CIVIL PROCEDURE
Mr. Martin
December 9, 2013

Exam ID no. ________________________________

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 in accordance with the amount of time suggested for each question. All questions are to be answered in one or more blue books. Turn in this white examination paper along with your blue book or blue books.

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 examination identification number to identify your blue book or blue books. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, you exam ID number will be 45678959. If you use more than one blue book, identify each one (“No. 1 of 2,” “No. 2 of 2,” etc.), make sure that your exam ID number is on each one, and insert all others into the first blue book when you turn them in.

The Federal Rules of Civil Procedure apply to all questions. You may assume, if relevant, that any American state has a longarm statute identical to that of Illinois which is printed at pp. 778 and 780 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

THIS WHITE EXAM PAPER AND ALL BLUE BOOKS MUST BE RETURNED AT THE END OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK WITH THE WORK ‘SCRAP.’
QUESTION ONE
(suggested time: thirty minutes)

Attorney Cecelia McStinger sued her former partners in the 24-lawyer firm of Sniff, Peck & Grubb. Suit was brought in federal court under Title VII of the federal Civil Rights Act. Cecelia alleged that she was forced out of the partnership because of conduct and attitudes that discriminated against her on the basis of sex.

Because a law firm is a partnership (not a corporation), suit was brought against each of Cecelia’s former partners. The defendant partners each filed a timely motion to dismiss for failure to state a claim upon which relief can be granted based on the argument that Title VII does not cover professional legal partnerships. Relying on Hishon v. King and Spaulding, 467 U.S. 69 (1984), the district court denied these motions.

ANSWER EACH OF THE FOLLOWING QUESTIONS “YES” OR “NO” WITH A BRIEF EXPLANATION. YOUR ONE-WORD ANSWER “YES” OR “NO” COUNTS AS FORTY PERCENT (40%) OF EACH QUESTION. YOUR BRIEF EXPLANATION COUNTS AS THE REMAINING SIXTY PERCENT (60%). WHERE APPROPRIATE, INCLUDE IN YOUR BRIEF EXPLANATION A CITATION TO THE RELEVANT FEDERAL RULE SECTION OR SUB-SECTION.

1. Can any of the defendant partners now move to dismiss for lack of subject matter jurisdiction?

2. Can any of the defendant partners include in his or her answer the defense of lack of jurisdiction over the person?

Sylvester Peck was the managing partner of Sniff, Peck & Grubb. Each year he asked every lawyer at the firm to write an evaluation of each of the other lawyers. Peck did not share these evaluations. He used them to fix
compensation levels and to determine which of the associate lawyers should become partners.

Cecelia sought and obtained discovery of the evaluations. She had always thought of Walter J. Grubb, another senior partner, as a friend. Imagine her distress to read that Grubb described her as a “power-hungry butch lesbian,” “openly hostile to males” who should for that reason “be confined to representing other angry females in the domestic relations practice.”

3. May Cecelia amend her Title VII complaint to add a claim for libel [tort claim based on written statement that is injurious to the reputation of another] against Walter J. Grubb?

4. Must Cecelia amend her Title VII complaint to add a claim for libel against Grubb, or else forego this claim which might otherwise be brought later in a state court?

5. Herbert Sniff, the greatly esteemed senior partner of Sniff, Peck & Grubb, was surprised to discover that Cecelia’s evaluation described him as “brain-dead,” “no longer able to practice at the level expected of a partner in SP&G,” and “a malpractice hazard if he does anything but play golf with the older clients.” May Sniff counterclaim for libel in Cecelia’s Title VII suit?

6. Must Sniff counterclaim for libel in Cecelia’s Title VII suit, or else forego this claim which might otherwise be brought later in a state court?

QUESTION TWO
(suggested time: fifteen minutes)

Explain the differences between the uses and functions of impleader, interpleader, and intervention. Give an example of each.
QUESTION THREE  
(suggested time: forty-five minutes)

Veganburger Corp. ("Veganburger") of Vermont is in the business of franchising fast food restaurants in Vermont that specialize in vegan cuisine such as carrot burgers, soy cheese pizza, vegan chili, salads, and the like.¹ A franchise agreement with Veganburger entitles a restaurant owner (the franchisee) to use, for a fee, the "Veganburger" name and logo, and to purvey food products supplied by Veganburger. Veganburger’s franchise agreements all contain termination clauses which provide that any franchise may be cancelled at will by Veganburger if, in its sole judgment, the franchisee is not operating the restaurant satisfactorily.

Amanda Marinara’s Veganburger restaurant was cited by her town’s health inspector for unsanitary conditions. Veganburger thereupon terminated her franchise in accordance with the franchise agreement notwithstanding Amanda’s protest that the violations were trivial and soon corrected. Amanda brought a class action suit in a Vermont state court on behalf of the class of all Veganburger franchisees. The suit sought an injunction against enforcement of the termination clause on the grounds that its unlimited grant of discretion to Veganburger was unconscionable.

Upon filing of the suit, the trial judge held a hearing to determine if the suit should be certified as a class action pursuant to Vermont Rule of Civil Procedure 23, which is identical to Federal Rule 23. At the hearing, several franchisees opposed certification on the ground that they (and others like them) feared that, if the termination clause were invalidated, the entire franchise agreement might fall with it or that Veganburger might use other

¹ A “vegan” diet, as opposed to a vegetarian diet, eschews not only meat but also all food products of animal origin such as milk, eggs and cheese.
and more punitive measures to get rid of franchisees that it didn’t like. The court rejected these arguments against certification, however, and certified the class under Rule 23(b)(2). Following a bench trial, the court ruled that the termination clause was not unconscionable and entered judgment for Veganburger. Amanda, lacking funds, did not appeal.

A few months later Veganburger terminated the franchise of Emily Chutney, another franchisee, for adulterating the soy cheese with mozzarella. Insisting that this charge was false, Emily brought suit against Veganburger in Vermont state court. This suit sought an injunction against enforcement of the termination clause against Emily on the ground that the clause violated a Vermont statute prohibiting the termination of any franchise agreement except for “just cause.” Emily had not received personal notice of, and was unaware of, Amanda’s earlier lawsuit.

Veganburger now moves to dismiss Emily’s suit on the ground that it is precluded by the judgment in Amanda’s earlier case. Discuss the issues raised by this motion, and assess the motion’s chances of success.

**QUESTION FOUR**
*(suggested time: forty-five minutes)*

Buster Klaxon, a citizen of Maine, was a businessman who owned the largest retail store in Maine selling hunting and fishing equipment exclusively. He had an idea for a new line of business that he thought might turn a profit. Buster decided that he might make money selling refrigerators during the months of January through March. He observed that his fellow Maine citizens liked to shop for out-of-season bargains such as Christmas decorations in January and winter boots in April. He thought that they would enjoy buying refrigerators in winter too.
Buster had seen an article in a national trade magazine about Polar Co., a manufacturer of small refrigerators in Alabama. The article said that Polar usually had refrigerators left over at the end of a year of production which it could not sell.

Polar was a profitable company that had a good reputation in southern states which it had developed by marketing refrigerators through stores that sold hunting and fishing equipment in Alabama, Georgia, Florida, South Carolina and Mississippi. The customers bought small refrigerators for use in local hunting, fishing and vacation lodges. Polar introduced a “new, improved” model of refrigerator each year in the hopes of stimulating repeat sales. At the end of the year in December, unsold refrigerators of the old model were disposed of for their scrap metal value alone.

Buster’s plan was to buy the surplus refrigerators at a heavy discount from their normal wholesale price, ship them to Maine, and offer them to his hunting and fishing customers in Maine at a little below the price of competing models.

When Buster approached Polar (by telephone) the company’s officers were intrigued. Buster was careful not to explain the details of his plan to Polar. He insisted that he would buy the refrigerators “F.O.B.” which meant that he would take title to them at Polar’s warehouse in Alabama and arrange his own shipping, so that Polar could not copy his plan and take over the Maine market. Despite Buster’s secretive manner Polar decided that, if Buster would pay, even at a reduced price Polar could make money by selling surplus refrigerators which would otherwise be scrapped.

So the deal was made. Polar checked out Buster’s credit references, which were good, and agreed to sell him the refrigerators on credit with payment to be made 60 days after shipment from Polar’s warehouse. Polar
was experienced in making deals with retailers who resisted formal written contracts so, except for a few letters that went back and forth, the understanding was oral.

At first the small refrigerators got a good reception in Maine. Customers loved the bargain price. All over Maine and even into New Hampshire word spread that Buster had something special.

Problems, however, soon arose. It turned out that Maine citizens liked to use the refrigerators when they did their cold weather snowmobiling and ice fishing. They wanted a small refrigerator that would keep their beer chilled without freezing it. But the refrigerators were not designed to resist extreme cold. Large numbers of customers returned their refrigerators to Buster’s store, demanding refunds and complaining about their frozen beer. Buster complained to Polar that Polar’s officers had told him, orally and in writing, that the refrigerators were designed to withstand extremes of temperature. Polar’s officers replied that they were talking about hot weather, not cold weather.

Polar refused to accept any returns from Buster. Buster stopped writing checks to Polar. The exchanges between Buster and Polar became more and more hostile.

Polar sued Buster in a state court in Alabama for $100,000 unpaid by Buster to Polar. Polar sued in Alabama for two reasons: (1) it wanted the home field advantage—specifically it hoped for a jury of satisfied Alabama hunters and fishermen, not a jury of Maine folks who might know about the frozen beer; and (2) Alabama law recognizes and will enforce most oral contracts. Buster was properly served in Maine with process from the Alabama state court.
Two days after service of process upon Buster, Buster retained a lawyer in Alabama. You are that lawyer. Alabama’s long arm statute is identical to that of Illinois which is printed at pp. 778 and 780 of your casebook.

Formulate a strategy for forcing Polar to sue Buster in Maine. Identify the procedural steps that you will take to implement the strategy. Estimate your likelihood of success.

**QUESTION FIVE**  
(suggested time: forty-five minutes)

Mr. and Mrs. Malarkey bought a recreational vehicle called a Fat Boy made by the Overwaite Coach Co. ("Overwaite") of Overwaite, West Dakota. The Fat Boy was nothing but trouble. First the air conditioning wouldn’t work. Then the pressurized water tank depressurized and the Malarkeys couldn’t take their showers. The refrigerator wouldn’t keep the ice frozen. The sofa bed jammed in the open position. The handle fell off the dishwasher. Every week, it seemed, the Malarkeys were taking the Fat Boy back to the dealership to have some new glitch fixed. Overwaite denied all responsibility for the defects. In addition, Overwaite’s customer service representatives were surly and unresponsive. Finally the Malarkeys could take it no longer. They sued Overwaite in the United States District Court for the District of West Dakota under the federal Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.* To their complaint they added West Dakota state law claims of negligence, strict product liability and breach of warranty. The state law claims are within the federal court’s pendent (now called “supplemental”) jurisdiction. A jury trial was demanded.
The Malarkeys thought that they should teach Overwaite a lesson about the consequences of poor customer relations. In addition to compensatory damages for breach of warranty of their state law and Magnuson-Moss Warranty Act claims, the Malarkeys sought punitive damages on their pendent negligence and strict product liability claims.

