CIVIL PROCEDURE CASES, MATERIALS, AND QUESTIONS

Sixth Edition
LexisNexis Law School Publishing Advisory Board

William Araiza  
*Professor of Law*  
Brooklyn Law School

**Lenni B. Benson**  
*Professor of Law & Associate Dean for Professional Development*  
New York Law School

**Raj Bhala**  
*Rice Distinguished Professor*  
University of Kansas, School of Law

**Ruth Colker**  
*Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law*  
Ohio State University, Moritz College of Law

**David Gamage**  
*Assistant Professor of Law*  
UC Berkeley School of Law

**Joan Heminway**  
*College of Law Distinguished Professor of Law*  
University of Tennessee College of Law

**Edward Imwinkelried**  
*Edward L. Barrett, Jr. Professor of Law*  
UC Davis School of Law

**David I. C. Thomson**  
*LP Professor & Director, Lawyering Process Program*  
University of Denver, Sturm College of Law

**Melissa Weresh**  
*Director of Legal Writing and Professor of Law*  
Drake University Law School
DEDICATION

RDF: To Louise, Collin and Courtney

WCP: To David, Bill and Ben
Civil Procedure is a challenging course both for students and teachers. Of all the first year subjects, it is the most alien to students’ pre-law school lives. As a result, the course sometimes seems to students to be unconnected to the “real world.” Ironically, of all the first year courses, Civil Procedure is the most connected to the “real world” of what lawyers do. Graduates routinely report that Civil Procedure is central to their work.

Thus one challenge for professors (and casebook authors) is to bridge the gap in student experience. The book addresses this issue by including many problems and hypotheticals which are intended to make the material more concrete. We also include notes and questions that explore the strategic and ethical choices that real lawyers face.

A second challenge is that the course includes significant amounts of detail, but at the same time raises such fundamental questions as the role of justice, fairness and efficiency in the adjudication of rights. Students sometimes miss the richness of the course because they fail to see how its various aspects fit together — they may come away with a knowledge of individual trees but not an overall sense of the forest. This book seeks to avoid that result by stressing integration. The chapters are arranged in related blocks and each chapter begins with a section called “Introduction and Integration” which provides an overview and indicates how the section fits with other topics.

In some areas, we have arranged material differently from what seems to be the common approach. We do this to facilitate the integrative function. The first part of the book addresses where litigation can proceed and includes personal jurisdiction, subject matter jurisdiction, and venue. We have also included notice and service of process in this part because of its close relationship to personal jurisdiction.

Next, the book moves to the phases of a lawsuit — pleading, discovery, and adjudication (with and without a jury). Joinder is covered later because we do not believe this topic is necessary to understanding the basic steps of litigation and, by delaying it, we can cover it with the related issues of preclusion. Covering pleading and discovery back-to-back highlights that they are both methods of information exchange. The chapter on adjudication includes both summary judgment and judgment as a matter of law. In this edition, we have moved the *Erie* chapter after the chapter on adjudication. The reason is that students have a better chance of understanding *Gasperini* if they have already studied Rule 59.

Next are three chapters on preclusion and joinder. We view them as a unit on “packaging” of litigation. We begin with preclusion. That chapter, which explores the goals of efficiency and finality, lays the foundation for the joinder chapters. Although we introduce supplemental jurisdiction briefly in the chapter on subject matter jurisdiction, we defer detailed analysis until the joinder chapters. This seems particularly necessary after the passage of § 1367 which students cannot understand without first studying the joinder rules. Following joinder, we address appeals.

This course stresses civil procedure as part of the litigation process — a publicly funded system of dispute resolution. We feel that students should consider whether the litigation system is a good way to resolve disputes. The last chapter of the book raises questions about alternative dispute resolution and comparative law. We feel that these
Recent years have seen remarkable change in civil procedure. Much of this has been generated by the Supreme Court. Indeed, seven major cases — decided since the publication of our fifth edition in 2008 — are featured in this edition. Two of these cases — J. McIntyre Machinery Ltd. v. Nicastro, 131 S. Ct. 2780 (2011), and Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) — represent the Court’s first efforts in personal jurisdiction since 1990. Each is a principal opinion in Chapter 2, with notes and questions probing their potential impact. The third case is The Hertz Corporation v. Friend, 130 S. Ct. 1181 (2010), which brings considerable clarity to the definition of a corporation’s principal place of business for purposes of diversity of citizenship jurisdiction. The fourth case is part of the Court’s revolution in pleading — started with Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), which was included in the fifth edition. It is, of course, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). In this edition, we follow these two cases with an instructive Seventh Circuit case in which Judges Wood and Posner disagree on the application of the “plausibility” requirement. The Court’s fifth major case is Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010), which is now a principal vehicle for considering the application of the Federal Rules and validity under the Rules Enabling Act. Sixth, in Taylor v. Sturgell, 553 U.S. 880 (2008), the Court rejected virtual representation and clarified when a non-party might be bound by a judgment. Finally, in Chapter 13, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), limits the scope of Rule 23(b)(2) classes and may portend a limiting interpretation of the commonality requirement under Rule 23(a)(2).

