticus v. Shelly? (For this question, ignore the later claims against Luci.)
- A. No, because the claim did not arise from substantial events in the district where the suit was filed.
 - B. Yes, because Atticus lives in the district where the suit was filed.
 - C. No, because Shelly lacks contacts in the district where the suit was filed.
 - D. Yes.
4. Does the court have subject matter jurisdiction over Shelly's claim against Luci?
- A. No, because the amount in controversy is too low.
 - B. Yes, even though the amount in controversy is too low.
 - C. No, because joinder of the claim of Shelly v. Luci would destroy complete diversity.
 - D. Yes, because Shelly's claim against Luci is authorized by Rule 14.
5. Does the court have subject matter jurisdiction over Atticus' claims for hacking and negligence against Luci?
- A. Yes, because an original plaintiff is not a "plaintiff" for purposes of third-party complaints (which treat the defendant as the third-party "plaintiff").
 - B. No, because the claims of Atticus v. Luci are not authorized by Rule 14.
 - C. No, because the claims are by a plaintiff against a third-party defendant.
 - D. Yes, because Atticus' claims against Luci are authorized by Rule 14.

6. Suppose Luci counterclaims against Atticus seeking \$100,000 for negligence arising from the car crash between Atticus and Luci. Does the court have subject matter jurisdiction over Luci's counterclaim against Atticus?
- A. Yes, because there is a common nucleus of operative fact between Luci's counterclaim against Atticus for negligence and Atticus' claim against Luci for negligence.
 - B. No, because the original jurisdiction of Atticus v. Shelly is based solely in diversity.
 - C. No, even though there is a common nucleus of operative fact between Luci's counterclaim against Atticus for negligence and Atticus' claim against Luci for negligence.
 - D. Yes, because Atticus' claim against Luci is authorized by Rule 14.
7. For purposes of this question only, assume that Luci was a citizen of Hawaii rather than California and that she ran her software/hacking business out of Honolulu, Hawaii. What is Atticus' best argument that there would be personal jurisdiction against Luci in California?
- A. There is no good argument that there is personal jurisdiction against Luci in California.
 - B. Luci had systematic and continuous contacts with California.
 - C. Luci engaged in tortious conduct aimed at California.
 - D. Luci provided software for a product that she knew would go through the stream of commerce to California.
8. Suppose that for Atticus to use his SHELLPHONE, he had to "click through" a required "user terms of service," which included the following language: "Any claims arising from the use of this SHELLPHONE device must be litigated solely in the state or federal courts of Hawaii." What is Shelly's best argument that personal jurisdiction is lacking over him in California?
- A. The SHELLPHONE terms of use establish personal jurisdiction in Hawaii.
 - B. The SHELLPHONE terms of use prohibit personal jurisdiction in California.
 - C. Minimum contacts are absent in California.
 - D. Shelly has timely objected to personal jurisdiction, therefore preserving the defense of lack of personal jurisdiction.

9. Suppose that the California federal court concludes that personal jurisdiction is lacking over Shelly. What should the court do next? (For this question, assume that Luci is never brought into the suit.)
- A. Dismiss the lawsuit because personal jurisdiction is lacking and Shelly moved for dismissal on that very basis.
 - B. Transfer the lawsuit to the United States District Court for the District of Hawaii, because that is a place where both personal jurisdiction and venue would be proper.
 - C. Dismiss the lawsuit on the basis of forum non conveniens, as the suit can and should be heard by Hawaii state courts.
 - D. Remand the case to the state trial court in California for further proceedings.