

Civil Procedure
Professor Sachs
Final Exam, Fall 2013

Please answer each of the following three questions. You're free to use any paper or electronic materials you have brought with you, but not the Internet.

Each question has a recommended time allocation based on the number of points it's worth. The recommendations build in

- (1) an extra 20 minutes at the beginning to read through the entire exam, and
- (2) an extra 15 minutes at the end for proofreading.

Read each question carefully. My advice is to take a half-hour or so to sketch an outline to all three questions before you actually begin to write. If you just dive in, you'll get lost halfway through.

Organize your answers clearly. You don't need to follow the "IRAC" format with rigor, but you should identify the applicable legal standard before applying it. Stating your conclusions up-front will be very helpful to me when grading. Mentioning individual rules or statutes can be useful, but chapter-and-verse citations are unnecessary; it's more important to state the substance correctly. The same is true for relevant cases.

When giving reasons why a particular result would be legally correct, you should give as many as come to mind—even if just one of them would be enough to end the case. (Don't assume that I'll know you know the basics; show me that you do!) That said, brevity is appreciated.

Answers will be graded on your understanding, analysis, and clarity of exposition. Individual questions on the exam will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with Duke's grading policies.

Good luck!

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Question I. (60 pts, ≈ 2 hrs 40 min.)

Your firm’s client, Dr. Victor Gronkenspleen, has just received a summons and complaint naming him as a defendant. The complaint reads as follows:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

CAWKER CITY MOTOR LODGE,)
on behalf of all others similarly situated,)
ERNIE SYKES, and)
MYRTLE SYKES,)
)
Plaintiffs,)
)
v.)
)
DR. VICTOR GRONKENSPLEEN,)
)
Defendant.)

Case No. 13-1031

**JURY TRIAL
DEMANDED**

COME NOW the Plaintiffs, by and through their attorneys, PITCHFERK & TURCHES LLP, and state as follows:

INTRODUCTION



Fig. 1. Cawker City. © 2012 Dan Brown. Used per Creative Commons Attribution—Share Alike 3.0 Unported license.

1. This is Cawker City, Kansas. Once a city of nearly five hundred people. What has happened here was caused by a force which up until recently was entirely beyond the scope of Man's imagination. Cawker City, a smoldering memorial to the unknown, an unknown which at this very moment still prevails and could at any time lash out with its terrible destruction anywhere else in the world.

JURISDICTION

2. Subject-matter jurisdiction is proper in this Court because the case arises under federal law, *see* 28 U.S.C. § 1331, and because the parties are citizens of different states, *see* 28 U.S.C. § 1332. In the alternative, supplemental jurisdiction is proper under 28 U.S.C. § 1367.

PARTIES

3. Plaintiff CAWKER CITY MOTOR LODGE (the "Lodge") is a Nebraska corporation. At the time of the Incident, it operated a motel in downtown Cawker City, Kansas, conducting its corporate affairs from an office in the lobby. The Lodge sues on behalf of a class of all businesses that operated within the city limits of Cawker City as of October 31, 2012 (the "Kansas Plaintiffs").

4. Plaintiffs ERNIE SYKES and MYRTLE SYKES are citizens of Nebraska.

5. Defendant DR. VICTOR GRONKENSPLEEN is a subject of the Principality of Transylvania and a lawful permanent resident of the United States domiciled in Kansas.

ALLEGATIONS COMMON TO ALL COUNTS

6. Defendant GRONKENSPLEEN is the Director of the Drăculești Cryptozoological Laboratory, located just outside Cawker City (the “Laboratory”). On information and belief, Defendant GRONKENSPLEEN has at all times relevant to this Complaint had full authority over the Laboratory’s design, management, and physical plant.

7. When he opened the Laboratory, Defendant GRONKENSPLEEN promised the residents of Cawker City that there was nothing to fear from its operation. For several months prior to the Incident, however, disturbing reports circulated among the townspeople about the bizarre experiments conducted there and the unnatural creatures housed therein. Now, Defendant GRONKENSPLEEN’s pride and hubris have led to ruin for us all.

