# Conflict of Laws: Final Exam

STEPHEN E. SACHS
*Duke University*

**Course 220.01**
May 3, 2021

This is an **8-hour** exam. You may take it at any point during the 24-hour window beginning at **8 a.m. Eastern time** on **Monday, May 3**, and closing at 7:59 a.m. Eastern time on Tuesday, May 4. Your 8-hour clock starts when you 'Begin Assessment' on https://sakai.duke.edu and runs until you submit your answers via email to examdeposit@law.duke.edu (or until the submission window closes, whichever occurs first).

**MECHANICS**

Before the exam, please download the template from the course website (Resources/G. Exam/xxxxxxx_220–01ConflictOfLaws_Sachs_Spring2021.docx), or save the copy that was emailed to you along with these instructions. Replace the xxxxxxx's with your Student ID number, both in the filename and in the header that appears on each page.

To reduce implicit bias, I'll be grading all the answers to each question separately, randomizing the order each time. To make this easier, **please use the template to start each separate answer on a separate page.** Also, to ensure anonymity across answers, please don't alter the typeface or spacing (or include any other identifying information).

## CONTENTS

The exam consists of **three questions**. Your entire answer must not exceed **3500 words**. You don't have to write that many; brevity is encouraged. But additional words won't be read, so remember to watch your word count.

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.

## MATERIALS

The exam is completely **open-book** and **open-note**; you may use any digital or paper materials you find helpful. That said, you are instructed not to consult anyone else or to do new research on the Internet during the exam. *Your exam must be entirely your own work.*

## COMMUNICATIONS

Per Duke policy, students may not communicate with faculty members about problems during or after an exam. In case of emergencies, contact the Registrar's Office instead, at `registrar_office@law.duke.edu`.

Also, because the exam may be administered to some students at different times, you may not discuss its contents with anyone until after the exam period ends, or until I've notified you that all exams have been submitted.

## SUGGESTIONS

In general, please follow the advice given in John H. Langbein's *Writing Law Examinations*, at `https://bit.ly/3bhUJ0b`. A few specific recommendations:

(1) *Make sure that you read each question carefully.* Pay attention to the point values: they signal how important each question will be. The time allocations assume that you will take a half-hour at the beginning to read the whole thing, a half-hour for lunch, and twenty minutes at the end for proofreading. Separately, I'd encourage you to spend up to one-third of

your time on each question 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 helps greatly to identify an applicable legal standard before applying it. Stating your conclusions clearly will also be helpful to me when grading. Mentioning individual cases or provisions can sometimes serve as useful shorthand, but chapter-and-verse citations are a waste of time. 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) *State the substance accurately.* 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 is understood on the date of the exam, including any recent developments or statutes.

(5) *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, brief, or response presents the best available arguments for its position; and so on. Don't try to invent new and helpful facts or law not mentioned in the exam.

(6) *With respect to conflict of laws in particular, unless you're given specific details to the contrary, you may assume*: that each state uses the conflicts principles listed in the Symeonides excerpt; that each state employs the contractual choice-of-law standards of § 187 of the Second Restatement; that states relying on the Second Restatement have adopted any rules the textbook describes as belonging to the 1988 revised version thereof; and that each state's long-arm statute extends its personal jurisdiction as far as the Constitution allows.

(7) *If there are issues that seem inconclusive or that require more information than is provided, 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.

(8) **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!

**GRADING**

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Final grades will be calculated in compliance with Duke's grading policies.

<p style="text-align:center">*       *       *</p>

Good luck!

— START OF EXAM —

**Q.1: Non-Fungible Tokens** *(50 pts, ≈3 hr 20 min, up to ≈1800 words)*

Willem van Gesmoorde Snoek, of Boca Raton, Fla., is a famous dealer in fine art. He has offices, billboard advertisements, and extensive sales across the fifty states. Recently he listed for sale a work entitled *The Allocameli*, attributed to the British photographer Frederick Evans and dated to 1940.



Fig. 1. *The Allocameli (Llamas and Riders)* (c. 1940?) (silver nitrate photograph).

Marybeth Frankel, a law student in Durham, N.C., viewed the photograph on Snoek's website and was intrigued. She emailed Snoek and arranged to meet him at his Boca Raton gallery, where he praised the artistic qualities of Evans's work and suggested that the photograph might be of great value. Snoek offered to sell Frankel the sole copy of the photograph as well as the copyright in its image.

Because anyone can duplicate images online, Snoek also offered to sell Frankel an NFT, or "non-fungible token." This entry on a digital ledger, or blockchain, would assert Frankel's ownership of the copyrighted image, and it could be transferred to others along with the copyright.

Frankel was confused by the offer and turned it down. On vacation a month later at a Hawaii resort, however, she heard that an NFT of an artwork by the digital artist Beeple had recently sold for $69 million. Frankel immediately opened her laptop and bought a number of NFT's. She then returned to Snoek's website and clicked "Accept," exchanging for the *Allocameli* NFT another NFT she had purchased of a dancing banana.

