

STUDENT ID:

**FALL EXAM 2016**

IN-HOUSE EXAM INFORMATION		
<b>Instructor: Stephen Sachs</b>		
<b>Course Name: Civil Procedure</b>	<b>Course #: 110_05</b>	
<b>COMMENTS:</b>		
Exam date and time	Date: 12/13/16	Time: 8:30 am
Type of exam	UNBLOCKED	
Number of Essay Questions	3	
Number of multiple choice/true or false		
Exam information/materials allowed (check as many as applicable)	<input type="checkbox"/> None <input type="checkbox"/> Access to Internet <input checked="" type="checkbox"/> Textbook <input checked="" type="checkbox"/> Textbook Supplement <input checked="" type="checkbox"/> Course Syllabus <input checked="" type="checkbox"/> Student's Own Outline and/or Notes <input checked="" type="checkbox"/> Calculator <input checked="" type="checkbox"/> Other Material (see comments)	<b>Permitted:</b> All additional digital and paper materials, the textbook, the coursepack, your notes, other people's notes, commercial outlines, English translation dictionary (on paper.) <b>Not Permitted:</b> to consult with anyone or to access the Internet during the exam.
Number of hours for exam	4	
Qualifying LLM students may receive up to 1/3 extra time	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
International students may refer to a hard copy English translation dictionary (not a legal dictionary). Note: electronic versions may not be used.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
INSTRUCTOR'S EXAM INFORMATION		

Continue to the next page for Professor's instructions.

**Civil Procedure**  
Final Exam, Fall 2016

Professor Stephen E. Sachs  
December 13, 2016  
8:30 a.m.

This exam is **11 pages** long, including these instructions. It consists of **three questions**. To assist in grading, please separate your answers to different questions within the exam software. Each question will be separately graded and each pile of answers separately randomized, so your later answers shouldn't make any reference to your earlier ones.

You have **four hours** to complete the exam. Brevity is appreciated, but there's **no word limit**. Should anything untoward occur—computer error, sudden illness, monster attack, etc.—please notify the proctor and/or the Registrar.

The exam software will be in the “**unblocked**” mode, and **all** additional digital and paper materials are approved for use on the exam. 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 a hard-copy English translation dictionary, though not an electronic one. You are **not permitted to access the Internet** during the exam, so you **must bring along** a paper or electronic copy of the Federal Rules and the various statutes included in the coursepack. Nor are you permitted to consult with anyone. Your exam must be entirely your own work.

To preserve anonymity, don't include your name or other identifying information on the exam, except for your student ID number. Please don't discuss the exam with me or with your fellow students, including by email, until I've confirmed to all of you that all students have taken the exam. (Some might be taking it at a different time.)

In general, please review and follow the advice given in John H. Langbein's *Writing Law Examinations*, available on the course website.

A few specific recommendations:

1. *Make sure that you read each question carefully.* I suggest that you take twenty minutes at the beginning to read the whole thing, as well as fifteen minutes at the end for proofreading. I'd also encourage you to spend up to twenty minutes sketching out your answers to all three questions with pencil and paper before starting to write. If you just dive in, you'll get lost halfway.

2. *Organize your answers clearly.* You don't need to follow any particular format with rigor, but it greatly helps to identify an applicable legal standard before applying it. Stating your conclusions clearly will be 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. In the words of the now-repealed Rule 84, the model exams available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."

3. *Unless you're given specific details to the contrary, 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 seem inconclusive or that require more information, you should say so; some of them might be intentional. (Likewise, not every issue suggested by the fact pattern is actually relevant to the question asked; discussing irrelevancies will only cost you time.) 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 particular rule or statute that we haven't addressed at length—or, indeed, at all.

4. *Apply the law as it stands today.* 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 on the date of the exam, including any recent amendments to the Federal Rules of Civil Procedure.

5. *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!

