

## **ESSAY QUESTION NO. 4**

### **Answer this question in booklet No. 4**

Dan, the CEO of Heavy Equipment Inc. comes into your law office on February 1, 2005, with a complaint filed on January 20, 2005, that alleges Heavy Equipment Inc. breached a contract with Bearings, Inc. The complaint also alleges that Heavy Equipment Inc. tortiously interfered with Bearings, Inc.'s future business opportunities by spreading lies about its bearings. According to the complaint, Dan called the owner of Bearings, Inc. on March 10, 2002, and said that he was not going to honor the contract and that he had advised his friends in the heavy equipment business in Anchorage not to use Bearings, Inc., because Bearings, Inc. used inferior materials.

The contract was signed by all the parties on March 1, 2002. According to the contract, Bearings, Inc., agreed to rebuild all of Heavy Equipment Inc.'s bearings for the 12 month period beginning April 1, 2002.

Dan said that in early March 2002 one of his engineers told him that Bearings, Inc., used inferior materials in rebuilding bearings. Dan decided not to use Bearings, Inc., because he did not want to risk damaging the company's equipment. Dan shows you a letter signed by the owner of Bearings, Inc. on March 15, 2002. In the letter, the owner denies that his company uses inferior materials and says he is shocked that Dan would damage Bearing Inc.'s reputation in the heavy equipment industry.

Dan says that his Manager for Customer Relations was served with the complaint in Bethel, Alaska while he was there on a business trip. Although the Manager is a senior employee of Heavy Equipment Inc., he is not a shareholder or officer of the company. His duties only involve sales and marketing.

The complaint was filed in the Superior Court in Bethel in the Fourth Judicial District. Bethel is 400 miles from Anchorage and accessible only by air. Dan does not want to go to trial in Bethel. Dan would rather go to trial in Anchorage in the Third Judicial District because his facilities are in Anchorage. Three of Dan's employees negotiated the contract for Heavy Equipment Inc. Dan says that it will be expensive and time consuming if the witnesses have to fly to Bethel for the trial. Dan also says that Bearings, Inc.'s manufacturing plant is in Anchorage. Heavy Equipment Inc.'s employees negotiated the contract with Bearings Inc.'s employees in Anchorage.

1. Discuss any procedural motions suggested by the facts that you can file on behalf of Heavy Equipment Inc.

## **GRADER'S GUIDE**

### **\*\*\* QUESTION NO. 4 \*\*\***

#### **SUBJECT: CIVIL PROCEDURE**

##### **A. Insufficiency of Process (20 pts.)**

Alaska Rule of Civil Procedure 12(b) provides that a party may file a motion to dismiss for the following reasons: (1) for lack of subject matter jurisdiction, (2) lack of personal jurisdiction (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, and (7) failure to join a party under Rule 19.

Alaska Civil Rule 4 requires personal service of the complaint. Subsection (d)(4) provides that service on a corporation is made by delivering the complaint and summons to an “officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.”

Bearings, Inc. served the complaint on Heavy Equipment Inc.’s Manager for Customer Relations. The Manager is not an officer and his duties do not include receiving service of process. Thus, Bearings, Inc., failed to serve the corporation properly, and Heavy Equipment Inc. could file a motion to dismiss under Alaska Rule of Civil Procedure 12(b)(4).

##### **B. Improper Venue (50 pts.)**

Heavy Equipment Inc. has arguments to change venue under both Alaska Civil Rule 12(b)(3) and AS 22.10.040.

###### **1. Rule 12(b) Motion To Dismiss**

Subject to a couple of exceptions not relevant to this question, Rule 12(b) motions must be filed together. Both the venue and process must be filed at the same time. According to Alaska Rule of Civil Procedure 3(c) venue is proper in the judicial district where (1) the claim arose or (2) where the defendant may be personally served. The facts indicate that the claims arose in Anchorage. The contract was negotiated in Anchorage and Dan made the decision to breach the contract in Anchorage. He also told his friends in the heavy equipment business in Anchorage that Bearings Inc. used inferior materials. Thus, the tort claim also arose in Anchorage. Nothing in the facts indicates that Heavy Equipment Inc. may be personally served in Bethel or the Fourth Judicial District. The manager for Customer Relations was in Bethel on a business trip, but nothing indicates that Heavy Equipment, Inc has any officers or agents in Bethel. Heavy Equipment could file a motion to dismiss for improper venue.

