

AGN: _____

MIDTERM: CIVIL PROCEDURE

Fall 2022—2.0 hours

Professor Ira Steven Nathenson, St. Thomas University College of Law

Read the instructions carefully. When time is called, all work must cease.

Time and length. This examination is eight (8) pages long. I am also providing you with an 18-page supplement with relevant sections of the Constitution, statutes, and FRCP. Make sure you have all pages of this exam and the supplement and let the Proctor know right away if you do not. You may not write anything on, or erase anything from, any examination materials after time runs out.

Closed book. Except for the supplement I provide, the examination is closed book.

AGN; avoid other personally identifying information. Indicate your 4-digit AGN number on this exam and on the supplement. Do not put your real name or any other personally identifying information on the examination or other materials except for your AGN. Violating this rule may violate the College of Law Academic Integrity Policy.

Please do not contact me. You should not contact me with any questions about the examination until scores have been released, as that may constitute a breach of exam anonymity. If you have any questions or concerns, please contact Dean Hernandez.

Time and scoring. The suggested times below add up to 75 minutes. However, I will give you two (2.0) hours. Scoring is proportional to times suggested below.

- *Essay question (one question, suggested time of 45 minutes):* I suggest you spend approximately (i.e., at least) 45 minutes on the essay question. Write your answer using **Exam4** or other software required by the Registrar. You may not exceed the **1500-word limitation**, which should be more than enough words to answer the essay question. Since Exam4 counts all words towards the limitation, I suggest that you do not include your outline in the exam submission. You would be better advised outlining on paper or outlining on computer and then turning your outline into your essay answer. If you handwrite your essay, you are limited to **one bluebook**, writing on one side of the page only, skipping lines.
- *Multiple-choice (10 questions, suggested time of 30 minutes):* Answer the questions using **Remark** or other required software or sheets supplied by the Proctor. Do not enter your multiple-choice answers into a Bluebook or Exam4, because you will waste words and your multiple-choice answers will not get any credit.

Additional instructions for essay questions.

- *Writing.* Legibility, proper writing, and organization are expected and are part of your score.
- *How to address essays.*

- Read the call of the question and facts carefully—twice—before you outline and write.
- Raise, discuss, and decide all issues reasonably raised by the call of the question, whether or not they are dispositive, and whether or not resolution of one issue makes discussion of other issues technically unnecessary. However, do not engage in negative issue-spotting, which is discussing: 1) issues or parties falling outside of the call of the question, or 2) tangential issues that, although technically falling within the call of the question, are nonetheless frivolous.
- If you believe you have discovered an error in any essay question, then expressly identify the error in your written answer and resolve it in a reasonable manner.
- If (and only if) you believe that it is absolutely necessary to assume additional facts, then state what those facts would be and how they would affect your analysis.
- Note below that the multiple-choice questions are based on the essay and may build upon or change some of the facts from the essay. You should therefore not start the multiple-choice questions until you complete the essay, to avoid the possibility of inadvertently using multiple-choice facts in your essay answer.

Additional instructions for multiple-choice questions.

- Finish the essay question first, before turning to the multiple-choice questions. First, because the multiple-choice questions are based upon the essay fact pattern. And second, some of the multiple-choice questions require you to add facts or change facts from the essay. Facts added or changed in multiple-choice questions may not be used for the essay, but only for that multiple-choice question.
- You must use **Remark** or other required software or sheets provided by the Proctor for your multiple-choice answers. If you enter your multiple-choice using a Bluebook or Exam4, you will not receive credit.
- If more than one multiple-choice answer seems to be correct, then choose the best answer.

THIS EXAM IS CONFIDENTIAL

As a St. Thomas Law student, you are bound by the St. Thomas University College of Law Code of Academic Integrity. In addition, you may not discuss this examination with any classmates who have not yet completed this exam. Any breach will be considered to be a serious violation of the Code of Academic Integrity and will be addressed accordingly.

ESSAY QUESTION

Suggested essay time: 45 minutes.

Atticus Dog was born in Antwerp, Belgium. In 2010, he and his parents (dad a law professor, mom a schoolteacher) moved to a lovely one-story home in Miramar, FL. In a few years, they became American citizens, although they also remained proud Belgians, retaining dual citizenship.

