FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted equally for grading purposes and you should spend equal amounts of time on each question. If there are individual parts within a question, each part within the question will be weighted equally.

Please write legibly, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your social security number to identify your blue book. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your social security number is on each one, and insert all others into the first one.

The Federal Rules of Civil Procedure apply to all questions. You may assume, if relevant, that any American state has a long-arm statute identical to that of Illinois which is printed at pages 697 and 703 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

Because at least one student has to take this examination on a deferred basis, you must enter your social security number at the top of this white examination paper and turn it in with your blue book or blue books. This is a temporary measure for examination security only, and this examination paper will be returned to you.
QUESTION ONE

Stanley Simmerwell lent his 2002 Ford Devastator sport-utility vehicle to his nephew Herb Highball, who had a reputation for wild and crazy off-roading. Highball decided that he wanted to drive the Devastator up the Mt. Washington Auto Road to the summit of Mt. Washington in New Hampshire.

While ascending the mountain at an excessively high speed, Highball was in collision with a descending car owned and driven by Tammy Tumblehome. Tumblehome did not see the Devastator coming because she was talking on her cell phone while adjusting her makeup and trying to get heavy metal music on the radio. Tumblehome’s car was knocked off the auto road. The car overturned and rolled down the mountainside before coming to a stop several hundred feet from the site of the collision. Tumblehome suffered serious injuries.

The Devastator remained on the road but suffered substantial property damage.

Tumblehome sued Simmerwell and Highball as co-defendants in the United States District Court for the District of Massachusetts claiming damages of $500,000.

In addition to filing an appropriate defensive response to the complaint, Simmerwell wants to assert offensive claims (1) to recover for the damage to the Devastator, and (2), if Highball should be found at fault in the accident, to receive indemnification from Highball for any money paid by Simmerwell to satisfy the
judgment in favor of Tumblehome. Note that the first of these two claims can be asserted against both Highball and Tumblehome.

REVIEW RULES 13(a), 13(b), 13(g), 18(a) AND 20(a). THEN ANSWER EACH OF THE FOLLOWING SUB-QUESTIONS BRIEFLY.

1. Tumblehome is a resident of New Hampshire. Simmerwell and Highball are residents of Massachusetts and have been properly served under Rule 4. Are subject matter jurisdiction, personal jurisdiction and venue correct? Explain.

2. Why is the joinder of Simmerwell and Highball as co-defendants proper? Cite the relevant federal rule or rules.

3. What pleading may Simmerwell file against Tumblehome? What, if anything, will happen to Simmerwell’s claim against Tumblehome if he fails to file it in this action? Cite the relevant federal rule or rules.

4. What pleading may Simmerwell file against Highball? What, if anything, will happen to Simmerwell’s claim against Highball if Simmerwell fails to file it in this action? Cite the relevant federal rule or rules.

5. Suppose that Simmerwell asserts a claim against Highball, in the original action, for indemnity but not for damage to the Devastator. The entire case, including this claim against Highball, goes to trial. The court concludes that Highball was solely responsible for the accident. Now Simmerwell files a separate action against Highball to recover for damage to the Devastator. Why will this second case be dismissed? (Hint: the answer is not found in Rule 13[a] or Rule 13[g]).
6. Suppose that Simmerwell asserts against Highball both his claim for indemnification and his claim for property damage to the Devastator in the original proceeding. If Simmerwell has a completely unrelated claim against Highball for trespassing on Simmerwell’s farm, can Simmerwell join this trespass claim to his indemnification and property damage claims against Highball? Cite the relevant federal rule or rules.

7. Suppose that Simmerwell has no claim against Highball either for indemnification or for property damage, but does have against Highball the unrelated trespass claim mentioned in sub-question 6. Why can Simmerwell not assert the trespass claim alone in the original action? Cite the relevant federal rule or rules.