## 2. Motion To Change Venue - AS 22.10.040

Heavy Equipment Inc. may also file a motion for a change of venue under AS 22.10.040 which allows for a transfer of venue when (1) an impartial jury cannot be had, (2) the convenience of the witnesses and the ends of justice would be promoted by the change (3) the local judge is disqualified, or (4) the defendant will be put to unnecessary expense and inconvenience.

The facts suggest that Heavy Equipment could move for a transfer of venue based on subsection (2) and (4).

The convenience of the witnesses will be served by holding the trial in Anchorage. Dan's witnesses live in Anchorage, and they negotiated the contract with employees of Bearings Inc., in Anchorage. Dan will need to support his motion outlining the proposed testimony of the witnesses showing that their evidence would be admissible, relevant, and material and why the attendance of each would be inconvenient. Coughlan v. Coughlan, 423 P.2d 1010, 1015 (Alaska 1967). The inconvenience would result from having to travel to Bethel.

The proposed change of venue must also "promote the ends of justice". Id. The Alaska Supreme Court has not interpreted the phrase "promote the ends of justice". However, in explicating the doctrine of *forum non conveniens*, the court emphasized that trial courts should consider the burden on the community in litigating matters not of local concern and the desirability of litigating local matters in local courts. Bodzai v. Arctic Fjord, 990 P.2d 616, 621 n. 28 (Alaska 1985). Bethel has no apparent connection to the case at all. The issues involve events that took place in Anchorage, so an Anchorage jury should decide it.

Heavy Equipment could also move for a change of venue under subsection (4) which allows for a change when the venue chosen by the plaintiff would cause unnecessary expense and inconvenience. Dan has indicated that Heavy Equipment will bear the cost of flying and lodging its employees in Bethel for the trial. This will also cost the company in lost productivity, for the employees will have more lost time if the trial were in Bethel rather than Anchorage.

### **C. Statute of Limitations (30 pts.)**

The facts indicate that Heavy Equipment Inc. should move for a partial summary judgment on the tort claim. The complaint alleges both a contract claim and a tort claim. The limitations period for contract claims is 3 years, AS 09.10.053, while the limitations period for torts is 2 years, AS 09.10.070 .

The contract was signed on February 1, 2002, with performance to begin on April 1, 2002. Heavy Equipment Inc. breached the contract sometime in the

first half of March when he called the owner of Bearings, Inc. and told him that he would not use Bearings, Inc. The owner's letter dated March 15, 2002, shows that the contract breach and the tort occurred in the first half of March 2002. The complaint was filed on January 20, 2005, or about 2 years, 10 - 11 months after the contract breach and alleged tort.

Since the complaint was filed within 3 years, the contract claim is viable. However, the complaint was filed 10 - 11 months after the limitations period for the alleged tort expired. The Discovery Rule, see Hutton v. Realty Executives, Inc., 14 P.3d 977, 980 (Alaska 2000), is not an issue because Bearing Inc.'s March 15, 2002, letter indicates that he had knowledge of the alleged tort by then.

Although a the failure to file a complaint within the limitations period can be the basis for a Rule 12(b)(6) motion for failure to state a claim, Hutton v. Realty Executives, Inc., 14 P.3d 977, 979 (Alaska 2000), the motion on these facts will really be a summary judgment motion. Heavy Equipment Inc. cannot succeed on its motion without submitting an affidavit from Dan and the owner's letter.

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# Alaska Bar Examination

**FEB**  
**2005**

*This Book is for your answer to*

*Question* **No. 4** *Only*

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## 1) Change of Venue - Forum Inconvenience

Don can file a Motion for a change of venue. ~~Don's~~ ~~the~~ When a court determines change of venue, the court must first determine whether the other court would have jurisdiction. Secondly, the court will take the costs and efficiency of having a trial in another location into effect. Also where the action occurred.

