

STUDENT ID:

FALL EXAM 2018

IN-HOUSE EXAM INFORMATION		
Instructor: Prof. Stephen E. Sachs		
Course Name: Civil Procedure	Course #: 110_05	
COMMENTS:		
Exam date and time	Date: 12/14/18	Time: 8:30 a.m.
Type of exam	UNBLOCKED	
Number of Essay Questions	4	
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)	Permitted: All additional digital and paper materials, the textbook, the coursepack, your notes, other people's notes, commercial outlines, English translation dictionary (hard copy only). Not Permitted: to consult with anyone or to access the Internet.
Number of hours for exam	4 hours	
Qualifying LLM students may receive extra time	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Amount of extra time: 1/3 of total (1 hr 20 min)
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		

Please continue to the next page for the professor's instructions.

Civil Procedure
Final Exam, Fall 2018

Professor Stephen E. Sachs
December 14, 2018
8:30 a.m.

This exam is **12 pages** long, including the instructions.

TIME AND LENGTH

You have **four hours** to complete the exam, which consists of **four questions**.

This year there is also a **limit of 3500 words**. **This is a strict limit; additional words will not be read.**

You are definitely *not* expected to write that many words. (Brevity is appreciated.) Make sure to watch your word limit, so that you don't find yourself making substantial cuts in the last few minutes.

Each question is accompanied by a point value, a recommended time allocation, and a recommended word limit. These are only recommendations! Allocate your time and words in whichever way seems best to you.

FORMAT

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 don't make any reference in your later answers to your earlier ones.

MATERIALS

The exam software is to be in “**unblocked**” mode, and **all** additional digital and paper materials are approved for use on the exam if they are permitted by the Registrar. 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—but electronic translation dictionaries may not be used, per the Registrar's requirements.)

CONDUCT

Your exam must be entirely your own work. You are **not permitted to consult with anyone or to access the Internet** during the exam. As a result, **you must bring paper or electronic copies of the Federal Rules of Civil Procedure, as well as of the statutes and other rule provisions (of Appellate Procedure, Evidence, etc.) that are included in your coursepack.**

ANONYMITY

To preserve anonymity, **don't include your name or other identifying information on the exam**, except for your student ID number. Should anything untoward occur during the exam—computer error, sudden illness, monster attack, etc.—please notify the proctor and/or the Registrar.

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.)

GRADING

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.

SUGGESTIONS

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:

- I. *Make sure that you read each question carefully.* I suggest that you take twenty minutes at the beginning to read the whole thing and reserve ten minutes at the end for proofreading. (The recommended time allocations assume that you do this.) Separately, I'd encourage you to spend up to one-third of your time on each question just sketching out the answer

with pencil and paper before starting to type. 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 (IRAC, etc.), but it greatly helps to identify an applicable legal standard before applying it. Stating your conclusions clearly will also 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.
4. *If there are issues that seem inconclusive or that require more information, you should say so.* Some of them may 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. Don't try to invent new and helpful facts or law not mentioned in the exam. 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.
5. *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.

6. **This one is very important:** *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!*

Good luck!

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

EXAM QUESTIONS

— START OF EXAM —

Q.1: “Zoboomafoo” (45 pts, 1 hr 40 min, up to ≈1600 words)

The Duke Lemur Center is one of the world’s leading research centers on prosimian primates. One of its most famous residents was Jovian, a Coquerel’s sifaka (*Propithecus coquereli*) who provided the live-action sequences for the talking lemur puppet in the PBS children’s television series *Zoboomafoo*.



Jovian. License CC-BY-SA 4.0, <https://goo.gl/KerF1r>

The Center regularly seeks donations through its “Adopt-a-Lemur” program. As described on its website:

This season, give the gift of lemurs! The DLC’s popular Adopt a Lemur program is thrilled to announce a special holiday adoption package featuring black and white ruffed lemur Halley! This special adoption gift is \$75 and can be sent to your loved ones anywhere within the United States.

In smaller print, the website currently states:

Our limited-edition 2018 holiday adoption package includes a plush lemur, gift packaging, quarterly updates about Halley's family, a photo, a sticker, and a newly redesigned adoption certificate, species fact sheet, and bio.

Alethea Snirp, a longtime fan of *Zoboomafoo*, learned about the Center's adoption program from its website. She ordered the adoption package sent to her home in Cookeville, Tenn. However, she was startled to receive a stuffed animal instead of the real lemur she thought she had adopted.

Snirp got in her car and traveled east on Interstate 40, eventually arriving at the Durham County Sheriff's Office. Adhering to the relevant North Carolina statutes, she swore out an affidavit and paid a bond of \$225 to obtain a writ of replevin for Halley the Lemur. Accompanied by an armed sheriff's deputy, she entered the Center, seized Halley, shoved her into a small cage, and drove off—much to the horror of the staff. After a few frantic calls to the U.S. Fish & Wildlife Service, Snirp was apprehended by federal agents just over the Tennessee state line. She was later assessed \$30,000 in civil penalties under the Endangered Species Act for the unlicensed interstate transport of a black and white ruffed lemur (*Varecia variegata*).