In 2022, Atticus decided to take a trip out West to see the great American city of San Francisco, California! Golden Gate Bridge! Ghirardelli chocolate! And the now-closed Alcatraz prison, once the home of the notorious gangster Al Capone himself!! Atticus had long been fascinated with real-crime dramas on cable TV (he always sat on the floor and watched with his mommy) and had longed to visit Alcatraz, a famed former federal prison from which no person had ever successfully escaped because it was on an island in San Francisco Bay, surrounded by treacherous waters. Atticus searched Google for Alcatraz tours and found a website for “Big Ear Tours,” which promised a “Safe, fun, ferry ride and day trip to and from Alcatraz. Satisfaction guaranteed!” Atticus entered his name, home address, and credit card information into the Big Ear website and paid \$41 for the tour fee.

In May 2022, Atticus took his Alcatraz tour on the Big Ear boat. The sole proprietor of Big Ear and its main tour guide, Luci Rabbit, took an *immediate* disliking to Atticus as she thought “he looks like a stupid wolf.” Plus, Atticus barked question after question at Luci, such as: “Will there be food? Can I go in Capone’s cell? Where is the gift shop? When can I go for a walk? Why is it so much colder here than Florida???” Once the ship got to the dock and it was time for people to get off the boat to explore the island and prison, Atticus asked Luci, “What time do I have to be back on the boat?” Annoyed with all the yapping, Luci snapped back, “We leave at 5:30PM sharp,” even though the real departure time was 5:00PM. She thought, “I’ll show Florida Man, let him freeze his tail off here overnight.”

Atticus enjoyed his day on Alcatraz Island, and was surprised at how beautiful it was. It was filled with plants and flowers. Atticus seemed to have to stop and sniff every single one. There were also thousands of birds, and Atticus loved chasing them and making them scatter! (“Stupid birbs!,” he thought.) He also visited Al Capone’s cell, which was smaller than he expected.

At 5:15PM, Atticus went back to the dock, but it was abandoned. Nobody was there. In fact, the entire island was deserted. Atticus had no way of getting off the island and he could not get a stable cellphone connection. Even when he did, Uber refused to boat out to the island to come and get him. As a result, he had to sleep in Al Capone’s cell, which was cold and very, very scary. Atticus thought, “I’m a good boy, why was Luci Rabbit so *mean* to me?” His tummy ached, and he missed his dinner bowl and his mommy. He did, however, like San Francisco so much that he decided that he should soon move to California.

The next day, Atticus hitched a ride back to San Francisco with another tour company, although it cost him another \$200. Several weeks later, Atticus hired a Florida lawyer to find out his rights against Luci. The lawyer discovered that Luci, a former Florida native who had moved years ago to San Francisco, owned an expensive collection of Beatrix Potter figurines that was currently on loan to a Florida museum. In early July 2022, Atticus’ lawyer filed suit against Luci Rabbit in the United States District Court for the Southern District of Florida, seeking recovery of “damages in excess of \$100,000 for OUTRAGEOUS AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.” The lawyer also filed papers in Dade County to attach the lawsuit to Luci Rabbit’s collection of Beatrix Potter figurines. Within a few weeks, Luci Rabbit was personally served with the complaint and

summons while her boat was docked in San Francisco Bay. “Stupid Dog,” she said, shaking her head. A few weeks later, Atticus moved to California.

QUESTION: You are the clerk for the District Judge handling the case. Luci has filed a timely motion to dismiss for lack of personal jurisdiction. Discuss whether the Court should grant the motion.

Further information:

- Regardless of the content of actual Florida law, please assume for purposes of this question that the Florida long-arm statute states: “A court of this state may exercise personal jurisdiction to the full extent permitted by the Constitution of the United States.”
- Luci Rabbit is the sole proprietor of Big Ear Tours, meaning that her business is not incorporated and instead is a one-person operation. So Atticus has sued the right defendant, and you should not worry about corporations or business entities for this essay.
- Assume for this essay that service of process complied with FRCP 4.
- Despite their names, you should assume that Atticus and Luci are human beings and not the names of several of Professor Nathenson’s beloved pets, past and present.

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MULTIPLE-CHOICE QUESTIONS

Suggested total time for 10 multiple-choice questions: 30 minutes.