The Rules Advisory Committee has continued its activity. Of especial interest is the 2010 amendment to summary judgment practice under Rule 56, which we address in Chapter 9.

Finally, Congress has weighed in with broad changes to removal jurisdiction and venue in the Jurisdiction and Venue Clarification Act of 2011, which became effective in January 2012. We are pleased that this edition includes treatment of these new provisions.

Notes on Form

We indicate textual deletions from opinions and other materials by “* * *.” We have not noted deletions of citations from opinions. Our additions to cases are enclosed in brackets. Our footnotes are denoted by asterisks. We have retained the original numbering of footnotes appearing in opinions. We have adopted a short form of citing the several classic treatises to which we refer throughout the book. With apologies to the contributing authors on the two standard multi-volume treatises, we refer to them, respectively, as MOORE’S FEDERAL PRACTICE AND WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS (7th ed. 2011) is cited WRIGHT & KANE, FEDERAL COURTS; MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (2d ed. 1990) is cited REDISH, FEDERAL JURISDICTION; JACK FRIEDENTHAL, MARY KAY KANE & ARTHUR MILLER, CIVIL PROCEDURE (4th ed. 2005); LARRY TEPLY & RALPH WHITTEN, CIVIL PROCEDURE (4th ed. 2009) is cited TEPLY & WHITTEN, CIVIL PROCEDURE, and RICHARD D. FREER, CIVIL PROCEDURE (2d ed. 2009) is cited FREER, CIVIL PROCEDURE.
ACKNOWLEDGMENTS

Acknowledgments by Professor Freer

I have had generous colleagues at Emory. In particular, my friend Tom Arthur has contributed greatly to the development of this book. George Shepherd and Robert Schapiro have also been model colleagues. Outside the Emory community, we are in the particular debt of Sherman Cohn, Mike Vitiello and Jim Duane, who have gone far beyond the call of friendship in offering suggestions. And we have benefited greatly from contributions by Vince Alexander, John Beckerman, Lenni Benson, Debra Cohen, Stan Cox, Jeff Dobbins, Charlotte Goldberg, Glenn Koppel, Ben Madison, Colleen Murphy, and Rocky Rhodes.

I acknowledge with gratitude the generosity of the late Judge Robert Howell Hall, who endowed the professorship which I am honored to hold. I am grateful for the continued support of Emory University School of Law. And, as with all my work, I remain indebted to Louise, Collin, and Courtney.

Acknowledgments by Dean Perdue

I am grateful for the support I have received from the Georgetown University Law Center. I want to particularly thank my colleagues who share my passion for procedure and have offered invaluable ideas and encouragement on this and earlier editions. That group includes Sherman Cohn, Carrie Menkel-Meadow, Naomi Mezey, Nina Pillard, Phil Schrag, and David Vladeck.

My deepest thanks go to my family, David, Bill, and Ben. Although my sons occasionally questioned my choice of topic (“Why don’t you do something useful — like write a book about baseball?”), and my efficiency (“You’re not done yet?”), their love and good humor were essential to keeping my sanity and perspective.

We acknowledge with gratitude the numerous helpful suggestions from users of prior editions. We also acknowledge the permission of the following copyright holders to quote material contained in the book. Any errors that occurred in editing or reprinting are our responsibility, not that of the copyright holder:


