Civil Procedure

Civil Procedure

Cases, Materials, and Questions

EIGHTH EDITION

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We dedicate this work to Sherman Cohn — model scholar, teacher, mentor, and friend — in celebration of his fifty years on the faculty at Georgetown University Law Center.

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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 significant amounts of original text to provide background, as well as 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 fundamental questions about 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 subject fits with other topics. This integrative text allows the professor to assign chapters in any order she chooses.

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 forum selection, and includes personal jurisdiction, subject matter jurisdiction, and venue. We have include notice and service of process in this part because of its close relationship to personal jurisdiction.

A new Chapter 6 addresses remedies, and focuses on provisional remedies, including temporary restraining orders and preliminary injunctions. This topic provides a nice pivot to the next part of the book, which addresses phases of litigation: 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 and supplemental jurisdiction. 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. We place the *Erie* chapter

after the chapter on adjudication. (We believe students may better understand *Gasperini* if they have 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, because students cannot understand § 1367 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 issues are well treated at the end of the course, after the students have seen the litigation process fully.

The Supreme Court has been remarkably active in Civil Procedure over the past decade. In 2011, it returned to personal jurisdiction after a 21-year absence with J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011), which embraced a cramped view of specific jurisdiction, and Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011), which suggested major retrenchment in general jurisdiction. The Court confirmed the retrenchment of general jurisdiction in Daimler AG v. Bauman, 571 U.S. 117 (2014), and BNSF Ry. Co. v. Tyrell, 137 S. Ct. 1549 (2017). The gap created by the restriction of general jurisdiction (at least with regard to corporations) has required plaintiffs to attempt to rely increasingly on specific jurisdiction. This reliance sometimes raises the issue of relatedness: whether the plaintiff's claim is sufficiently related to the defendant's contacts with the forum. The Court issued an important (and seemingly cramped) view of relatedness in Bristol-Myers Squibb v. Superior Court, 137 S. Ct. 1773 (2017). Moreover, it issued its first discussion since 1984 of "effects" jurisdiction with Walden v. Fiore, 471 U.S. 462 (2014).

In subject matter jurisdiction, the Court has refined federal question jurisdiction over state-law claims in Gunn v. Minton, 568 U.S. 251 (2013), and clarified removal procedure in Dart Cherokee Basin Operating Co., LLC, v. Owens, 574 U.S. 81 (2014). Atlantic Marine Construction Co., Inc. v. U.S. District Court, 571 U.S. 49 (2013), is a major decision concerning enforceability of forum selection clauses through transfer under 28 U.S.C. § 1404(a). In pleadings, the Court makes an important distinction between legal and factual sufficiency in Johnson v. City of Shelby, 574 U.S. 10 (2014), which may moderate the impact of *Twombly* and *Iqbal*. In Tolan v. Cotton, 572 U.S. 650 (2014), the Court appears to give force to the hackneyed saying that a judge ruling on summary judgment must view evidence in the light most favorable to the nonmoving party.

The Court has been especially interested over the past decade in the class action. Comcast Corp. v. Behrend, 569 U.S. 27 (2013) is an important decision concerning

certification of damages classes under Rule 23(b)(3). On the heels of Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), it front-loads a great deal of litigation into the certification stage. Yet, in securities fraud cases, the Court has rejected some efforts to require substantive showings at the certification stage. See, e.g., Amgen v. Connecticut Retirement Plans, 568 U.S. 455 (2013). The Court has also continued its embrace of arbitration. In American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013), it upheld a form contractual waiver of class arbitration even though the cost of pursuing individual litigation would be prohibitive. The decision, following AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), which reached the same conclusion in a consumer class action, raises significant questions of access to justice.

The Rules Advisory Committee has been active as well. This edition covers the 2015 amendments to the Federal Rules of Civil Procedure. Principal among these is the change to the scope of discoverability, which moves "proportionality" to center stage as part of the definition of what information may be discovered. Reflecting its increasing importance, we have expanded the discussion of discovery of electronically stored information, ESI, including the 2015 version of Rule 37(e) regarding loss of ESI. This edition discusses the proposed amendment to Rule 30(b)(6), which (absent intervention by the Court or Congress) will take effect on December 1, 2020.

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 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; and Richard D. Freer, Civil Procedure (4th ed. 2017) is cited Freer, Civil Procedure.

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Acknowledgments by Professor Freer

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