

Monterey College of Law

Civil Procedure I - Section 1

Midterm Examination

Fall 2021

Prof. M. Christensen

Instructions:

Answer Two (2) Essay Questions

Answer 25 MBE Questions - NOT AVAILABLE

Total Time Alloted: Three (3) Hours

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## Civil Procedure I, Fall 2021, Midterm Exam Essay Question 2

*(Use only the facts provided.)*

DUFF, INC. is a beer brewing company incorporated and headquartered in STATE Z. The company manufactures all of its beer products in STATE Z and, through a third-party distributor, sells them nationwide.

DUFF announced an exciting limited release of a new product called “Yoink,” DUFF’s first ever caffeinated beer. DUFF marketed the product primarily through a TV commercial that aired during the NFL Superbowl. The distributor also sent an email, approved by DUFF, to its largest DUFF customers, inviting them to place orders.

MOE has a small tavern in State X that only serves DUFF beer. MOE doesn’t check his email, but he saw the Superbowl commercial and immediately contacted the distributor to order 40 cases of “Yoink.” MOE thinks of himself as a VIP retailer of DUFF products because, last year, the company sent him some free neon lights and coasters for his tavern. The gifts came with a signed note from DUFF’s President & CEO, thanking MOE by name for his support of the brand.

As soon as he received the shipment of “Yoink,” MOE began selling it to his customers. First in line to try “Yoink” at MOE’s Tavern was HOMER SIMPSON. HOMER resides in State X with his wife MARGE and their three children. After immediately drinking 3 cans of “Yoink,” HOMER suddenly felt like he was having a heart attack. MOE called an ambulance and HOMER was taken to the hospital. By the time MARGE arrived at his side, the couple was informed that “Yoink” contained highly dangerous levels of caffeine and alcohol. HOMER was in the hospital for two weeks, incurring substantial medical bills.

Once recovered, HOMER and MARGE consulted a lawyer and decided to file suit against DUFF, INC., and MOE, individually, in a court of general jurisdiction in State X. State X has an unlimited long arm statute and adopted the Federal Rules of Civil Procedure on service of process.

After filing the complaint, HOMER solicited the help of his 8-year-old daughter, LISA, to serve the summons and complaint. With her dad waiting in the car, LISA went inside MOE’s Tavern and handed the documents to MOE, who laughed at her and immediately tore them up. HOMER then hired a State Z process server, who took another copy of the summons and complaint to the home of DUFF’s President and CEO. The President wasn’t home, but her husband accepted the documents and said he would give them to his wife, which he did.

1. Did HOMER properly serve process on:
  - a. MOE? Discuss.
  - b. DUFF, INC.? Discuss.
  
2. Does the court in State X have personal jurisdiction over:
  - a. MOE? Discuss.
  - b. DUFF, INC.? Discuss.

Civil Procedure I, Fall 2021, Midterm Exam Essay Question 3

(Use only the facts provided.)

A few years later, after a settlement was reached in *Homer v. Duff Inc., et al.*, twin sisters PATTY and SELMA were tired of living in State X, near their annoying brother-in-law, Homer. PATTY and SELMA had always dreamed of moving to State Y so they could open up a small cantina on the beach and live out their days in margarita-filled bliss. They quit their jobs at the State X DMV, packed all their belongings, and moved into a little bungalow they had purchased in State Y. A few years later, after finally opening "Maggie's Margs," their sister MARGE called in distress. Homer squandered all of the settlement money on toys for himself, and it was the last straw for MARGE. They were getting divorced, and she needed her sisters' help and support. PATTY and SELMA flew to State X and planned to stay at MARGE's house for a few weeks.

On the third day of their visit, the three sisters were walking to Krusty Burger for lunch when all of a sudden they saw a man, SMITHERS, open the door to his car and release a pack of angry hounds. The dogs attacked the sisters, causing each of them injuries. After weeks of medical treatment, PATTY and SELMA returned to State Y. But before they left, the three sisters consulted with an attorney and decided to sue SMITHERS for negligence, assault, battery, and intentional infliction of emotional distress. Their attorney filed the complaint in a court of general jurisdiction in State X, and properly served SMITHERS at his place of residence and employment, Burns Manor, in State X. The complaint stated that PATTY and MARGE each claimed \$80,000 in damages for their injuries, and that SELMA, who managed to hide behind her sisters for most of the attack, claimed \$10,000.

Two weeks after being served the complaint, SMITHERS removed the case to federal court in the Central District of State X. The sisters filed a Motion to Remand the action to state court, solely on the basis that the federal court lacked subject matter jurisdiction of each of their claims.

