

FINAL EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 3 pm on 12 December 2008. You must submit your answers by 6 pm on Monday, 15 December 2008. **If you turn in your answers after 6 pm on 15 December, then you will receive an F for your Torts grade. NO EXCUSES.**

2. **TURNING IN YOUR ANSWERS:** Turn in your answer by sending the file to registrar@law.du.edu. It's a good idea to send your answer with either a send receipt or a delivery receipt. As well, send yourself a copy of the message that you send to the registrar. This will verify the fact and time of your sending your answer. **DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL.** In the subject line of your email, put the following text: "Russell-Torts-[exam number]" where [exam number] is your exam number. Name the file that contains your answer using the same convention: Russell-Torts-[exam number]. If you have technical problems turning in your answer, please contact the registrar. If you have additional difficulties, please contact Ms. Bonnie Catts at bcatts@law.du.edu or 303-871-6268. **Do NOT contact Professor Russell with exam-related difficulties.**

3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, 15 December. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 6 pm on 15 December 2008.

4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.** You should name the file Russell-Torts-[Exam Number]

5. **LENGTH:** This examination consists of one question. You may use no more than 2,700 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination.

6. **SPACING:** Please try to double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **JURISDICTION:** Each of the injuries that form the foundation of the exam questions takes place in Newstate, the 51st state of the union. Newstate is NOT Colorado.

9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answers. You will earn a better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.

10. **YOURS TO KEEP:** You may keep your copy of the exam.

11. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.

12. **GOOD LUCK:** Good luck and have an excellent break.

“Inordinate Fondness for Beetles”

I.

Ellen Wheeler was looking forward to closing the deal. She was cruising on the Interstate toward the City of Metropole. She was soaking in a few rays as she drove with the top down in her convertible. It was a hot, dry, slightly breezy July day in the mountains. The humidity was around 6 percent. There had been no rain for months.

Wheeler had plenty of time to make it to the meeting where she would close the business deal of her life. She expected to make an immediate profit of \$5,000,000 after she inked the deal. She was also confident that the publicity would expand her firm’s business. She was humming the old tune “I’m in the money” as she drove.

Wheeler knew that only she could close the deal, because the man with whom she was doing business trusted only her. Mr. Hughes was a quirky, rich man who did not use telephones, email, or faxes. Hughes only did business in person—face-to-face. He had also made it emphatically clear to her that they had to conclude the deal that afternoon or there would be no deal. Wheeler had allowed two extra hours for the drive to his office, and she was within 90 miles. Everything was on track barring any unforeseen emergencies.

Wheeler first noticed the flecks of ash hitting her windshield. Then she smelled the fire. Next, she saw the cloud of dark smoke and could see the flames reaching above the mountain peak in the distance. The smoke and ash moved her way. She rounded a bend on the interstate and saw brake lights on the line of stopped cars that stretched to the horizon in front of her. She braked hastily and barely avoided crashing into the car in front of her.

In her stopped car, Wheeler waited. She tuned the A.M. radio to the traffic information station and learned that the Interstate would be closed for at least six hours. There was no way for her to leave the Interstate, and there was no alternate route to Metropole. She felt like throwing up. After being stopped for about 5 minutes, she noticed that falling ash was accumulating on the upholstery of her car like snow—or, she thought ruefully, like the ash from Mount Vesuvius that in A.D. 79 buried the city of Pompei along with its residents. She pushed the button to raise the roof on her convertible. Wheeler’s deal with Hughes was gone.

II.

Once, when theologians asked if he had concluded anything about the Creator from his study of biology, the British geneticist and evolutionary biologist J. B. S. Haldane (1892-1964) is alleged to have said, “The Creator, if He exists, has an inordinate

fondness for beetles.” Haldane was referring to the fact that there are more beetles than any other type of insect and more insects than any other type of animal.

The Newstate pine beetle, *Dendroctonus newstatus*, is a species of bark beetle native to the forests of western North America from Mexico to central British Columbia. *Dendroctonus newstatus* is a distinct species from *Dendroctonus ponderosae*. *Dendroctonus ponderosae* is a pine bark beetle that is thriving in Colorado (which is an altogether different state than Newstate). The physiology of *Dendroctonus newstatus* is entirely distinct from the Colorado pine beetle, even though, as the picture to the right makes clear, the two beetles look almost identical.



