

Conflict of Laws
Professor Sachs
Final Exam, Spring 2014

Mechanics.

Your exam is available in hardcopy from the Registrar's Office, Room 2027, starting at **8:30 a.m.** on **Wednesday, April 23**. You will then have until **4:30 p.m.**, eight hours later, to submit your answers by email.

(Per Duke policy, "qualified LLM" students will have an additional 2 hours and 40 minutes to complete the exam, or until 7:10 p.m. If you are an LLM student and are unsure whether you are a "qualified LLM," consult the Registrar's Office *before* the day of the exam.)

Instructions for the email submission process are being provided to you separately.

Format.

Please write your exam in 12-point font, 15-point leading, with a 1.5-inch top margin and 2-inch side and bottom margins. Begin the answer to each question on a separate page.

Make sure to name your file according to the registrar's instructions, and to include your student ID—*not* your name—in the header of every page.

(A pre-made sample template is posted on the course website, under "Resources.")

Materials.

Feel free to use any print materials you like—including the textbook, the coursepack, your notes, other people's notes, commercial outlines, etc. You can also use any electronic materials you've previously saved to your computer. (This includes

an English translation dictionary, whether electronic or on paper.)

You are not to use the Internet for research during the exam, so please make sure you download any relevant materials *in advance*.

Time limits.

Each question on the exam has a recommended time allocation based on its point value, assuming an eight-hour exam. The recommendations build in

- 1) an extra 30 minutes at the beginning to read through the entire exam, and
- 2) an extra 20 minutes at the end for proofreading.

My advice is to sketch an outline to all three questions, with pencil and paper, before you actually begin to write. If you just dive in, you'll get lost halfway through.

Word limits.

Your entire exam is limited to 4000 words (and no footnotes!). Additional words won't be read, as a favor to me and to you. Remember to watch your word count.

Substance.

Read each question carefully, and organize your answers clearly. You don't need to follow the IRAC format with rigor, but you should identify an applicable legal standard before applying it. Stating your conclusions up-front will be helpful to me when grading.

Mentioning individual rules or statutes can be useful, but chapter-and-verse citations are unnecessary. It's more im-

portant 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!)

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

Grading.

Grades will be based 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), as will the exam as a whole. Final grades will be calculated in compliance with Duke's grading policies.

Good luck!

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General Instructions

On this exam, you may make the following assumptions, unless a contrary indication is given below:

- The term “state” includes the District of Columbia.
- Each state uses the choice-of-law principles for torts and contracts described in the Symeonides table (attached), with the following provisos:
 - The “Second Restatement” includes any provisions described in the textbook as belonging to the 1988 revised version.
 - “Interest Analysis” refers solely to the rules expressed by Prof. Brainerd Currie on p. 196 of the textbook.
 - “Combined Modern” refers solely to the “comparative impairment” analysis favored by Prof. William Baxter.
- The long-arm statute of each state permits the exercise of personal jurisdiction whenever it would be consistent with due process of law under the Fourteenth Amendment.
- Each state has enacted the Uniform Foreign-Country Money Judgment Recognition Act (UFCMJRA).

Question 0. (*0 pts., ≈ 0 min.*)

This exam—not including footnotes, which are strictly prohibited—is ____ words long. (*Max = 4000*)

Question I. (60 pts., ≈ 4 hr. 20 min.)

Fibonacci's is an international chain of Italian restaurants, famous for its "Secret Ingredient Spaghetti." The chain's founder, Leonardo Pisano Bigollo, is chairman of Restorante Bigollo S.r.l., the Italian holding company to which he has licensed his family's secret recipes. The holding company, headquartered in Pisa, is purely passive and has no operations outside Italy. Instead, it licenses the Fibonacci's name and recipes to various independent restaurateurs the world over.

The U.S. licensee is Cassini Restaurants, Inc., a New York corporation with its headquarters at 1271 Avenue of the Americas, New York, N.Y. As the operator of a number of famous American chains, Cassini agreed to pay Restorante Bigollo 55% of its profits from the Fibonacci's brand. Cassini, in turn, sublicenses the name and recipes to various independent franchisees, keeping its involvement private while providing the franchisees with certain common ingredients. Over time Cassini's skillful management has made the Fibonacci's brand highly successful, and numerous Fibonacci's restaurants operate in each of the 50 states. (There are no such restaurants in Washington, D.C., or in any other possessions or territories of the United States.)

All this began to change on January 5, 2013, when the front page of the Tri-State Star-Advertiser carried the following full-page photograph, under the headline "SPAGHETTI'S SECRET INGREDIENT REVEALED":



According to the accompanying article, Fibonacci's regularly allowed cats to swim through the sauce tanks at its Central Sauce Production Facility in Minnetonka, Minnesota, providing that special 'kick' no other spaghetti sauce could match.