8. According to information bravely supplied by a former employee of the Laboratory, now suspiciously deceased, Defendant GRONKENSPLEEN intentionally kept, fed, and maintained at the Laboratory for many weeks prior to the Incident a certain monstrous and unnatural creature (the “Creature”). The origins and nature of the Creature remain mysterious to Plaintiffs, even as of the date of this Complaint.

9. A true copy of a photograph of the Creature, taken by the same now-deceased employee, is reproduced in Fig. 2.



Fig. 2. The Creature.

10. On or about October 30, 2012, the same now-deceased employee was instructed by his immediate supervisor to install, together with several other Laboratory employees, an opening in a side door of the Laboratory. The said opening was described as slightly larger than the Creature. Although this opening was in a portion of the Laboratory easily accessible by the Creature, these employees were not instructed to secure the opening, but merely to cover it with an easily opened rubber flap. Heedless of the danger, the employees obeyed their supervisors' instructions.

11. In light of Defendant GRONKENSPLEEN's position of authority in the Laboratory, in the absence of any other reasonable explanation, and given the remarkable nature of such an act as installing an accessible Creature-sized opening in a side door, Defendant GRONKENSPLEEN must have personally ordered the installation of the opening.

12. On or about the evening of October 31, 2012, the Creature discovered the said opening and escaped from the confines of the Laboratory, beginning the reign of terror that is the subject of this Complaint.

**COUNT I — NEGLIGENT DEPRIVATION OF BUSINESS OPPORTUNITIES
(*PER SE* NEGLIGENCE / VIOLATION OF FEDERAL AND KANSAS LAW)**

13. The foregoing paragraphs are hereby incorporated by reference as if fully restated herein.

14. Prior to the Incident, Cawker City was home to the World’s Largest Community-Rolled Ball of Twine (the “Ball of Twine”). The Ball of Twine was the city’s main attraction; the tourism it generated was a major revenue source for local businesses. A true copy of a photograph of the Ball of Twine is reproduced in Fig. 3.



Fig. 3. The Ball of Twine, in happier days.

15. At some time between 8 p.m. on October 31, 2012, and 6 a.m. the next morning, the Creature entered the building housing the Ball of Twine. Once there, it proceeded remorselessly to unravel the said Twine, destroying Cawker City’s best hope at economic revival.

16. The Lodge is highly dependent on Cawker City's tourist trade. With the Ball of Twine destroyed, tourists found little reason to visit Cawker City. In the twelve months following the Incident, the Lodge saw its average vacancy rate quadruple as compared to the prior year.

17. Due to the Incident, the other businesses operating in Cawker City have all suffered declines precisely identical in scope and monetary value to that suffered by the Lodge.

18. Kan. Stat. Ann. § 29–108 provides that plaintiffs may seek damages for injuries due to trespasses by animals resulting from a defendant's negligence. Kansas law further provides that the violation of any federal or state statute automatically qualifies as negligence *per se*.

19. Section 13(a) of the Federal Monstrous Creatures Act (the "FMCA") makes it unlawful "to harbor or possess, or to assist in harboring or possessing, any monster, vampire, zombie, Wolf-Man, Swamp-Thing, or other monstrous, eerie, or unnatural creature, or bride thereof," except as provided by regulations of the Department of Unnatural Resources (the "Department"). Subsection (b) declares that the willful violation of the Department's regulations is a federal crime.

20. As should be obvious from its deeds and its terrifying appearance, the Creature is indeed "monstrous, eerie, or unnatural" within the terms of the FMCA.

21. Section 281 of the Department's Monstrous Creature Confinement Regulation (the "Confinement Regulation") provides as follows: "Any facility holding

any FMCA-regulated creature must maintain adequate fencing or other protections to prevent any escape and/or rampage on the part of said creature.”

22. Section 305(e)(2) of the Confinement Regulation provides that “No officer, director, or similar controlling person of a creature-holding facility shall personally command any action that would cause the facility to violate the terms of this Regulation.”

23. By personally ordering the installation of an opening that compromised the security of the Laboratory, Defendant GRONKENSPLEEN failed to comply with the Confinement Regulation.

24. In light of this failure to comply, Defendant GRONKENSPLEEN was *per se* negligent in keeping the Creature under Kansas tort law.

25. As a direct and proximate result of Defendant GRONKENSPLEEN’s *per se* negligence, the Kansas Plaintiffs have been deprived of tourist traffic and valuable business opportunities, for which Kansas tort law provides a remedy.

