

CIVIL PROCEDURE - FINAL EXAMINATION

You have four (4) hours to complete this examination. The final exam is worth 80% of the total points available for the course. There are a total of 400 points available in this exam. You should have 18 pages of material. The examination is in two parts: Part I, worth 160 points, consists of one long essay question and four shorter ones based upon the same hypothetical. Part II is worth 240 points and consists of 40 multiple choice questions, each of which is worth 6 points.

While you are free to allocate your own time as you choose, if you spend one hour and twenty minutes on Part I, you would have 160 minutes for the multiple choice section (or an average of 4 minutes for each problem). Some are quite straight-forward and may be answered in less time, however, leaving time to allocate to others. It is up to you to pace yourself.

For the essay questions, read each question carefully and draft your answer according to the instructions provided for it. Be sure to explain the analytical process you use to arrive at your answer, instead of simply providing a conclusion. Remember always to indicate the rule(s), statute(s), cases, or other authority on which you rely, indicating how they should be applied in light of the facts presented in the hypothetical. If additional facts are necessary to fully resolve a matter, please indicate which ones. There is no word or page limit. Write your answers in one or more bluebooks; label these book(s) according to the questions that are answered in each. **BE SURE TO PUT YOUR EXAM NUMBER ON EVERY BLUE BOOK OR PAGE, IF YOU ARE TYPING.**

For multiple choice questions, select the correct letter for each question and record it on the scantron sheet provided by the proctor. Pay close attention to the call of the question.

You may use your casebook and the rules/statutory supplement to your casebook (or an equivalent rules supplement approved by me in advance of this exam). That's it. You may not use anything else, including Understanding Civil Procedure, outlines, notes, commercial outlines, hornbooks, nutshells and the like. You may not append any outlines or type-written material into your case or rule book.

PART I

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Question #1 (160 points):

This hypothetical involves a civil suit between Theresa Tenant and Larry Landlord. Theresa is the plaintiff in the lawsuit involved; Larry is the defendant. Theresa is a 3L student at the University of Dayton School of Law. She was born and raised in San Antonio, Texas and attended the University of Texas immediately prior to coming to UDSL. She was recruited by the admissions office of UDSL and, this being her first experience away from home, she entered law school resolved to return to Texas following graduation. She worked in San Antonio between her first and second year. However, she remained in Dayton after second year, having received a job with a local Dayton firm and begun a relationship with a classmate, a Dayton resident. During this time she had her driver's license renewed in Dayton and registered to vote so she could weigh in on the Democratic presidential ballot. As she searched for permanent jobs, she looked in Dayton as well as San Antonio and her classmate, now her fiancée, searched in both places as well. While she remained open to staying in the Dayton area, she remained hopeful throughout the litigation involved in this problem that she would return to her native Texas upon graduation or shortly thereafter. A Texas wedding was planned, and Theresa assisted her fiancée in making connections with Texas attorneys.

Larry is a long-time resident of Dayton, Ohio. He owns and manages hundreds of apartments in the Dayton area, including the unit rented by Theresa during her 1st and 2nd year of law school. Additionally, having participated as a child in the national Trapshooting Competition held at the Dayton airport each year, he nurtures a hobby and part-time business interest in trapshooting and trapshooting equipment and souvenirs. While most of his sales take place at the competition through a vendor's booth, two years ago he initiated a website on which he sells souvenir buttons and paraphernalia as well as trapshooting equipment. Coincidentally, about 35% of his internet customers are Texas residents. Persons interested in purchasing his wares may do so online, and Larry mails the products directly to their home based upon information they provide on a web-based form he has provided. Flashy advertisements of Larry's business on Chamber of Commerce websites and the sites of a variety of sporting clubs specifically target Texas residents. Larry also purchased a cabin near Big Bend National Park in Texas, where he vacations every year. And he owns one small K.O.A. campground in Texas, which he manages with the help of a local management agency.

Theresa filed her original lawsuit during the summer after her second year of law school in federal district court in Dayton, Ohio for claims arising out of her tenancy with Larry. In her original complaint, which she hastily crafted and filed pro se, she alleged only that "Larry Landlord failed to maintain my apartment properly and discriminated against me and I'm entitled to damages." After consulting with an attorney, however, and prior to Larry responding, Theresa filed a Notice of Dismissal.

In September 2003, she discovered Larry's connection with her home-state of Texas, retained an attorney there, and refiled a complaint in the Western District of the federal district court in

San Antonio, Texas. She alleged a number of claims stemming from her tenancy with Larry, including breach of contract (for failure to maintain the premises, provide adequate heat and water), breach of warranty of habitability (for failure to maintain the premises properly), breach of Ohio landlord-tenant statutory law, and race and gender discrimination under a federal Fair Housing statute that provides a cause of action for discriminatory actions by landlords. Aside from the fair housing claim, her other claims were based upon Ohio common and statutory law. Additionally, she included a claim for unfair and deceptive trade practices under Ohio law arising out of her purchase of defective trapshooting equipment for her fiancée which she purchased at the Dayton trapshooting competition. She alleged damages of \$80,000 for each claim and alleged generally that the court had subject matter jurisdiction and venue over all causes of action.