Read these rules carefully before proceeding:

- *Finish the essay first.* The multiple-choice questions are based on the essay fact pattern, but may add or change some of the facts from the essay. You should therefore not start the multiple-choice questions until you complete the essay, to avoid the possibility of inadvertently using multiple-choice facts in your essay answer.
- *Each multiple-choice question stands on its own:* Unless expressly provided otherwise, a fact added or changed from the essay for one multiple-choice question applies to that question only and not to any other question.
- *Choose the best answer:* If more than one multiple-choice answer seems to be correct, then choose the best answer.
- *Long-arm statute:* Unless a question states to the contrary, assume that the relevant long-arm statute states: “A court of this state may exercise personal jurisdiction to the full extent permitted by the Constitution of the United States.”

Note – correct answers are highlighted in blue, and incorrect answers in red.
At the bottom of each question is a breakdown of what answers were chosen by students from the two sections together. Since you have the exam, you should be able to score yourself.

1. Does the court have subject matter jurisdiction?
 - A. Yes, because the tort took place in a federal prison, an essential ingredient of Atticus’ claim against Luci, making his claim a federal question.

Incorrect, because the plaintiff’s claim was for intentional infliction of emotional distress, a claim created under state law and which satisfies diversity jurisdiction. Federal question jurisdiction does not exist. The plaintiff’s cause of action (Mottley) is for intentional infliction of emotional distress created by state law (Holmes test). The Grable line of cases is not at issue: although Alcatraz was a federal prison, this is an evidentiary fact and is not a disputed or substantial issue of federal law.
 - B. No, because Atticus has both Belgian and U.S. citizenship, making him stateless.

Incorrect, because for dual nationals who have joint citizenship in the U.S. and another country, we ignore the foreign citizenship for purposes of section 1332.

- C. **Yes, because the suit is a dispute between citizens of different states.**

Correct, because Atticus is a citizen of Florida (naturalized U.S. citizen domiciled in Florida), and Luci is a citizen of California (birthright U.S. citizen domiciled in California).

- D. **No, because Luci and Atticus are both citizens of California.**

Incorrect, because citizenship is measured as of the time of filing; at that time, Atticus still resided in Florida. Even though he may have had the intent of moving to California at that time, he had not yet established residence there.

1	Q1	C	2.08	2.08	85.42	10.42
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2. What is Luci's best argument that the amount in controversy is not met for purposes of diversity jurisdiction?

- A. **It is not possible for Atticus to win more than \$100,000.**

Incorrect, because the St. Paul Mercury test asks whether it is legally impossible for the claimant to obtain more than \$75,000, not \$100,000.

- B. **It is not possible for Atticus to win more than \$75,000.**

Correct, the test asks whether it is legally impossible for the claimant to get more than \$75,000, exclusive of interest and costs. Put differently, if it is possible to recover more than the AIC, then it is met so long as the claimant is otherwise pleading in good faith.

- C. **It is not a certainty that Atticus will win more than \$100,000.**

Incorrect, because it need only be possible for Atticus to win more than \$75K (the AIC), and not \$100K (the pleaded amount). It also need not be certain that he will get that much, just possible that he will.

- D. **It is not a certainty that Atticus will win more than \$75,000.**

Incorrect, for the reasons noted above.

2	Q2	B	2.08	62.50	4.17	31.25
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3. Assume for this question only that Big Ears is an Oregon corporation with its principal place of business in Oregon. Atticus sues both Luci Rabbit and Big Ears. Where does venue lie?

A. Southern District of Florida (where Miramar, FL is) because Atticus resided there when the cause of action arose.

Incorrect, because the plaintiff's residence is irrelevant to 1391(b)(1) venue.

B. Northern District of California (where Alcatraz is), because that is where the claim arose.

Correct, because 1391(b)(2) is the only possible basis for venue. In this question, there are two Ds, who are domiciled in different states, making 1391(b)(1) "residence"-based venue impossible. The plaintiff's residence is irrelevant. But Luci's allegedly outrageous conduct occurred in San Francisco, which is in the N.D. Cal.

C. District of Oregon, because that is where Big Ear resides.

Incorrect, because residence venue is only possible when all Ds reside in the same state. They do not.

D. All of the above.

Incorrect, because of the reasons noted above.

3	Q3	B	0.00	50.00	8.33	41.67
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4. Assume for this question only that Big Ears is an Oregon corporation with its principal place of business in Oregon. Atticus sues both Luci Rabbit and Big Ears. He seeks \$100,000 from Luci for intentional infliction of emotional distress, and \$200 from Big Ears for his incidental damages for breach of contract due to having to find a ride back from Alcatraz. Does the court have subject-matter jurisdiction?