# Table of Contents

<table>
<thead>
<tr>
<th>Chapter 1</th>
<th>AN INTRODUCTION TO THE CIVIL ACTION AND PROCEDURE</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>THE STUDY OF PROCEDURE</td>
<td>1</td>
</tr>
<tr>
<td>B.</td>
<td>FEDERALISM</td>
<td>3</td>
</tr>
<tr>
<td>C.</td>
<td>OVERVIEW OF THE STRUCTURE OF A COURT SYSTEM</td>
<td>5</td>
</tr>
<tr>
<td>1.</td>
<td>Trial Courts</td>
<td>5</td>
</tr>
<tr>
<td>2.</td>
<td>Intermediate Appellate Courts</td>
<td>5</td>
</tr>
<tr>
<td>3.</td>
<td>Supreme Courts</td>
<td>6</td>
</tr>
<tr>
<td>4.</td>
<td>Appellate Practice and the Doctrine of Precedent</td>
<td>6</td>
</tr>
<tr>
<td>D.</td>
<td>THE ADVERSARY SYSTEM</td>
<td>7</td>
</tr>
<tr>
<td>E.</td>
<td>ALTERNATIVES TO LITIGATION</td>
<td>10</td>
</tr>
<tr>
<td>F.</td>
<td>A BRIEF HISTORY OF OUR ENGLISH JUDICIAL ROOTS</td>
<td>12</td>
</tr>
<tr>
<td>G.</td>
<td>GENERAL TOPICS OF CIVIL PROCEDURE</td>
<td>15</td>
</tr>
<tr>
<td>1.</td>
<td>Selecting the Forum (Chapters 2-6, 10)</td>
<td>16</td>
</tr>
<tr>
<td>2.</td>
<td>Learning About the Opponent’s Case (Chapters 7 &amp; 8)</td>
<td>17</td>
</tr>
<tr>
<td>3.</td>
<td>Adjudication With or Without a Jury (Chapter 9)</td>
<td>17</td>
</tr>
<tr>
<td>4.</td>
<td>Preclusion, Joinder, and Supplemental Jurisdiction (Chapters 11-13)</td>
<td>18</td>
</tr>
<tr>
<td>5.</td>
<td>Appeal (Chapter 14)</td>
<td>18</td>
</tr>
<tr>
<td>6.</td>
<td>Litigation Alternatives (Chapter 15)</td>
<td>18</td>
</tr>
<tr>
<td>7.</td>
<td>A Quick Note on Materials</td>
<td>19</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 2</th>
<th>PERSONAL JURISDICTION</th>
<th>21</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>INTRODUCTION AND INTEGRATION</td>
<td>21</td>
</tr>
<tr>
<td>B.</td>
<td>CONSTITUTIONAL LIMITS ON PERSONAL JURISDICTION</td>
<td>22</td>
</tr>
<tr>
<td>1.</td>
<td>The Fountainhead — Pennoyer v. Neff</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>Pennoyer v. Neff</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>29</td>
</tr>
<tr>
<td>2.</td>
<td>Interim Developments</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>Hess v. Pawloski</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>35</td>
</tr>
<tr>
<td>3.</td>
<td>The Modern Era</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>International Shoe Co. v. Washington</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>Note on McGee, Hanson, and Gray</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>World-Wide Volkswagen v. Woodson</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>Notes and Questions</td>
<td>56</td>
</tr>
<tr>
<td></td>
<td>Personal Jurisdiction in Federal Court</td>
<td>59</td>
</tr>
<tr>
<td></td>
<td>Note on Keeton and Calder</td>
<td>61</td>
</tr>
</tbody>
</table>
Table of Contents

Why Litigants Care About Where Litigation Occurs ............................. 62
Burger King Corp. v. Rudzewicz .................................................. 63
Notes and Questions ................................................................. 76
J. McIntyre Machinery, Ltd. v. Nicastro .............................................. 77
Notes and Questions ................................................................. 92
4. General Jurisdiction ........................................................................... 95
Goodyear Dunlop Tires Operations, S.A. v. Brown .................................. 95
Notes and Questions ............................................................................. 100
5. Explicit Consent and Forum Selection Provisions .............................. 105
6. In Rem and Quasi-in-Rem Jurisdiction ............................................. 106
Shaffer v. Heitner .................................................................................. 106
Notes and Questions ............................................................................. 118
7. Transient Presence ............................................................................ 121
Jurisdiction Over Corporations and Partnerships .................................. 125
8. Personal Jurisdiction and the Internet .............................................. 127
Revell v. Lidov ...................................................................................... 128
Notes and Questions ............................................................................. 133
C. A DIFFERENT PERSPECTIVE .............................................................. 135
1. The Purposes of Personal Jurisdiction ............................................. 135
2. Personal Jurisdiction in Other Countries .......................................... 137
   Chapter II, Jurisdiction, European Union ........................................... 138
D. STATUTORY LIMITS ON PERSONAL JURISDICTION ....................... 139
   Official Code of Georgia, Annotated .................................................. 140
   Notes and Questions ........................................................................... 140
Chapter 3 NOTICE AND OPPORTUNITY TO BE HEARD ................. 143
A. INTRODUCTION AND INTEGRATION .................................................. 143
B. NOTICE ............................................................................................ 143
   1. The Constitutional Requirement .................................................. 143
      Mullane v. Central Hanover Bank & Trust Co. .................................. 143
      Notes and Questions ..................................................................... 150
   2. Statutory Requirements ................................................................. 153
      National Dev. Co. v. Triad Holding Corp. ....................................... 154
      Notes and Questions ..................................................................... 157
   3. Immunity, Evasion, and “Sewer Service” ......................................... 161
C. OPPORTUNITY TO BE HEARD ............................................................. 162
   Connecticut v. Doehr .......................................................................... 163
   Notes and Questions ........................................................................... 173
Chapter 4 SUBJECT MATTER JURISDICTION ....................................... 177
A. INTRODUCTION AND INTEGRATION .................................................. 177
Table of Contents