\* \* \*

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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**STOP! DO NOT TURN THIS PAGE  
UNTIL INSTRUCTED TO DO SO!**

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— START OF EXAM —

**Q.I: “Ziffs and Zuffs”** (65 pts, 2 hr 10 min)

In his documentary work *Scrambled Eggs Super*, Dr. Theodor Seuss Geisel recounts the experience of a young chef collecting scores of exotic eggs to produce a special dish, *Scrambled Eggs Super Dee Dooper Dee Booper, Special Deluxe a la Peter T. Hooper*. Geisel presents Hooper’s account of one egg as follows:



(reproduced per 17 U.S.C. § 107)

Then I went for some Ziffs. They're exactly like Zuffs,  
But the Ziffs live on cliffs and the Zuffs live on bluffs.  
And, seeing how bluffs are exactly like cliffs,  
It's mighty hard telling the Zuffs from the Ziffs.  
But I *know* that the egg that I got from the bluffs,  
If it wasn't a Ziff's from the cliffs, was a Zuff's.

Hooper's recipe was a great success. Following the book's publication, however, Hooper found himself the target of a civil enforcement action filed by Secretary of the Interior Sally Jewell. The Department of the Interior includes the Fish and Wildlife Service, which is responsible for enforcement of the Endangered Species Act.

The complaint in *Jewell v. Hooper* was filed in the U.S. District Court for the District of New Jersey, Newark Division, on the last day of the five-year limitations period prescribed by 28 U.S.C. § 2462. Seeking statutory damages up to \$25,000 under section 11(a)(1) of the Act, it alleged in relevant part as follows:

On or about January 20, 2011, in violation of section 9(a)(1)(B) of the Act, defendant HOOPER did knowingly take an egg from the Ateb Cliffs near Weehawken, N.J., which egg was the egg of a Common Eastern Ziff (*Birdus zifficus*), an endangered species listed by the Secretary under 50 C.F.R. § 17.11.

(Section 9 of the Act prohibits “tak[ing] any [listed] species within the United States.” Section 3 defines “take” as meaning “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” and it extends the Act's protections of wildlife to “any part, product, egg, or offspring thereof.” You may assume that a violation of the Act requires no specific knowledge that the particular species taken is endangered, if one generally knows that one is taking wildlife and if that wildlife is in fact a member of a listed species.)

Hooper answered the complaint. His answer admitted that he did knowingly take an egg on January 20, 2011, but denied

that it was a Ziff egg. He attached to his answer two exhibits. The first was a copy of the relevant portion of Dr. Geisel's book. The second was a declaration under 28 U.S.C. § 1746, in which Hooper declared that he'd *intended* to obtain a Ziff egg from the Ateb Cliffs, but found himself instead on the adjacent Afla Bluffs, from which he removed the egg of a North-by-North-western Zuff (*Birdinatus zufferino*). The Ziff has been listed as an endangered species, as few have ever been conclusively identified, but Zuffs are plentiful to the point of nuisance.

The answer also asserted a defense of failure to state a claim. Hooper invoked this defense, as well as his declaration, in moving for judgment on the pleadings under Rule 12(c). Jewell simultaneously moved under Rule 12(f) to strike Hooper's Zuff-egg defense as legally insufficient. The court **denied** both motions.

Over the course of discovery, both parties agreed to stipulate that cliffs and bluffs are indistinguishable and that Ziffs and Zuffs are physically identical in all known respects. Numerous documents were produced and many depositions were taken. Hooper refused, however, to turn over the report of Prof. Gerta Klunk, a noted monadologist and expert on the seventeenth-century philosopher Gottfried Wilhelm Leibniz (1646–1716). Though no one expected such deep matters to come up at trial, Klunk had advised Hooper on Leibniz's principle of "the identity of indiscernibles" and on whether it is metaphysically possible for there to be two identical but still-distinct species. Jewell moved to compel production; the court **denied** that motion.

