

*Final Exam  
Spring 2020*

# Conflict of Laws

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You may download this take-home exam via <https://sakai.duke.edu> on any day of the exam period, starting at 8 am EDT on Monday, April 20.

## STYLE

Please download the exam template from the course website (under [Resources/G. Exam/xxxxxxx\\_220-01ConflictOfLaws\\_Sachs\\_Spring2020.docx](#)) or use the copy that has been emailed to you along with these instructions. Per the Registrar's instructions, make sure to include your student ID number in the filename, and also in the header that will appear 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. In the words of the now-repealed Rule 84 of the Federal Rules of Civil Procedure, the model

answers on the course website “illustrate the simplicity and brevity that these [instructions] contemplate.”

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.*

## CONTACT

According to 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](mailto:registrar_office@law.duke.edu). Also, because students will be taking the exam at different times, you may not discuss the exam with anyone else until the exam period has ended, or until after I’ve notified the class that all exams are have been submitted.

## SUGGESTIONS

In general, please review 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 the questions 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. It’s likely a good idea to sketch out detailed outlines for each question with pencil and paper before you start to write. If you just dive in, you might get lost halfway.

2. *Organize your answers clearly.* You don’t need to follow any particular format with rigor, 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 statutes can be useful, but detailed citations are unnecessary and a waste of your time. It’s much more important to state the substance correctly.

3. *Apply the law as it stands today.* The exam doesn’t ask things like “how would this case have been decided in 1872?” It only tests on the law as it’s understood on the date of 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 case or statute.

4. *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 law or facts not mentioned in the exam.

5. *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; and that each state's long-arm statute extends its personal jurisdiction as far as the Constitution allows.

6. *If there are issues that you're not sure of or that require more information than is provided, you should say so.* Some of them may be intentional!

7. **This one is very important:** *When listing reasons why a particular result would be correct, don't give just one.* Give as many as are correct, even if one 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.

Good luck!

— START OF EXAM —

**Q.1: “Sitting on a beach, earning twenty percent”** (45 pts, ~3 hr, ~1575 words)

The U.S. Treasury Retail Securities office in Minneapolis, Minn., has received a request to redeem a large number of savings bonds. On investigation, however, the office learned that the bonds may have been stolen. They were among a set of \$640 million in negotiable bearer bonds believed to have been lost or destroyed in an explosion in Los Angeles on December 24, 1988.



The bonds and the explosion. Source: 20th Century Fox. Used per 17 U.S.C. § 107.

The bonds were previously owned by the Nakatomi Corporation, a Japanese conglomerate based in Tokyo. At the time, they were in the custody of the Nakatomi Trading Co., a subsidiary incorporated in Japan with its principal place of business at the Nakatomi Tower, 2121 Avenue of the Stars, Los Angeles. At some point thereafter, the bonds were taken to Germany by unknown actors and resold by a broker in Frankfurt. The buyers were two groups of investors, located in Darien, Conn., and in McLean, Va., who have since submitted the redemption request.

Ordinarily, the Treasury's policy is to redeem bearer bonds without investigating their provenance. But a recent federal statute prohibits such redemption by Treasury Retail Securities if "the requestor is not the owner of the security or acting on the owner's behalf."

American jurisdictions do not allow a thief to pass good title. Both Germany and Japan have 'market overt' laws, which allow a market-dealer to pass good title in a stolen item to a bona fide purchaser for value. There is no evidence that the German broker or the American investors were aware of the bonds' history.

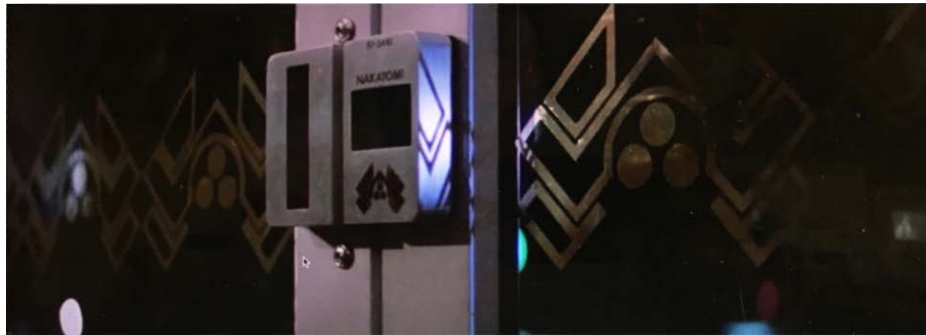
The bonds are also claimed by Old Glory Insurance, a Delaware corporation. Nakatomi Trading had purchased a policy, issued at Old Glory's headquarters in Wilmington, Del., that provided coverage for property in its custody against loss, theft, or damage. After the explosion, the insurer paid out the full \$640 million by check sent to the Nakatomi Tower in Los Angeles. It now claims the bonds under a clause of the policy reassigning the insured property after payment. Such clauses are valid in most states but are forbidden by public policy in California, where the insurers would have only a monetary claim against Nakatomi Trading, not a property interest.