Dendroctonus newstatus (“the beetle”) inhabits pines, particularly the Newstate Pine (*Pinus newstatus*) but also the Limber Pine (*Pinus flexilis*). The beetles are nasty critters that kill trees by boring through the bark in order to feed on the phloem layer. They then lay eggs. Female beetles initiate attacks on the trees and produce pheromones that attract other beetles and result in mass attack.

Beetles initiate their attacks in early April, and newstate pines are typically overwhelmed within 2 weeks of attack. Attacked trees die and the needles turn brown within 8 weeks of the first attack. The beetles are so voracious that they literally suck nearly all of the moisture out of the tree, and what moisture the beetles do not consume evaporates. Beetle attacks make entire groves or even forests of trees appear reddish brown. Two months after attack, newstate pines are nothing more than dry needles, dry branches, dry twigs, and parched trunks—they are extreme fire hazards.

More than three years ago, *Dendroctonus newstatus* beetles had attacked the pines in the area where the fire started. The beetles killed every single tree in the area and turned what were once lovely evergreen forests into brown, dry kill zones. The trees where the fire started had been dead for three full years.

There are several ways to prevent beetle attacks. Some landowners spray their trees every spring with insecticide. Three or four years ago, the cost of doing so was

about \$15 per tree. Another, clever prevention technique is to tag each tree with a pheromone that communicates to invading beetles that the tree is already full. This technique, which is more environmentally friendly, costs about \$20 per tree.

Once the trees are dead, hiring a professional logger to cut down and remove the dead tree costs about \$75-100 per tree. Some landowners are hopeful that a market will develop for the distinctive burnt orange-striped lumber of a beetle-killed tree, but thus far no one—not even University of Texas football fans—has shown any interest in purchasing the trees.

The death of trees has also led to substantial reduction in the value of the vacation homes in affected areas.

III.

Little Billy was twelve years old. His dad, Big Billy, decided to let Little Billy start the barbecue grill all by himself at the annual party that he threw at his hunting cabin for his hunting buddies and their sons. Big Billy invited eight dads to the party who brought with them young hunters—all boys—between the ages of 10 and 15.

Big Billy had only consumed a few beers by noon on the day of the fire. Big Billy figured that since Little Billy was old enough to shoot a gun, he was old enough to start the grill. Little Billy had watched his father start the grill many times. His dad's habit was to empty the charcoal briquettes into the Weber grill, pour lighter fluid onto the grill, and then light a match and throw it onto the grill as he yelled "Opa!" They were not Greek, but for some reason they always yelled "Opa!"

Little Billy was really happy and pleased when his dad said, "Little Billy, why don't you start the grill for this group of men." "You betcha, Daddy-O," Little Billy said in reply as his dad handed him a pack of matches and a can of lighter fluid. Little Billy went outside with his 10-year-old friend Little Sammy and his 14-year-old friend Little Zach. Just like his father, Little Billy poured briquettes onto the grill in a good-sized pile. Then, he soaked the briquettes with lighter fluid—using about 50 percent more lighter fluid than his dad would have used. Next, he handed the lighter fluid to Little Sammy and said "Hold my can; watch this!" After six unsuccessful tries to light a match, Little Billy finally lit one and threw it awkwardly onto the briquettes. As they erupted into flame, he yelled "Opa!" in his squeaky, pre-pubescent voice.

The three boys watched the leaping flames for a few minutes—proud of what they had accomplished. Little Billy said "Let's go back in," and the three started to troop into the house—first Billy, then Zach, then Sammy. Sammy looked around and put the can of lighter fluid on the grill shelf right next to the cooking surface of the grill. He placed the can about 8 inches from the nearest flaming coal. This was a fateful error.

IV.

Big Billy owned the hunting cabin and the parcel of more than 100 acres of land that had previously been lovely evergreen forest. All the trees died more than three years ago after the beetles got them. Before the beetle attack, Big Billy had been meaning to spray the trees with beetle poison, but he never found the time to get around to it. Since then, the Town council passed an ordinance requiring the removal of the trees. Earlier that summer, Big Billy received a notice from the Town about his trees. The notice included the following text.

Pine Beetle Ordinance Enforcement Notice

Town Ordinance 44 requires that landowners remove all dead, diseased, and/or beetle infested trees located on their property within 10 days of notification.

You are hereby notified that every tree on your property is infested and dead.

Property owners with pine beetle trees remaining on their property are subject to enforcement measures. If the dead and/or diseased trees are not removed from properties within 10 days of Town notification, and property owners have not contacted the Town with a tree removal plan, the Town will pursue an abatement order as outlined in Code Section 4-8-44.