8. Suppose that Simmerwell asserts against Highball both his claim for indemnification and his claim for property damage to the Devastator in the original proceeding. Now suppose that Highball wants to assert a claim against Simmerwell, alleging that the Devastator had defective brakes when Simmerwell lent it to Highball. May Highball assert this claim against Simmerwell in the original proceeding? Cite the relevant federal rule or rules.

9. Same facts as in sub-question 8 above. Must Highball assert this claim against Simmerwell or else forfeit the opportunity to do so in another proceeding? Cite the relevant federal rule or rules.
QUESTION TWO

A person who inflicts tortious injury on another is called a "tortfeaser." Two or more persons who in combination inflict tortious injury on another are called "joint tortfeasers."

At common law, the plaintiff could elect to sue all joint tortfeasers, or fewer than all, or one alone. Also at common law, a plaintiff who prevailed was entitled to a judgment in the full amount of his proven claim against each of the joint tortfeaser defendants. (To be sure, the plaintiff was entitled to collect the judgment only one time, but the plaintiff could elect which of the liable defendants to collect it from). Finally, at common law, a defendant who paid the judgment had no right to demand that the other joint tortfeasers contribute their shares. These rules conferred great power upon plaintiffs in suits against joint tortfeasers, power that was capable of being abused. (Do not go further with this question until you are satisfied that you understand why the common law of joint tortfeasers "conferred great power upon plaintiffs").

Most American jurisdictions have passed statutes (i.e. acts of their legislatures) that modify the above rules. In particular, most American jurisdictions now by statute permit a joint tortfeaser who has paid all of a judgment, or more than his pro rata share, to demand contribution from the other joint tortfeasers. (This is known as "contribution among joint tortfeasers"). There is a great deal of variation from state to state in the statutes that authorize contribution among joint tortfeasers.
The relevant statute in New Hampshire provides as follows:

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same individual claim, or otherwise liable for the same injury, death or harm. Except as provided in section (c), the right of contribution may be enforced only by a separate action brought for that purpose.

(b) Except as provided in section (c), no separate action for contribution shall be brought until the liability of the party seeking contribution shall have been reduced to a sum certain either by judgment of a court or by agreement of the parties recorded with the court.

(c) If and only if the plaintiff in the principal action agrees, a defendant seeking contribution may bring an action in contribution prior to the resolution of the plaintiff's principal action, and such action shall be consolidated for all purposes with the principal action.

The late Beth Brownie lived in a new apartment complex in Concord, New Hampshire, called Marvin Gardens. She died when a faulty hot water heater emitted carbon monoxide gas in her apartment. Ms. Brownie's estate brought a wrongful death action in the United States District Court for the District of New Hampshire against Spades Realty Co. ("Spades"), the owner of the apartment complex, based on diversity of citizenship. Subject matter jurisdiction, personal jurisdiction and venue are all correct.

Within ten days of serving its answer to the complaint, Spades served third-party summonses and complaints on the following parties: Club's Plumbing and Heating Co., whose employees installed the water heaters at Marvin Gardens, Hart Supply Co., which sold the water heaters, and Diamond Appliance Co., the manufacturer of the water heaters. In each third-party complaint Spades is seeking
contribution from the third-party defendants in the event that Spades shall be found liable for the death.

Ms. Brownie’s estate moved to strike the third-party complaints (i.e. moved to cancel the joinder of the third-party defendants). At oral argument on this motion the estate pointed out that a right of contribution exists only because of New Hampshire statute law, which the federal court should follow in this diversity case. A plaintiff has a right to choose his or her defendant, and the statute quoted above gives plaintiff a right to require a defendant to litigate its contribution claims (if any) elsewhere than in plaintiff’s suit against the chosen defendant. As a practical matter, the estate also pointed out, the estate’s claim against the landlord, Spades, is a simple one based on breach of the implied warranty of habitability. Spades’s contribution claims, however, will raise complex issues of negligence and product liability law. The intent of the New Hamshire legislature, in passing the statute quoted above, was to not require plaintiffs to bear the burden of complex contribution claims raised by defendants.

