



**The University of New Mexico**

---

School of Law Library  
MSC11 6080  
1 University of New Mexico  
Albuquerque, NM 87131-0001  
Telephone (505) 277-0939  
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

**NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS**

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

512 Civil Procedure I  
Spring 2000

Three Credits

Professors DuMars & Kovnat  
Wednesday, May 10, 2000  
1:30 p.m. to 5:30 p.m.

**Final Examination**

(Four Hours)

**INSTRUCTIONS:**

This is an open-book examination. You may bring into the exam your class materials, the federal rules of civil procedure, notes, an outline prepared either by you or together with other students in the class. You may not bring any commercial outlines, hornbooks, nutshells or other similar materials.

The examination consists of five questions. They are not equally weighted. The time allotments are for your guidance and they reflect the approximate relative weight of each question. Please use the extra time to organize your answers so that your arguments are presented clearly.

Take a deep breath, relax, and after you finish this examination, enjoy your summer.

**[EXAMINATION BEGINS ON NEXT PAGE]**

### Examination

On July 15 1996, while on a trip to San Diego, California, Professor Klutz bought a pair of fashionable shoes at the Macy's Department Store in San Diego. The shoes, while elegant, were of a sturdy design and had sensible heels. The shoes were manufactured by Damato Ltd., a well-known Italian shoe manufacturer. On April 15 1999, Professor Klutz who lives and works in New Mexico, fell down a flight of stairs when at work in Albuquerque while wearing her Damato shoes. She believed that her fall was caused by a break in the heel of the left shoe. She was shocked by the broken heel for two reasons: first, she had worn this particular pair of shoes infrequently so that they were "practically new;" and second, she had been induced to purchase these shoes by the Macy's salesperson's representation that the heels were particularly strong.

Professor Klutz's injuries consisted of a large bump on her head and a disfiguring, deeply scraped knee. She missed no work, but did experience difficulty in sleeping for weeks after her fall. In September of 1999, after hearing on National Public Radio that each hour of sleep loss reduces IQ by five points, Professor Klutz consulted her attorney. After listening to Professor Klutz's account, the attorney asked Professor Klutz whether she had noticed anything on the stairs that might have contributed to her fall. Professor Klutz said: "No, and in any case, I don't want to involve my employer in this case. Even if something is wrong with the stairs, I only want to sue Macy's and Damato. Can't I do that?" The attorney said: "Sure you can. It's even better if you leave your employer out of it. You can sue in federal court." The attorney then proceeded to draft Professor Klutz's complaint against Macy's Corporation and Damato. Macy's is incorporated in Delaware, has its principal place of business in New York, and has stores in 25 states, including one in Albuquerque, New Mexico. Damato is an Italian business enterprise that ships its full line of shoes to Macy's upscale stores in New York, Texas and California. Damato is registered to do business in California. California has strict standards as to shoe construction safety. The heel design was developed in Italy, but all the technical experts who worked on it are employed at Sandia Laboratories in Albuquerque. However, Damato does not supply shoes to the Macy's store in Albuquerque nor does it regularly ship shoes to any other retail outlet in New Mexico. Occasionally, Damato does ship shoes directly to New Mexico consumers when those consumers place orders with Damato through Damato's web site. Damato also sends its catalogue and price lists to specialty retailers in New Mexico and from time to time receives an order from New Mexico through this route. Damato gross sales volume in New Mexico is approximately \$20,000 per year.

Klutz's attorney filed her complaint against Macy's and Damato in federal district court for the District of New Mexico on October 15, 1999. She alleged jurisdiction on the basis of diversity of citizenship. The complaint alleged further, in the claim against

Macy's, that: 1. ... "on or about July 15, 1996, plaintiff purchased Damato shoes from Macy's in San Diego; 2. Macy's employee warranted that the Damato shoes were sturdy and had induced plaintiff to buy the shoes; 3) on or about April 15, 1999, as a result solely of defective design or manufacture, a heel broke on one of the shoes and catapulted plaintiff down a flight of stairs; 4) as a result of the fall, plaintiff suffered severe and grievous injuries. In the claim against Damato, plaintiff alleged that Damato sold the defective pair of shoes to Macy's of San Diego some time before July 15, 1996 and realleged that her fall was caused solely by the defective design or manufacture of the shoes sold to Macy's and ultimately to Klutz. Klutz sought compensatory damages in the amount to be determined at trial for her physical injuries, pain and suffering, lost sleep and reduced intelligence. With the complaint, Klutz's attorney simultaneously filed and effected service of a writ of attachment on all of Macy's inventory in New Mexico.