1. How should the district court rule on the sisters' motion to remand?
2. On the same day that SMITHERS removed the action to federal court, he filed a counterclaim against MR. BURNS, who resides at Burns Manor. SMITHERS' complaint alleges that he is employed as MR. BURNS' assistant in all matters, and that he released the hounds upon the sisters because MR. BURNS had ordered him to do so. His complaint against MR. BURNS states claims of indemnity and contribution under State X law. If any claims are to remain in federal court, would the district court also have subject matter jurisdiction over SMITHERS' claims against MR. BURNS?

Civil Procedure Fall 2021, Midterm Exam Essay Question 2, Personal Jurisdiction & Notice

MODEL ANSWER

- I. Service of Process
  - a. MOE: improper service
    - i. Lisa is under 18.
    - ii. Actual notice is not required, but if Lisa told her dad that MOE immediately tore up the documents, and if MOE wasn't told what the documents were, Homer should have tried again to properly serve him (Mullane, Flowers).
  - b. DUFF: improper service, Rule 4(h)
    - i. Ok to serve a corporation by personally serving a corporate officer, but cannot serve the officer's spouse
    - ii. Actual notice does not cure violation
  
- II. Personal Jurisdiction
  - a. MOE
    - i. Domicile PJ, or general in personam PJ if Moe resides in an adjacent state and owns and runs his bar in State X
  - b. DUFF
    - i. No traditional bases (domicile, consent, physical presence)
    - ii. No general in personam
    - iii. Specific in personam
      1. Case arises out of the contacts: products ended up in X, marketing on TV in X and directly to retailers in X by sending them free merch, product injured Homer in X
      2. Purposeful availment:
        - a. On the one hand, D sells products nationwide through a third-party distributor, the commercial aired nationwide, and the distributor sent the email inviting retail orders
        - b. On the other hand, D personally recognized MOE for his outstanding sales. Directly sending merchandise to retailers in State X likely shows targeting State X for sales.
      3. Fairness factors
        - a. D burden limited, they're a company with nationwide sales
        - b. P interest significant, Homer is an individual consumer suing in his home state and place of injury
        - c. Forum state interest is significant, injury of citizens within their state
        - d. Efficiency interest is somewhat balanced, injury evidence is in X, but design and manufacturing evidence is in Z
        - e. On balance, factors weigh in favor of PJ over DUFF being fair

Civil Procedure Fall 2021, Midterm Exam Essay Question 3, SMJ

MODEL ANSWER

Motion to Remand

- I. PATTY v. SMITHERS
  - a. Remand must be granted if the District Court lacks SMJ (FRCP 12(h)(3), 28 USC 1447(c))
  - b. All 3 sisters bring tort claims, therefore Fed Q SMJ does not apply and the Court must have diversity jurisdiction (28 USC 1332)
  - c. There is complete diversity between Patty and Smithers
    - i. Patty's citizenship for diversity purposes: Changed domicile from X to Y.
    - ii. Smithers' citizenship for diversity purposes: X.
  - d. Amount in controversy is sufficient because Patty individually claims \$80,000
  - e. Patty's argument for remanding her claim based on lack of SMJ fails
- II. SELMA v. SMITHERS
  - a. Complete diversity is met
    - i. Selma also changed domicile from X to Y
  - b. Amount in controversy, \$10,000, is not sufficient
  - c. Selma cannot aggregate her claim with Patty's because they are not claiming based on a common, undivided interest. Rather, they're seeking damages for their respective injuries.
  - d. The Court would likely exercise Supplemental Jurisdiction over Selma's claim (28 USC 1367)
    - i. Same case or controversy (1367(a))
      1. Common nucleus of operative fact (*Gibbs*): same incident, lots of common evidence
    - ii. Would not destroy diversity (1367(b))
  - e. Court would likely reject Selma's argument for remand, because it can be tried together with Patty's, and Patty's remand argument fails.
- III. MARGE v. SMITHERS
  - a. Amount in controversy is met, but...
  - b. Complete diversity is not met
  - c. Supplemental Jurisdiction over Marge's claim is not permissible, because it would defeat complete diversity for the action as a whole (1367(b))
  - d. The Court would sever Marge's claims from the action and remand them to state X court (28 USC 1441(c))

Plaintiffs' Motion to Remand would be granted as to Marge's claims and likely denied as to Patty & Selma's claims.