B. STATE COURTS AND GENERAL SUBJECT MATTER JURISDICTION ........................................ 177

C. FEDERAL COURTS AND LIMITED SUBJECT MATTER JURISDICTION ........................................ 178

1. The Constitutional Grants and Role of Congress ................................. 178
   Notes and Questions ........................................................................ 178

2. Plaintiff’s Burden to Establish Federal Subject Matter Jurisdiction ........ 179

3. Diversity of Citizenship and Alienage Jurisdiction ............................ 180
   a. Introductory Note ...................................................................... 180
   b. The Complete Diversity Rule ..................................................... 182
      Strawbridge v. Curtiss ............................................................. 182
      Notes and Questions ................................................................ 183
   c. Determining Citizenship of Individuals ..................................... 184
      Mas v. Perry .............................................................................. 184
      Notes and Questions ................................................................ 187
   d. Determining Citizenship of Entities ............................................ 191
      i. Corporations ......................................................................... 191
         Randazzo v. Eagle-Picher Industries, Inc. ................................ 191
         Notes and Questions ................................................................ 193
         Hertz Corporation v. Friend ..................................................... 195
         Notes and Questions ................................................................ 203
      ii. Non-Incorporated Businesses ................................................ 204
          Belleville Catering Co. v. Champaign Market Place L.L.C. .... 205
          Notes and Questions ................................................................ 207
   e. Representative Suits and Assignments of Claims ............................ 208
   f. The Domestic Relations and Probate Exceptions ............................ 209
   g. The Amount in Controversy Requirement .................................... 211
      Notes and Questions ................................................................ 211

4. Federal Question Jurisdiction ......................................................... 214
   a. Introductory Note ...................................................................... 214
   b. Narrow Interpretations of the Jurisdictional Statute ................. 215
      i. The Well-Pleaded Complaint Rule ........................................ 215
         Louisville & Nashville Railroad Co. v. Mottley ...................... 215
         Notes and Questions ................................................................ 217
      ii. Well-Pleaded Complaint Problems Raised by Declaratory
          Judgments .............................................................................. 220
      iii. Centrality of the Federal Issue to the Claim ....................... 222
         Grable & Sons Metal Products, Inc. v. Darue Engineering &
         Manufacturing ..................................................................... 224
         Notes and Questions ................................................................ 230

5. Supplemental Jurisdiction ............................................................. 233

6. Removal Jurisdiction ................................................................... 233
Table of Contents

Notes and Questions .................................................. 234

Chapter 5 VENUE ..................................................... 241

A. INTRODUCTION AND INTEGRATION .............................. 241
B. LOCAL AND TRANSITORY ACTIONS .............................. 241
C. STATE VENUE PROVISIONS ........................................ 242
   Maryland Code Annotated ........................................... 242
   Notes and Questions ................................................ 244
D. VENUE IN FEDERAL COURT ....................................... 245
   The Basic Rules ...................................................... 245
   Notes and Questions ................................................ 246
   Bates v. C & S Adjusters, Inc. ..................................... 248
   Notes and Questions ................................................ 250
E. CHANGE OF VENUE .................................................. 252
   1. Transfer of Civil Cases in State Courts ....................... 252
   2. Transfer of Civil Actions in Federal Court .................... 252
      a. Where Can Cases Be Transferred? .......................... 253
      b. Goldlawr Transfers ......................................... 254
      c. Forum Selection Clauses .................................... 254
      d. Choice of Law ................................................ 254
      e. Standard for Transfer Under §§ 1404 and 1406 .......... 256
      f. Multidistrict Litigation ..................................... 257
F. FORUM NON CONVENIENS ........................................... 258
   Piper Aircraft Co. v. Reyno ......................................... 258
   Notes and Questions ................................................ 268

Chapter 6 RAISING JURISDICTIONAL AND RELATED
CHALLENGES .................................................. 273

A. INTRODUCTION AND INTEGRATION .............................. 273
B. THE TRADITIONAL AND MODERN APPROACHES TO CHALLENGING
PERSONAL JURISDICTION ............................................. 273
   Notes and Questions ................................................ 275
C. COLLATERAL AND DIRECT ATTACKS ON PERSONAL
JURISDICTION .......................................................... 276
   Baldwin v. Iowa State Traveling Men’s Association ........ 278
   Notes and Questions ................................................ 279
D. CHALLENGING FEDERAL SUBJECT MATTER JURISDICTION ... 280
Chapter 7  PLEADINGS AND JUDGMENTS BASED ON PLEADINGS ............................... 283

