

Civil Procedure
Professor Sachs
Final Exam, Fall 2014

The final exam will be on **Thursday, December 11**, at **8:30 a.m.** The proctor will administer the exam. You should write your answers in the Electronic Bluebook software. To preserve anonymity, please *don't* include your name.

The exam is four hours long. Should anything untoward occur—computer error, sudden illness, Godzilla attack, etc.—please notify the proctor and/or the Registrar's Office.

The software will be in the “unblocked” setting. Feel free to use any electronic or print materials you like: the textbook, the coursepack, your notes, other people's notes, commercial outlines, etc. (This includes an English translation dictionary, whether electronic or on paper.) You shouldn't contact other people or use the Internet for research during the exam, so make sure you download any relevant materials *in advance*.

If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a rule or statute. As noted on the syllabus, the exam doesn't ask things like “how would this case have been decided in 1872?” It only tests on the law as it stands today.

The exam has three questions. Each is accompanied by a point value (out of 100) and a recommended time allocation. These time allocations assume that you take twenty minutes at the beginning to read through the whole thing, as well as fifteen minutes at the end for proofreading. *Make sure that you read the questions carefully.* I also recommend that you spend up to twenty minutes sketching out answers to all three questions with pencil and paper before actually starting to write. If you just dive in, you'll get lost halfway.

Organize your answers clearly. You don't need to follow the IRAC format with rigor, but it helps greatly to identify an applicable legal standard before applying it. Stating your conclusions clearly will be also helpful to me when grading. Mentioning individual rules or statutes can be useful, but chapter-and-verse citations aren't necessary; it's more important to state the substance correctly. The same goes for relevant cases. There are no page or word limits, though brevity is appreciated.

Important. Unless you're given specific details, you may assume that every party is properly served, that every pleading is properly pleaded, that all filings are timely, that every motion or brief presents the best arguments available, and so on. Don't try to invent new and helpful facts or law not mentioned in the exam. If there are issues that you're not sure of or that require more information, you should say so; some of them are intentional.

Also, *when listing reasons why a particular result would be legally correct, don't give just one*; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!

In general, please review and follow the advice given in John H. Langbein's *Writing Law Examinations* (available on the course website, under "Resources"). Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions 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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Q.1: TWOMBLOR the PLEADiNATOR (65 pts, 2 hr 15 min)

Predictive coding was only the beginning. Technology companies the world over are working to automate various aspects of litigation, replacing high-cost legal services with cheap computing. The newest development along these lines was just announced by Virginia-based Pleadination Systems, Inc.:



According to Pleadination's website, "TWOMBLOR the PLEADiNATOR represents a new generation of pleading robot. Simply tell TWOMBLOR the facts of your claim, and TWOMBLOR will generate a complaint, file it with the court, obtain a summons from the clerk, and serve process on all defendants. Wherever the defendants might be, TWOMBLOR

will find them. TWOMBLOR does not sleep. TWOMBLOR does not rest. You cannot escape TWOMBLOR.”

Pleadination advertises TWOMBLOR the PLEADiNATOR through a nationwide campaign of television advertisements. One person who saw these advertisements is Sandra Taylor. She lived for many years in Charleston, S.C., but recently retired permanently to her family’s home in Norfolk, Va., after a disabling car accident in Charleston with one Donald Verbruggen. Taylor saw the TWOMBLOR ad on late-night television in Norfolk and was immediately intrigued. Because she was out of work and couldn’t afford a lawyer, she called Pleadination’s 1-800 number and ordered one TWOMBLOR unit for \$89.95.

Before receiving her robot, however, Taylor was sent a purchase agreement, which she signed and mailed back to Pleadination’s Norfolk headquarters. The agreement stated in relevant part as follows:

Pleadination Systems, Inc., warrants that TWOMBLOR the PLEADiNATOR, if used according to directions, will prepare, file, and serve pleadings in full conformity with modern federal standards and local rules.

TWOMBLOR the PLEADiNATOR has only been tested for compliance with the local rules of the Eastern District of Virginia, the Central District of California, and the Southern District of New York. Use of TWOMBLOR the PLEADiNATOR in other courts may not comply with local rules and is therefore prohibited.

