

CIVIL PROCEDURE
CASES, MATERIALS,
AND QUESTIONS

Sixth Edition

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CIVIL PROCEDURE CASES, MATERIALS, AND QUESTIONS

SIXTH EDITION

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MATTHEW  BENDER

DEDICATION

RDF: To Louise, Collin and Courtney

WCP: To David, Bill and Ben

PREFACE

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 law suit — 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

PREFACE

issues are well treated at the end of the course, after the students have seen the litigation process fully.

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. Nicastrò*, 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*.

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