A. Yes, the court has original diversity jurisdiction over both claims, which can be aggregated to meet the amount in controversy.

Incorrect, because aggregation does not permit a P to aggregate the AIC of separate claims together when they are asserted against different Ds. Accordingly, the AIC against Big Ears is too low.

B. Yes, because there is original diversity jurisdiction over the emotional distress claim and supplemental jurisdiction over the breach of contract claim.

Incorrect, because there is no supplemental jurisdiction. It is true that 1367(a) is satisfied and grants supplemental jurisdiction. First, the \$100,000 claim

against Luci satisfies diversity jurisdiction, and the claim against Big Ears arises from the same “common nucleus of operative fact.” But 1367(b) divests supplemental jurisdiction because original jurisdiction is solely based on diversity, the supplemental claim is by a plaintiff, and is asserted against a second Rule 20 defendant.

- C. **No, although there is original diversity jurisdiction over the emotional distress claim, there is not supplemental jurisdiction over the breach of contract claim.**

Correct, for the reasons noted for B.

- D. No, the defects in one of the claims contaminates jurisdiction for the other claim.

Incorrect, because contamination refers to when the supplemental claim violates the *Strawbridge* rule by destroying the complete diversity that was the basis for original jurisdiction. Here, P is of diverse citizenship from both Ds.

4	Q4	C	12.50	52.08	27.08	8.33
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5. Assume for this question only that Atticus had filed his lawsuit in state court in California. Could Luci remove the case to federal court?

- A. **No, because Luci is a citizen of California.**

Correct, because of the in-state/forum defendant rule, which prohibits removal if the sole basis to remove is diversity and if any D is a citizen of the state in which the suit is filed.

- B. Yes, because Atticus is not a citizen of California.

Incorrect, because P’s citizenship is irrelevant to the in-state defendant rule.

- C. No, because a case cannot be removed solely on the basis of diversity jurisdiction.

Incorrect, because a case can be removed based on diversity unless it falls within an exception (such as the in-state defendant rule).

- D. Yes, because there would be original jurisdiction in federal court.

Incorrect, because the in-state defendant rule prohibits removal in exactly this scenario, one where the case could have been originally filed in federal court, but cannot be removed to federal court.

5	Q5	A	62.50	10.42	12.50	14.58
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6. Assume for this question only that Atticus' lawsuit was served by a process server who went to Luci's office at the pier in Fisherman's Wharf in San Francisco and asked for Luci. After being told by Luci's assistant that Luci was out on her boat, the process server left the complaint and summons with Luci's assistant. Was service proper?

A. **No, because it was not delivered to Luci personally.**

Correct, because the defendant is Luci, served under FRCP 4(e), and not a corporation served under FRCP 4(h). Here, the method of service used is not appropriate under these facts. Nothing indicates that the boat employee is authorized by appointment or law to accept process for suits against Luci. Also, there is nothing in the facts that suggests California or Florida law permits this kind of service against an individual defendant. See FRCP 4(e)(1).

B. Yes, because the documents were given to an employee of Luci.

Incorrect, for the reasons noted above.

C. No, because the process server did not take additional steps to ensure that Luci got actual knowledge of the lawsuit.

Incorrect, because notice requires compliance with FRCP 4 (here, 4(e)), which was not complied with. Also, although Due Process requires service reasonably *calculated* to lead to actual knowledge, notice does not require actual knowledge.

D. Yes, because Luci's office is her headquarters or "nerve center."

Incorrect, because the defendant is an individual and not a corporation. Also, the "nerve center" test is relevant to diversity jurisdiction, not FRCP 4 service.

6	Q6	A	27.08	47.92	14.58	10.42
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7. Assume for this question only that after being served with the summons and complaint, Luci asserted a Rule 13 counterclaim against Atticus for breach of contract, alleging that Atticus had fraudulently contacted his credit card company to reverse the \$41 he paid for his tour of Alcatraz. Does the court have subject-matter jurisdiction over the counterclaim?

A. **Yes, even though original jurisdiction is premised solely on diversity.**

Correct, because there is original diversity jurisdiction; the two claims arise from a common nucleus of operative fact; and 1367(b) does not divest Rule 13 counterclaims (or for that matter, a supplemental claim by a D).