In this case Anchorage ~~is~~ Superior ~~court~~ <sup>court</sup> would have jurisdiction, since both parties have locations in Anchorage. Secondly, this appears to be more convenient than Anchorage, due to location of witnesses. Last, the contract was ~~not~~ formed

in Anchorage. Due to availability and costs of witnesses change of venue would be an appropriate motion to file.

Motion to Dismiss Failure to state a claim  
Failure to serve.

One might file a failure to dismiss and claim that Bearings Inc. failed to state a claim. Are Bearings Inc. must state a claim for which relief may be granted. ~~Deny~~ One could argue that No Breach of contract or Elements of interfering with a contract are present, and therefore a valid claim for which relief could be sought is claim.

One could also argue that serving an employee in Bethel is inappropriate service.

One may be served by certified mail with receipt, as well as personal service.

However bearing in mind served an employee in Bethel and it is doubtful whether this

was appropriate service. Personal service of corporation can not be to any employee,

but must be to a director or member of the board in most cases. Therefore

a Motion to dismiss due to failure of proper service ~~we~~ would be appropriate

### No Personal Jurisdiction

One might argue that the Bethel



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Court does not have personal jurisdiction in this matter. ~~one~~ To establish personal jurisdiction one must be where corporate is located, or time occurrence of the injury.

In this case ~~Dr~~ Heavy inc. would argue that they are located in Anchorage, and that the alleged injury also occurred in Anchorage. Therefore the action in Bethel B is void ~~is~~ since they ~~do~~ do not have jurisdiction.

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# Alaska Bar Examination

**FEB  
2005**

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4)

The first issue is change of venue. A party can file in any jurisdiction in the state. Usually it is where the business headquarters is or where they operate most etc. The policy is that you file where it is convenient for most of the parties who will be involved in the court case. Bearing had a right to file in Bethel since it appears that business did go on there because we are told that the Manager of Customer Relation was there for a business trip.

Next can the case be brought under Statute of Limitations (SOL). In Alaska under 1997 Tort reform act the SOL for contracts was lowered from 6 years to three. So assuming the date supplied is correct Contract was signed March 1, 2002 and was to run for 12 months. So three years would end on March 1, 2005. It is close and the firm will have to hustle but SOL is met.

Timeliness of answer. Heavy Equip has 20 days to file answer and was served on January 20. If today's date is used then the 20 days has expired and all issues pled by Bearings are found to be in their favor since Heavy Equip was not timely.

Service - This may be the one that saves the 20 days. Was the company properly served?

Service is generally at the company's headquarters site or where they have designated to the state on their incorporation papers that they can be served. It appears that Anchorage would be the proper site. Heavy can argue that service was not done. The customer service manager might be qualified to get service depending on what his standing is within the company. Here he is not an officer of the company and has not duties that would imply that he is an officer.

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The argument should be made that service is not proper since no agent of the inc was served and due to incorp papers filed with the state Bearing could had found out where to complete service. If not proper service is granted then the 20 days don't count and Equipment can be served again. This should be granted by court since person served was not authorized by company to receive service.

Bearing can still get it in under the SOL but it will be close. Since they did file in time the court should allow them to refile and by relation back doctrine they can argue that SOL has been met. On other hand Equip can argue SOL should govern since Bearing had plenty of time before now and was not in good faith when they filed in Bethel.

Equip can ask for change of venue. Court will consider where most of the witnesses are and where other evidence might be. After all the taxpayers in Bethel should not have to bear the expense if the occurrences were in Anchorage. Equip can so cause and will be granted change of venue. This must be filed in the first motion to the court made by Equip or it can be considered waived. The same way with the proper service. Has to be in the 1st one or waived.

So file wrong service as way to save Equip from exceeding the 20 days. then do change of venue. If Bearings doesn't file in time (SOL March 1) then Equipment can use SOL as reason that case should be dismissed.

File for Change of venue and it should be granted.

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**Alaska**  
**Bar Examination**  
**FEB**  
**2005**

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① (A) Lack of Proper Service

The defendant, Heavy Equipment Inc, (~~HEI~~) should file a motion in Bethel stating that the plaintiff did not properly serve defendant the complaint.