A. INTRODUCTION AND INTEGRATION ............................................. 283
B. HISTORICAL OVERVIEW OF THE EVOLUTION OF PLEADINGS ............ 284
C. THE COMPLAINT ................................................................. 286
1. Requirements ............................................................................ 287
   a. Elements of the Complaint .................................................... 287
       i. A “short and plain statement of the grounds for the court’s jurisdiction” .................................................... 287
       ii. A “short and plain statement of the claim showing that the pleader is entitled to relief” .................................. 287
       iii. A “demand for the relief sought, which may include relief in the alternative or different types of relief” .......... 288
   b. Form of Pleadings ................................................................... 288
   c. Legal Sufficiency .................................................................... 289
       Notes and Questions ............................................................. 291
   d. Factual (or “Formal”) Sufficiency: The Debate Over Specificity ........ 292
       i. Code Pleading ................................................................... 293
       ii. Federal Rules Pleading ....................................................... 294
           Dioguardi v. Durning............................................................ 294
           Notes and Questions .......................................................... 296
           Bell Atlantic Corporation v. Twombly .................................... 297
           Notes and Questions .......................................................... 305
           The Iqbal Case ................................................................. 307
           Notes and Questions .......................................................... 310
           Swanson v. Citibank, N.A. ..................................................... 311
           Notes and Questions .......................................................... 317
       iii. The Common Counts .......................................................... 318
   e. Heightened Specificity Requirements in Certain Cases .................... 318
       Leatherman v. Tarrant County ................................................ 319
       Notes and Questions ............................................................. 321
   f. Pleading Inconsistent Facts and Alternative Theories ....................... 324
2. Voluntary Dismissal .................................................................... 325
   Notes and Questions ................................................................. 326
3. Involuntary Dismissal .................................................................. 327
   Notes and Questions ................................................................. 328
D. DEFENDANT’S OPTIONS IN RESPONSE .......................................... 328
1. Motions ...................................................................................... 328
   Questions .................................................................................. 329
2. The Answer ................................................................................ 330
   a. Responses to the Plaintiff’s Allegations .................................... 330
   b. ...
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Admissions</td>
<td>330</td>
</tr>
<tr>
<td>ii. Denials</td>
<td>330</td>
</tr>
<tr>
<td>iii. Denials for Lack of Knowledge or Information</td>
<td>331</td>
</tr>
<tr>
<td>b. Affirmative Defenses</td>
<td>332</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>333</td>
</tr>
<tr>
<td>3. Claims by the Defendant</td>
<td>334</td>
</tr>
<tr>
<td>4. Failure to Respond: Default and Default Judgment</td>
<td>334</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>335</td>
</tr>
<tr>
<td>E. AMENDED PLEADINGS</td>
<td>337</td>
</tr>
<tr>
<td>1. Basic Principles Under Rule 15(a)</td>
<td>337</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>337</td>
</tr>
<tr>
<td>2. The Problem of Variance Under Rule 15(b)</td>
<td>339</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>340</td>
</tr>
<tr>
<td>3. Amendment and the Statute of Limitations Under Rule 15(c)</td>
<td>341</td>
</tr>
<tr>
<td>a. Amendment to Claims or Defenses</td>
<td>341</td>
</tr>
<tr>
<td><em>Marsh v. Coleman Company</em></td>
<td>341</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>345</td>
</tr>
<tr>
<td>b. Amendment Changing a Party</td>
<td>345</td>
</tr>
<tr>
<td>F. SUPPLEMENTAL PLEADINGS</td>
<td>346</td>
</tr>
<tr>
<td>G. VERACITY IN PLEADING: RULE 11 AND OTHER DEVICES</td>
<td>346</td>
</tr>
<tr>
<td>1. Rule 11</td>
<td>346</td>
</tr>
<tr>
<td>Model Rules of Professional Conduct</td>
<td>348</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>350</td>
</tr>
<tr>
<td><em>Rector v. Approved Federal Savings Bank</em></td>
<td>351</td>
</tr>
<tr>
<td>Notes and Questions</td>
<td>356</td>
</tr>
<tr>
<td>2. Other Sanctions</td>
<td>358</td>
</tr>
<tr>
<td>Chapter 8 DISCOVERY</td>
<td>361</td>
</tr>
<tr>
<td>A. INTRODUCTION AND INTEGRATION</td>
<td>361</td>
</tr>
<tr>
<td>B. OVERVIEW OF THE DISCOVERY DEVICES</td>
<td>364</td>
</tr>
<tr>
<td>1. Required Initial Disclosures (Rule 26(a)(1))</td>
<td>364</td>
</tr>
<tr>
<td>Questions</td>
<td>364</td>
</tr>
<tr>
<td>2. Depositions (Rules 30, 31)</td>
<td>365</td>
</tr>
<tr>
<td>Questions</td>
<td>365</td>
</tr>
<tr>
<td>3. Interrogatories (Rule 33)</td>
<td>366</td>
</tr>
<tr>
<td>Questions</td>
<td>366</td>
</tr>
<tr>
<td>4. Production of Documents and Things (Rule 34)</td>
<td>367</td>
</tr>
<tr>
<td>Questions</td>
<td>367</td>
</tr>
<tr>
<td>5. Medical Examination (Rule 35)</td>
<td>367</td>
</tr>
<tr>
<td>Questions</td>
<td>368</td>
</tr>
<tr>
<td>6. Requests for Admission (Rule 36)</td>
<td>368</td>
</tr>
</tbody>
</table>
Table of Contents