The article was the product of a nine-month undercover investigation by Washington, D.C., activist Cara Earthflower. Earthflower is a member of the Kale Liberation Front, the militant wing of the Slow Food movement. She had experienced an allergic reaction on March 28, 2012, after eating at the Fibonacci's in Chevy Chase, Md. (just on the other side of the

D.C. border). She decided to take revenge. The next morning, March 29, 2012, she returned to that restaurant and asked Buca di Beppo, the franchisor of the Chevy Chase Fibonacci's, about the possibility of working at his restaurant. He willingly offered her a job and gave her a copy of his standard employment form. The application contained, among other things, the following provisions:

“PARTIES. This contract is between you (the Employee) and Buca di Beppo (the Employer). The contract also operates for the benefit of any person or entity from which the Employer has licensed or sublicensed, directly or indirectly, the Fibonacci's name and related intellectual property (a Licensor). A Licensor may bring suit to enforce this contract as a third-party beneficiary.

“CONTRACTUAL ACCEPTANCE. This contract represents an offer by the Employer to hire the Employee for work at Fibonacci's Restaurant, Chevy Chase, Md. By signing and returning this form, the Employee accepts Employer's terms offered herein.

“CONFIDENTIALITY. The Employee agrees to hold in confidence and not to disclose to third parties any trade secrets or other confidential information belonging to the Employer or to any Licensor.

“CHOICE OF FORUM. This clause applies to any lawsuit that in any way relates to, results from, or is connected with this contract (a Related suit). The Employee may file a Related suit against the Employer or against any Licensor only in the defendant's home forum (principal place of business for entities, domicile for individuals). Related suits against the Employee may be filed in any court of competent jurisdiction. However, once a Related suit is filed or maintained in a particular

forum—whether by the Employee, by the Employer, or by a Licensor—then any Related counterclaim may be brought in that same forum.”

Earthflower took the form home and filled it out that afternoon, giving her name as “Jane Smith” and falsifying her employment history to conceal her ties to extreme anti-chain-restaurant organizations. She signed the application, put it in an envelope addressed to di Beppo, and deposited it in her home mailbox. The application was received by di Beppo in Maryland the next day, and she began work a week later.

Earthflower worked at Fibonacci’s for roughly nine months, waiting tables and microwaving frozen gnocchi. In December 2012, Earthflower asked di Beppo for an opportunity to attend a training event the next weekend at the Central Sauce Production Facility in Minnetonka. Di Beppo agreed, and Earthflower attended the event, where she captured the controversial photo with a hidden camera. She then quit her job and handed over the images and a written account of her experience to reporters at the Chevy Chase office of the Tri-State Star-Advertiser, which published it on the front page of the January 5 edition.

The Star-Advertiser is a regional paper that, as everyone knows, circulates in the tri-state area of Maryland, West Virginia, and Ohio. The paper does not maintain a website, but on the day Earthflower’s story was published, a subscriber in Ohio posted a scan of the front page to Facebook. The photo then went viral, becoming one of the most widely viewed images on the Internet. Sales fell at Fibonacci’s restaurants nationwide; Cassini Restaurants’ stock price plummeted; and health officials in Minnetonka closed the Central Sauce Production Facility and arranged adoptions for the cats. As the United States had been Fibonacci’s largest international market, Restorante Bigollo S.r.l. suffered a severe decline in revenues.

Earthflower soon received a letter from Cassini Restaurants at her home in D.C. The letter accused Earthflower of common-law trespass, having entered the Central Sauce Production Facility (which Cassini owns) under false pretenses. It also accused her of breaching her confidentiality agreement by providing the picture and story to the Star-Advertiser. The letter threatened a lawsuit, arguing that Earthflower should have known that the article would go viral and that she had therefore caused lost sales to Cassini Restaurants in all 50 states.

At a closed-door shareholder meeting of Restorante Bigollo S.r.l. in Pisa, Leonardo Pisano Bigollo announced that the company was considering filing suit against Earthflower in the Pisa courts for *denigrazione di salse*. Under Italian law, one who brings the recipe of another into disrepute is guilty of *denigrazione di salse*, or the ‘denigration of sauces,’ for which the plaintiff can recover ten times the amount of actual damages. It is unclear whether truth is a defense to such charges, as the First Amendment requires in the United States. Italian courts are empowered by statute to exercise universal personal jurisdiction over all *denigrazione di salse* claims, which are exempt from Italy’s general choice-of-law rules (which largely resemble the First Restatement) and its general two-year limitation period for all torts and delicts.

