

CIVIL PROCEDURE
PROFESSOR STEINMAN

SPRING, 2009

REQUIRED MATERIALS

MARCUS, REDISH & SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH (4th ed. 2005) or (Updated 4th ed. 2008), and the 2008 Teacher's Update (which I will provide to you);
COUND, FRIENDENTHAL, MILLER, SEXTON, 2008 CIVIL PROCEDURE SUPPLEMENT
or some other current edition of the Federal Rules of Civil Procedure;
STERN, THE BUFFALO CREEK DISASTER.

AVAILABLE SECONDARY MATERIALS

Hornbooks

FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE (4th ed. 2005)
JAMES, HAZARD & LEUBSDORF, CIVIL PROCEDURE (5th ed. 2001)
TEPLY & WHITTEN, CIVIL PROCEDURE (3d ed. 2004)
WRIGHT & KANE, FEDERAL COURTS (6th ed. 2002)
SHREVE & RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE (3D ED. 2002)

Paperbacks

There are other texts, and several outlines and Q&A books designed for students, that you might find helpful. I do not know their content well enough to recommend one over another. The ones I am aware of include works by Mullenix, Miller & Friedenthal, Glannon, Freer/Redish, Clermont, Dittfurth, and Dorsaneo/Thornburg. There also are Emanuel; Quick Review - Sum & Substance; Roadmap; Black Letter series; First Year Key Review; and Civil Procedure in a Nutshell.

So, there's an abundance of aids. **You should not feel obliged to buy any of them**, but they exist and you can consult them, if you think that doing so would be helpful.

CLASS SCHEDULE

Class will meet on Mondays, Tuesdays, & Thursdays from 9:45-11:20 a.m. in room 510, beginning on Tuesday, January 20th.

CLASS PARTICIPATION AND GRADES

Those students who, in my judgment, make particularly valuable contributions to the class may have their grades raised above their final examination grade by a half-grade (for example, B to B+). By the same token, chronic lack of preparation or chronic absence may be penalized by deduction of a half grade from your final exam grade to arrive at your course grade. If you

attend fewer than 70% of the classes (fewer than 29 of 42) you may not be permitted to take the final exam and may be dropped from the course.

COURSE OUTLINE

The course will begin with an examination of constitutional limitations on the ability of a private plaintiff to sue a private defendant on a civil claim. It then will focus upon the process of civil litigation in the federal court system. The topics we will address, in varying degrees of detail, include: personal and subject-matter jurisdiction, pleadings and challenges thereto, pretrial discovery, and adjudication without trial. Time permitting, we will do more.

All page references are to MARCUS, REDISH & SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH (4th ed. 2005) or (Updated 4th ed. 2008). (At an appropriate time, I will ask how many of you have the 2005 edition and I will give to those who need it the materials that are in the Appendix to the 2008 edition – which is what distinguishes it from the 2005 edition.) Always read the corresponding pages in the 2008 Teacher's Update, as well. (Selected portions of Chapters I and II on Choosing a System of Procedure and on The Rewards and Costs of Litigation previously were assigned for background.)

In addition, we will periodically refer in class to THE BUFFALO CREEK DISASTER by Gerald Stern, as an example of how procedure works.

I. Personal Jurisdiction: Over whom or what may a state court exercise its authority? (pp.690-859, with minor omissions)

- A. The necessary relationship between the defendant and the state.
 - 1. Historical focus on the power of the forum state to enforce its judgment (pp. 690-710)
 - 2. Current focus on the defendant's chosen affiliation with the forum state
 - a. The basics of the constitutional requirement (pp. 710-23)
 - b. The states' attempts to take advantage of the new jurisdiction (pp. 723-27)
 - c. Personal jurisdiction in federal court (pp. 727-29)
 - 3. Permutations
 - a. When may states assert personal jurisdiction over defendants never physically present in the forum state?
 - 1' Products of the defendant and "the stream of commerce" (*Gray* reprise; pp. 729-45 and 765(bottom: *Asahi*)-76 (top))

- 2' Intentional causation of impact in the forum (pp. 745-52)
 - 3' Intentional affiliation with a forum actor (pp. 752-65)
 - 4' Use of cyberspace (pp.776-90)
4. Current doctrine
- a. Effect of defendant's property in the forum, attached at the commencement of the law suit (quasi in rem and in rem jurisdiction)
 - 1' Historical reprise (*Harris* at 703; *Seider* at 699-700, swing para.)
 - 2' Current requirements (pp. 791-806)
Choice of law (pp.806-09) (not for class discussion)
 - b. Effect of service of process while defendant is physically present in the forum state (pp. 809-21)
 - c. Effect of "residence" (herein of "general jurisdiction") (pp. 821-29)
 - d. Effect of jurisdictional choices by parties
 - 1' Forum selection clauses (pp.834-35)
 - 2' "Consent" as a result of litigation activity (pp. 829-834; Rule 12(b),(g),(h), FRCP)
 - 3' *Hess* reprise (p. 706-08)
- B. Affording the defendant reasonable notice and opportunity to be heard (pp. 835-40)
- C. Final notes on locating the litigation
- 1. Venue (28 U.S.C. § 1391-92; pp. 840-47; we probably will not take class time on *Bates*)
 - 2. Technically correct but inconvenient locations [Transfer and forum non conveniens] (28 U.S.C. §§ 1404, 1406; pp. 847-59)
- II. Subject-Matter Jurisdiction: Over what kinds of cases may a federal court exercise its authority? (pp. 860-918; STERN, THE BUFFALO CREEK DISASTER, Part I)

Over what kinds of cases do the federal courts exercise jurisdiction?