As part of the abatement order, the Town will dispatch a private contractor to cut down the trees on your property, and you will be charged two times the full cost of tree removal. Additionally, fines of \$300 per day may also be levied if the trees are not removed within 10 days of this notification.

Big Billy did not have enough money to pay someone to cut down the trees. He had not submitted any sort of tree removal plan to the Town. He did have a plan, though. His plan was that during the afternoon of the party, he and his hunting buddies would take chainsaws into the forest and cut down as many dead trees as they could.

V.

Little Billy and his friends came back into the house after lighting the fire. They went downstairs where everyone else was. Everyone, that is, but his Uncle Eddy, who was still out in his tent. Uncle Eddy regarded hunting and camping as companion ventures. So, the evening before, he had gone out in the woods to pitch his tent. He often slept late and had not yet come in from his tent in the woods. Only later, when the coroner found his body, did anyone discover that Uncle Eddy had walked so far to pitch his tent that he ended up camping on the neighboring storeowner's property.

In the basement, the men and boys were playing pool, shuffleboard, and the latest edition of Grand Theft Auto on a sweet, new Xbox 360 Elite system with Surround Sound and a 67-inch High Def flat screen TV. About 15 minutes after the boys came back into the house, Big Tommy was playing Grand Theft Auto. In the game, Big Tommy threw some Molotov cocktails at some cops, and when the Molotov cocktails exploded, he thought to himself "This game is so realistic that I can smell the smoke."

Five minutes afterwards, Little Billy went upstairs intending to check the fire in the grill. As he moved to the front door, he saw the flames that had begun 15 minutes earlier when the can of lighter fluid that Little Sammy had left near the grill exploded. Little Billy stepped onto the porch and saw that the forest was on fire all around the hunting cabin. The fire was in the shape of a C; luckily, the opening in the C was in front of the house. Little Billy ran to the top of the stairs, and he yelled "Fire, Fire, Fire" at the top of his lungs.

The men and boys scrambled out of the basement as the flames engulfed the rear of the house. The intense heat was more than they could bear, and the men and their boys set off running down the driveway away from the flaming house and toward the road. Except for Big Tommy. Big Tommy yelled "my gun!" and ran back into the house. He had purchased a special, custom rifle from Outdoor World for \$37,000 after he figured out a way to crack the 527 College Fund that his ex-wife had set up for Little Tommy's education. Big Tommy ran into the house; the second story was engulfed in flames. He crawled on his hands and knees into the kitchen and grabbed his gun from the kitchen table where he had been cleaning and polishing it earlier in the morning. Big Tommy made it through the living room, nearly to the front door when the two-gallon can of gasoline that Big Billy had been meaning to take out to the shed exploded. The explosion blew Big Tommy down the front steps and damaged his left arm so severely that it was later amputated. With his clothes partly on fire and his left arm mangled, Big Tommy ran down the driveway toward the other men and boys, holding his prized hunting rifle in his right hand. He would never again be able to work on the Pabst assembly line, and he had to switch to hunting with a handgun.

When they got to the road, the men and boys crossed over to the side of the road near the river. Some of the men helped to stop the bleeding from Big Tommy's arm. As the fathers and sons paired off, Little Eddy found himself to be the odd boy out.

“Where’s my dad?” he whispered; Little Eddy then started to scream. Later, the coroner determined that Uncle Eddy awakened when the fire came his way. Uncle Eddy tried to scramble away without success. He ran 100 yards farther into the neighbor’s property before the fire finally stopped him.

VI.

As the men and boys stood on the road, they could see the flames of the burning forest were moving from their left to right and spreading to the property on the right. They could also see that there was smoke rising from the far right corner of the property to the right of Big Billy’s. What they did not know was although there were only a few clouds in the sky, a freak lightning strike had hit the back corner of the adjacent parcel at roughly the same time that the can of lighter fluid exploded.

For reasons that neither the men nor their sons were capable of comprehending, the fire spread toward the middle—that is, toward the place where the two parcels met. The fire on Big Billy’s property moved mostly left to right; the fire on the property where the store was located moved from right to left. The combination of swirling winds and topography caused the two fires to move toward each other at the boundary between the two properties. At the outer edges of the properties, though, the fire spread quickly to adjoining land. When the firefighters showed up, there was nothing they could do. The fire became the largest fire in Newstate’s history.

VII.