Snirp filed suit against Duke University, a North Carolina non-profit corporation, in the U.S. District Court for the Middle District of North Carolina. She sought \$90,000 in damages under the North Carolina Unfair & Deceptive Trade Practices Act (UDTPA). Snirp's theory was that Duke had promised her something that federal law prevented her from actually taking home, thus constituting a "deceptive act[] or practice[]" within the meaning of the Act. She had relied on Duke's promise, and she was owed not only indemnification for her civil penalties but treble damages under the UDTPA. As she stated in her complaint,

I understood the phrase "a plush lemur" to use "plush" in its entirely ordinary sense, that of "richly luxurious and expensive." I had been promised one of the best, the most luxurious lemurs. In the alternative, the word "plush" was not on the website when I saw the advertisement; at that time it said "a real lemur," so it must have been changed to "a plush lemur" later on.

Snirp asked her husband Sam to act as process server. He waited until Duke's President Vincent Price was visiting Oak Ridge, Tenn., then handed him a copy of the complaint and summons (but no

waiver form) during a tour of the federal nuclear research facilities at the Oak Ridge National Laboratory.

Duke answered the complaint. Its answer, among other things, asserted defenses of insufficient process, insufficient service, and failure to state a claim. (In Duke's view, no reasonable person would understand the advertisement to promise an actual lemur, and no reasonable jury would believe Snirp's alternative allegation.) Duke's answer also contained a counterclaim challenging the seizure of Halley, arguing that the writ of replevin was invalid, and seeking an injunction requiring Halley's return to the Lemur Center. On the same day, Duke filed a motion for a preliminary injunction for Halley's return, as well as a motion for judgment on the pleadings based on the defenses listed above.

For her part, Snirp moved for leave to amend her complaint by adding two new claims under the UDTPA, one against Duke University and one against Joan Burrall, the Tennessee-based consultant who had designed the Center's "Adopt-a-Lemur" program. These claims sought a refund of Snirp's \$75 payment, trebled to \$225, to be assessed jointly and severally against both defendants.

The district court denied both of Duke's motions. Over Duke's opposition, it also granted Snirp's motion.

As an intern in the University's Office of Counsel, you have been asked to address the following:

- (a) **Were these three rulings of the district court correct? Why or why not?**
- (b) **Is there a way for Duke to obtain immediate appellate review of any of these orders?**

Q.2: “Rubber Duckie, You’re the One” (20 pts, 40 min, up to ≈700 words)

The law firm of Crowell & Moring LLP is a limited-liability partnership organized under the laws of Washington, D.C. Its main office is located at 1001 Pennsylvania Avenue N.W., only a few blocks away from the White House. It operates branch offices in New York, Los Angeles, San Francisco, Irvine, Brussels, and London, and it represents well-known clients across the country.

The unofficial symbol of Crowell & Moring is the rubber duck. An unknown prankster once left several such ducks in the impressive office fountain, and the firm has since claimed the yellow bath toy as its own.

To raise the firm’s national profile, its Executive Committee decided to undertake a duck-themed promotion, releasing one million rubber ducks into the nation’s waterways, each bearing the firm’s logo. Hidden inside one rubber duck would be a golden ticket, entitling the lucky finder to a million-dollar prize. The firm hoped the promotion would make it even better known, generating new clients as well as helping it recruit new lawyers.

To run the promotion, Crowell & Moring contracted with Amazing Promotions, Inc., a Georgia corporation headquartered in the city of Commerce, Ga., a half-hour north of the University of Georgia’s campus in Athens. Amazing Promotions purchased the ducks, planted the golden ticket, and held the prize money in escrow. Amazing Promotions also hired expert hydrologists to predict where the ducks would likely go, and it offered to share the reports with the law firm. Crowell’s representative was uninterested, however—“just send them all over,” she told them.

The ducks were released in ten separate locations across the United States. One of those locations was a small stream just behind the company’s Commerce headquarters, which bore the same name as the town. As it happened, the duck with the golden ticket was among the 100,000 released into that stream. It floated into the nearby Crooked Creek, and thence into Grove Creek, the Broad River, the Savannah River, and finally into the Atlantic, where currents eventually brought it ashore in North Carolina (as the hydrologists had expected a very small but nonzero percentage of the ducks to do).

On a bright morning in late August, the duck was retrieved on a beach near Wilmington by Morris Grove, a rising 2L at Duke. After

opening it on the beach and—to his amazement—finding the golden ticket, he returned to campus in triumph.

Unfortunately, when he contacted Amazing Promotions to claim his prize, he learned that the promotions company had filed for bankruptcy, that its CEO had fled the country, and that the prize money was missing. Grove angrily confronted the Crowell & Moring associate who was then visiting Durham for Duke's on-campus interviewing and recruitment program, but the associate claimed ignorance of the whole affair. Incensed, Grove filed suit against Crowell & Moring in the U.S. District Court for the Middle District of North Carolina, serving process by certified mail, return receipt requested, to the firm's headquarters in Washington, D.C.

Crowell & Moring has not yet answered the complaint, but it has filed a motion to dismiss under Rule 12(b)(2) and (3). **What ruling on this motion, and why?**

Q.3: “Things We Have Not Studied” *(20 pts, 40 min, up to ≈700 words)*

Below are listed several provisions that we never discussed at any length in class. Read them again. 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 you are not permitted to use the Internet.

- (a) Rule 20(b).
- (b) Rule 26(b)(4)(E)(ii).
- (c) Rule 49(a)(3).

Q.4: “Just the Worst” (*15 pts, 30 min, up to ≈500 words*)

Of course we all love civil procedure. But being there for someone also means telling them when they’re wrong. **From a policy perspective, which is the single *worst* thing you’ve studied in this class? How would you improve it?**

— END OF EXAM —