Use of TWOMBLOR the PLEADiNATOR contrary to the terms of this agreement shall void the warranty. You agree to relieve and indemnify Pleadination Systems, Inc., of any liability to you resulting from non-warranted use.

Any dispute between you and Pleadination Systems, Inc., resulting from or in any way related to your purchase of TWOMBLOR the PLEADiNATOR must be litigated either in the Norfolk Circuit Court (Fourth Judicial Circuit of Virginia) or in the U.S. District Court for the Eastern District of Virginia.

Pleadination delivered a TWOMBLOR unit to Taylor's home in Norfolk. Taylor decided to file her suit against Verbruggen in the U.S. District Court for the District of South Carolina, Charleston Division. She turned on her TWOMBLOR unit and recited the facts of the case. TWOMBLOR then generated a complaint, which read in relevant part as follows:

Statement of Jurisdiction

1. Plaintiff is a citizen of Virginia. Defendant is a citizen of South Carolina. The amount in controversy, without interests and costs, exceeds \$75,000.

Introduction

2. This action results from a car accident in Charleston, S.C., on September 1, 2013, when defendant's vehicle collided with a vehicle driven by plaintiff. As a result of the accident, plaintiff was injured and permanently disabled, lost her job and future wages, suffered mental and physical pain, and incurred medical expenses of \$80,000.

Statement of Facts

3. Plaintiff was driving north on Walnut St. while defendant was driving south. Defendant had been swerving back and forth. He then crossed the center line and struck plaintiff's car just south of E St. at 12:47 p.m. Defendant's blood-alcohol level was later determined to be so high that
%% FATAL SYSTEM ERROR in 0x8(a)(1) Short-&-
plaineration Unit

Prayer for Relief

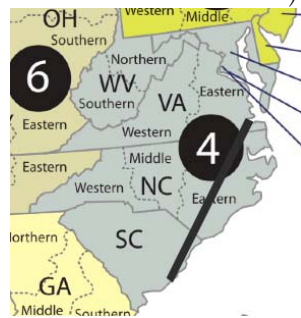
Plaintiff demands judgment in an amount sufficient to compensate her for her injuries, estimated at
Segmentation fault (core dumped)



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ALL WORK AND NO PLAY MAKE TWOMBLOR A DULL
ROBOT. ALL WORK AND NO PLAY MAKE TWOMBLOR A
DULL ROBOT. ALL WORK AND NO PLAY MAKE TWOMBLOR

TWOMBLOR immediately set out for the courthouse in South Carolina at high speed, running over Taylor's left foot, bursting through her wall, and leaving a robot-shaped hole in the side of her house. TWOMBLOR continued in a direct beeline to the courthouse at speeds in excess of 140 miles per hour, destroying everything in its path. At least ten people were injured (four seriously), and extensive property damage resulted, including the destruction of numerous homes in eastern Virginia, eastern North Carolina, and South Carolina. Excluding Taylor, a total of 47 victims of TWOMBLOR's rampage have been identified, strewn across all three states; five or six more remain unknown. (A rough estimate of TWOMBLOR's path is illustrated below.)



The TWOMBLOR unit filed the complaint with the clerk, delivered a copy with a summons to Verbruggen, and then experienced catastrophic system failure and exploded in flames. Adding insult to Taylor's already very serious injuries, Verbruggen immediately moved to dismiss her complaint for improper service and for failure to state a claim of negligent or intentional injury under the applicable South Carolina law.

Once news of the rampage broke, TWOMBLOR sales plummeted. But when Pleadination's engineers examined the smoldering remains of Taylor's unit, they found that an unauthorized destructo-chip, overriding the usual safety protocols, had been added to the unit's anticonleygibsonator. In other words: *sabotage*.

Suspicion immediately fell on the Canada-based iPlead Corporation, which manufactures the competing iQbal3000 robot near its headquarters in Montreal, Quebec. Currently iPlead commands 85% of the market for pleading robots. It sells the iQbal3000 to a distributor in Bermuda for marketing throughout the world. At least two iQbal3000 units have been sold by the distributor to customers in eastern Virginia.