SMJ over SMITHERS v. BURNS

- I. Fed Q SMJ is not available: Smithers seeks indemnity or contribution under state law
- II. Complete diversity is not met: Burns' citizenship for diversity purposes is X

- III. Supplemental jurisdiction over this claim is not permissible because it would defeat complete diversity for the action as a whole (1367(b))
- IV. The Court would likely sever this claim

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**a. Service of MOE**

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20  
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30  
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**Service of Process**

A person can serve process as long as they are a nonparty and at least 18 years old

**Serving a Person**

- (1) Personal Service-walk up and give it to them
- (2) Substituted Service-give it to someone that permanently resides at the D's residence
- (3) Serve D's Agent: Could be an appointed agent; agent through contract or operation of law

**Serving a Business**

- (1) Serve an Officer: President or Vice President
- (2) Serve a General or Managerial Agent: check the Secretary of States Website to see who the business's agent is that can accept service of process

Serve any other way the state authorizes: CA authorizes service by certified mail

Mullane: requires service of process to be Constitutional/Consistent w/Due process: under Mullane notice has to be reasonably calculated under all the circumstances to

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apprise the interested parties to the pendency of the action and afford them an opportunity to present objections.

Edridge: discussed: burden on the D (what's being taken from them); Government's burden: to hold a hearing for every person that was denied/disqualified from SSI; and If there are safety net protections (that are consistent with the law)

Constitution: the government cannot deprive a person of life, liberty or property without giving them notice and a hearing.

Subrules of Mullane:

If serving by certified mail-then you must get a receipt, if you don't, then keep trying, or serve another way

If you post the notice of the D's door, you also have to send it to them by mail

If you see the process server throw the papers in the gutter or trash, then you have to serve the D again.

Notice by publication: only allowed when the interest of the defendant are unknown; the D's name is unknown or the D's last known address is unknown.

Actual notice does not cure a defect in service

Here, MOE was not properly served because Homer had his daughter who was only 8 years old serve process. This is not sufficient service. Although it does not matter that MOE tore them up because he received actual notice, service by the 8 yr old daughter is inadequate.

The court would hold, that service on Moe was not adequate.

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**b. Service of DUFF INC**

20/20

Service of Process

A person can serve process as long as they are a nonparty and at least 18 years old

Serving a Person

- (1) Personal Service-walk up and give it to them
- (2) Substituted Service-give it to someone that permanently resides at the D's residence
- (3) Serve D's Agent: Could be an appointed agent; agent through contract or operation of law

Serving a Business

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Notice by publication: only allowed when the interest of the defendant are unknown; the D's name is unknown or the D's last known address is unknown.

Actual notice does not cure a defect in service

Here, Homer hired a State Z process server to serve Duff's president and CEO. This service is adequate because the process server served an officer. However, this is not adequate because instead of serving the Officer of the company, they served the husband the documents. Substituted service is not allowed for a business. Although the husband said that he would give the documents to the President, actual notice does not cure a defect in service.

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The court would hold that service is not adequate of Duff Inc.

2. a. Personal Jurisdiction (PJ) over MOE 8/10

PJ-is the power of the court to issue binding orders over a person or an entity. A court has PJ if there's a state long arm statute and if the US Constitution authorizes it.

**Traditional Basis**

Traditionally a court has PJ over a defendant (D) that was (1) domiciled in the forum state (2) expressly consents/makes a general appearance in court or (3) the D was personally served with process while present in the forum state.

There is a traditional basis of PJ over the Defendant Moe he is domiciled in State X and the forum is in State x. The court would hold that there is traditional basis of PJ over Moe.

2. b. Personal Jurisdiction (PJ) over Duff 39/50

PJ-is the power of the court to issue binding orders over a person or an entity. A court has PJ if there's a state long arm statute and if the US Constitution authorizes it.

**Traditional Basis**

Traditionally a court has PJ over a defendant (D) that was (1) domiciled in the forum state (2) expressly consents/makes a general appearance in court or (3) the D was personally served with process in the forum state.

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Traditional Basis of PJ over Duff Inc: Duff is incorporated and headquartered in State Z. So that means Duff is not domiciled in the forum state X. Duff did not consent or make a general appearance in court. Duff was also not personally served with process in the forum state. So, there is not traditional basis of PJ over Duff.

10/10

The court would conclude that there no no traditional basis of PJ over Duff.

### Long Arm Statute

A state long arm statute is how a state exercises PJ over a non resident.

Forum State X has an unlimited long arm statute which presumably extends as consistent with the US constitution. State X would be able to exercise JD over a non resident as long as it is consistent with due process.