In response, Spades says simply that it has an unqualified unilateral right to implead third-party defendants, under Federal Rule 14(a), within ten days of filing its answer to the plaintiff’s complaint.

How should the judge decide Ms. Brownie’s estate’s motion to strike the third-party complaints? Why?
QUESTION THREE

Attorney Philander S. Podsnap of Foulhaven, Massachusetts, represented Mrs. Edna Bombast in acrimonious divorce proceedings against her husband Bart. The fight was only about money. Husband and wife both wanted out of the marriage. Bart was a well-to-do local businessman. Edna was a housewife. She wanted a lump sum of cash to get on with her life. She didn’t want periodic alimony payments because she knew that Bart would try to use these to keep her on a leash.

Divorces in Massachusetts are heard in the Probate and Family Court, a court of limited jurisdiction. The historic antecedents of Probate and Family Court jurisdiction lie in courts of equity; for this reason Probate and Family Court judges sit without juries.

Podsnap tried the Bombast divorce before Judge Solomon Wisdom. After five days of testimony about Bart’s assets and Edna’s needs, Judge Wisdom awarded Edna a lump-sum "equitable distribution" of $2,000,000.

Judge Wisdom routinely inquired about the legal fees that were paid by divorce litigants to their lawyers. (For this practice he was hated by the divorce bar). The judge asked Podsnap about his fee. Podsnap told the judge that he had a contingent fee agreement under which he would receive 25% of the lump sum award. The following exchange was then recorded by the court reporter:
THE COURT: You can’t be serious, Mr. Podsnap. You know it’s unethical to represent a divorce client on a contingent fee basis.

MR. PODSNAP: The fee’s not for the divorce part of it, judge. I did the divorce for free. The contingent fee, that’s for the equitable distribution part.

THE COURT: There’s no merit in that argument. I find your contingent fee agreement unenforceable because unethical. If you want to argue about it, I’ll refer it to the Board of Bar Overseers for attorney discipline and you can argue with them.

MR. PODSNAP: Holy smokes, judge, no.

THE COURT: However, I don’t want to deny you a reasonable fee. I will therefore entertain an application for approval of a reasonable fee based on your time.

Podsnap collected his miserably inadequate time records, faked some entries in his diary, estimated his time where he thought he could get away with it, and applied for approval of a bill for 1,054 hours of time at $250 per hour.

By this time Edna had fired Podsnap. She hired a new lawyer and told him to fight Podsnap over the fee. Judge Wisdom called for a hearing. Podsnap testified about his time charges and was cross-examined about his time records by Edna’s new lawyer. It did not go well for Podsnap. Judge Wisdom concluded:

THE COURT: I find by a preponderance of the evidence that attorney Podsnap reasonably expended 173.3 hours of time on behalf of his client Mrs. Bombast. I find that a reasonable fee for these services is $150 per hour. Based on my own observations, I find that the services were performed competently by attorney Podsnap.

Podsnap sent his bill for $25,995, plus approved expenses, to Edna. She did not pay it. Podsnap started suit in the Massachusetts Superior Court to collect the bill. (Unlike the
Probate and Family Court, the Superior Court is a court of general jurisdiction in which there is a right of jury trial. Edna’s response, in addition to an answer on the merits, is a counterclaim for legal malpractice seeking damages of $1,000,000.

The counterclaim asserts that Podsnap failed to perform adequate discovery of Bart’s bank accounts and miscalculated Bart’s pension assets. For this reason, according to the counterclaim, the evidence of Bart’s net worth at the divorce trial was too low by at least $5,000,000. Had this information been known to the Court, says the counterclaim, Edna’s equitable distribution award would have been at least $1,000,000 higher.