Questions ........................................................................ 368
7. Practice Problem ..................................................... 368
C. SCOPE OF DISCOVERY ............................................ 369
   1. General Scope .................................................... 369
      United Oil Co. v. Parts Associates, Inc. ....................... 369
      Notes and Questions ........................................ 374
   2. Discovery of Material in Electronic Form .................... 376
      Zubulake v. UBS Warburg LLC ............................... 376
      Notes and Questions .................................... 386
3. Relation to the Rules of Evidence ............................... 388
4. Privileged Material ................................................. 388
5. Work Product ....................................................... 391
      Hickman v. Taylor ............................................. 391
      Notes and Questions ........................................ 400
6. Experts .............................................................. 404
      Ager v. Jane C. Stormont Hospital & Training School For Nurses . . 405
      Notes and Questions ........................................ 411
7. Discovery in an International Context ......................... 413
8. Review Problem .................................................... 415
D. TIMING AND PRETRIAL DISCLOSURES, CONFERENCES, AND ORDERS ............................................. 416
   1. Timing ............................................................ 416
   2. Pretrial Disclosures .............................................. 417
   3. Pretrial Conferences and Orders ............................... 417
E. SANCTIONS ......................................................... 421
   Washington State Physicians Insurance Exchange & Association v. Fisons Corp. ........................................... 421
   Notes and Questions ............................................ 434

Chapter 9 ADJUDICATION WITH AND WITHOUT A TRIAL OR A JURY .................................................. 439
A. INTRODUCTION AND INTEGRATION ............................ 439
B. THE RIGHT TO A JURY ............................................ 439
   1. Scope of the Constitutional Right .............................. 439
      a. “Actions at Common Law” and the Historical Test ............. 441
         Chauffeurs Local 391 v. Terry ................................ 441
         Notes and Questions ........................................ 451
      b. The Complications of Merger and the Federal Rules ........... 457
      c. Juries in Non-Article III Courts .............................. 458
      d. Juries in State Courts ........................................ 459
   2. Selection and Size of the Jury ................................. 460
Table of Contents

a. The Venire and Voir Dire ....................................... 460
b. Peremptory Challenges ................................ 460
   J.E.B. v. Alabama .................................. 461
   Notes and Questions ................................ 478
c. Two Views of Voir Dire and Peremptory Strikes .............. 480
   The Mapplethorpe Obscenity Trial .................... 481
   10 Trial Mistakes .................................. 485
d. Jury Size ........................................... 485
3. Jury Nullification and Its Limits ............................ 486
C. SUMMARY JUDGMENT — ADJUDICATION WITHOUT TRIAL OR JURY ................................................ 487
   Anderson v. Liberty Lobby, Inc. ..................... 489
   Notes and Questions ................................ 498
   Coble v. City Of White House ........................ 501
   Notes and Questions ................................ 506
D. CONTROLLING AND SECOND-GUESSING JURIES ............ 508
1. Judgment as a Matter of Law (Directed Verdict and JNOV) ........ 508
   Lavender v. Kurn .................................. 510
   Notes and Questions ................................ 514
2. New Trials ........................................... 518
   Dadurian v. Underwriters At Lloyd’s Of London ........ 518
   Notes and Questions ................................ 524
3. Other Techniques for Controlling Juries ...................... 527
   a. Admissibility of Evidence .......................... 527
   b. Jury Instructions .................................. 528
   c. Form of the Verdict ................................ 529
   d. Judicial Comment .................................. 530
   e. Juror Misconduct ................................ 531

Chapter 10 WHAT LAW APPLIES IN FEDERAL COURT ....... 535

A. INTRODUCTION AND INTEGRATION .......................... 535

B. DETERMINING WHAT LAW APPLIES ........................ 537
1. The Erie Doctrine ....................................... 537
   Erie Railroad Co. v. Tompkins ........................ 537
   Notes and Questions .................................. 542
   Note: Constitutional Bases of Erie ................... 546
2. Early Efforts to Describe When State Law Applies ........ 548
   Byrd v. Blue Ridge Rural Electrical Cooperative, Inc. .... 550
   Notes and Questions .................................. 553
   Hanna v. Plumer ..................................... 555
Table of Contents