B. No, because original jurisdiction is premised solely on diversity.

Incorrect, because even though original SMJ is premised solely on diversity, the supplemental claim is a Rule 13 counterclaim by a D.

- C. Yes, because breach of contract is not a novel or complex issue of State law.

Incorrect, because this answer refers to 1367(c), which exists to give a federal court the discretion to decline otherwise proper supplemental jurisdiction. It does not, however, create supplemental jurisdiction.

- D. No, because the supplemental claim is asserted against a plaintiff.

Incorrect, because 1367(b) does not care whether the supplemental claim is asserted against a P. It cares whether a P is asserting the supplemental claim.

7	Q7	A	39.58	12.50	22.92	25.00
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8. Assume for this question only that Luci Rabbit is an employee of the California Park Service, and that Atticus' sole claim against her is under 42 U.S.C. § 1983, which states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" He alleges that Luci violated Section 1983 by confining him to false imprisonment on Alcatraz Island. Does the court have subject matter-jurisdiction? He only seeks return of his \$41.

- A. No, because the amount in controversy sought against Luci is too low.

Incorrect, because federal question SMJ does not require an AIC.

- B. No, because at its essence Atticus is simply claiming that Luci falsely imprisoned him, which is a common law claim created by state law.

Incorrect, because the cause of action is created by federal law and satisfies federal question jurisdiction.

- C. Yes, because his state-law claim includes a substantial federal ingredient.

Incorrect, because here Luci is asserted a federal cause of action, a private right of recovery created by the U.S. Congress.

- D. Yes, because he is alleging a cause of action created by federal law.

Correct, because he is.

8	Q8	D	6.25	22.92	33.33	37.50
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9. Assume for this question only that federal regulations concerning former federal prisons require that all tour operators to take a head count to make sure that any visitors are accounted for and not abandoned at former prisons. Atticus' sole claim against Luci is for negligence per se premised on Luci's failure to abide by the federal regulation. Is there federal question jurisdiction?

A. Yes, because the claim turns on an issue of federal law.

Incorrect, because this is not by itself enough for the "state claim with a federal ingredient" to satisfy federal question jurisdiction (Grable/Gunn). The federal issue must be necessarily raised (it is), actually disputed (it is), substantial to the federal system as a whole (likely it is not) and capable of resolution in federal court without disturbing Congress' intended balance of state-federal dockets (allowing FQ SMJ here would invite many more negligence cases into federal court in cases where the lawyer could tie the state claim to a federal regulation or standard.)

B. Yes, because the federal issue is substantial.

Incorrect, for the reasons noted above. The federal issue may be important to the parties but is not particularly important for the smooth operation of the federal government.

C. No, because claims created by state law cannot be heard in federal court.

Incorrect, because diversity jurisdiction allows exactly this.

D. No, because allowing the claim in federal court would upset Congress' intended balance of case allocation between federal and state courts.

Correct, because if this claim would satisfy the Grable/Gunn test, then likely so could any negligence per se claim that turns on a duty borrowed from a federal regulation or rule. Such claims are easy to state and could unleash a floodgate of state negligence claims in federal court between non-diverse litigants. In fact, the Court already rejected FQ SMJ over an analogous claim in Merrell-Dow (negligence per se premised on federal drug labeling standard).

9	Q9	D	58.33	12.50	2.08	27.08
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10. Suppose that the Florida long-arm statute instead only allows personal jurisdiction over “tortious conduct in the State of Florida.” What is Luci’s best argument that the long-arm would not be met?

A. She did not purposefully avail herself of Florida.

Incorrect, because purposeful availment is part of the Due Process analysis in the context of “Minimum Contacts.” It is not part of the long-arm statute, which requires construction of what is “tortious conduct,” and a determination of where it occurred.

B. The exercise of personal jurisdiction against her in Florida would be compellingly unreasonable due to the burden of her traveling, the fact that Florida has a small interest in events happening in California, and that witnesses and evidence would be based primarily in California.

Incorrect, because of the same reason. The reasonableness factors are part of the Due Process/MC test.

C. Any contacts she has with Florida did not give rise or relate to Atticus’ claim, which arose in California.

Incorrect, because of the same reason.

D. The harm did not occur in Florida.

Correct, because if the tortious conduct did not occur in Florida, then the long-arm does not authorize PJ, regardless of what the minimum contacts test would have to say.

10	Q10	D	2.08	10.42	10.42	77.08
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