A counterclaim calls for a responsive pleading that is denominated a reply. In his reply, Podsnap raises two affirmative defenses:

(1) **Res judicata.** Podsnap claims that Edna is barred by res judicata because she could have, but did not, raise her claim of legal malpractice as a defense to Podsnap’s fee application before Judge Wisdom.

(2) **Collateral estoppel.** Podsnap claims that Edna is collaterally estopped on the issue of malpractice by Judge Wisdom’s finding that Podsnap’s services were performed competently.

**Part A.**

Evaluate Podsnap’s defense based on res judicata.

**Part B.**

Evaluate Podsnap’s defense based on collateral estoppel.
QUESTION FOUR

In 1995 Tennyson Lance, an Australian citizen who currently lives in Portland, Oregon, sold his skateboard manufacturing company to Radical Industries, Inc. ("Rad"), for $5,000,000. Rad is a Delaware corporation. Its corporate headquarters are located in Los Angeles, California. Its manufacturing facilities are equally divided between Seattle, Washington, and Portland, Oregon. Rad's warehouse and and distribution center is also located in Portland. Payroll is paid from corporate headquarters in Los Angeles. All decisions about corporate business emanate from company headquarters.

Lance's company had a reputation for producing skateboards of the highest quality. Its tradename, "Lance-A-Lot," was known to skateboarders from the Charles River to the Great Wall of China. At the time of the sale, accountants estimated that the tradename alone was worth $500,000 in sales per year. Lance himself was a champion skateboarder who pioneered the skateboard maneuver called "Lance's Dances." He was well aware of his own reputation and that of the Lance-A-Lot brand. Lance was afraid that Rad would try to profit from the Lance-A-Lot reputation while reducing the quality of the product. To guard against this, the contract of sale provided that all skateboards sold by Rad under the Lance-A-Lot name must meet the standards of the Federal Skateboard Safety Act. If Rad violated this provision of the contract, its rights to the Lance-A-Lot name would automatically revert to Lance who would then be free to use or sell the Lance-A-Lot name as he saw fit.

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The Federal Skateboard Safety Act ("FESSA") was enacted in 1990 after a tide of serious skateboard injuries came to the attention of Congress. Section 3-1 of FESSA provides a private right of action for anyone injured by a violation of FESSA standards. Lance testified before Congress in favor of FESSA and was one of the industry's most visible supporters of the law. (It didn't hurt that Lance-A-Lots already met FESSA standards whereas most of Lance's competitors had to retool and redesign their products).

The August 2002 issue of Boarding Housenews magazine revealed that Lance-A-Lot skateboards made by Rad were defective. The skateboards delaminated when wet and the wheels came off when stressed. Soon after, Lance was contacted by the Half Pipe Skateboard Co. ("Half Pipe"). Half Pipe inquired if it could acquire the Lance-A-Lot name for two years, for which it was willing to pay $50,000. Lance liked the deal but told Half Pipe that he first had to make certain that the rights to the Lance-A-Lot name had reverted to him.

Lance wrote to Rad, quoting the Boarding Housenews article. Lance told Rad that it was manufacturing and selling Lance-A-Lot skateboards which were defective under FESSA standards. Accordingly, Lance's letter concluded, all rights to the Lance-A-Lot tradename had now reverted to him.

Lance received an angry reply by FAX denying the allegations in Boarding Housenews and insisting that Rad retained exclusive rights to the name.
Lance sued Rad in California Superior Court seeking a declaratory judgment that the Lance-A-Lot skateboards manufactured by Rad failed to meet FESSA standards, and that all rights to the Lance-A-Lot tradename had therefore reverted to him. He also sought an injunction against Rad's further use of the tradename. Ten days after receiving service of process, Rad removed the action to the appropriate federal district court. As grounds for removal, Rad alleged federal question jurisdiction under 28 U.S.C. s. 1331 and diversity of citizenship under 28 U.S.C. s. 1332. Lance has filed a motion to remand to California Superior Court. How should the federal district judge decide the motion to remand? Why?

END OF EXAMINATION