COUNT II — NEGLIGENT DEPRIVATION OF BUSINESS

OPPORTUNITIES (NEGLIGENCE / VIOLATION OF KANSAS LAW)

26. The foregoing paragraphs are hereby incorporated by reference as if fully restated herein.

27. By personally ordering the installation of an opening that compromised the security of the Laboratory, Defendant GRONKENSPLEEN engaged in ordinary negligence under Kansas tort law.

28. As a direct and proximate result of Defendant GRONKENSPLEEN's negligence, the Kansas Plaintiffs have been deprived of tourist traffic and valuable business opportunities, for which Kansas tort law provides a remedy.

**COUNT III — NEGLIGENT DESTRUCTION OF PERSONAL PROPERTY
(VIOLATION OF NEBRASKA LAW)**

29. The foregoing paragraphs are hereby incorporated by reference as if fully restated herein.

30. On November 14, 2012, two weeks after the destruction of the Ball of Twine, the Creature was discovered to be in Red Cloud, Nebraska.



Fig. 4. The approximate path of the Creature from Cawker City, Kansas, to Red Cloud, Nebraska.

31. At 9 p.m. that evening, under cover of darkness, the Creature secretly entered the Red Cloud home of Plaintiffs ERNIE SYKES and MYRTLE SYKES through an open window. Once inside, it sank its savage claws into an upholstered couch; knocked over, and then ravenously devoured, an entire glass of milk; and generally terrified the household with a deep rumbling sound of uncertain meaning.

32. For as much as twenty minutes, off-duty police and military personnel were helpless against the Creature's cunning efforts to evade capture.

33. Plaintiff ERNIE SYKES was forced to replace the milk he bought; experienced a diminution in the value of his couch; and lost the peaceful use and enjoyment of his living room for approximately one half-hour.

34. By personally ordering the installation of an opening that compromised the security of the Laboratory, Defendant GRONKENSPLEEN engaged in ordinary negligence under Nebraska tort law.

35. As a direct and proximate result of Defendant's negligence, Plaintiff ERNIE SYKES experienced damage to his personal property, for which Nebraska tort law provides a remedy.

**COUNT IV — NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(VIOLATION OF NEBRASKA LAW)**

36. The foregoing paragraphs are hereby incorporated by reference as if fully restated herein.

37. Ever since the Incident, Plaintiff MYRTLE SYKES has been afflicted by great fear, wondering what new bewhiskered fiend might suddenly emerge from the darkness.

38. By personally ordering the installation of an opening that compromised the security of the Laboratory, Defendant GRONKENSPLEEN engaged in ordinary negligence under Nebraska tort law.

39. As a direct and proximate result of Defendant's negligence, Plaintiff MYRTLE SYKES experienced significant emotional distress, for which Nebraska tort law provides a remedy.

PRAYER FOR DAMAGES

WHEREFORE, Plaintiffs request:

- a. money damages of \$5,010,000 for the Kansas Plaintiffs;
- b. money damages of \$75,010 for Plaintiff ERNIE SYKES;
- c. money damages of \$75,010 for Plaintiff MYRTLE SYKES;
- d. an injunction requiring the Laboratory, to which the Creature has now returned, to cease its operations and to remove the Creature and similar unnatural beings from the general vicinity of Cawker City; and
- e. such other relief as the Court may deem just and proper.

Dated: November 4, 2013

/s/ Ramona T. Pitchferk
Ramona T. Pitchferk
PITCHFERK & TURCHES, LLP
600 N. Cedar St. #2
Red Cloud, NE 68970

The complaint was filed with the court on November 4, 2013. Dr. Gronkenspleen received the complaint and summons this morning—December 9, 2013—by courier delivery to the Laboratory’s mailroom, which routed the papers to his desk. He brought them straight to you.

Your client has told you that, to his knowledge, everything alleged in the complaint is true—with three significant exceptions.