As of this morning, April 23, 2014, no suits have yet been filed. Earthflower has retained you as her attorney. She wishes to know where she might be sued, how likely it is that she will lose, and whether her assets are in danger. (A politically radicalized aluminum heiress, Earthflower has sufficient assets—particularly her lucrative bauxite mines in Alabama—to pay any subsequent judgment.) She is also considering filing two separate personal-injury suits against Restorante Bigollo S.r.l. and against Cassini Restaurants, Inc., on the ground that their cat-infused sauce recipe likely caused her allergic reaction to Fibo-

nacci's spaghetti. (She has no interest in suing Bigollo or di Beppo in their individual capacities, as the companies have deeper pockets.)

Your investigation of the law has revealed the following:

- Tort and contract claims are subject to a standard four-year statute of limitations in Alabama, New York, Ohio, and West Virginia. The period is a particularly short one year in Maryland and the District of Columbia. The period in Minnesota is a very short 180 days. At a recent legislative hearing, a majority of Minnesota's Supreme Court justices testified in favor of lengthening the period to the national average of four years.
- Minnesota, Ohio, and the District of Columbia share a strong public policy against the judicial enforcement of private confidentiality agreements that interfere with the disclosure of health and safety violations. In New York, public policy strongly favors the enforcement of such confidentiality agreements. Other jurisdictions have no public-policy bar to enforcement, but no strong policy in favor either.
- In 2011, the Minnesota legislature—"for the avoidance of frivolous suits and the reduction of congestion in our courts"—enacted a damage cap on tort suits. Technical trespasses, including trespass by false pretenses, are subject to a cap of \$500 plus full compensation for any physical damage to the premises during the trespass.
- Because the parties would be diverse and the amount-in-controversy substantial, any U.S. lawsuits would likely be filed in (or removed to) a federal district court.

Assess Earthflower's litigation risk. Provide advice on whether she should pursue recovery on her own claims, and if so how. If there are any facts or legal rules as to which you are uncertain or need more information, say so.

Question 2. (25 pts., ≈ 1 hr 45 minutes)

In discussing the requirements of the Constitution's Full Faith and Credit Clause, the Supreme Court has stated,

“Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.”

Baker v. General Motors Corp., 522 U.S. 222, 232 (1998). **To what extent, and in what respects, is this statement accurate as a description of current doctrine?**

Question 3. (*15 pts., ≈ 1 hr 5 min.*)

A perennial question: of the many rules and doctrines that we've studied in this class, **name one that you'd like to change, how you'd like to change it, and why.** (There's no single right answer, of course.)

TABLE 1. ALPHABETICAL LIST OF STATES AND CHOICE-OF-LAW
METHODOLOGIES FOLLOWED

States	Traditional	Signif. contacts	Restatement 2d	Interest Analysis	<i>Lex Fori</i>	Better Law	Combined Modern	
Alabama	T+C							
Alaska			T+C					
Arizona			T+C					
Arkansas		C				T		
California				T			C	
Colorado			T+C					
Connecticut			T+ C?					
Delaware			T+C					
Dist. of Columbia				T			C	
Florida	C		T					
Georgia	T+C							
Hawaii							T+C	
Idaho			T+C					
Illinois			T+C					
Indiana		T+C						
Iowa			T+C					
Kansas	T+C							
Kentucky			C		T			
Louisiana							T+C	
Maine			T+C					
Maryland	T+C							
Massachusetts							T+C	
Michigan			C		T			
Minnesota						T+C		
Mississippi			T+C					
Missouri			T+C					
Montana			T+C					
Nebraska			T+C					
Nevada		C	T					
New Hampshire			C			T		
New Jersey			T				C	
New Mexico	T+C?							
New York							T+C	
No. Carolina	T	C						
North Dakota		T					C	
Ohio			T+C					
Oklahoma	C		T					
Oregon							T+C	
Pennsylvania							T+C	
Puerto Rico		T+C						
Rhode Island	C					T		
So. Carolina	T+C							
So. Dakota			T+C					
Tennessee	C		T					
Texas			T+C					
Utah			T+C					
Vermont			T+C					
Virginia	T+C							
Washington			T+C					
West Virginia	T		C					
Wisconsin						T+C		
Wyoming	T+C							
TOTAL	52	Torts 10 Contr. 12	Torts 3 Contr. 5	Torts 24 Contr. 23	Torts 2 Contr. 0	Torts 2 Contr. 0	Torts 5 Contr. 2	Torts 6 Contr. 10
							T = Torts	C = Contracts