- A. Suits between citizens of different states (pp. 860-71; Article III of the Constitution; 28 U.S.C. §§ 1332, 1335)
- B. Suits involving a federal question (pp. 871-90; Article III; 28 U.S.C. §§ 1331, 1257, 2201)
- C. Supplemental jurisdiction (pp. 890-92; omit *Rosario* at pp. 892-top of 911; add 23-page handout on *Exxon Mobil* and *Rosario* – or find it in the Appendix to the 2008 ed.; 28 U.S.C. § 1367; also read Rules 13, 14, 18-21, 24, F.R.C.P.; BUFFALO CREEK, Part I)
- D. When may a suit filed in state court be "removed" to federal court? (28 U.S.C. §§ 1441, 1446-47; pp. 911-18)

III. Choosing the Law to be Applied -- Read 28 U.S.C. §§ 1652, 2072; otherwise, LECTURE ONLY

If a federal court has subject matter jurisdiction over a case and personal jurisdiction over the defendant, will it apply federal or state law to determine issues in the case?

- A. Constitutional and statutory restraints on a federal court's authority to craft common law: Article III, The Rules of Decision Act, The Rules Enabling Act.
- B. How does a federal court determine the content of state law?
- C. When and why must a *state* court use *federal* law?

[Issues concerning pleadings, discovery, and other pre-trial activity also are discussed in STERN, THE BUFFALO CREEK DISASTER, and we will raise them at the appropriate times.]

READ THE RULES!!!

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Effective Dec. 1, 2007, the FED.R.CIV.P. were "restyled" in an effort to put them into plainer English and make them easier to understand. As a result, the text of the Rules in your rule book will vary from the text of the Rules discussed in many of the cases we will read. For the most part, the drafters did not intend to change the substance of the Rules. You should keep the changes in mind, however; and from time to time we may discuss whether the restyling has changed the meaning of various Rules.

IV. Pleadings (pp. 121-227; Rules 1-3, 5, 6-13, 15, FRCP, many of which are tied to

particular topics below; additional rules cited below; STERN, THE BUFFALO CREEK DISASTER, Parts II and III)

- A. Why you're glad you live now: A brief history (pp. 121-26) (not for class discussion)
- B. The complaint: plaintiff's story -- Rules 7(a); 8(a),(e), (f); 10.
 - 1. How detailed do you have to be? Rule 9 (pp. 126-38)
 - 2. What if the details conflict? (pp. 138-42)
 - 3. What restrains an over-active imagination?
 - a. Rule 11 (pp. 143-56)
 - b. Rule 12(b)(6) (pp. 156-62)
 - c. Rule 9(b) (pp. 163-73; omit *Cash Energy* at pp.173-77 and mid-p.181-89 [up to C.]; read pp. 177-81 and add 22-page handout on *Bell Atl. Corp. v. Twombly* – or find it in the Appendix to the 2008 ed.)
- C. Defendant's turn at bat
 - 1. Motions to dismiss -- Rule 12 (pp. 189-91)
 - 2. What if you don't respond? -- Rules 8(d), 54(c), 55 & 60 (pp. 191-99)
 - 3. The answer -- Rules 8(b)-(f); 10.
 - a. Choices (yes, no, and I don't know) (pp. 199-203)
 - b. Affirmative defenses ("yes, but ... ") -- Rule 8(c) (pp. 204-07)
 - c. Counterclaims ("he owes me") -- Rule 13 (pp. 207-12)
- D. Changing your mind
 - 1. Voluntary dismissals -- Rule 41(a) (pp. 212-14)
 - 2. Amendments -- Rule 15 (pp. 214-27)

E. LECTURE

An interjection: Now that you know what you need to get a lawsuit off the ground, consider whom (and on what claims) you can sue in a single lawsuit. Review Rules 18, 19, 20, 24, F.R.C.P.

- V. Pretrial Discovery FRCP 26, (27-29), 30, (31-32), 33-37) (pp. 332-423)
 - A. Scope -- Rule 26(a),(b)(1,2) (pp. 332-42)
 - B. Tools - how do you ask? -- Rules 27-29, 33-36; 26(c)-(g), 45 (pp. 342-57)
 - C. Judicial Management of the Burdens -- (pp. 357-80)
 - D. Specific limitations on your curiosity
 - 1. The work product rule -- Rule 26(b)(3), (5) (pp. 380-91)
 - 2. Privileges -- Rule 26 (b)(1),(5) (pp. 391-401)
 - 3. Experts -- Rules 26(b)(4); 45 (pp. 401-12)
 - E. Other fact gathering (pp. 412-14)
 - F. Sanctions - what if that nasty person refuses to answer your brilliant questions?, and other misbehavior -- Rule 37 (pp. 415-23)

- VI. Summary Judgment: If there's no dispute about any facts, let the judge decide on the law (but how do you know that there's no dispute about any fact?) -- Rules 56, 51(a),(b) (pp. 424-64)

Insofar as time permits, we also will study:

VII. Preclusive Effects of Judgments

A. Res Judicata

(A valid, final, judgment on the merits by a court of competent jurisdiction is conclusive on the parties in any subsequent litigation of the same cause of action, whether the matters comprising such cause actually were litigated or could have been litigated.)

1. Defining a cause of action (pp. 1092-1111)
2. When may a cause of action be split? (pp. 1111-20)
3. What is a decision “on the merits”? (pp. 1120-25)
4. Problems caused by our federal system (pp. 1125-33 top)

B. Collateral Estoppel

(A judgment on one cause of action estops parties or their privies from relitigating, in conjunction with a second cause of action, issues actually litigated and the determination of which the initial judgment was based upon.)

1. What was litigated? (pp. 1142-58)
 2. Alternative grounds for a decision (pp. 1158-64)
- C. Who is bound by a judgment?
1. Who is in privity? (pp. 1164-73)
 2. Mutuality of estoppel (pp. 1173-88)