The plaintiff served a ~~to~~ senior employee, not an officer with the company, nor the designated agent of the company. Further, the service of an employee in Bethel, as opposed to Anchorage was not the proper place of service. Generally, a corporation may be served by either certified mail to the principal place of business, personal delivery to the principal place of business or general headquarters, or the designated agent of the company for service. Every company operating in Alaska

is required to designate an agent and have that person be on record with the State as its agent. In this case, the plaintiff served an employee - not any agent. ~~The~~

~~The~~ plaintiff can serve a person who appears qualified to receive service if they are unable to identify <sup>to whom</sup> ~~or~~ where they are supposed to bring a service of complaint.

It is questionable whether the Manager for Customer Relations is qualified.

### (B) Change of Venue

A ~~the~~ motion for a change of venue in this case is ~~ex~~ very appropriate. The motion must be filed in Bethel, Me. ~~but~~.

the Bethel Court should grant the motion.

A court will look at several factors in determining whether a change in venue is proper. First, the court should determine what type of suit is being ~~seen~~ brought - contracts, tort, or other.

In this case, the plaintiff is suing on a contract ~~claim~~ claim and a tort claim.

The contract could have a provision for where to bring a claim, but ~~it is not~~ in this case ~~the court~~ there does not appear to be a clause like that.

Thus, the court will look at where the injury (tort case) or breach (contract case)



occurred, where the defendant is ~~in~~ place of business is located, the ease at which the court can compel witnesses, the cost to the ~~part~~ parties, the location at which a contract was negotiated, and the ~~ex~~ expectations or foreseeability ~~of~~ the defendant to be sued in the venue at hand.

In this case, the Bethel court will consider what, if any ~~ties~~ <sup>ties</sup> the defendant has in Bethel. Generally, a plaintiff can bring a claim in the jurisdiction in which the ~~pl~~ defendant's business is located or where the injury occurred. According to the facts,

it appears as though the defendant has minimal presence in Bethel. Heavy Equipment, its plant and management staff are located in Anchorage. The person who was served was only on a business trip to Bethel, ~~Alaska~~. Moreover, the contract was negotiated in Anchorage, not Bethel. The phone call that is the tort claim appears to have taken place in Anchorage. Thus, the court in Bethel could easily grant the motion to change venue.

Additionally, the court will take notice that the plaintiff's business is located in Anchorage, and it appears plaintiff is trying to harass

The defendant is by bringing a claim in Bethel. Plus, the fact that defendants will have to fly in 3 witnesses to Bethel - at great cost - ~~By~~ demonstrates the inconvenience to potential witnesses and the cost to bringing a suit in Bethel.

Anchorage would be easier for both parties and is the proper venue for this case.

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# Alaska Bar Examination

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## I. Motion to Dismiss for Improper Service

Service on a corporation must be on registered agent, director, officer, or general manager.

If service is improper, ~~the~~ personal jurisdiction will fail and the defendant can move for dismissal pursuant to Civil Rule 12. Dismissed for ~~in~~ lack of personal jurisdiction over the defendant due to failure of service would be without prejudice to the plaintiff.

Here, Bearings served the defendant Heavy by serving the Manager of Customer Relations. Heavy is a corporation, so service must be on a person under the service rule (which I believe is Civil Rule 4). At first blush, it appears that service fails because the Manager of Customer

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Relations is not the General Manager. He or she is merely a senior employee in a management position. He is not a shareholder or officer of the company and his duties only involve sales and marketing, nothing directly related to general oversight. Bearings will likely argue being any manager is sufficient and the Manager ~~is~~ is a Sr employee and the complaint reached the right people. However, in light of Manager's technical and practical ~~status~~ lack of status as general manager, service shall fail.

#### II. Motion to Transfer Venue

Proper venue for an action is either where claim<sub>s</sub> arose, where defendant resides, or where ~~the~~ defendant

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is served. Technically, since Heavy was served in  
Bethel in the 4<sup>th</sup> Judicial District, venue is proper.