### Constitutional Analysis

A court asserting PJ over a D means that it must be consistent with Due Process.

Consistent w/Due Process means that the D has sufficient minimum contacts with the forum state, they purposefully availed itself to the forum state, and exercising PJ over the D does not offend notions of fair play and substantial justice.

Minimum Contacts w State X: Duff markets their product through TV commercials, specifically the NFL Superbowl. Millions of people watch the superbowl each year, it is very popular. Companies pay a lot of money to have their commercials advertised during the super bowl game because it reaches million of potential customers. Also, even though Duff has a 3rd party distributor (which could defeat purposeful availment), the distributor sent an email (that was approved by Duff) to its "largest Duff customers", that "invited them to place orders. Furthermore, although Moe didn't get that email, Moe did in fact see the Superbowl commercial, which enticed him to "immediately contact" the

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distributor and ordered 40 cases of the newly advertised "Yoink" beer that is the "first ever" caffeinated beer. One can presume that customers would be excited and intrigued to try this new alcohol.

The court would conclude that Duff has sufficient minimum contacts with the forum state.

### General Jurisdiction (JD)

6/10

A court has general JD over a D whose contacts with the forum state are so continuous and systematic that it would warrant asserting PJ over the D for any and all claims. The D is essentially "at home away from home" and the claims do not have to arise or relate to the D's contacts with the forum state.

The court likely has general JD over Duff because its contacts with the state were so continuous and systematic, that it could be considered its "home away from home". This is further shown by the company sending Moe neon light and coasters for his tavern. If the court has general JD over Duff, then the claims do not have to arise or relate to the D's contacts with the forum state. Although, here the claims do arise or relate to the contacts with State X because Homer was injured by drinking alcohol manufactured by Duff. On the other hand, Duff can argue that they only sold its beer to Moe (whose tavern is in the forum state) one time. Duff Inc would claim that that is not continuous and systematic contacts with the forum state.

If the court does not hold that there is general JD over Duff, specific JD might be also probable. (Discussion below)

### Specific JD

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A court has specific JD over a D that has sufficient minimum contacts w/ the forum state; even if those contacts are isolated or infrequent; the contacts cannot be inadvertent or incidental. The D also had to have personally availed itself to the benefits and protections of the forum state. The claims have to arise or relate to the D's contacts w/ the forum state.

### **Relatedness**

Here the claims do arise or relate to the contacts with State X because Homer was injured by drinking alcohol manufactured by Duff Inc.

### **Purposeful Availment**

(also see minimum contacts discussion)

14/20

Duff purposefully availed itself to State X by advertising their newly made "one of a kind" "Yoink caffeinated beer" on the super bowl commercial. These commercials reach millions of potential customers, and companies pay BIG money to have their commercials aired on TV. Here, Duff Inc did purposely avail itself by advertising to customers and expecting to get the benefits (of profit making from the huge amount of beer sales" of the forum state X.

### **Due Process-5 Fairness Factors**

(1) The burden on the D; (2) The forum state's interest; (3) The P's interest; (4) Interstate Efficiency; (5) Interstate Policy Interests.

Since D advertises and presumably makes a lot of money for being a bug beer selling company, it wouldn't be a heavy burden to hail them into court in the forum state. The Defendant could afford to represent itself in court even if it was out of state. However,

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Duff inc can argue that they never even traveled to the forum state, so they should not be required to travel far away to litigate that case. The court would likely hold that there is not such a heavy burden on the defendant.

State X's interest is high because they want to protect their citizens from being injured, especially from out of state parties. The court would likely hold that the forum state's interest in protecting its residents is high.

The plaintiff's interest could be high, especially if Homer could not sue Duff in State X. But here, since Duff is domiciled in state Z, Homer would be able to sue Duff in state Z. The court would likely conclude that the plaintiff's interest is high even though Homer has a remedy by being able to sue Duff. However, it would be a burden on Homer to have to travel from State X to State Z in order to litigate his claim.

Interstate efficiency: it would be more efficient to have the State X court be the forum because that is where the events that gave rise to the claim happened. It is also where Homer's injury occurred and where the evidence of the beer sold to the tavern was served. The witnesses to Homer's heart attack are also located in State X, so it would be more efficient to hold court in state X, because it would be a high cost to compel the witnesses to go to State Z.

a/o

Interstate Policy Interest: I cannot think of any interstate policy interests, running out of time.

In conclusion, balancing all the interest, it would be better to subject Duff Inc to Homer's law suit in the forum State X.