The investors, Old Glory, and Nakatomi Trading have all threatened to sue Treasury Retail Securities in federal court. Such suits, as to which the federal government has waived its sovereign immunity, might be filed in any of the parties' home districts or in the District of Minnesota.

**What should Treasury Retail Securities do, and why?** If the answer is unclear, or if you need more information, just say so. (For purposes of this question, assume that "Combined Modern" states use the "comparative impairment" approach, and that states use the same choice-of-law approach for property disputes as they use for torts.)

**Q.2: “But have no illusions: we are in charge”** (25 pts, ~1 hr 40 min, ~875 words)

Like many corporations based in Japan, the Nakatomi Corporation employs a circular control structure to entrench its existing management. A total of 55% of the shares of the Nakatomi Corporation are owned by its various subsidiaries, such as Nakatomi Trading and the Nakatomi Investment Group. For example, Nakatomi Trading is 80%-owned by the parent corporation, with the remaining 20% owned by the public. In turn, it owns a 15% block of its parent corporation. In this way, the parent’s managers can control how the subsidiary votes its shares.



The Nakatomi corporate logo. Source: 20th Century Fox. Used per 17 U.S.C. § 107.

A year ago, California resident Shirley Jones was told by her broker over the phone that Nakatomi Trading might be a hot stock. She placed an order for a substantial number of shares. Since then, the shares have underperformed, for which she blames the management of the parent company in Japan.

Jones has filed a suit in the California courts against Nakatomi Trading, seeking an injunction preventing the company from voting its shares in favor of management-approved proposals at the upcoming Nakatomi Corporation shareholder’s meeting in Tokyo. She relies on a California statute stating a fundamental public policy against circular control structures. By its terms, the statute forbids the voting of any shares in a parent corporation by a subsidiary (1) that is incorporated in California, (2) that has its principal place of business in California, or (3) that receives at least \$30 million in revenue from California.

Nakatomi Trading meets both of the latter criteria, but it believes that California’s statute is unconstitutional. Additionally, the company cites provisions of its own articles of incorporation stating that any shareholder lawsuits must be brought in Tokyo District Court under Japanese law.

**Can Nakatomi Trading avoid the application of the statute in this case? Why?** If the answer is unclear, or if you need more information, just say so.

**Q.3: “Is this what this is all about? Our project in Indonesia?”** (30 pts, ~2 hr, ~1050 words)

One of Nakatomi’s many subsidiaries is Nakatomi Transport plc, a British firm specializing in major transportation projects. After that firm completed a bridge in Indonesia, that nation’s legislature retroactively heightened the project’s wage-and-hour rules, producing a flood of new employee claims for backpay.



The Indonesian building project. Source: 20th Century Fox. Used per 17 U.S.C. § 107.

A class action in the Indonesian courts led to a sizeable judgment against Nakatomi Transport and *all* the other Nakatomi subsidiaries. (The others, which had nothing to do with the project, refused to appear in the suit. Indonesian law attributes conduct by any one corporate affiliate to all others, as to both jurisdiction and liability; American law strongly emphasizes corporate separateness.)

The courts of Japan have refused to enforce the judgment. Nakatomi Trading also has substantial assets in California (a UFCMJRA state) and New York (a UFMJRA state). If the judgment is not recognized, the plaintiffs will file a new class action on the merits against Nakatomi Trading in California, either under Indonesian law or under the Fair Labor Standards Act, 29 U.S.C. § 206(a). (The latter provides, in relevant part, that “Every employer shall pay to each of his employees who in any workweek . . . is employed in an enterprise engaged in commerce . . . wages at the following rates: . . .”)

**Assess Nakatomi Trading’s likely exposure in this matter.** If the answer is unclear, or if you need more information, just say so.

— END OF EXAM —