Her fellow resortgoers congratulated her on the purchase when they learned of it, as many of them had bought NFTs after viewing them at Snoek's large galleries in Honolulu or Oahu. The physical photograph of *The Allocameli* was mailed from Florida gallery to Frankel's Durham address, and the ledger entry was accordingly updated on the blockchain.

Frankel later agreed to auction the *Allocameli* photograph and NFT at Sotheby's New York office, with a provision of her agreement with Sotheby's selecting New York law. Just before the auction, however, she learned that her photograph was taken, not in 1940, but prior to 1926; it was thus out of copyright in the United States, allowing anyone to make as many copies of the image as they liked. Moreover, the photograph was taken, not by Frederick Evans, but by Sir Anthony Henry Wingfield at his private zoo in Bedfordshire. The NFT was therefore worthless. The auction was canceled, leaving Frankel to pay substantial fees to Sotheby's. She also learned that experts now valued her dancing-banana NFT at $43 million.

Frankel promptly filed suit in Hawaii state court against Snoek, who declined to appear. The Hawaii court issued a default judgment that the contract had been induced by fraud. By way of remedy, it announced the rescission of the sale, decreeing that the banana NFT was again the property of Frankel and the *Allocameli* NFT that of Snoek, and ordering Snoek to re-exchange the tokens. It also awarded Frankel $1 in nominal damages. Upon learning of the judgment, however, Snoek promptly sold the banana NFT to his unknowing neighbor Chadsworth Blum, in exchange for a different NFT image of a 1996 Toyota Tercel. The Hawaii court found Snoek in contempt and imposed a $50,000 fine.

Frankel now wishes to bring another suit against Snoek and Blum in their home jurisdiction of Florida. She seeks rescission of the sales, a declaration that the banana NFT is hers, and an injunction ordering Snoek and Blum to undertake the necessary acts on the blockchain to transfer ownership back to Frankel. In the alternative, she seeks contract damages reflecting the NFTs' difference in value and her debt to Sotheby's, as well as the treble damages for fraud uniquely available under the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA) and the New York Anti-Fraudulation Ordinance (NYAFO). Snoek and Blum argue, among other things, that the sale of *The Allocameli* (photograph, copyright, and token) was final under North Carolina and Hawaii property law once Frankel clicked "Accept," and that Florida's contract law does not recognize a defense of fraud-in-the-inducement.

Please answer the following:

(a) **To what extent, if any, must the Hawaii judgment be recognized or enforced in the Florida court?**

(b) **Assuming that it would not be recognized, what law or laws might the Florida court apply to the various issues?**

(c) **Florida's legislature has expressed interest in unifying the state's choice-of-law rules, adopting for all issues either the First or Second Restatement. If it did so before this case was heard, what consequences might that have?**

(If there are more facts or law you'd need to know, just say so—and remember to give as many reasons for your answer as are legally correct.)

**Q.2: The Nutmeg State** *(30 pts, ≈2 hr, up to ≈1000 words)*

The State of Connecticut seeks to cash in on the cryptocurrency craze by establishing a new currency known as NutmegCoin. Through clever software design, the state automatically exacts a 0.001% tax on NutmegCoin transactions wherever they occur.

Unfortunately, adoption of the currency has been slow. So Connecticut adopts the following measures:

- Whereas previously NutmegCoin could only be exchanged for cash at various kiosks in and around Hartford, it may now be bought or sold using a credit card on a state-run website. The state has even waived the credit card processing fee for Connecticut residents.

- Any buyer of goods located in Connecticut, or who is a citizen of Connecticut or an entity organized under Connecticut law, must either pay for the goods in NutmegCoin or must certify in writing that the buyer is aware of NutmegCoin and has specifically chosen to use another means of payment. The seller of the goods is required by law to collect these certifications and to forward them semiannually to the State Treasurer.

- All Connecticut taxes, fines, fees, and penalties must be denominated and paid in NutmegCoin. The same goes for all money judgments awarded by Connecticut courts, imposed on causes of action created by Connecticut law, or arising from events or omissions within Connecticut.

**Given what we have studied, which of these measures would or would not be effective, in light of potential constitutional objections? Discuss.**

**Q.3: Conflicts in Cyberspace** *(20 pts, ≈1 hr 20 min, up to ≈700 words)*

In 1996, John Perry Barlow wrote a "Declaration of the Independence of Cyberspace":

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

 We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

 . . .

 You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different.

 . . .

 Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here. . . .

**Does the emergence of "cyberspace" pose a problem for the field of conflict of laws? How should it be addressed? Would a separate "law of cyberspace" solve the problem, or create new ones? Discuss.**

(Reminder: Your exam submission, in total, should not exceed 3500 words.)

— END OF EXAM —