Note on Understanding Hanna .......................... 564
a. What Happens When There Is a Federal Rule of Civil Procedure
   on Point — The Rules Enabling Act Prong ................. 564
   i. Determining Whether a Federal Directive Is on Point ...... 565
   ii. Determining Whether a Federal Directive Is Valid ..... 567
b. What Happens When There Is No Federal Rule of Civil Procedure on
   Point — The Rules of Decision Act Prong ................. 568
   Notes and Questions .................................. 568
c. Applying the Hanna Structure ......................... 570
   Gasperini v. Center For Humanities, Inc. ................. 570
   Notes and Questions ................................ 581
   Shady Grove Orthopedic Association v. Allstate Insurance Co. 583
   Notes and Questions ................................ 604
C. DETERMINING THE CONTENT OF STATE LAW ............ 605
   Deweerth v. Baldinger ................................ 606
   Notes and Questions ................................ 609
D. FEDERAL COMMON LAW ................................ 610
E. FEDERAL LAW IN STATE COURT ......................... 611

Chapter 11 THE PRECLUSION DOCTRINES ................. 613

A. INTRODUCTION AND INTEGRATION .................... 613
B. CLAIM PRECLUSION .................................. 615
   1. Scope of a Claim .................................. 615
      a. In General ................................... 615
         Carter v. Hinkle ................................ 615
         Notes and Questions .......................... 618
      b. Contract Cases ............................... 622
   2. Parties or Persons in Privity ......................... 623
      a. Who Can Be Bound? ............................ 623
         Notes and Questions .......................... 624
      b. Configuration of the Parties .................... 625
         Notes and Questions .......................... 626
   3. Valid, Final Judgment, on the Merits ................. 626
      a. Validity ..................................... 626
      b. Finality ..................................... 626
      c. On the Merits ................................ 627
         Notes and Questions .......................... 628
   4. Exceptions to the Operation of Claim Preclusion ....... 629
      Notes and Questions ............................. 630
C. ISSUE PRECLUSION .................................... 632
   1. Same Issue Litigated and Determined .................... 632
Table of Contents

Cromwell v. County Of Sac .............................................. 633
Notes and Questions ...................................................... 636

2. Issue Determined Was Essential to the Judgment ................. 638
   Rios v. Davis .......................................................... 638
   Notes and Questions ................................................ 640

3. Against Whom Can Issue Preclusion Be Asserted? .................. 642
   Hardy v. Johns-Manville Sales Corp. ............................... 642
   Notes and Questions ................................................ 645

4. By Whom Can Issue Preclusion Be Asserted? ....................... 649
   a. Mutuality and Exceptions .................................. 649
   b. Rejection of Mutuality for Defensive Use ................. 651
      Notes and Questions ........................................... 652
   c. Rejection of Mutuality for Offensive Use .............. 654
      Parklane Hosiery Co. v. Shore ............................... 654
      Notes and Questions ........................................... 657

5. Exceptions to the Operation of Issue Preclusion .................. 660
   Notes and Questions ................................................ 660

D. PROBLEMS OF FEDERALISM .......................................... 662
   1. State-to-State ................................................... 662
   2. State-to-Federal ............................................... 663
   3. Federal-to-State ............................................... 664
   4. Federal-to-Federal ............................................. 665

Chapter 12 SCOPE OF LITIGATION — JOINDER AND SUPPLEMENTAL JURISDICTION .................. 667

A. INTRODUCTION AND INTEGRATION .................................. 667
B. REAL PARTY IN INTEREST, CAPACITY, AND STANDING ............. 668
   Notes and Questions ................................................ 670
C. CLAIM JOINDER BY PLAINTIFFS .................................... 671
   1. Procedural Aspects .............................................. 671
   2. Jurisdictional Aspects ......................................... 672
      United Mine Workers v. Gibbs ................................. 672
      Notes and Questions ........................................... 676
D. PERMISSIVE PARTY JOINDER BY PLAINTIFFS ....................... 679
   1. Procedural Aspects .............................................. 679
      Schwartz v. Swan ............................................... 680
      Notes and Questions ........................................... 684
   2. Jurisdictional Aspects ......................................... 688
      Notes and Questions ........................................... 689
E. CLAIM JOINDER BY DEFENDANTS ................................... 692
   1. Counterclaims ................................................... 692
## Table of Contents

a. Compulsory Counterclaims .................................................. 692
   i. Procedural Aspects .................................................. 692
   \hspace{1em} *Dindo v. Whitney* ........................................... 692
   \hspace{1em} *Carteret Savings & Loan Assn. v. Jackson* ............... 694
   Notes and Questions .................................................. 695
   ii. Jurisdictional Aspects ............................................. 698
       Notes and Questions ............................................. 699
b. Permissive Counterclaims .................................................. 700
   i. Procedural Aspects .................................................. 700
       Notes and Questions ............................................. 700
   ii. Jurisdictional Aspects ............................................. 700

2. Crossclaims ................................................................. 701
   a. Procedural Aspects .................................................. 701
       Notes and Questions ............................................. 701
   b. Jurisdictional Aspects ............................................. 703
       Notes and Questions ............................................. 703