Punitive damages in tort are available in all but four or five American states.\(^2\) Abolition or curtailment of punitive damages, especially in product liability actions, is high on the tort reform agenda that has been promoted for the past twenty years by American manufacturing and insurance interests. Economists argue that punitive damages are dysfunctional. The United States Supreme Court has found that there are constitutional Due Process limitations on the states’ law authorizing punitive damages, although it hasn’t said exactly what those limitations are. Several American jurisdictions have enacted legislation in recent years restricting punitive damages. One of these jurisdictions is West Dakota.

In its 2008 Tort Reform and Insurance Act, West Dakota limited punitive damages to three times actual damages, imposed restrictions on discovery relating to defendants’ net worth, and introduced the following special requirement:

No claim for punitive damages shall be accepted in any court of this state until the plaintiff shall have filed in court a statement on oath of facts which, if proven, would entitle the plaintiff to recover punitive damages, and the court shall have found that there is a reasonable basis for the plaintiff’s claim.

(Note that the requirement for a statement “on oath” means that a plaintiff can be prosecuted for perjury if he or she files a statement containing unfounded or exaggerated claims).

\(^2\) Massachusetts is one of the exceptions.
(Note that the requirement for a statement “on oath” means that a plaintiff can be prosecuted for perjury if he or she files a statement containing unfounded or exaggerated claims).

Mr. and Mrs. Malarkey have not filed this statement in the federal district court nor, on the facts set out above, can they do so. Overwaite moves to dismiss the Malarkeys’ pendent state claims for want of this statement. The Malarkeys argue that the Court should deny this motion because the West Dakota statute amounts to a special pleading requirement that is contrary to F. R. Civ. P. Rules 8(a) (2), 8(a) (3) and 9(g).

(The argument for Overwaite’s motion to dismiss is a precursor to other arguments that lie down the road in this or other federal court cases in West Dakota, specifically that restrictions on discovery of defendants’ net worth contravene F. R. Civ. P. Rule 26(b)(1), and that restrictions on awards of punitive damages abridge the right to trial by jury as guaranteed by the Seventh Amendment).

How should this judge rule on Overwaite’s motion to dismiss the Malarkeys’ pendent state law claims? Why?

END OF EXAMINATION

REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN. THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY UNUSED, AND ALSO BLUE BOOKS USED AS SCRAP. LABEL ANY SCRAP BLUE BOOK WITH THE WORD, “SCRAP.”

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QUESTION ONE
(suggested time: forty-five minutes)

Stanley Simmerwell lent his 2012 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 a head-on 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 find 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**

*(suggested time: forty-five minutes)*

There still is a French Foreign Legion. It still enlists only non-French citizens, and it still guards the identity of its legionnaires by enrolling them in the Legion under false names—*noms du Legion*. All this Minnie of Methuen found out, to her sorrow, when she divorced her no-good husband Vinnie.
When Vinnie walked out on Minnie in 2006, he told her that he was going to join the French Foreign Legion. It was just about the only truthful statement he ever made to her. This was the last she saw or heard of him. In 2009 she filed for divorce, on the grounds of desertion, in the appropriate Massachusetts state court.

Minnie’s first problem was to serve the summons and complaint for divorce upon Vinnie. She sought to make personal service in accordance with French law which, if effected, would have been valid service under Rule 4(f). The French process-server, however, could not locate anybody named Vinnie in the Foreign Legion for the very good reason that nobody by that name was enrolled. Minnie then sent the summons and complaint by international certified mail to Vinnie c/o the Foreign Legion at its headquarters in Corsica. Same result. Finally Minnie applied to the court for an order authorizing her to serve Vinnie by publication. This was allowed. Notice of the pending divorce proceedings, addressed to Vinnie, was published for three weeks in the Boston Herald and in the Paris edition of the English-language International Herald-Tribune. Vinnie, however, was engaged in a tribal civil war in Mali, Africa, fighting with the rest of his Legion battalion, and he never saw the notice.

After Vinnie failed to appear in the divorce proceedings, Minnie’s divorce was granted by default. The judgment of divorce contained two provisions of consequence: (1) it recited that a child, Serena, had been born to the couple, and (2) it ordered Vinnie to pay $100 per week to Minnie for the support of the child retroactive to her date of birth, June 14, 2008.

Abandoned by her husband and caring for a two-year-old, Minnie applied for public assistance. As a condition of assistance she assigned to
the Welfare Department\(^1\) her right to seek and collect child support from Vinnie. No more than Minnie could the Welfare Department find French Foreign Legionnaires under false names, so all that happened was that Vinnie’s unpaid child support was recorded on the Welfare Department’s computer in ever-increasing amounts.

In September, 2011, Vinnie’s enlistment in the Foreign Legion ended. He returned to Massachusetts with $10,000 in profits from various black-market transactions in Mali. With this money he opened a checking account at the Last National Bank under his real American name and social security number. He then made the serious mistake of writing a check on that bank account to renew his Massachusetts driver’s license. The Welfare Department’s computer, finding a bank account identified to Vinnie by name and social security number, levied on the account taking the entire $10,000.

Vinnie was ripped. First he went to the bank for an explanation. The bank sent him to the Welfare Department. There he learned for the first time the meaning of the term “deadbeat dad.” Not only was he penniless but, also, he found that he was obliged for the next fifteen years to support a child he knew nothing about.

Vinnie asked when Serena was born. “June 14, 2008,” said the Welfare Department worker.

“But,” said Vinnie, “I’ve been out of the United States continuously since 2006.”

“Sorry, Mac,” said the Welfare Department worker. “You’re the father. It’s res judicata.”

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\(^1\) Formally called, in Massachusetts, the Department of Transitional Assistance. The business of collecting delinquent child support is in the hands of another agency, the tax collector at the Department of Revenue. For simplicity, the combined functions of the Department of Transitional Assistance and the Department of Revenue are called the “Welfare Department” in this question.
Part A.
(eighty percent of this question)

Represented by legal services, Vinnie sued the Welfare Department. Vinnie seeks the return of his $10,000. He also seeks a declaratory judgment that he is not the father of Serena. The Welfare Department answered raising the affirmative defenses of res judicata and collateral estoppel. For the purpose of testing the Welfare Department’s arguments of law, Vinnie’s lawyer made a motion pursuant to Rule 12(f) to strike these defenses as insufficient. How should the judge decide the motion? Why?

Part B.
(twenty percent of this question)

Assume that the judge denied Vinnie’s lawyer’s motion, in effect ruling that the defenses of res judicata and collateral estoppel will apply to Vinnie’s claim, regardless of your actual answer. Does Vinnie, in that event, have any other route to relief? If so, identify it and evaluate Vinnie’s likelihood of success.

[NOTE: This Question two is not a Family Law question. You are not expected to know any domestic relations law, of Massachusetts or elsewhere, in order to answer this question. Consider the divorce judgment to be no different from any other judgment for res judicata and collateral estoppel purposes].
QUESTION THREE  
(suggested time: thirty minutes)

Mary Gentleman was a recent graduate of Millard Fillmore School of Law in upstate New York who succeeded in finding a job at the law firm of Tydings, Comfort & Joy in New York City. In her first year at that firm she gave herself, as a Christmas present, a living room set and a waterbed which she purchased from Nicols & Dime, a furniture retailer incorporated in Delaware with its principal place of business in Illinois. Short of cash, Mary obtained the merchandise by signing an installment payment agreement on a form supplied by the store. Like most customers she signed the form without reading it. However, in a free moment at her office she decided to practice her skills by reading the document to see if it complied with federal and state laws.

Mary’s careful review disclosed that Nichols & Dime’s form violated a requirement of the federal Truth in Lending Law that the “nominal annual percentage rate” should be shown on the face of the contract. The form also violated the New York Retail Installment Credit Act which required that material portions of the contract be printed in type “not smaller than eight-point.” Under the federal law Mary was entitled to bring suit in federal court without regard to the amount in controversy and to recover a $100 penalty for the violation. The federal statute also provided that, if a class action were brought thereunder, the class’s total recovery would be limited to $100,000 or one percent of the creditor’s net worth, whichever was less. The New York statute was more generous. It provided for a statutory penalty “in the amount of the credit service charge” which in Mary’s case was $313.75.
Mary filed a class action in the federal district court for the Southern District of New York on behalf of herself and all other residents of New York who purchased merchandise from Nichols & Dime by entering into installment contracts on the company’s form. The number of class members is uncertain but is estimated to be in excess of 3000.

In response to Mary’s motion for class certification, Nichols & Dime moved to dismiss the state class claims under the New York Retail Installment Credit Act. Nichols & Dime argued that the class claim was prohibited by the New York Class Action Law, N.Y. C.P.L.R. s. 901(b), which provides:

Unless a statute creating or imposing a penalty or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty or a minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Nichols & Dime also oppose certification of the federal class claims as inappropriate under Federal Rule 23.

You are a clerk for the federal judge who must decide these motions. Please draft a memorandum advising her how she should rule and why.

**QUESTION FOUR**
*(suggested time: one hour)*

In 2005 Tennyson Lance, an Australian citizen admitted to the United States for permanent residence, who currently lives in San Francisco, California, sold the North American manufacturing and sales rights of his skateboard company to Radical Industries, Inc. ("Rad"), for $5,000,000. Rad is a Delaware corporation. Its corporate headquarters, manufacturing
facilities, warehouse, and distribution center are all located in Portland, Oregon.

At the time of the sale, Lance’s skateboards, called “Lance-A-Lots,” were being manufactured at Lance’s small factory in Australia. They were not sold by retailers. Instead, customers purchased Lance-A-Lots directly from Lance’s company. The company maintained a website on which customers could place their orders. Sales were booming. The capacity of the factory had been reached. To raise capital for expansion Lance decided to sell his North American manufacturing and distribution rights to Rad. As part of the sale transaction, Lance executed a covenant not to compete with Rad in connection with sales in North America.

Rad is a manufacturer of sports and fitness equipment which it sells through the usual retail channels. Rad decided, however, to retain the “special order” feature and the website for Lance-A-Lots manufactured by it, believing that this feature enhanced the cachet and prestige of the Lance-A-Lot. Orders placed via the website, of course, are not being fulfilled in Australia but rather at Rad’s headquarters in Portland.

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 North American 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 would automatically revert to Lance who would then be free to use or sell the Lance-A-Lot rights as he saw fit.