Within a month, her attorney arranged to have Larry personally served by a professional process server with a summons and complaint in Dayton, Ohio. Larry did not file a response but called Theresa's attorney and proposed a settlement agreement. Based upon the expected terms of the settlement agreement, Theresa's attorney convinced her that that the best option would be to dismiss her case and "let the negotiation process run its natural course." The attorney filed a stipulated Notice of Dismissal with the court, indicating the mutual interest of the parties in dismissing the matter, and the matter was again dismissed.

Settlement did not go as expected. Larry decided to sign on to an 18-month contract with Haliburton Corporation for reconstruction of housing destroyed by U.S. forces in Iraq and left for Baghdad without resolving the matter. Theresa directed her attorney to refile the complaint, again in federal district court in San Antonio. This complaint was identical to the last.

Theresa attempted to notify Larry of the resumed lawsuit by mailing a letter in first-class mail to Larry Landlord, care of the corporation, that stated: "Please be informed that the case against you that was previously filed in response to your failure to properly maintain my apartment and your discriminatory actions has been reinstituted in the federal district court. Contact my attorney at the above-referenced address if you wish to be served formally with process again. Otherwise, I will assume that you wish to voluntarily accept service of process based upon previous notification of an earlier and identical suit." She included a copy of the complaint with her letter.

Twenty days later, an attorney files a Notice of Entry of Appearance in the case on Larry's behalf but files no responsive pleading. A month later, the attorney mysteriously withdraws his appearance, indicating his client's desire to retain alternative legal counsel. No one else enters the case on Larry's behalf.

One month after receiving the Notice of Withdrawal and having received no answer, formal entry of appearance, or request for an extension of time, Theresa's attorney files a notice of entry of default with the court clerk and makes application for judgment by default. A hearing on damages is scheduled by the court. Theresa, who now has acquired a valid address for Larry in Baghdad and who knows his regular attorney and business in Dayton, does not take steps to notify Larry or his attorney or agent of this hearing, and neither Larry nor any legal representative appears at it. The court takes testimony from Theresa about the amount and extent of his damages. The court enters default judgment in the amount of \$300,000.

Theresa takes the judgment and begins enforcement proceedings. A year passes and Larry learns that his Haliburton wages are being garnished and hears from his Dayton attorney that Theresa is “nosing around about how to attach his apartments to satisfy the judgment.” He calls the court and learns of the default judgment, then decides to set aside the judgment and contest the allegations set forth in the complaint. Eighteen months after the entry of the default judgment, he files a Motion to Set Aside the default judgment, arguing the judgment is void for a number of reasons and that relief from the judgment was justified by excusable neglect.

(A) Should the court grant his motion to set aside the default judgment? Why or why not and based upon what authority? Be sure to identify all possible legal issues and authority in support of your conclusion and set forth your analysis. (120 points)

(B) If the default judgment were set aside and the matter advanced to the discovery stage, which of the following forms of discovery might be appropriate (40 points – 10 points for each of the following):

(1) Could Larry Landlord compel Plaintiff to undergo a mental and/or physical examination to ascertain the effects of her allegations that “exposure to toxins such as mold and lead paint” caused irreparable harm to her health and caused her to incur thousands of dollars of medical fees for physical and mental therapy. Why or why not? What, if any, procedures or limitations might apply?

(2) Which of the following additional forms of discovery could Theresa require Larry to answer: (a) interrogatories, (b) requests for production, (c) requests for admission, and/or (d) questions presented during an oral deposition?

(3) Which of the following could Theresa require Trudy Tenant, a neighbor and tenant of Larry Landlord’s who is likely to be a key witness in the case, to answer: (a) interrogatories, (b) requests for production, (c) requests for admission, (d) questions presented during an oral deposition, or (e) a subpoena duces tecum requesting all documents and other tangible evidence related to her tenancy with Larry Landlord?

(4) Assume that Larry asks Theresa to “identify any and all witnesses, documents, and other evidence that support your claim that I discriminated against you in any way;” and Theresa produces nothing. Furthermore, assume that Larry asks Theresa during deposition to set forth the factual basis for her Fair Housing claim and Theresa states in response: “In the beginning Larry fixed everything like he was supposed to but immediately after seeing me with my fiancée, who is African American, everything changed. He became cold and distant when I would contact him and refused to send anyone to the house to respond to my complaints. I heard from two neighbors that Larry was known to be a racist and despised interracial relationships. But they’re afraid to testify against Larry for fear of losing their Section 8 subsidies. I don’t have any statistics or eyewitness testimony or anything like that but I just know in my heart of hearts that the whole reason my problems with Larry arose were because he discriminated against me because he thought I was a white woman and I was involved with someone from another racial background. I can just tell from his mannerisms.” *If Theresa bears the burden of proof on the Fair Housing discrimination claim and at the close of the*

discovery process the above-referenced testimony is the sole evidence on the record regarding that claim, would Larry likely succeed in disposing of that claim through summary judgment?

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