F. **OVERRIDING PLAINTIFF’S PARTY STRUCTURE** ...................... 704
   1. Impleader (Third-Party Practice) .................................. 705
      a. Procedural Aspects ............................................. 705
      \hspace{1em} *Markvicka v. Brodhead-Garrett Co.* .................. 706
      \hspace{1em} Notes and Questions ................................... 708
      b. Jurisdictional Aspects .......................................... 709
         \hspace{1em} *Owen Equipment & Erection Co. v. Kroger* .......... 710
         \hspace{1em} Notes and Questions ................................... 717
   2. Compulsory Joinder (Necessary and Indispensable Parties) ......... 719
      a. Procedural Aspects ............................................. 719
         \hspace{1em} *Haas v. Jefferson National Bank* .................... 719
         \hspace{1em} *Temple v. Synthes Corp.* ............................. 723
         \hspace{1em} Notes and Questions ................................... 724
      b. Jurisdictional Aspects .......................................... 727
         Notes and Questions ............................................. 728
   3. Intervention ........................................................... 730
      a. Procedural Aspects ............................................. 730
         Notes and Questions ............................................. 731
      b. Jurisdictional Aspects .......................................... 733
         Notes and Questions ............................................. 734

---

**Chapter 13**

**SPECIAL MULTIPARTY LITIGATION: INTERPLEADER AND THE CLASS ACTION** ................. 737

A. **INTRODUCTION AND INTEGRATION** .................................. 737
B. **INTERPLEADER** ...................................................... 737

xix
Table of Contents

1. Background .......................................... 737
2. The Two Types of Interpleader in Federal Court .......... 739
   *Pan American Fire & Casualty Co. v. Revere* ............... 739
   Notes and Questions ........................................ 743
3. The Limits of Interpleader to Avoid Duplicative Litigation .... 747
   *State Farm Fire & Casualty Co. v. Tashire* ................. 747
   Notes and Questions ........................................ 751
C. THE CLASS ACTION .................................... 753
1. Background .......................................... 753
2. Policy and Ethical Issues ................................. 753
3. Constitutional Considerations ............................. 756
   *Hansberry v. Lee* ......................................... 757
   Notes and Questions ........................................ 760
4. Practice Under Federal Rule 23 ............................ 763
   a. Background ........................................ 763
   b. Filing and Certification of a Class Action ............... 763
   c. Requirements for Certification Under Rule 23 ............. 764
      i. Prerequisites of Rule 23(a) ............................ 765
         Notes and Questions .................................... 767
      ii. Types of Class Actions Under Rule 23(b) ............... 768
         Notes and Questions .................................... 771
d. Notice to Class Members of the Pendency of the Action ...... 773
   Notes and Questions ........................................ 774
e. Court’s Role in Dismissal and Settlement .................... 775
5. Subject Matter Jurisdiction ................................ 777
   *Exxon Mobil Corp. v. Allapattah Services* ................... 778
   Notes and Questions ........................................ 788
   Note on Jurisdiction Under CAFA ................................ 789
6. Personal Jurisdiction .................................... 789
   Notes and Questions ........................................ 791

Chapter 14 APPEALS .................................... 793
A. INTRODUCTION AND INTEGRATION ............................ 793
B. APPELLATE JURISDICTION IN THE FEDERAL COURTS ........ 794
1. Section 1291 ......................................... 794
2. Collateral Order Doctrine ................................. 796
   *Cunningham v. Hamilton County* ............................ 797
   Notes and Questions ........................................ 802
3. Section 1292 ......................................... 806
   Notes and Questions ........................................ 807
4. Rule 23(f) ........................................... 809
# Table of Contents

5. Rule 54(b) ........................................... 810
   Notes and Questions .................................. 810

6. Mandamus ........................................... 811

7. Appealability of Discovery Orders ......................... 813

8. Mechanics and Timing of Filing an Appeal ................. 814

9. Appellate Jurisdiction of the United States Supreme Court . 814

C. APPEALS IN STATE COURTS .............................. 815

D. SCOPE OF REVIEW ..................................... 815
   Notes and Questions ................................... 818

E. REVIEW OF JUDGMENTS OUTSIDE OF THE APPEAL PROCESS . . 820

Chapter 15 ALTERNATIVE MODELS OF DISPUTE RESOLUTION .............. 823

A. INTRODUCTION AND INTEGRATION ........................... 823

B. MODELS OF GREATER JUDICIAL CONTROL .................... 823
   The German Advantage in Civil Procedure .................. 823
   Notes and Questions ..................................... 834
   *Sempier v. Johnson & Higgins* .............................. 834
   Notes and Questions ..................................... 840

C. MODELS OF NON-JUDICIAL RESOLUTION ...................... 842
   1. Non-Judicial Adjudication: Arbitration .................. 842
   2. Dispute Resolution Without Adjudication ................ 843
      The Implications of Apology: Law and Culture in Japan and in
      the United States ....................................... 844
      Notes and Questions ..................................... 849