The Federal Skateboard Safety Act ("FESSA") was enacted in 2000 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 2012 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 North American manufacturing and sales rights to Lance-A-Lot, for which it was willing to pay $10,000,000. 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 its exclusive rights.

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 under the sale contract had therefore reverted to him. He also sought an injunction against Rad's further use of the tradename "Lance-A-Lot." Lance was concerned that, even if he were to be awarded this relief, Rad might still seek to enforce the covenant not to compete against him. Therefore he sought to litigate in California because California law treats covenants not to compete as void and unenforceable, as a matter of public policy.

Service of the California summons and complaint was made upon Rad by certified mail to its headquarters in Portland. California law allows service by certified mail; Oregon law does not. 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. Rad then filed the following motions:

1. A motion to dismiss under F.R.Civ.P.Rule 12(b)(s), lack of jurisdiction over Rad's person, or in the alternative to transfer the action to federal court in Oregon pursuant to 28 U.S.C. s. 1404.

2. A motion to dismiss under F.R.Civ.P.Rule 12(b)(3), improper venue, or in the alternative to transfer the action to federal court in Oregon pursuant to 28 U.S.C. s. 1404.

3. A motion to dismiss under F.R.Civ.P. Rule 12(b)(5), insufficient service of process, on the grounds that service upon a corporation by certified mail is not authorized by F.R.Civ.P.Rule 4(h).

Rad's evident purpose is to force Lance to litigate in Oregon, where covenants not to compete are enforced.

Seeking to prevent Rad from achieving this purpose, Lance filed a motion to remand the action to California Superior Court. Note that, to
prevail on this motion, Lance will have to show that the action is not removable under either (4) diversity or (5) federal question grounds.

How should the judge decide these motions? Why? Please address each motion separately. Conspicuously number the separate sections of your answer, (1), (2), (3), (4), and (5), in accordance with the numbers assigned to each motion or issue in the foregoing paragraphs.

END OF EXAMINATION
REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN.

THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY UNUSED, AND ALSO BLUE BOOKS USED AS SCRAP. LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."
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. All questions are to be answered in one or more blue books. Turn in this white examination paper along with your blue book or blue books.

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 examination identification number to identify this white examination paper and your blue book or blue books. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, you exam ID number will be 45678959. If you use more than one blue book, identify each one (“No. 1 of 2,” “No. 2 of 2,” etc.), make sure that your exam ID number is on each one, and insert all exam materials into the first blue book when you turn them in.

The Federal Rules of Civil Procedure apply to all questions. You may assume, if relevant, that any American state has a longarm statute identical to that of Illinois which is printed at pp. 713-14, and 715-16 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

ALL BLUE BOOKS MUST BE RETURNED AT THE END OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK WITH THE WORK ‘SCRAP.'
QUESTION ONE

Review Rules 13(a), 13(b), 13(g), 13(h), 14(a), 18(a) and 20. Then answer each of the following questions “YES” or “NO.” After each “yes” or “no” answer, cite the relevant federal rule section and subsection. Then give a brief explanation for your answer. Your one-word answer, “yes,” or “no,” counts as 40% in each of the following questions. Your correct citation to the relevant federal rule section and subsection counts as 20%. Your brief explanation counts as 40%.

Podsnap purchased a new Ford sport utility vehicle called a Devastator from Dogberry Auto Sales, Inc. (“Dogberry”). Podsnap made a small down payment. Podsnap and his wife Peaches signed a note for the balance of the purchase price payable to Dogberry. The Devastator proved to be, in Podsnap’s opinion, defective. Podsnap stopped making payments on the note. Podsnap sued Dogberry for breach of warranty and strict product liability in a state court that follows the federal rules of civil procedure.

1. Can Dogberry counterclaim against Podsnap for the unpaid balance on the note?

2. Must Dogberry counterclaim against Podsnap for the unpaid balance on the note, or lose this claim and be unable to prosecute it in another action?

3. If Dogberry wants to counterclaim against Podsnap for the unpaid balance on the note, can Dogberry join Peaches as a co-defendant on the counterclaim?

4. Can Dogberry join the Ford Motor Co. as a third-party defendant, claiming that Ford is liable to indemnify Dogberry for any damages that Dogberry must pay to Podsnap?
5. If Dogberry joins Ford as a third-party defendant, can Dogberry also make a claim against Ford for failure to reimburse Dogberry for warranty work on cars other than Podsnap’s?

6. If Dogberry joins Ford as a third-party defendant, can Ford set up as a defense that Dogberry improperly prepared the car for delivery to Podsnap, and this was the cause of the alleged defect?

7. If Dogberry joins Ford as a third-party defendant, can Ford set up as a defense that Podsnap abused the car by allowing the cooling system to run dry and failing to maintain the oil level, and this was the cause of the alleged defect?

8. Assume that Podsnap sued both Dogberry and Ford. Can Ford cross-claim against Dogberry for improperly preparing the car for delivery to Podsnap?

9. Assume that Podsnap sued both Dogberry and Ford. Can Ford cross-claim against Dogberry for failure to repay loans made by Ford to Dogberry?

QUESTION TWO

Peter and Paula Pugh, a husband-and-wife team, operate a small and unincorporated business from their home in Colorado. Together they sell fabric and hand-made crafts such as aprons, blankets, and placemats, under the name “Pooh’s Pleasures.” The majority of their income is derived from selling these products on eBay, whose operations are based in California. Peter and Paula’s eBay auction pages clearly list the location of their merchandise as Hardship, Colorado.
In October of 2011 Pooh’s Pleasures launched an auction on eBay offering fabric for sale with the imprint of the cartoon character Betty Boop wearing various gowns. One of these gowns is recognizable as a design of the artist known as Ertae, a twentieth-century Russian-born French artist and fashion designer. In Ertae’s original works, Symphony in Black, and Ebony on White, a tall, slender woman is pictured wearing a form-fitting floor-length dress that trails her feet, and holding the leash of a thin, regal dog. The fabric offered for sale by Pooh’s Pleasures replaced the rather elegant woman in Ertae’s image with the rather less elegant Betty Boop, and replaced Ertae’s svelt canine with Betty Boop’s pet, Pudgy.

NineMuses, Ltd., a British corporation, owns the copyrights in these works of Ertae. Slashem & Burns, a Delaware corporation with a principal place of business in Cos Cob, Connecticut, is NineMuses’s American agent. Slashem & Burns is also a member of eBay’s “Verified Rights Owner” (“VeRO”) program. Under this program, eBay will automatically terminate an ongoing auction when it receives a notice of claimed infringement (“NOCI”) from a VeRO member stating, under the pains and penalties of perjury, that the member has a good-faith belief that an item up for auction infringes its copyright. The complaint, if unresolved, can also result in suspension of the seller’s account.

Invoking the VeRO program on behalf of NineMuses, Slashem & Burns filed a NOCI with eBay contesting Pooh’s Pleasure’s sale of the Betty Boop fabric. In turn, eBay cancelled the auction and notified Peter and Paula of the NOCI. Paula then contacted NineMuses and Slashem & Burns by e-mail to ask
that the NOCI be withdrawn. Paula stated that she would voluntarily refrain from selling the disputed fabric, but said that she was worried about having a black mark on her eBay record. "I make my living on eBay," she wrote. I have a 99.9% satisfaction rating. Your action puts my business in danger of going under. Nothing to you perhaps but everything to me."

In response, NineMuses notified Paula by e-mail that, in order to prevent that auction from being resumed under eBay’s procedures, it intended to "file an action in the federal courts" within ten days.

Six days after receiving this notice, and before NineMuses followed through on their threat to sue, Peter and Paula filed a complaint in the United States District Court for the District of Colorado against NineMuses and Slashem & Burns. Their suit sought a declaratory judgment to the effect that their use of the contested Betty Boop fabric did not infringe NineMuses's copyrights, and an injunction preventing defendants from interfering with future sales of the product.

Proper service was made on both defendants. Immediately, each responded with a motion to dismiss on multiple grounds. Together, the two motions to dismiss raise the following issues:

1. The District Court lacks jurisdiction over the subject matter of the complaint [ten percent of this question];

2. Venue in the District of Colorado is improper with respect to the defendant NineMuses [fifteen percent of this question];

3. Venue in the District of Colorado is improper with respect to the defendant Slashem & Burns [fifteen percent of this question];

4. The Court lacks jurisdiction over the person of the defendant NineMuses [thirty percent of this question]; and
5. The Court lacks jurisdiction over the person of the defendant Slashern & Burns [thirty percent of this questions].

You are the lawyer for Peter and Paula. How will you address these issues in opposing the defendants’ motions to dismiss?

**QUESTION THREE**

George Washington Speedwell is a lawyer in Washington, D.C. who owns and drives a flashy BMW sports sedan, metallic silver grey with maroon leather interior. On a December day in the year 2010 Speedwell was driving on H Street (N.E.) nearing the approach to a parking lot when he observed the green light ahead turn to yellow. He downshifted and pumped the BMW’s accelerator. Through the intersection sped Speedwell. Sped, he did, but not well enough. He was recorded by an automatic camera entering the intersection against a red light.

A red light camera is a traffic enforcement camera that captures an image of a vehicle that has entered an intersection against a red traffic light. Typically, a law enforcement officer or clerk reviews the digital photographic evidence and determines if it is sufficient evidence that a violation occurred. If so, a citation is then mailed to the owner of the vehicle alleged to be in violation of the law.

Red light cameras were first developed in the Netherlands. They are in use worldwide. In the United States they are in use in 26 states and the District of Columbia. They are unpopular in this country and some states (including no-helmet New Hampshire) ban them.

Supporters of red light camera use cite a variety of statistics to show an association between their use and reduced numbers of a right-angle auto crashes. Detractors cite the same studies to show an increased number of rear-end collisions.
Detractors also accuse local governments of installing red light cameras for revenue-raising purposes rather than public safety purposes. There have been several well-documented instances where municipalities have reduced the duration of the yellow light cycle for the purpose of issuing more red light citations.

Soon after encountering the red light camera, Speedwell received a citation from the D.C. Bureau of Traffic Adjudications ("BTA"). The citation told Speedwell that the civil fine for the red light violation was $200. It advised him that, within fifteen days, he must "(1) admit, by payment of the civil fine, your commission of the infraction, or (d) deny, by requesting a hearing, your commission of the infraction." Finally it contained the following message in bold-faced type:

YOUR PAYMENT OF THE CIVIL FINE CONSTITUTES AN ADMISSION OF YOUR LIABILITY FOR THE INFRINGEMENT FOR ALL PURPOSES, EXCEPT THAT IT DOES NOT ADMIT YOUR FAULT OR LIABILITY TO ANOTHER PERSON WHO SUES YOU FOR DAMAGES ARISING OUT OF, OR IN CONNECTION WITH, THE INFRINGEMENT.