Like his neighbor Big Billy, Mr. Vender had a property full of dead pine trees. Vender did not have the money to pay for their removal, and he had received notice from the Town that he should remove them at the same time that Big Billy received his notice.

Mr. Vender’s business was undercapitalized. Put differently, he had a crummy little store. Mostly, he sold beer, bait, bullets, and bootleg DVDs to local hunters and fishers. The service was bad; the store smelled bad; and the beer was warm and in cans. Mr. Vender liked to complain that illegal immigrants were causing his business to fail. The only thing that Vender had going for him was that there was no other store for 15 miles in any direction.

When the lightning struck, Ms. Consumer was in the store. She had stopped in order to buy some Chap Stick. Ms. Consumer had a romantic image of rural life in America, and she had been to many wonderful small stores during her travels. This store turned out not to be so wonderful. When she first asked Mr. Vender for Chap Stick, he was puzzled and offered her a Slim Jim. She tried again, and he pointed to the cigarettes, cupped his ear, and gave her a quizzical, annoyed look. Ms. Consumer noticed that his lips were dry and cracked. After her third attempt, Mr. Vender just pointed her to the

back of the store. She wandered back toward the rear of the store and felt sad to see the nearly empty shelves and dusty cases of beer. Toward the rear of the store, she spotted a bathroom and thought that she might as well get something out of the visit.

Ms. Consumer peed, washed her hands, and then wiped her hands on her pants because, predictably, there were no paper towels in the bathroom. As she looked in the foggy mirror that had lost much of its ability to reflect, she noticed an orange glow over her shoulder. She cocked her head, swiveled to look out of the glass block windows, and smelled smoke. She stretched for the door and found that she could not open it. She shook the door ferociously and yelled for Mr. Vender to help. But Vender was already off the property. When he saw the flames, he dashed out the door, ran past Ms. Consumer's husband (Mr. Companion) jumped in his (Vender's) truck, and sped off.

Mr. Companion had been napping lightly in the car while listening to his I-pod. He opened his eyes and saw that fire had reached the store on three of four sides, though the front was not yet engulfed in flames. Mr. Companion yelled "my wife!" and ran into the store. Entering the store, he was struck by the stale smell, which reminded him of the locker room and cafeteria of his middle school. His wife was nowhere in sight.

Smoke was starting to fill the store, and Mr. Companion could see flames in the back of the building. He could not see his wife in Vender's crummy, burning little store. Out of the corner of his eye, through the gathering smoke, he noticed the bathroom door vibrating and sprinted over to it. He could see that doorframe was askew so that the door, if closed, became jammed into the frame. Pulling with all his strength, Mr. Companion opened the door and saw his wife about eight feet from him and safe within the bathroom. With smoke in her eyes and beginning to cough, Ms. Consumer looked at her husband's face, took one step closer to him, and then opened her mouth and watched in horror as a baker's shelf full of cases of now warmer beer fell forward, hit her husband at an angle in the back, and crashed the floor. The shelf and beer narrowly missed Ms. Consumer.

Mr. Companion fell to the floor but with his wife's help, he struggled to his feet and the two of them were able to run out of the store without suffering further physical injury. Ms. Consumer helped her husband into the passenger seat, and then jumped into the driver's seat of their Prius, started the car, and drove off. They suffered no additional physical injury.

VII.

The fire spread and raged for ten days and then continued to burn in hot spots for another two weeks afterwards.

Mr. Vender found when he returned to the site of his store that every tree was burned and that his store was completely burned to the ground. Likewise, Big Billy's trees and property were reduced to ashes.

Mr. Companion and Ms. Consumer survived, but Mr. Companion has had back problems since that time. At least one surgeon has suggested surgery, and Mr. Companion has had to give up most of his athletic activities.

VIII.

Your job is to analyze fully the tort claims of those injured in this disaster. In a very real way, everyone was injured, but you should limit your analysis to the injuries suffered by Mr. Vender, Big Billy, Ms. Consumer, Mr. Companion, Big Tommy, Ellen Wheeler, and, of course, Uncle Eddy. (If there is a claim to be made regarding Uncle Eddy, be sure to say who should bring the claim.) If you spot any contracts claims, ignore them. If you spot any product liability claims—that is, where a defect in a product may have led to an injury—ignore those claims as well.)

Please note that there are many claims to analyze. To the extent that it makes sense to do so, you should consolidate your analysis of parts of some claims or defenses in order to minimize the number of words that you use.

END OF EXAM