After the close of discovery, both parties filed cross-motions for summary judgment under Rule 56. Hooper's motion referenced his own deposition testimony reiterating his story. It also invoked the deposition of Dr. Jacob Moogberg, an eccentric scientist at the Weehawken Municipal Aviary. Moogberg makes the outrageous claim that *there are no Ziffs*, and that the very idea of

Ziffs is the product of a typographical error in a colonial-era ornithology text. (“There’s only one bird, for Pete’s sake! Ziffs? Zuffs? They’re the *same thing!* Doesn’t anyone notice this?”)

Jewell’s motion countered with the depositions of twenty respected birdologists from the New Jersey State Flappytorium. They noted that the Ziff/Zuff distinction is widely accepted in the scientific community, and that experiments at the National Cryptoörnithological Institute at Fort Detrick, Md., may produce a definitive DNA test to distinguish the birds within the next two years.

The court **denied** both summary judgment motions and proceedings continued. (In the meantime, Jewell filed an interlocutory appeal of the denial of her motion in the U.S. Court of Appeals for the Third Circuit. That court **dismissed** her appeal for lack of jurisdiction.)

Jewell moved for leave to amend her complaint to add a second count alleging the *attempted* taking of a Ziff egg. (Section 3 of the Act also defines “take” to include an “attempt to engage in any such conduct.”) Hooper opposed this motion, both in general and with regard to the statute of limitations, but the court **granted** it. In response to the newly amended complaint, Hooper filed an entirely different answer and declaration under § 1746. He now stated that his previous assertions had all been mistaken, that he had never gone in search of Ziff eggs at all, that he had never even *been* to Weehawken, and that he surely was thinking of some other birds, when he wrote in his filings those incorrect words—say, the Sala-ma-goox, or the Mop-Noodled Finch, or maybe the Beagle-Beaked Bald-Headed Grinch. After the court reopened discovery, Hooper stuck to his new story in a second deposition.

At trial, Jewell called as witnesses her twenty birdologists and introduced Dr. Geisel’s book into evidence. The defense called only one witness, Hooper himself. He testified to his new story,



remaining stubbornly consistent under a withering cross-examination, even after Jewell's counsel confronted him with his prior deposition and declaration. (Hooper did not call Dr. Moogberg, whose bombastic style might have offended the jury.)

At the close of all the evidence, Jewell moved under Rule 50(a) for a judgment as a matter of law. That motion was **denied**. The jury returned a general verdict for Hooper on both counts. Jewell renewed her motion under Rule 50(b) and moved for a new trial under Rule 59. The court **denied** the renewed motion but **granted** a new trial.

This second trial ended in a jury verdict for Hooper on Count I but for Jewell on Count II, imposing the maximum amount of statutory damages. Judgment was entered accordingly, and Hooper did not appeal or file any further motions.

**Were the district court's rulings, and the appellate court's dismissal of the appeal, legally correct? Why or why not?** (Analyze each relevant issue, even if the disposition of one motion might ordinarily affect another. And if you're unsure or need more information, just say so.)

**Q.2: “Things We Have Not Studied”** (20 pts, 45 min)

Below are listed several provisions that we never discussed at any length in class. Some were not even in your assigned readings. Read them now. Then **explain, based on what you’ve already learned, what you think they’re for.** For instance, what do they do? When might they be used, and by whom? Why do they say what they say, and not something else? What difference do they make to the legal system? Etc.

(Remember that, while you should feel free to consult the materials you’ve brought in, you are not permitted to use the Internet.)

- (a) 28 U.S.C. § 1367(d).
- (b) Fed. R. Civ. P. 4(k)(1)(B).
- (c) Fed. R. Civ. P. 69(a)(2).

**Q.3: “Playing Favorites”** *(15 pts, 30 min)*

To us procedure professors, the Federal Rules are like one’s children; we love them all equally. But you law students are allowed to play favorites. **What is *your* favorite Federal Rule of Civil Procedure not yet referenced in this exam? Defend your choice.**

— END OF EXAM —