FAILURE TO REMIT PAYMENT OR TO REQUEST A HEARING WITHIN FIFTEEN DAYS IS AN ADMISSION OF LIABILITY AND WILL RESULT IN ADDITIONAL PENALTIES AND A DEFAULT JUDGMENT AGAINST YOU.

Reasoning that his billable time was worth more than $200 an hour, and that attendance at a hearing would probably cost him a half day, Speedwell paid the $200 civil fine.

The traffic light at H Street became notorious for the large numbers of violators that it caught. Another of the violators, with the aid of a traffic engineer, determined that the District of Columbia had reduced the duration of the yellow light interval at the intersection from 3.5 seconds to 3.0 seconds when the red light camera was installed.
Armed with this information, D.C. City Councilor Carol Black asked the Mayor to remove it. She wrote:

The intersection where this camera is placed is nothing more than the entrance to a very small parking lot, with at the most twenty spaces, and has no crosswalk. Drivers come upon this traffic light unexpectedly. While I do not support red-light-running in any form, I also do not support this money-making, “gotcha,” trap.

The camera was removed in July, 2011, a month after Council Member Black’s letter. At the time, approximately 20,000 motorists had been issued citations for violations recorded by the H Street camera, and civil fines had been imposed in the amount of approximately $4,000,000.

The D.C. government agreed to dismiss unpaid civil fines against approximately 3,000 motorists, but announced that it would not reimburse those who had already paid the fines.

In the last paragraphs above Speedwell perceived a business opportunity. He sued the District of Columbia on his own behalf and on behalf of the class of 17,000 motorists whose civil fines had not been reimbursed. His complaint alleged that the District’s decision to forgive some penalties but to decline to reimburse other “similarly situated” motorists caught by the camera was facially discriminatory under the D.C. code, and violated the Fifth and Fourteenth Amendments to the Unites States Constitution. He sought the return of approximately $3,400,000 in paid penalties, plus attorneys fees and costs associated with the lawsuit.

Before any action was taken on certification of the class, the District of Columbia filed an answer to the complaint, denying its material allegations, and raising the following Affirmative Defenses:
FIRST AFFIRMATIVE DEFENSE: The plaintiff is barred by the doctrine of res judicata.

SECOND AFFIRMATIVE DEFENSE: The plaintiff is barred by the doctrine of collateral estoppel.

Part A.

Discuss the res judicata issues raised by the District of Columbia’s First Affirmative Defense.

Part B.

Discuss the collateral estoppel issues raised by the District of Columbia’s Second Affirmative Defense.

[Part A and Part B of this question will be weighted equally for grading purposes].

QUESTION FOUR

Max sued Harry in the United States District Court for the District of Oregon. Jurisdiction was properly based on diversity of citizenship. Max sought damages of $1,000,000. The jury awarded Max $100,000.

Max was an openly homosexual man from Massachusetts who went on a cross-country motorcycle tour in the summer of 2010. Max was, as he himself put it, “Way, way out of the closet.” In Portland, Oregon, Max sought admission to a bar called Happy Hour Harry’s, owned by Harry. Harry’s doorman, Bruno, had explicit instructions that under no circumstances were openly gay males to be admitted to Happy Hour Harry’s. According to Max, Bruno communicated these instructions to Max by announcing, as he
barred the way, "No faggots." Max remonstrated, again according to Max, in a restrained manner and by citing certain civil rights laws.

Without any provocation (again according to Max), Max was roughly ejected by Bruno, was punched, kicked and slapped by Bruno and by Harry, was detained by a police officer employed by Harry until the patrol wagon appeared, and was carried off to the police station.

Harry’s and Bruno’s version of these events was quite different, but the jury’s verdict in favor of Max settled the conflict in testimony. The jury found for Max in the amount of $50,000 compensatory damages and $50,000 punitive damages.

There was no evidence that Max was seriously injured. He testified that he had a bruise on his left leg and another on his wrist as a result of the altercation. He did not need or seek medical attention. He was released upon arriving at the police station, and continued on his motorcycle tour. Claiming that the damages were excessive, Harry moved the Court to set aside the verdict and for a new trial under F.R.Civ.P. Rule 59(a).

The district judge allowed the motion but conditioned the award of a new trial upon Max’s refusal to accept a reduction in the award of damages to $10,000 compensatory and $10,000 punitive, finding these to be the largest amounts which a jury could award on the evidence without “shocking the conscience of the court.” After much hesitation, Max concluded that he would not bear the risk and expense of another trial 3,000 miles from his home. Max reluctantly accepted this remittitur “under protest and without waiving my rights of appeal.”

Alopne among American jurisdictions Oregon, according to its state constitution as interpreted by its state Supreme Court, forbids a trial judge to set aside a jury verdict
on the grounds that the damages are excessive. *Van Lom v. Schneiderman*, 187 Or. 89, 210 P.2d 461 (1949). According to Oregon law, such action impermissibly intrudes upon the jury's sole power to decide questions of fact and violates the state's constitutionally-guaranteed right of the plaintiff to a jury trial.

Max appealed to the United States Court of Appeals for the Ninth Circuit. Harry cross-appealed.

Max claims that the judge had no power to set aside the verdict as excessive (in which case Max would be entitled to the jury's $100,000 award).

Harry claims that the judge had no power to order a remittitur and that there should be a new trial (at which Harry hopes for a better result).

How should the Circuit Court decide the appeals? Why? Begin your answer with a one-sentence conclusion. Your one sentence should follow this format: “The Circuit Court should...because....”

END OF EXAMINATION

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QUESTION ONE
(suggested time: forty-five minutes)

Rovingham, a citizen and resident of Rhode Island, consults you. Rovingham is a broker in potatoes. He was supposed to take delivery of 10,000 tons of Maine-grown potatoes at the railhead at Presque Isle, Maine, pursuant to a contract executed in Maine. The potatoes never arrived. Rovingham suspects that the potatoes were sold at a better price to Sinoburger, Inc. ("Sinoburger"), a corporation incorporated under the laws of Delaware and having a principal place of business in Hong Kong, which has entered the U.S. potato market in anticipation of supplying frozen French fries to 10,000 hamburger restaurants which it plans to open in China in 2011.

You are a lawyer admitted to practice in state and federal courts in Massachusetts. You hope to litigate Rovingham’s breach of contract case in Massachusetts so that you will not have to share the fee with local counsel in another state.

Answer each of the following questions “Yes” or “No” and give a brief explanation for each of your answers. Your one-word answer, “Yes” or “No,” counts as forty per cent of each question. Your brief explanation counts as sixty per cent.

Assume that all defendants will raise all possible objections to jurisdiction and venue. Therefore the question, “Can Rovingham sue,” means “Can Rovingham sue, successfully overcoming all defendants’ objections to jurisdiction and venue?”

The amount in controversy exceeds $75,000.

Remember that each New England state constitutes a single federal judicial district.
1. McDumpling, a large grower, was supposed to deliver the potatoes to Rovingham in accordance with the contract. McDumpling is a citizen and resident of Massachusetts. Can Rovingham sue McDumpling for breach of contract in the federal district court in Massachusetts?

2. Rovingham wants to add as an additional defendant Chickenstalker, a citizen and resident of Connecticut, who is McDumpling’s partner in the potato-growing business. Can Rovingham sue both McDumpling and Chickenstalker in the federal district court in Massachusetts?

3. You learn that McDumpling and Chickenstalker, as partners, own a large warehouse in South Boston, Massachusetts, where they store potatoes for air shipment from Logan Airport to destinations all over the world. In light of this additional information, can Rovingham sue both McDumpling and Chickenstalker in the federal district court in Massachusetts?

4. Same facts as in question No. 3. Rovingham wants to add Sinoburger as an additional defendant. Can Rovingham sue McDumpling, Chickenstalker and Sinoburger in one action in the federal district court in Massachusetts?

5. You learn that the 10,000 tons of potatoes have been shipped to McDumpling’s and Chickenstalker’s warehouse in South Boston to be collected when Sinoburger pays for them. Does this change your answer to question No. 4?

6. Same facts as in question No. 5. Can Rovingham sue McDumpling, Chickenstalker and Sinoburger in one action in any federal district court other than Massachusetts? If “Yes,” identify the district and explain. If “No,” explain.

7. The potatoes are still in the warehouse in South Boston. If Rovingham seeks only an injunction to prevent Sinoburger from shipping the potatoes to China (or elsewhere), can Rovingham sue Sinoburger in the federal district court in
Massachusetts?

8. Would it make a difference to your answer in question No. 7 if the potatoes had already been shipped to China?

9. Anticipating your suit for an injunction, Sinoburger, together with McDumpling and Chickenstalker, as plaintiffs, sue Rovingham in the federal district court in Maine seeking a declaratory judgment that the contract to deliver potatoes to Rovingham was not valid. On your motion, can the federal district court in Maine transfer this litigation to the federal district court in Massachusetts?

QUESTION TWO

(suggested time: fifteen minutes)

Read Rule 35. Study the rule, then answer the following questions.

You represent Mary Beth, who seeks damages arising out of an automobile accident in which she was injured and her boyfriend was killed. Suit has been filed in a federal court based on diversity of citizenship. Mary Beth's complaint includes claims for medical expenses, pain and suffering, permanent disability, and emotional injury.

As part of your pre-filing investigation you sent Mary Beth to be examined by a psychiatrist whose written report to you says that Mary Beth is suffering from "post-traumatic stress disorder" but also says that "the patient appears greatly to exaggerate the disabling effect of her injuries."

After the filing of the complaint, Mary Beth was examined by an orthopedic surgeon engaged by the defendant for the purpose. You agreed to this examination without requiring the defendant to obtain a court order under Rule 35.
1. You would like to see the orthopedic surgeon’s report. Are you entitled to see it? Why or why not?

2. Is the defendant entitled to see your psychiatrist’s report? Why or why not?

NOTE: This question is to be answered entirely by reference to Rule 35. Do not divert to Rule 26(b)(1) (privilege,) Rule 26(b)(3) (trial preparation materials), or Rule 26(b)(4) (experts not expected to be called as witnesses at trial). Upon careful examination Rule 26(b)(1), Rule 26(b)(3) and Rule 26(b)(4) will all be found to be inapplicable to the production of an examiner’s report under Rule 35(b).

QUESTION THREE
(suggested time: one hour)

The Town of Applethorp in the state of Catatonia is small. Residents observe the rural custom of parking old motor vehicles in their front yards to signify wealth or status. Dibblestick bought a 1992 Buick Electra at an auction. Because his 1983 Ford dumptruck and his 1974 Dodge stepvan left no room in his front yard, Dibblestick parked the Buick at the side of Poorfarm Road in front of his house. Poorfarm Road is narrow and unpaved. In order to pass, some other cars and trucks detoured over the property of Sowerberry who lived across the road. Sowerberry complained to the police.