However, from the facts venue appears that it  
will be very inconvenient. Thus, Heavy will likely  
want to move for transfer of venue ~~on~~ on  
the grounds that it is very inconvenient  
("Forum Non Conveniens"). The AK court  
will look at the following factors in considering  
a forum non conveniens transfer motion:

1. Access to evidence
2. Prejudice to defendant in defending action  
~~Harassment~~
3. Convenience of current forum for  
witnesses
4. Whether proper relief can be granted by  
current court
5. Burden on the community

Here, it appears that all of the evidence

all witnesses, and parties are in Anchorage in the 3<sup>rd</sup> judicial district. It will be expensive and time consuming for Heavy to have witnesses fly to Bethel. All action took place in ANC and both parties have all their facilities here. Furthermore, Bethel is unusual in that it is 400 miles from ANC and only accessible air. That is particularly inconvenient. Other judicial districts are at least accessible by road. Finally, since really ANC issue, seems unfair for a remote small town to bear burden of trying this case.

Motion to transfer likely granted

### III State of Limitations

R12 motion for failure to state a claim



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because it appears like the tortious interference claim ~~has~~ will be barred by statute of limitations, which is 2 yrs for tort. Looks like claim arose around 3/10/02 so it had to be filed by 3/10/04, so the complaint filed as of 1/20/05 likely barred. Not so with breach of contract because that statute is of limitation is 3yrs so had to be filed by 3/10/05, so within that time period.

TV. ~~Motion to Dismiss~~ ~~and~~ ~~Summary Judgment~~

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# Alaska Bar Examination

**FEB  
2005**

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4)

Heavy Equipment Inc. (HEI) has can file several procedural motions that will keep Bearing Inc.'s (BI) action against it out of court.

To begin with there was inadequate service of process on at least two accounts. First, in order for an Alaskan court to have personal jurisdiction over a defendant the complaint **must** be served with the summons. On the facts presented in the question, Manager was only served with the complaint while in Bethel. Thus the court does not yet have jurisdiction over HEI. However, it should be noted that HEI should be careful in challenging this or any of the following in court without first preserving its lack of personal jurisdiction challenge. Otherwise HEI may inadvertently waive this claim.

Also in regards to inadequate service of process, the service of the complaint on Manager was inadequate. In Alaska, a defendant may be served personally or by mail. Personal service may be done in one of three ways: personal delivery to the defendant by an authorized process server at his place of work; or to someone then residing at the defendant's dwelling; or to a 3rd party authorized by the defendant to accept service. Here, Manager duties were confined to sales and marketing. On the facts, HEI has not explicitly authorized Manager to be served and thus service to him was improper and a motion to dismiss for improper service should be made.

Venue was also improper. In Alaska, venue is proper either in the judicial district where

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the claim arose or where the defendant can be served. In this case, BI filed the action in Bethel. Neither BI or HEI operate out of Bethel. Both the contract claim and the tortious interference claim arose out of conduct that occurred in Anchorage, which is in another judicial district. When venue is improper, a court must relinquish jurisdiction to the proper judicial district and HEI should move for a change in venue based upon improper venue.

Even if the court deems service upon Manager in Bethel as proper and thus venue as proper in Bethel, HEI could still make a motion for change of venue based upon inconvenient forum. A court with proper jurisdiction/venue may still relinquish jurisdiction over a claim if in its discretion it determines that another forum would be better suited to hear the complaint. The court will look at the following factors in making its determination: inconvenience on witnesses, expense and trouble on the defendant, problems with the particular judge, or jury issues as well. Because the parties and witnesses to this action are all living in Anchorage and it would be a great expense and inconvenience to travel to Bethel the court is likely to grant a motion for change of venue.

HEI should also file a motion to dismiss based on the running of the pertinent statute of limitations. For tort claims in Alaska the SOL is 2 years. For contract claims the SOL is 3 years. And for contract claims for the sale of goods governed by the UCC as adopted in Alaska the SOL is 4 years. Here the alleged breach was on March 10, 2002 by HEI of their contract with BI. Thus BI must have filed their claim by March 10, 2005. They did file on January 20, 2005, however, as mentioned previously service was improper and thus the SOL has yet to be tolled. As to the tortious interference claim, the

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question provides no date as to when the alleged interference occurred, but since Alaska follows the Discovery Rule with regards to the starting of the clock--i.e. the clock starts running when the plaintiff knows or should have known about all the elements of their claim--the tortious interference would assumably have occurred around the time of the alleged breach and thus the 2 year SOL has run and plaintiff has no enforceable tort claim.