

STUDENT ID:

FALL MIDTERM EXAM 2017

IN-HOUSE EXAM INFORMATION		
Instructor: Stephen E. Sachs		
Course Name: Civil Procedure		Course #: 110_05
		COMMENTS:
Exam date and time	Date: 10/20/2017	Time: 1:30 PM
Type of exam	UNBLOCKED	
Number of Essay Questions	1	
Number of multiple choice/true or false	0	
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)	Feel free to use any electronic or print materials: textbook, coursepack, your notes, other people's notes, commercial outlines, etc. You are NOT permitted to consult with anyone or to access the Internet during the exam.
Number of hours for exam	1 hour	
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 your instructor's exam information.

Civil Procedure
Midterm Exam, Fall 2017

Professor Stephen E. Sachs
October 20, 2017
1:30 p.m.

This exam is **8 pages** long, including these instructions. It consists of **one question**.

You have **one hour** to complete the exam. Brevity is appreciated, but there is **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 an English translation dictionary—but electronic translation dictionaries may not be used, per the Registrar’s requirements.) You are **not permitted to consult with anyone or to access the Internet during the exam**, so you **must bring along** a paper or electronic copy of the Federal Rules and the statutes included in the coursepack. 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 the question carefully.* I suggest that you take ten minutes at the beginning to read the whole thing, as well as five minutes at the end for proofreading. Separately, I'd encourage you to spend up to fifteen minutes sketching out your answer with pencil and paper before starting to write. If you just dive in, you'll get lost halfway.

2. *Organize your answer 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 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 document 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. 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!

* * *

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Grades on the midterm will be curved and reported to you as if they were final grades calculated in compliance with Duke's grading policies.

Good luck!

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

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— START OF EXAM —

Q.1: “Grumpy Cat Is Grumpy”

In April of 2012, a domestic shorthair kitten was born in the home of Tabatha Bundesen of Morrissett, Ariz. Bundesen named the kitten “Tardar Sauce.” Her brother Bryan, visiting from Ohio, photographed Tardar Sauce and shared the photograph on the Internet. Some viewers considered the kitten’s unhappy expression amusing. They called her “Grumpy Cat.”

This is Grumpy Cat.



Photo © 2014 Gage Skidmore. Licensed CC-BY-SA 3.0. <https://goo.gl/RmbPY8>

Bundenen and her brother formed an Ohio limited liability company to commercialize their rights of publicity in Grumpy Cat. The company is known as Grumpy Cat Ltd., maintains its

seat in Marion, Ohio, and has registered the trademark “Grumpy Cat®” (Reg. No. 4672289). Grumpy Cat’s disgruntled visage now adorns a variety of stuffed and plush toys, books, action figures, and other memorabilia.

* * *

The above is a matter of public record. What is less well known, because it is entirely untrue, is the following:

On a recent visit to Learning Express Toys in nearby Worthington, Ohio, Bryan Bundesen noticed a plush toy that resembled Tardar Sauce but lacked the official Grumpy Cat® label. Instead, its label was written in French and German and bore the cryptic heading “*LCG/DmK.*” The toy was among many that had been manufactured under contract to Le Chat Grincheux S.A., a French corporation based in Marseille. Grumpy Cat Ltd. sued the French company for violations of its assigned rights of publicity under Ohio law. It sought money damages as well as an injunction against any future participation in manufacturing Grumpy-Cat-like products. The suit was filed in federal court in Washington, D.C., in reliance on Section 2 of the Newly Expanded Federal Fallback (NEFF) Act of 2017:

SEC. 2. EXPANDED FEDERAL FALLBACK.

(a) IN GENERAL.—If, but for this Section, a civil action may not be brought as filed because there is no state or federal court that may exercise personal jurisdiction over all the claims asserted and defendants named in the initial complaint, such action may be brought in the U.S. District Court for the District of Columbia, which shall be a proper venue and may exercise personal jurisdiction over all such claims and defendants.

(b) RULE OF CONSTRUCTION.—This Section shall not apply to any claim first raised or any defendant first joined after the filing of the initial complaint.

Le Chat Grincheux answered, stating among its defenses a lack of personal jurisdiction and improper venue. It also initiated

a third-party complaint against Knockoff Toys, Inc., a Delaware corporation. Knockoff had a contract with Le Chat Grincheux and Die mürrische Katze Aktiengesellschaft (DmK AG), a German corporation based in Stuttgart, to produce toys at Knockoff's factory and headquarters in Flagstaff, Ariz. Every month, the three companies each chipped in one third of the \$20,000 overhead necessary to maintain the factory. Knockoff paid for the parts and labor, made the toys, and shipped them to willing buyers in the United States. The companies then divided the profits according to a complex formula. Thus far, Knockoff's toys had been selling quite well, including to the Learning Express store in Worthington. Le Chat Grincheux alleged that Knockoff would have been a joint participant in the alleged tort and that it owed contribution under Ohio law. Knockoff answered the third-party complaint, stating among its defenses Grumpy Cat Ltd.'s failure to join DmK AG as a defendant.

Once the pleadings closed, Le Chat Grincheux moved for judgment under Rule 12(c), asserting that the plaintiff's claim against it had not been filed in a proper venue. Knockoff also filed a 12(c) motion, asserting that the court lacked subject-matter jurisdiction over the third-party claim and objecting to Grumpy Cat Ltd.'s failure-to-join. Grumpy Cat Ltd. moved for leave to amend its complaint to add right-of-publicity claims against Knockoff, which Le Chat Grincheux and Knockoff opposed on the sole ground that the amendment would be futile.

Knowing only what you know, **what ruling would be proper on these three motions, and why?** Analyze each relevant issue, addressing each motion independently. (That is, treat each one as if it were the first to be decided, ignoring any potential effect that a ruling on one motion might have on another.) And if you're unsure or need more information, just say so.

— END OF EXAM —