The police in Applethorp maintain informal ways. Officer Dinwiddie left a note tacked to Dibblestick’s front door asking him to move the Buick. When this was not done, Dinwiddie called McSwiney’s gas station and asked McSwiney to tow the car and hold it until Dibblestick reclaimed it. Dinwiddie left another note telling Dibblestick where to get the car. Dinwiddie didn’t issue a citation because, he later testified, he didn’t want to add to Dibblestick’s difficulties in recovering his car.

Dibblestick balked at paying McSwiney for the tow. Instead, Dibblestick filed suit against McSwiney and the town in Town Justice Court seeking to replevy the
Buick. Town Justice courts in Catatonia are part-time courts in rural areas presided over by elected judges called Town Justices who need not be legally trained. Their civil jurisdiction is limited to $5000, and includes actions for replevin where the property in question is worth $5000 or less.

Perceiving that the $50 tow charge was less than the burden of defending the replevin case, McSwiney offered the car back to Dibblestick free of charge if Dibblestick would come and get it. Dibblestick refused.

At the trial, Officer Dinwiddie testified as to the circumstances under which he had called for the tow. The Town Justice held that Officer Dinwiddie had lawfully taken the Buick into possession for the purpose of removing an obstruction from the public way, and declined to issue the writ of replevin.

After losing in Town Justice Court, Dibblestick turned to the federal district court. His federal district court complaint, filed against the same defendants, maintained that the town had not offered him a hearing either before or after it seized his car, and that it was the policy of the town not to do so. The complaint invoked the Due Process clause of the Fourteenth Amendment and the federal civil rights act, 42 U.S.C. s. 1983. It sought, in addition to the return of the Buick, $100,000 in compensatory damages and $100,000 in punitive damages.

The town’s answer raised the defenses of res judicata and collateral estoppel. The town also answered on the merits claiming that (1) no pre-hearing seizure was constitutionally required, and (2) the replevin hearing was constitutionally adequate even though it took place twenty-three days after the seizure. Along with its answer the town filed a motion for summary judgment in its favor. Attached to this motion were copies of the papers and a transcript of the hearing on the replevin case in Town Justice Court.
In response, Dibblestick filed his own motion for summary judgment in his favor (called a “cross-motion). In support of his cross-motion Dibblestick filed an affidavit signed by him averring that: (1) the Buick was properly registered and displayed the required number plates when it was towed; (2) the Buick was legally parked because no town by-law or regulation prohibited parking on Poorfarm Road; (3) Dibblestick was away from home when Dinwiddie left the note asking him to move the Buick; and (4) Dibblestick still doesn’t have his car back. The town did not dispute Dibblestick’s affidavit.

Write the federal judge’s decision on the cross-motions for summary judgment. Be sure to address all issues. In a real case, if the judge decided that Dibblestick was barred by res judicata there would be no need to discuss other issues. For the purposes of this examination answer, however, if you come to a similar decision about res judicata you should nevertheless go on to discuss the remaining claims and defenses.

QUESTION FOUR
(suggested time: one hour)

The Char-D is an electrically powered automobile. Loosely translated, the name means “Car D” or “Model D.” Americans call it a “Chard.” The vehicle is manufactured in Switzerland by Industrie Char-D Suisse, S.A. (hereinafter anglicized as “Swiss Chard”). It was unavailable in the United States until Marcie Groates, a citizen and resident of Maine, encountered a Chard while on a ski trip to the Swiss Alps in 2004. Marcie loved the delicate design of the Chard, its quiet pulsating him, and its Art Deco hood ornament. She looked up the manufacturer and approached Swiss Chard about possibly introducing the vehicle into the United States.
Swiss Chard agreed that Marcie should have distribution rights to the Chard in the six New England states. Swiss Chard retained the New York City law firm of Waterhouse & Wipe to prepare a written contract. Marcie and Swiss Chard both executed the contract.

With perhaps an eye on future business, the lawyers at Waterhouse & Wipe included the following term in the contract:

Dealer [this means Marcie] and Swiss Chard agree that any state or federal court located in the Borough of Manhattan, City of New York, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement, and shall be a proper forum in which to adjudicate such case or controversy.

This is an example of a “forum selection clause.” There is not complete agreement in this country as to the validity of forum selection clauses. The modern trend is to treat them as enforceable, and the United States Supreme Court has sustained the validity of a forum selection clause in an admiralty case, citing the desirability of giving effect to the freely bargained expectations of the parties. The older view was that people should not be able, simply by making an agreement, to oust the jurisdiction of a court otherwise competent to adjudicate a dispute between them. Some American states still maintain the position that forum selection clauses are unenforceable. One of them is Maine, which reaffirmed its position in a 2002 case.

The contract also contained the following term:

This agreement is terminable by either party upon ninety days’ written notice. No cause for termination need be specified in such notice, nor shall absence of cause be a defense to termination.
Maine, however, has enacted an “Automobile Dealer’s Day in Court” law which provides that an automobile dealership may not be terminated by an automobile manufacturer except for cause, and the burden is on the manufacturer to show cause. Any agreement to the contrary, says the Maine law, is void and unenforceable.

Upon taking an order for a Chard, Marcie would communicate the details to Swiss Chard. Swiss Chard would then arrange for shipment of the Chard via the port of Boston. Occasionally, when no Boston-bound ship was available, Swiss Chard shipped via Portland, Maine, or New York City. Swiss Chard had no other dealers in the United States.

Marcie, unfortunately, was not a great saleswoman. She sold only about 100 Chards in the six years from 2004 to 2010. The sales were mostly made to automotive hobbyists with disposable income, and to lovers of adult toys. About half of all her sales were made in Maine, Marcie’s base of operations.

Earlier in this year, Swiss Chard realized that the electric automobile was becoming a mass market phenomenon in the United States and decided to enter the American market on a large scale. In August of 2010 Swiss Chard signed a partnership with a major North American distributor of imported automobiles. It then notified Marcie that her dealership was to be terminated effective January 1, 2011, stating no cause.

Marcie brought suit in a state court in Maine seeking to enjoin Swiss Chard from terminating her contract or, if the injunction were refused, an award of damages in the amount of $100,000. Appearing specially, Swiss Chard removed the case to the United States District Court for the District of Maine on the basis of diversity of citizenship. See 28 U.S.C. s. 1332(a)(2).
In the federal court, still appearing specially, Swiss Chard has filed the following motions:

1. A motion to dismiss for improper venue;

2. A motion to dismiss for lack of jurisdiction, citing the forum selection clause in the contract;

3. In the alternative, a motion to transfer the case to the United States District Court for the Southern District of New York (which sits in Manhattan), pursuant to 28 U.S.C. s. 1404(a).

Part A.
(eighty per cent of this question)

How should the federal district judge in Maine decide these three motions?

Part B.
(twenty per cent of this question)

New York has no statute comparable to the Maine Automobile Dealer’s Day in Court Act, which you should assume to be applicable to Marcie as a “dealer.”

If Marcie, by reason of allowance of one or another of the three motions noted above, is obliged to pursue her case against Swiss Chard in a state or federal court in New York, will the state or federal judge in New York require Swiss Chard to prove cause for terminating Marcie in accordance with the Maine Automobile Dealer’s Day in Court Act?

END OF EXAMINATION

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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 in accordance with the amount of time suggested for each question. Question One is to be answered on this white examination paper. The remaining questions are to be answered in one or more blue books. Turn in this white examination paper along with your blue book or blue books.

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 examination identification number to identify this white examination paper and your blue book or blue books. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, your exam ID number will be 45678959. If you use more than one blue book, identify each one (“No. 1 of 2,” “No. 2 of 2,” etc.), make sure that your exam ID number is on each one, and insert all exam materials into the first blue book when you turn them in.

The Federal Rules of Civil Procedure apply to all questions. You may assume, if relevant, that any American state has a longarm statute identical to that of Illinois which is printed at pp. 713-14 and 715-16 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

ALL BLUE BOOKS MUST BE RETURNED AT THE END OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK WITH THE WORD "SCRAP."
QUESTION ONE
FIVE MULTIPLE-CHOICE QUESTIONS
(suggested time: twenty-five minutes)

When you have determined your answers to the following five multiple-choice questions, fill in the answers in the blanks below:

1. _____
2. _____
3. _____
4. _____
5. _____

All five of the following questions are answered by reference to the Federal Rules of Civil Procedure or (in the case of one question) to Title 28, United States Code. If you don’t know an answer, DON’T GUESS; LOOK UP the answer in your Federal Rules book or your casebook.

QUESTION 1. Cranberry sues Gumdrop, from Gregaria, for fraud in the sale of stock. Cranberry brings the action in a state court in Euphoria. Euphoria’s rules of civil procedure are identical to the federal rules. Gumdrop is served in Gregaria with the summons and complaint. He answers the complaint, denying that his representations were fraudulent and denying that they injured Cranberry. The case is litigated and tried to a jury which finds for Cranberry in the amount of $50,000. Judgment is entered on the jury verdict and there is no appeal. However, Gumdrop has no assets in Euphoria and does not pay.
Cranberry now brings suit in Gregaria, seeking to enforce the Euphoria judgment against Gumdrop's property in Gregaria. Gumdrop appears and raises the defense that the court in Euphoria lacked personal jurisdiction over him for Cranberry's claim.

A. The court in Gregaria may consider whether the Euphoria court had personal jurisdiction over Gumdrop, because Gumdrop did not litigate the issue in the Euphoria court.

B. The court in Gregaria may consider whether the Euphoria court had personal jurisdiction over Gumdrop, because Gumdrop could have raised the issue in the Euphoria court but didn't have to.

C. The court in Gregaria may not consider whether the court in Euphoria had personal jurisdiction over Gumdrop, because Gumdrop waived his objection to personal jurisdiction in the Euphoria court.

D. The court in Gregaria may consider whether the court in Euphoria had personal jurisdiction over Gumdrop. Although Gumdrop waived the issue in the court in Euphoria, he has not waived it in the court in Gregaria.

QUESTION 2. Holmes, who resides in the Southern District of Indiana, sues Cardozo and Harlan in federal court. Cardozo resides in the Western District of Tennessee. Harlan resides in the Western District of Kentucky. Holmes sues them both for damages arising out of a business deal for the financing of a subdivision that Holmes planned to build in the Northern District of Ohio.

Holmes's claim against Cardozo is for breach of contract. Holmes's claim against Harlan is for fraud and violation of the federal Truth in Lending Act. Holmes claims that, after the defendants had provided the first installment of financing and he (Holmes) had commenced construction, the defendants refused to provide subsequent payments needed to complete the project. Venue in Holmes's action would be proper in:
A. the Western District of Kentucky.