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2)

460/100

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Motion to Remand based on Subject matter

based on procedural defect, lack of Subject matter jurisdiction (SMJ), when federal claims have been adjudicated, or when appellate review of remand order

Only Defendant may remove

Plaintiffs can not migrate cases between state to fed, only the defendant

Smithers (S) had removed the case to federal court, this is a power the defendant has so long as the case in chief meets the diversity and \$75k criteria or holds a federal question. Here the case in chief meets the diversity and \$75k criterial, so S has full rights to remove to Federal courts.

Limitation on Removal in Diversity of Citizenship cases

when jurisdiction of the federal courts is based solely on diversity and one of the defendants is a citizen of the state in which the state action was brought, the action is not removable.

FS  
Here we have Patty and Salma who hold complete diversity against S, and who brought suit in state court. this implies that the case is not removable.

### Subject matter Jurisdiction (SMJ)

#### Diversity of citizen

each plaintiff must be diverse citizen from each defendant. also the amount in controversy must exceed \$75k.

#### Domicile

22/00  
a person's domicile is where there true fixed and permanent home is

Patty & Selma, permanent residents in state Y and Marge Domicile in state X.  
Smithers (S) has a permanent resident in state X.

#### Complete diversity

for citizens, no plaintiff may be citizen of the same state as any defendant.

15/00  
Patty and Selma hold complete diversity from S, however Marge does not hold complete diversity from S. If Patty and Selma should exclude Marge and add Marge in under supplemental jurisdiction because Marge is domiciled in the same state as S. however the sisters (Patty & Selma) are filing and not including Marge and in their motion to remand and therefore complete diversity holds between S, Patty & Selma.

#### Amount in controversy

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for federal suits based on diversity, the amount must be in good faith and greater than the \$75k

Marge's damages is for \$80k, Patty's damages are for \$80k, Salma's damages are for \$0k. Patty meets the amount in controversy alone.

Federal question

federal questions have jurisdiction over all civil actions arising under the constitution, laws, or treaties of the U.S.. Essentially stating a federal question and not a state question must be raised.

Patty and Selma are suing for damages arising from negligence, assault, battery, and intentional infliction of emotional distress. All of which are non federal questions and therefore there is no federal questions.

Conclusion

the district court will likely rule against Patty and Salma because there is no defect in SMJ.

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Continuing from SMJ

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### Anticipation of a federal question defenses

the federal question must be integral to plaintiff's cause of action. the defendant's defense based in federal statute/law does not raise a federal law.

No defendant may claim a federal law as a defense to SMJ. therefore

### Based on lack of SMJ

may be made at any time. If the court erroneously fails to remand, but the subject matter defect is cured before trial begins, failure to remain does not require that the federal judgement be vacated.

It is likely that patty and Salma do not have a subject matter defect, therefore this will not be applicable.

### Supplemental Jurisdiction (SJ)

new claims added to the original controversial issue that may not have to independently satisfy SJM.

Here S is claiming that he was acting within his scope of employment. Adding in Mr. Burns who is S's employer would be adding new claims-to the original controversial issues and therefore is permitted.

### Diversity cases

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impleader (3rd party plaintiff) , Joinder of D \* Cross-claims

Impleader (3rd party plaintiff)

A 3rd party claim is the joinder by the defendant in the original action.

Since S is introducing Mr. Burns, we need to first check the diversity between the defendants, here Mr. Burns and S are from the state (state x) therefore they do not have diversity and S can not claim impleader.

joinder of D

adding other defendants to the list for liability, so long as one D meets the diversity of citizenship.

6/10  
Here S is attempting to add Mr. Burns as a defendant, and S already holds complete diversity between Patty and Selma, S may add in Mr. Burns so long as S can show good cause for adding Mr. B.

Cross-claims

a party may assert additive claims in a current pending case against co-party, so long as claim arise from the same transaction or occurrences as the underlining dispute.

Here S is claiming that his actions were a product of his employment. S then intends to claim that add Mr. Burns is part of the same transaction or occurrence because S's actions related to his employment.

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### Erie Doctrine

a federal court, in the exercise of its diversity jurisdiction, is required to apply the substantive law of the state in which it is sitting, including the state's conflict of law.

The federal courts are not permitted to ignore or overrule state law when a valid applicable state law can be used in the ruling. If no state law is available, the federal court must look to see what the state's highest court would have ruled if the highest court was able to rule on it.

### Conclusion

S will be able to show that both his claims can be brought under federal court utilizing subject matter jurisdiction.

**END OF EXAM**