First, Dr. Gronkenspleen says he never instructed the workers to install the door. He was on vacation that week, and his assistant Igor did so without his knowledge or consent. In fact, he has a copy of an email confirming this version of events:

From: Igor <igor.h.chuffleston.iv@draculesti-lab.org>
Date: Wed, 31 Oct 2012 21:51:33 -0500
To: Dr. Victor Gronkenspleen <v.gronkenspleen@draculesti-lab.org>
Subject: Creature

Hi boss -- sorry to bother you on vacation! I know you said not to let out your creature because it wasn't safe, but it wanted to go outside anyway, so I told the workers to put in a door so your creature could go in and out when it wanted to. But I think it went out and didn't come back in. I'm sorry I made a mistake and didn't ask you first. I was drunk.

Second, Dr. Gronkenspleen contends that the damage to the Ball of Twine was not caused by the Creature, but rather by a band of local teenage hooligans. He believes that Ms. Edie Frimble, whose house is adjacent to the Ball of Twine, would likely have security camera footage that might prove his story true.

Third, Dr. Gronkenspleen argues that the Creature is actually just a standard house cat, which he is willing to confirm in an affidavit. If so, the Creature would not qualify as “monstrous, eerie, or unnatural” within the terms of the Federal Monstrous Creatures Act.

Your client’s goals for the litigation are as follows:

- Above all else, to win the case as quickly as possible;
- To make sure that Igor—a fellow Transylvanian subject and permanent resident of Kansas—pays for any damage from the Creature’s escape, not him;
- To have a bench trial, not a jury trial, since a jury might be biased against him;
- To litigate at home in Kansas, rather than in Nebraska; and

- To defend against individual plaintiffs one-by-one, rather than against groups of plaintiffs or a class.

Your initial research has revealed the following:

- Kansas choice-of-law principles select the tort law (including any limitations period) of the State in which the allegedly wrongful act or omission took place. Nebraska’s choice-of-law principles select the tort law (including any limitations period) of the State in which the injury to the plaintiff occurred.
- Plaintiffs’ descriptions of Kansas and Nebraska tort law, and of the content of the FMCA and its associated regulations, all appear to be correct. Moreover, Nebraska and Kansas tort law appear to be the same in all relevant respects. The only differences between the two relate to limitations periods. Nebraska requires that a tort case be commenced within one year after the plaintiff’s injury, while Kansas requires the case to be commenced within one year after the wrongful acts or omissions occurred. Also, Nebraska law states that a case is “commenced” when service is made on the defendant, whereas Kansas law defines “commenced”—in accordance with Rule 3 of the Federal Rules of Civil Procedure—based on when the complaint is filed with the court.
- The Laboratory is owned and operated by the Drăculești Research Foundation (“Foundation”), a Transylvanian government corporation that is Dr. Gronkenspleen’s employer. You have determined that the Foundation, as an instrumentality of the Transylvanian state, is immune from jurisdiction in the United States under the Foreign Sovereign Immunities Act.

Describe your litigation strategy in this case. For example, what would you file, and in what order? (It may help to organize your answer chronologically.) If those things didn’t work, what would you try next? What would you ask the court for, and what kind of issues would you raise? How likely are your various efforts to succeed, and which of the client’s goals might be unattainable? If there are things you’re unsure about, what more would you need to know?

Question 2. (*15 pts, ≈ 40 min.*)

Below are five pairs of things that may seem similar to each other, but aren't. **For each pair:**

- *briefly* describe each thing;
- discuss what role it plays in the law (that is, why we have it around); and
- explain how it differs from the other member of the pair.

1. Arbitration and settlement.
2. Claim preclusion and issue preclusion.
3. Discoverable material and admissible evidence.
4. Magistrate judges and Article III judges.
5. Motions for relief from judgment and appeals.

(PS: A few sentences is plenty. So, if the pair were “Compulsory and permissive counterclaims,” an answer might read: “Compulsory counterclaims have to involve the same transaction or occurrence as the first claim. We make you raise them to avoid extra suits between the same parties for the same events; this way the court deals with everything relating to that transaction at once. Any other counterclaims are just permissive. We let you bring them if you want, because you’ve already been dragged into court by that person anyway, so we might as well hear your claims against them while we’re at it.”)

Question 3. *(25 pts, ≈ 1 hr 5 min.)*

Suppose that Congress were considering the following constitutional amendment:

“The seventh amendment to the Constitution of the United States is hereby repealed.”

How would this amendment change the law? What would the practical consequences of those changes be? Is the amendment a good idea?