B. the Western District of Tennessee.

C. the Southern District of Indiana.

D. the Northern District of Ohio.

QUESTION 3. Peter, a potter, sues Deirdre for negligence, claiming that he was injured while a passenger in Deirdre’s car driving to a crafts fair. Peter sues in federal court claiming diversity jurisdiction. Deirdre answers the complaint, denying negligence. At the end of her answer, under a separate heading called “Counterclaim,” she asserts a counterclaim against Peter, claiming that Peter agreed to deliver forty pots to Deirdre for sale in her shop and didn’t do so. Peter files an answer to Deirdre’s counterclaim eight days later, defending on the grounds that he never agreed to deliver the pots.

Three days after receiving Peter’s answer to Deirdre’s counterclaim, Deirdre’s lawyer realizes that, since the agreement to deliver the pots was for a sum greater than $500 and was not in writing, it is unenforceable as a contract under the Uniform Commercial Code. Consequently Deirdre’s lawyer files and serves an amended counterclaim changing her theory of recovery from contract to misrepresentation, a tort claim, based on Peter’s alleged statement promising prompt delivery of the pots.

A. The amendment is proper without leave of court, because the amended counterclaim was filed within twenty days of Peter’s answer to the counterclaim.

B. The amendment will need leave of court, because Peter has already filed and served a responsive pleading to the counterclaim.

C. The amendment is proper without leave of court, because it was filed within twenty days after Deirdre filed and served her answer and counterclaim.

D. The counterclaim cannot be amended because the period for amendments has passed.
QUESTION 4. Relievo, the beneficiary of an insurance policy on the life of Deadlock, sues Old Faithful Insurance Company to collect the proceeds of the policy. In its answer, Old Faithful raises the affirmative defense that Deadlock committed suicide and it, therefore, is not liable on the policy. (As a matter of law Old Faithful will not be liable if this is true). Old Faithful moves for summary judgment. Its motion is accompanied by the affidavit of Eyeballer who swears that she watched while Deadlock opened the balcony door of his seventh-floor hotel room, climbed over the balcony rail, and jumped.

Relievo files an affidavit in opposition to the motion for summary judgment in which she states under oath, “Deadlock did not commit suicide.” The trial judge should

A. grant the motion because Relievo’s affidavit does not satisfy the requirements of Rule 56 for material sufficient to defeat the motion.

B. deny the motion because Relievo has submitted an affidavit contradicting Old Faithful’s supporting materials.

C. deny the motion because there is a genuine issue of material fact as to whether Deadlock committed suicide.

D. deny the motion if the judge believes that Eyeballer’s testimony may be biased.

QUESTION 5. Podsnap sues Dogberry for breach of a contract to insulate Dogberry’s house. Podsnap alleges that they had a contract, and that he did the work, but that Dogberry refused to pay the agreed price for the work. Podsnap seeks recovery in the alternative on quantum meruit. (“Quantum meruit” is a claim for recovery based on the value of the plaintiff’s service without reference to the contract).

Dogberry denies that he had a contract with Podsnap because the writing that Podsnap relies on is a scribbled note indicating the price for the job. Dogberry says that this note fails to satisfy the requirements for a valid contract. Dogberry also claims that the insulation used was substandard and improperly installed.
Podsnap moves for summary judgment. In support of his motion he submits the scribbled note itself, an affidavit attesting that it was signed by Dogberry in Podsnap's presence, and a memorandum of law arguing that the note is sufficient to constitute a contract. Dogberry submits no opposing affidavits, but does submit a memorandum of law in which he argues that the note does not constitute a contract because the terms are insufficiently described in it.

A. If the judge concludes that the note constitutes a valid contract, Podsnap is entitled to judgment as a matter of law on his claim. The judge should enter judgment for Podsnap in the contract amount.

B. If the judge concludes that the note does not meet the requirements of a valid contract, she should enter a final judgment for Dogberry dismissing the claim.

C. The judge should grant Podsnap's motion, because Dogberry has not submitted any evidence contradicting Podsnap's claim.

D. If the judge concludes that the note meets the requirements for a valid contract, she should enter partial summary judgment for Podsnap on the issue of the validity of the contract.

**QUESTION TWO**
(suggested time: twenty minutes)

New client Millie, a woman who appears to be in her 60's or 70's, and who walks with a cane, comes to your office. She tells you that she was struck by a car while crossing the street in a marked crosswalk three years ago. She was badly injured which is why she was so long in coming to see a lawyer. She has the defendant's name, address, and motor vehicle registration number. Liability seems clear, but you also realize that the statute of limitations will expire on this very day. You ask Millie to sign a standard form contingent fee agreement, which she signs. You then quickly draft and file a complaint in a court of competent jurisdiction and
correct venue. You send a copy of the complaint, together with a summons, to the
deputy sheriffs to be served on the defendant.

Very promptly the defendant files and serves an answer denying all material
allegations of the complaint. With the answer comes a motion for summary
judgment. Attached to the motion for summary judgment is a certified photocopy of
the defendant’s passport which makes clear that the defendant was in Ethiopia on the
day that the accident supposedly occurred. Also attached to the motion for summary
judgment is an affidavit from an insurance company investigator which, with
supporting documentation, asserts that Millie has a long history of filing fictitious
claims in the hopes of getting small nuisance settlements from insurance companies.

Finally, along with the answer and the motion for summary judgment, the
defendant serves a motion under Rule 11 seeking sanctions against you personally in
the amount of $2000.

What are you going to do?

QUESTION THREE
(suggested time: forty-five minutes)

In 1957 an ex-cowboy named McErrant began to participate in rodeos, horse
shows, and parades. From the beginning he indulged a penchant for costume. He
was already equipped with a black moustache. He soon settled on a black shirt, black
pants, and a flat-crowned black hat. He affixed a St. Mary’s medal to the hat. He
adopted the name “Paladin” after an onlooker of Italian descent hurled an epithet at
him containing the word “Paladino.” On looking up the word Paladin in a dictionary
McErrant found that it meant “champion of knights,” which he liked. On another
occasion, as McErrant was about to mount his horse, an onlooker called out “Have
gun, will travel,” a phrase that McErrant adopted as his personal slogan. The
finishing touches were the silhouette of a chess knight which McErrant used on his business card (bearing the words “Have gun will travel, wire Paladin, Providence, RI”), a silver copy of the knight silhouette on his six-shooter holster, and an antique derringer strapped under his arm.

So accoutred, McErrant as “Paladin” would appear in parades, the opening and finales of rodeos, at auctions and at horse shows. From time to time at rodeos he would stage a western gunfight featuring his quick draw and the timely use of his hidden derringer. He would pass out photographs of himself and his business cards, some 250,000 cards in all. Fame he sought but not fortune. He sold no product or service, charged no fees, and performed only for the entertainment of himself and others.

Ten years after he had begun to live his avocational role of Paladin, McErrant saw the first CBS television production of the series “Have Gun Will Travel” starring mustachioed Richard Boone, who played the part of an elegant black-clad knight of the Old West, always on the side of the good—for a fee. The television Paladin also wore a flat-crowned black hat bearing an oval silver decoration, had a silver chess knight on his holster, and announced himself with a card bearing a chess piece and the words “Have gun, will travel; wire Paladin, San Francisco.” The television series went on to be notably successful, appearing in 225 first-run episodes.

McErrant sued CBS in federal district court claiming infringement of copyright, unfair competition, misappropriation of intellectual property, and common-law trademark infringement. The trial of this action turned on the question whether or not CBS had copied McErrant’s creation or arrived at it independently. The writers and network executives responsible for the series testified in detail that the television Paladin was a spontaneous creation developed in total ignorance of his Rhode Island predecessor. The jury, however, found for McErrant in the amount of $150,000.
CBS appealed. The Circuit Court of Appeals acknowledged that the jury verdict necessarily implied that the jury disbelieved CBS's defense and, said the Court of Appeals of their disbelief, "[W]e think it clear that they were amply justified. Thus, the plaintiff has had the satisfaction of proving the defendants pirates."

The Court of Appeals, however, reversed the district court on the grounds that McErrant had no valid copyright, that McErrant had suffered no damages on account of CBS's competition, fair or unfair, and that the relevant state law on misappropriation of intellectual property did not extend to adopting only the "idea" of another. On the common-law trademark infringement claim the Court of Appeals said that McErrant had produced no evidence of confusion in the marketplace, which is the essential element in a trademark infringement claim.

Undaunted, McErrant applied to the United States Patent and Trademark Office ("PTO") to register the following trademark:

![Image of a knight chess piece with text]

**HAVE GUN WILL TRAVEL**

**WIRE PALADIN**

CBS opposed the application on the grounds that it (CBS) was the prior user of the trademark. The PTO's Trial and Appeal Board rejected CBS's claim of priority:

This seems to us to be a bald-faced falsehood urged so that CBS, already branded a pirate, should be allowed to make off with additional plunder unhindered by any inconvenience that might result from the recognition of McErrant's legal rights.
The PTO therefore registered the trademark shown above in the name of McErrant. Registration of a trademark confers certain rights on the registered holder, but does not relieve the plaintiff in an infringement action from the need to prove confusion in the marketplace.

CBS continues to derive profits from re-runs, cable TV performances, DVD sales, and non-US broadcasts of some or all of the 225 episodes of “Have Gun Will Travel.” McErrant now sues CBS for registered trademark infringement.

(You should understand that McErrant’s strategy is, and all along has been, not to drive “Have Gun Will Travel” out of the entertainment market but, rather, to extract royalty payments from CBS. If CBS is paying royalties, McErrant will be happy to let CBS exploit Paladin as widely as possible).

CBS makes a motion for summary judgment in the trademark infringement case. CBS’s summary judgment motion is based on res judicata and collateral estoppel. Analyze the arguments that CBS is making, and indicate how you think the trial judge should rule on the summary judgment motion.

**QUESTION FOUR**  
(suggested time: one hour)

Wendy Davenport and Sophia Highboy are co-owners of a corporation called Davenport and Highboy, Inc., which is in the furniture stripping and refinishing business in Haverhill, Massachusetts, under the name “Merrimack Strippers.” Most of their customers come from the river cities of Lawrence and Haverhill and from the towns of northern Essex County, Massachusetts. However, they occasionally work for people from New Hampshire and southern Maine. Two years ago their
corporation borrowed $150,000 from Plaistow Bank in Plaistow, New Hampshire, after receiving a letter from the bank offering the bank’s services. The bank learned of their business when one of its vice presidents attended a lecture on furniture refinishing that Sophia presented in Plaistow. Because the corporation had few assets other than its work in progress, the bank required Wendy and Sophia to execute personal guarantees of the loan. Wendy and Sophia signed the loan papers at their shop. Wendy then took them to the bank, located ten miles away in Plaistow.