Service of the complaint and summons was effected on Macy's on November 1, 1999 by personal delivery on the manager of the shoe department of Macy's store in Albuquerque and by mailing a copy to Macy's headquarters in New York. Macy's does not have a registered agent in New Mexico. Service was made on Damato by mailing the forms for waiver of service as specified in Federal Rule of Civil Procedure 4(d). Damato waived service in accordance with that rule on December 1, 1999.

Immediately after being notified of the action against Macy's, its corporate counsel called the general manager of the San Diego store and directed her to take the statement of the salesperson who had sold Damato shoes on July 15, 1996. In particular, she was to be questioned about her recollection of her conversations with Klutz regarding the sale and purchase of Damato shoes. The employee remembered the interchange well and her statement was taken by videotape because she was about to leave for an extended stay in Tahiti. Macy's lawyers also served an interrogatory on Klutz inquiring about the exact location of the fall. Klutz objected to this interrogatory because her employer was not a party to the suit and she did not want to give any information that would involve her employer in the action. Following Klutz's instructions, her attorney filed objections to the interrogatory stating that it sought irrelevant information and besides no discovery could be had until the attorneys met and conferred about initial mandatory disclosures. When Macy's was notified of the objection, it immediately hired an investigator and learned the location of Klutz's fall. Moreover, Macy's investigator discovered that the stair case on which the fall occurred was very uneven and all the steps had deep pits which could have easily caught the heel of even the best designed and manufactured shoe.

Macy's attorneys also did some legal research and learned:

1. Under New Mexico law, the law that governs in a suit stemming from injuries caused by sale of defective products is the law of the place where the sales takes place.
2. The New Mexico statute of limitations for actions for personal injuries caused by sale of defective products is three years from the date of the injury. The California statute of limitations for actions for personal injuries caused by sale of defective products is three years from the date of the sale.
3. To prevent erosion of its workers' compensation policies, California law requires that employees who are injured on their employer's premises join the employer as a defendant in any personal injury action filed against any other party. California law also requires that a court resolve the claim against the employer before it proceeds to trial on an employee's personal injury claim against any one else.

A. Damato moved to dismiss Klutz's complaint on three grounds:

1. for lack of jurisdiction over its person;
2. for improper venue or in the alternative on the grounds of forum non conveniens;
3. for failure to state a claim on which relief can be granted by virtue of the California statute of limitations.

B. Macy's filed an answer.

In its procedural defenses, it challenged:

1. the subject matter jurisdiction of the court;
2. the jurisdiction of the court over its person;
3. service of process

It also moved to dismiss the complaint on the grounds that it failed state a claim on which relief may be granted both because of the California statute of limitations and because it failed to allege the place of injury or to identify the salesperson who made representations to Klutz.

In its substantive answer, it admitted the sale, but denied the shoes were defective. It asserted lack of causation as an affirmative defense averring that the cause of Klutz's injuries was the condition of the staircase.

C. Macy's also filed a Rule 11 motion against Klutz and her attorney because the allegation of causation in the complaint lacked evidentiary support. Up to now, Klutz has not responded to this motion either by withdrawing, or by amending her complaint, or in any other way.

Question I (One Hour)

Rule on Damato's motion. Articulate the arguments in support of the motions as well as those opposed. Give reasons for your rulings.

Question II (One Hour)

Rule on Macy's procedural defenses contained in its answer. Articulate all of the arguments and give reasons for your rulings.

Question III (15 minutes)

Rule on Macy's Rule 11 motion. Again articulate the arguments and give reasons for your ruling.

Question IV (30 minutes)

Whatever you decided above, now assume that, after all of this initial wrangling, this case is proceeding in the federal district court for the District of New Mexico against Macy's and Damato.

Klutz subpoenas the general manager of Macy's in San Diego ordering him to attend a deposition in San Diego and to produce the videotaped statement of the salesperson who sold Klutz the Damato shoes.

Macy's moves to quash the subpoena on the grounds of attorney client or in the alternative attorney work product privilege. The salesperson is still in Tahiti. Her exact location is unknown.

Rule on Macy's motion. Give arguments and reasons.

Question V (30 minutes)

Discovery is now completed and Macy's moves for summary judgment. It supports its motion with the affidavit of a shoe expert who has examined Klutz's shoe and who swears that it was made free of defects. Macy's also supplies properly authenticated photographs of the steps which show the unevenness and pits in the steps. Klutz responds with her affidavit swearing that at the time of the fall, she was using the staircase in a normal fashion and that the heel of her shoe was not subject to any extraordinary forces by virtue of an uneven or pitted staircase. Rule on Macy's motion for summary judgment giving reasons for your ruling.

**[END OF EXAMINATION]**