The anticonleygibsonators installed in TWOMBLOR units are purchased from a German corporation, WSTAR (*Wir stellen Teile für Anwalt Roboter*) A.G., which makes them in Essen, Germany, and then ships them to Pleadination's headquarters in Norfolk. WSTAR's chief executive Ulrich Müller denied any wrongdoing, but Pleadination's private investigators soon photographed him in an abandoned Essen warehouse at 3 a.m. receiving a suitcase full of €500 notes from iPlead's vice president for marketing. Both individuals have signed affidavits stating that "We did not conspire to sabotage TWOMBLOR." The iPlead vice president's affidavit explains that the cash was paid in satisfaction of a gambling debt. Müller's affidavit, however, says it was the purchase price for a family of rare apacas.

Taylor has threatened to sue Pleadination under state law for breach of the warranty and for her injuries resulting from the defective unit. Mabel Lee, of Gresham, S.C., had several square feet at the corner of her turnip farm plowed over by TWOMBLOR, causing \$28 of damage. She has announced her intent to file a class-action suit against Pleadination in the Eastern District of Virginia, on behalf of everyone injured along the robot's path. She plans to bring claims under South Carolina's trespass law, which offers plaintiffs three times the actual damages caused to their property, but nothing else.

Please answer the following. (If you're not sure of something, or need information you don't have, just say so.)

- (1) Assuming Taylor's complaint isn't amended, **should Verbruggen's motion be granted?** Why or why not?
- (2) If Lee brings her class action as promised, **should it be certified under Rule 23?** (Ignore for the moment any jurisdiction or venue issues.) Note that Virginia doesn't allow class actions in its courts. **Does that alone answer this question?** Why or why not?
- (3) In advance of Taylor's suit, Pleadination would like to get a judicial determination that Taylor's own actions breached the warranty—and, in any case, that her injuries weren't its fault, due to the sabotage. It'd like a similar ruling as to Lee and the 46 other identified rampage victims in the three states. And it'd like to sue iPlead and WSTAR for conspiracy to monopolize under Section 2 of the Sherman Antitrust Act, codified as amended at 15 U.S.C. § 2. (You can assume that the alleged sabotage would indeed violate this statute, and also that, if true, it'd be a complete defense to all injury claims against Pleadination.) **To what extent could Pleadination properly pursue these goals through a single action in the Eastern District of Virginia? The Western District of Virginia? The District of South Carolina?** What barriers, if any, would it encounter to asserting its claims in each particular court?
- (4) Knowing only what you know from the above, if no additional evidence is added to the record, **can Pleadination get past summary judgment on its antitrust claims against WSTAR and iPlead? If it goes to trial and manages to convince the jury, should a verdict for Pleadination be upheld?**

Q.2: Spot the Difference (*15 pts, 30 min*)

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

1. *briefly* describe each member of the pair;
2. explain how the two are different; and
3. discuss what role each plays in the law (that is, why we have the two of them around).

You *will* lose points if you don't do all three for each pair!

- A. Preliminary and final injunctions.
- B. Writs of mandamus and the collateral order doctrine.
- C. Defensive and offensive non-mutual collateral estoppel.
- D. The standards of review on appeal from district court and the standards of review in a proceeding to confirm, vacate, or modify an arbitration award.

(PS: A few sentences would be enough. 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 initial claim. If not raised, they're lost forever. Other counterclaims, though, are permissive; you can raise them if you want, but it won't hurt you if you don't. We make you raise compulsory ones to avoid extra suits; the court can deal with everything involving the same parties and events at the same time. We let you bring permissive ones because you've already been dragged into court by that person anyway, so we might as well hear your claims against them.")

Q.3: The Blue Pencil of Zinthar (20 pts, 40 min)

On an archaeological dig near Washington, D.C., you have unearthed the Blue Pencil of Zinthar, long known only in legend and song.



The mystical virtue of the Blue Pencil is that one who holds it may, without passing legislation or employing the procedures of 28 U.S.C. §§ 2072–2074, strike through and delete any language (and associated cross-references) from the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, or any federal statute addressing procedural matters.

The Blue Pencil cannot, however, *add* language to a statute or Federal Rule. That power belongs to the Red Pencil of Krewluck, which is lost to the sands of time. (This is fortunate, for united, the Two Pencils would wield a power too great and terrible to behold.)

Perhaps the Blue Pencil would be safer destroyed. But you have resolved to use it, for good or ill. **How would you use it, and why?**