The loan agreement provided that it was to be governed by New Hampshire law, that the loan was to be repaid in two years, and that any suit against the bank had to be filed in New Hampshire. Shortly before taking out the loan Sophia, who grew up in New Hampshire and still lived with her parents, moved to Massachusetts to see if she would enjoy living away from home.

The purpose of the loan was to finance a plan to develop business for Merrimack Strippers by offering its services to antique dealers as well as to retail customers. Unfortunately the loan period coincided with the 2008-2009 Great Recession. In bad economic times, when money is tight, few people want to spend it on refinishing furniture or buying antiques. In the end Wendy and Sophia were able to make only two payments on the loan.

Pelham Bank sued Wendy and Sophia in federal court in New Hampshire to collect the unpaid principal and interest. New Hampshire’s longarm statute is identical to that of Illinois. However, in New Hampshire’s banking law there appears the following restriction:

The courts of New Hampshire shall have no jurisdiction in a suit by a New Hampshire lender against a borrower who is not a resident of New Hampshire, unless the nonresident borrower derives substantial revenue from goods sold, consumed, or used in New Hampshire, or from
services rendered in New Hampshire.

Sophia was served at her apartment in Lynn, Massachusetts. A week later she was involved in an automobile accident in White River Junction, Vermont. An ambulance rushed her to the nearest hospital, which was located in Hanover, New Hampshire. She was admitted as an inpatient. While there, she was served with a second copy of the summons and complaint.

Wendy settled with the bank, and the suit against her was dismissed. A year ago, after Sophia failed to appear in the federal court action, the court entered a default judgment against her in the amount of $100,000. The bank recently instituted enforcement proceedings against her in Massachusetts, attaching her $10,000 bank account here.

What can Sophia do to defend this enforcement action and to protect any other property that she may own or later come to own? How likely are her efforts to succeed?

**QUESTION FIVE**
(suggested time: thirty minutes)

The Reverend Timothy Uplight is the pastor of an evangelical Bible-believing church in a midwestern city. He takes seriously his calling to be a Good Shepherd to his flock. As a Good Shepherd he visits the sick, the shut-in, and the sorrowful, in their homes. Sometimes his ministry demands that he overstay his time at parking meters. At other times, in his zeal, he parks at bus stops or in no-parking zones.

In the hope of warding off the evil eyes of meter maids, Rev. Uplight affixed a purple oval tag to his license plate displaying the word “Clergy.” Alas, however, we live in irreligious times. Rev. Uplight was charged with no less than five parking
offenses in the month of October, 2009. In the case of each offense, a summons and complaint were placed under the windshield wiper of his car. The summons ordered the driver of the vehicle, or in his or her place the vehicle’s owner, to appear before the city’s Traffic Violations Bureau within seven days to answer the alleged violation of the Municipal Code for illegal parking. Additionally, each summons contained the following warning:

"IMPORTANT: FAILURE TO RESPOND WITHIN 30 DAYS OF ISSUE WILL SUBJECT THE VIOLATOR TO SUCH OTHER PENALTIES AS ARE PRESCRIBED BY LAW, INCLUDING THE IMPOUNDING OF THE VEHICLE INVOLVED AND THE ISSUANCE OF A WARRANT FOR THE ARREST OF THE VIOLATOR."

Trusting perhaps overmuch in Jesus’s admonition to “Take therefore no thought for the morrow” (Matthew 6:34, King James version), Rev. Uplight failed to respond to any of the summonses. Accordingly, the Traffic Violations Bureau issued an order that his vehicle be immobilized pursuant to relevant provisions of the Municipal Code. Rev. Uplight emerged from his parsonage one morning in late November to find the dreaded Denver Boot attached to his left front wheel. Pasted to his windshield was this notice:

RELEASE: RELEASE CAN BE OBTAINED AT THE TRAFFIC VIOLATIONS BUREAU, ROOM 106, CITY AND COUNTY BUILDING. ARRANGEMENTS FOR RELEASE MUST BE MADE WITHIN 72 HOURS AFTER THE INSTALLATION OF THIS DEVICE OR THE VEHICLE WILL BE REMOVED FROM THE STREET AND IMPOUNDED PURSUANT TO THE MUNICIPAL CODE [citing the section]. NO CHECKS ACCEPTED IN PAYMENT OF FINES.
The boot was removed the following day after Rev. Uplight appeared at the Traffic Violations Bureau and paid his accumulated fines plus a fifty-dollar "boot fee."

Soon thereafter Rev. Uplight decided to place faith in the Constitution as well as in the Bible. He filed a civil rights action in federal district court naming the city as defendant. His complaint alleges that: (1) the service of individual parking summonses by affixing them to the windshield of his car did not comply with the notice required by the Due Process Clause of the Fourteenth Amendment; (2) the City's failure to provide a hearing before immobilizing, and thus seizing, his car violated the Due Process Clause of the Fourteenth Amendment; and (3) the Municipal Code contains no provision for a prompt post-deprivation hearing at which a vehicle owner can contest his liability, as is required by the Due Process Clause of the Fourteenth Amendment. Rev. Uplight seeks damages pursuant to 42 U.S.C. ss. 1983 and 1985 for the unconstitutional deprivation of his use of his automobile.

PART A.
(ten per cent of this question)

Does the federal district court have subject matter jurisdiction of Rev. Uplight's complaint? Why or why not?

PART B.
(ninety per cent of this question)

Discuss the three issues presented by Rev. Uplight's complaint.
CIVIL PROCEDURE
Mr. Martin
December 8, 2008

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 in accordance with the amount of time suggested for each question. All questions are to be answered in one or more blue books.

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LABEL ANY SCRAP BLUE BOOK WITH THE WORD "SCRAP."
QUESTION ONE
(suggested time: thirty minutes)

In Massachusetts Superior Court Lauralee Thimble sued Foulhaven Community College and its dean, Sylvester Shagwell, for sexual harassment, unjust termination, and intentional infliction of emotional distress. Ms. Thimble is a 59-year-old widow who applied for the job of executive assistant to the dean. Her complaint alleges that Shagwell, during an interview with her in a private cubicle, commented on how attractive she appeared for a woman of her age. He made some salacious observations regarding her anatomy and expressed his desires with regard thereto. At the conclusion of the interview, according to the complaint, Shagwell intimated that her employment as executive assistant was subject to a condition precedent: her acquiescence in his sexual yearnings. Ms. Thimble claims that she declined his advances and left, greatly distraught.

Thereafter, unknown to Shagwell, Ms. Thimble was hired by Foulhaven Community College as a certification technician. When Shagwell discovered that she was working for the college he had her transferred to the payroll unit, a position for which he knew she had no training. Soon afterwards he terminated her employment.

In addition to her financial losses, Ms. Thimble claims to have suffered continuing emotional distress, loss of sleep, mental anguish, humiliation, reduced self-esteem, and other consequences.

The defendants’ answer denied all material allegations of the complaint. The defendants now seek an order compelling Ms. Thimble to undergo a mental examination to test the true extent of her injuries and to measure her ability to function in the workplace.
Ms. Thimble opposes the defendants' Rule 35 motion because it infringes on her right to privacy. The right to privacy is formally recognized by Massachusetts statute law, G. L. c. 214, s. 1B ("A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right..."). The United States Supreme Court has identified the right to privacy, especially in matters of sexuality, as a right protected by the Constitution.

Alternatively, if the examination is allowed, Ms. Thimble moves for a protective order (1) forbidding any inquiry by the examiner into her sexual history or practices, and (2) asking that her attorney be allowed to attend in order to assure compliance with the order.

How should the judge rule on the parties' motions? Why?

QUESTION TWO
(suggested time: fifteen minutes)

Review Celotex Corp. v. Catrett, casebook p. 435. Then answer each of the following questions:

1. What was the fight about? Everybody agreed that, in order to recover, Mrs. Catrett had to show that her husband had been exposed to asbestos products manufactured by Celotex. Everybody agreed that Celotex could defeat recovery by showing that Mr. Catrett had not been exposed to asbestos products manufactured by it. So what were the parties disagreeing about?

2. One of the issues in Celotex is whether asbestosis (as opposed to some other disease process) caused Mr. Catrett's death. Mrs. Catrett alleges in her complaint that it did; Celotex denies this in its answer. Suppose that Celotex moves for summary
judgment on this issue of causation. Reviewing all discovery documents, Celotex points out that no medically qualified expert has opined that asbestosis caused Mr. Catrett's death. In response, Mrs. Catrett produces the affidavit of a pathologist who recites his professional qualifications, describes the examination he made of the relevant tissue samples, and comes to the conclusion that the laboratory findings are "consistent with Mr. Catrett having died as a result of asbestosis." Explain why the Court should deny Celotex's motion for summary judgment.

3. Now suppose it is Mrs. Catrett, not Celotex, who moves for summary judgment on the issue of causation. In support of this motion she produces the same affidavit. In response, Celotex produces no affidavit or other evidence contradicting Mrs. Catrett's expert. Explain why the Court should deny Mrs. Catrett's motion for summary judgment. Why does the same affidavit lead to different results in the two different situations?

QUESTION THREE
(suggested time: forty-five minutes)

This question THREE consists of nine sub-questions. Answer each sub-question "YES" or "NO" and give a BRIEF explanation for your answer. Be sure to identify your answer to each sub-question with the number of the sub-question which it answers. Also, please skip a line between each of the nine answers. Your one-word answer, "YES" or "NO," counts as forty per cent of the grade on each sub-question. Your BRIEF explanation counts as sixty per cent.

Slumkin owns a three-decker house in Lawrence, MA, which is occupied by three tenants. Tenant Onehorse lives on the first floor, tenant Twobucks lives on the second floor, and tenant Threesome lives on the third floor.
One day there was a fire at the three-decker. No one was injured, but there was smoke and water damage to the personal property of Onehorse, Twobucks and Threesome. The Fire Department determined that the fire was caused by defective wiring. Earlier, the building inspector had cited Slumkin for building code violations including the wiring, but Slumkin never corrected them.

Onehorse sued Slumkin in small claims court at Lawrence District Court for $2000 to recover for damage to his personal property. (In Massachusetts, $2000 is the jurisdictional upper limit for an action brought under the small claims procedure). Onehorse’s statement of his small claim asserted that Slumkin was liable for the damage by reason of Slumkin’s failure to correct the building code violations, which were the cause of the fire.

Slumkin defaulted in the small claims action. Onehorse proved actual damages of $1375.40. A judgment in this amount was entered in favor of Onehorse. Slumkin did not appeal. (In this question, that case is called “Onehorse v. Slumkin No. 1”).

Part A.

Twobucks sued Slumkin in Lawrence District Court (not small claims court, because Twobucks’s claim exceeded $2000) to recover for damage to his personal property. (This case is called “Twobucks v. Slumkin No. 1”). Twobucks’s complaint alleged that Slumkin was liable for the damage by reason of Slumkin’s failure to correct the building code violations, which were the cause of the fire.

QUESTION 1. Can Twobucks make any offensive use of the judgment in Onehorse v. Slumkin No. 1?

QUEZSTION 2. Can Slumkin make any defensive use of the judgment in Onehorse v. Slumkin No. 1?
Part B.

In Twobucks v. Slumkin No. 1 Slumkin did not default but, instead, appeared and answered denying that there were any uncorrected code violations at the three-decker. Twobucks filed a motion for summary judgment on the issue of liability. Accompanying his motion for summary judgment were certified copies of the building inspector’s citations for building code violations and a certified copy of the Fire Department’s investigation and report concluding that the fire had been caused by defective wiring. In response Slumkin filed an affidavit repeating his assertion that there were no uncorrected code violations. The judge granted summary judgment to Twobucks on the issue of liability. Twobucks then proved damages in the amount of $3,729.77, and a judgment in this amount was entered in favor of Twobucks. Slumkin did not appeal.

Later, Twobucks sought a rebate of the rent paid by him prior to the fire on the grounds that he had been constructively evicted by reason of the uncorrected code violations. Twobucks sued in Lawrence District Court for the rebate. (This case is called “Twobucks v. Slumkin No. 2”).

QUESTION 3. In Twobucks v. Slumkin No. 2, can Twobucks make any offensive use of the judgment in Twobucks v. Slumkin No. 1?

QUESTION 4. In Twobucks v. Slumkin No. 2, can Slumkin make any defensive use of the judgment in Twobucks v. Slumkin No. 1?

Part C.

The fire damage went unrepaired. Six months after the entry of judgment in Twobucks v. Slumkin No. 2, Onehorse sued Slumkin seeking a reduction in the rent paid by him during the period after the fire on the grounds that he (Onehorse) had been constructively evicted by reason of the unrepaired fire damage. Onehorse filed
this case in Lawrence District Court. This case is called "Onehorse v. Slumkin No.2."

QUESTION 5. In Onehorse v. Slumkin No. 2, can Onehorse make any offensive use of the judgment in Onehorse v. Slumkin No. 1?

QUESTION 6. In Onehorse v. Slumkin No. 2, can Onehorse make any offensive use of the judgment in Twobucks v. Slumkin No. 1?

QUESTION 7. In Onehorse v. Slumkin No. 2, can Slumkin make any defensive use of the judgment in Onehorse v. Slumkin No. 1?

Part D.

Assume that judgment in Twobucks v. Slumkin No. 2 was granted to Slumkin on the grounds that, under Massachusetts law, constructive eviction will authorize rent withholding but will not authorize a rebate of rent actually paid.

The code violations continued uncorrected. The fire damage went unrepaired. Twobucks stopped paying rent. Slumkin brought an action in Lawrence District Court to evict Twobucks for nonpayment. (This case is called "Slumkin v. Twobucks").

In Massachusetts, the existence of uncorrected code violations is a defense to an action for eviction. As in the case of other defenses, the burden of pleading and proving uncorrected code violations is on the defendant.

QUESTION 8. In Slumkin v. Twobucks, can Twobucks make any defensive use of the judgment in Twobucks v. Slumkin No. 1?

Part E.

Threesome also stopped paying rent. Slumkin brought an action in Lawrence District Court to evict Threesome for nonpayment. (This case is called "Slumkin v. Threesome").
QUESTION 9. In *Slumkin v. Threesome*, can Threesome make any defensive use of any previous judgment involving Onehorse or Twobucks? If so, which one and why? If not, why not?

QUESTION FOUR
(suggested time: forty-five minutes)

Polly Peacham came east to go to college at Tufts University in Medford, MA. She was born, and lived all her previous life, in Los Angeles. Because she lived in Massachusetts for four college years she registered her car here and got Massachusetts plates. However, her parents continued to pay her car insurance. She got a Massachusetts drivers license although she kept her California license as well. (The Massachusetts license was better ID for buying alcohol). Polly was very interested in national politics. Because absentee voting in California was inconvenient, she registered and voted in Massachusetts.

Polly was the youngest child in her family, so nobody needed to move into her room at home. It remained as she had left it, crowded with the souvenirs of childhood and adolescence. Polly took to college only what she needed. She went home for some school holidays but couldn’t always afford the airfare. In the summers she waitressed on Cape Cod or Martha’s Vineyard.

Polly was interested in going to law school and hoped to study public interest law. In a magazine called *National Jurist* she read about a law school in Los Angeles with a strong public interest curriculum called West Coast Law School (“WCLS”). She went to WCLS’s website and learned that she had just missed a visit by a recruiter to the Boston area. However, the web site enabled her to request application materials, which WCLS mailed to her.
WCLS is a private law school which was incorporated in California in 1972, was accredited by the state of California in 1975, and graduated its first class in 1976. Its only place of business is in Los Angeles, California. It has never maintained any campus, office, bank account, mailing address or telephone listing in Massachusetts, nor is it licensed to do business here.

In her application to WCLS Polly described her interest in studying public interest law and her special desire to do so in Los Angeles where her family still lived and where she hoped to practice. She also explained that she suffers from a physical condition that requires frequent rest breaks during stress periods but that she had successfully coped with this condition during her undergraduate career.

Polly also applied to the Law School Admission Council ("LSAC," a New Jersey nonprofit corporation that designs and administers the LSAT) to take the LSAT. Because she wanted to visit Foxwoods she arranged to take the test at the University of Connecticut in Storrs, Connecticut, which is less than 100 miles from Medford and Boston. She submitted a request to the LSAC for extra rest breaks during the test. She received a letter granting that request. As is customary the test was proctored not by LSAC's employees but by local people hired at hourly rates. Polly’s test was proctored by Mack Heath, an elementary school teacher who lives and works in Storrs. During the test, Polly was distressed when Mack refused to accede to her request for rest breaks, despite her prior arrangement with LSAC.

Polly was disappointed with her LSAT score, and even more disappointed when WCLS notified her that she had not been admitted.

Paula files a lawsuit against WCLS and LSAC in federal district court in Massachusetts. Her complaint against WCLS contains two counts. The first count is based on a contractual theory— that her payment of the application fee and the
school’s acceptance of her application implied an agreement that she would be treated fairly. The second count alleges that the denial of her admission violated the federal Americans with Disabilities Act and other federal statutes forbidding discrimination on account of disability. Her complaint against LSAC states only one count—discrimination on account of disability.

Part A. (sixty per cent of this question)

Identify and discuss the jurisdiction and venue issues that are presented by the foregoing facts.

Part B. (ten per cent of this question)

Assume that all defendants’ Rule 12(b) motions are denied, regardless of your actual conclusions in Part A.

WCLS and LSAC answer, denying all material allegations of the complaint. LSAC implores Mack Heath alleging that he ignored the instructions that it gave him regarding Polly’s rest breaks. Mack files a Rule 12(b)(2) motion to dismiss with an affidavit which states that he lives and works in Storrs and last visited Massachusetts in December of 2007 to attend a Celtics game. Apart from occasional visits to sports events, he has no business or contacts in Massachusetts.

How should the court rule on Mack’s motion?

Part C. (ten per cent of this question)

The case proceeds. The parties exchange their initial disclosures. Polly’s disclosure includes a letter from her family physician in California stating that she has been under his care for stress since her high school days and does well if given breaks during examinations, and a letter from a dean at Tufts to the effect that she had been given such accommodation during her undergraduate years.
WCLS moves for partial summary judgment on the discrimination count. Its moving papers point out that the ADA is quite specific and technical in requiring certification and periodic recertification of disability by a suitably qualified professional, and that Polly had provided no such certification. In response, Polly produces a report and affidavit from a certified psychologist reporting on testing results within the year prior to the lawsuit—both documents attesting to Polly’s continuing disability.

What is WCLS’s best argument in support of its motion for summary judgment?

Part D. (ten per cent of this question)

The court grants WCLS’s motion for partial summary judgment on the discrimination count. WCLS immediately moves to amend its answer to add the affirmative defense of lack of subject matter jurisdiction, alleging that Polly is a citizen of California. In papers served on the same day, WCLS moves to have the case against it dismissed for want of subject matter jurisdiction.

How should the Court rule on WCLS’s motions, given the facts stated in this question?

Part E. (ten per cent of this question)

Assume that the Court grants WCLS’s motion, regardless of your actual answer to Part D. Polly files essentially the same suit in California Superior Court in Los Angeles. WCLS answers denying material allegations of the complaint and raising the affirmative defense of res judicata. WCLS moves for summary judgment on this defense, supporting its motion with appropriate papers from the prior federal action.

How should the Court rule on WCLS’s motion for summary judgment?
QUESTION FIVE
(suggested time: forty-five minutes)

Ms. Victim, a citizen of Ohio and the administratrix of the estate of her late husband Mr. Victim, filed an action in a federal district court in Florida to recover damages pursuant to Florida’s Wrongful Death Act. The alleged cause of death was medical malpractice committed by two Florida physicians and a Florida hospital, all named as defendants.

Like many other states, Florida has passed legislation responding to the alleged medical malpractice crisis. Florida’s statute, like that of Massachusetts with which you may be familiar, requires medical malpractice complaints filed in Florida courts to be initially referred to a malpractice screening panel composed of a judge, a lawyer and a physician. The screening panel reaches a decision which may be accorded weight by the jury in any subsequent trial. If the screening panel finds for the plaintiff (strictly speaking, in the terms of the statute, finds that the “evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry”) then the case proceeds in court in the usual manner. If, on the other hand, the screening panel finds for the defendant or defendants (i.e. finds that the evidence presented to it, even if properly substantiated, is not sufficient to raise a legitimate question of liability) then the plaintiff may still proceed in court but only by first filing a bond in the amount of $10,000 to cover the cost of defending the case if judgment is finally entered for the defendant.

Ms. Victim declined to submit her federal court case to a Florida malpractice screening panel. The Florida law prescribes that if the plaintiff in a medical malpractice case does not submit the case to the malpractice screening panel within twenty days after the filing of the defendant’s answer, the case shall be dismissed.
with prejudice. Twenty days after filing their answer (which denied all allegations of malpractice) the defendants moved to dismiss Ms. Victim’s complaint.

Opposing the motion to dismiss, Ms. Victim argued that (1) the Florida statute is procedural, not substantive, and the federal court should not invoke it, and (2) the Florida statute impermissibly abridges her Seventh Amendment right to a jury trial in federal court by requiring a substantial price of admission to the jury trial in the form of the $10,000 bond in the event of an adverse finding by the medical malpractice tribunal, and by permitting the tribunal’s adverse finding to be introduced as evidence and to be considered by the jury.

How should the judge rule on these arguments? Why?