

Civil Procedure C

Fall 2009

Professor Michael Moffitt

Working Syllabus and Course Memo

Class Meetings

Our class is scheduled to meet in Room 110 on Mondays and Wednesdays, from 2:30 p.m. until 4:20 p.m. We will always have a short break during that two-hour block, though it may not fall at exactly the same time each day.

Our first day of class is Monday, August 24, 2009, and our last day of class is scheduled for Wednesday, December 2, 2009.

Our class will not meet on the following days:

Monday, September 7, 2009 (Labor Day)

Wednesday, November 25, 2009 (the day before Thanksgiving)

We will hold a makeup class 1:00pm-3:00pm on:

Friday, October 9, 2009

I will provide you with as much notice as I am able for any additional class cancellations and make-up dates, should they become necessary. Thank you for your understanding.

Contacting Me

I am happy to meet with you to discuss Civil Procedure, law school, or any number of other things. We can, of course, meet whenever it is mutually convenient for us. The easiest and most predictable method for getting me without an advance appointment is to come to my office during my office hours on Tuesdays 3pm – 5pm. I am available many other days and times, but you can count on me being there then.

Office: Room 308

Phone: 346-0506

Email: mmoffitt@law.uoregon.edu or mmoffitt@uoregon.edu



Attendance and Participation

My expectation is that you will be at every class session, prepared to participate actively. If, for some extraordinary reason you are unable to attend a particular class, please write me a note in advance—email is best. I will assume that everyone in class is ready to participate, unless you provide me with written notice in advance of class. I will say more about this during our first class session.

Recording Class Sessions

You may not create a recording (in any format, using any medium, electronic or otherwise) of any portion of our class sessions without my specific consent, obtained in advance of class. You may, of course, take notes during class. My experience, however, is that almost all students take too many notes, rather than too few.

Grading

Your grade for this course will be based on an examination, to be typewritten on your laptop computer at the end of the semester. The exam is currently scheduled for Friday, December 11, 2009. As we work through the semester, I will say more about the exam, and you will also have an opportunity to take a practice examination. I read final exam answers blindly, submitting final grades based only on examination numbers.

If a student demonstrates extraordinarily good preparation and participation during the semester, I may exercise my discretion to adjust her or his grade higher by up to one letter grade. If a student's preparation or participation is unsatisfactory, I may lower her or his grade by as much as one letter grade. If a student's behavior in class is disruptive to other students' learning experiences, I may lower the disruptive student's grade, remove her or him from the class, or assign the student a failing grade for the course.

Readings

Almost all of the assigned reading will come from the casebook (Richard D. Freer and Wendy Collins Perdue, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS, 5th ed. (2008 Lexis-Nexis Publishing)) and from this year's course Supplement. I am likely to provide a few additional materials as the semester progresses. I will expect you to have all of these materials with you during the final examination.



Course Content

This course aims to help you:

Develop an understanding of

- the structure of our civil court systems, with a particular focus on federal courts
- modern litigation, including the rules, statutes, policies, constitutional laws, and pragmatic considerations that shape litigants' behaviors

Develop your ability to

- comprehend and analyze complex factual circumstances in a time-limited context
- apply relevant legal doctrines fluently to a variety of factual circumstances
- communicate legal reasoning in writing and orally, in a variety of formats

In the following pages, I have set out the topics I plan to cover during our course, along with my best guess about the reading assignments for each day. As we move through the course, I am likely to amend this syllabus. I will do my best to be clear about any changes as they happen, and I will try to give you as much notice as I can about any changes in the advance readings for each class.

Next to some of the sections I have listed below, you will see the designation “FP” followed by numbers in parentheses. These represent page numbers in your casebook, and I will expect you to have read the relevant pages in advance of each class. Occasionally, you will also see the designation “Supp.” followed by page numbers. These represent readings published in the Supplement. At many points, the readings in the casebook and the Supplement will refer you to a Federal Rule of Civil Procedure or to a specific statutory or constitutional provision. These are found in your Supplement, and you should get into the habit of reading these sections with particular care.



Personal Jurisdiction

The first topic we will cover in depth in this class is personal jurisdiction. Put most briefly, personal jurisdiction asks (and tries to answer) questions about whether a court legitimately can exercise power over a particular person or party. For example, if a court issues an order or enters judgment against a defendant, is that order binding and enforceable? If the court lacks personal jurisdiction over that defendant, then the answer must be “No.” We will begin by briefly examining a modern application of the concept of personal jurisdiction. From there, we will consider some of the historical foundations of personal jurisdiction, looking at the way jurisdiction was constructed and previewing some of the ways in which those doctrines might evolve over time. We then will examine a series of cases highlighting the evolution of personal jurisdiction notions as courts weighed the juxtaposition of traditional rules against the realities of modern life. From there, we consider why personal jurisdiction receives such significant attention. As you begin to understand the stakes involved, some of the arguments about the appropriate scope of personal jurisdiction may take on more relevance. Finally, we will examine some of the frontiers of personal jurisdictional issues, noting where (and why) there are limits to the scope of modern courts’ jurisdictional reach.

Class Session # 1: Class Logistics and Expectations

An Introduction to the Civil Action and Procedure (FP 1-19)

Introduction to the Supplement (Supp. 1)

Personal Jurisdiction and the Internet – Introduction (*Handout*)

Class Session # 2: Early Personal Jurisdiction

Constitutional Limits: *Pennoyer v. Neff* (FP 21-32)

Interim Developments: *Hess v. Pawloski* (FP 32-36)

Consent and Forum Selection Provisions (FP 96-98)

Class Session # 3: The Modern Era

International Shoe (FP 36-44)

McGee, Hanson, Gray (FP 44-46)

World-Wide Volkswagen v. Woodson (FP 46-59)



Personal Jurisdiction (continued)

Class Session # 4: The Modern Era (continued)

Federal Courts (FP 59-61)

Keeton v. Hustler, Calder v. Jones (Supp. 179-186, FP 61-62)

Why Litigants Care About Where Litigation Occurs (FP 62-63)

In-Rem and Quasi-in-Rem: Shaffer v. Heitner (FP 98-112)

Transient Presence: Burnham v. Superior Ct. of Calif. (FP 112-113)

(Note that I am not asking you to read the entire Burnham opinion, just Section I, as it appears on page 113. You should feel free to read it, of course. I'm not censoring things—just trying to save you from too much reading.)

Class Session # 5: The Modern Extent of Personal Jurisdiction

Personal Jurisdiction and the Internet – Revisited:

Millenium Music., Zidon, Barrett, and Planet Beach Franchising (Supp. 187-199)

Long-Arm Statutes (FP 140-142; Supp. 382)

As part of your assignment, please complete the questions on Supp. 382.

Notice

A court may not properly enter a judgment against a defendant over whom it has no personal jurisdiction. The first section of this course gave shape to this notion. Personal jurisdiction, therefore, is necessary, but our next section will demonstrate that it is not sufficient. The defendant must not only be subject to the court's jurisdiction, but also must have been given notice that an action was commenced against him or her. (Underlying this requirement is the idea that a defendant must have notice in order to decide whether or how to defend against the plaintiff's claims.) In this relatively brief section, we will examine the basic boundaries of notice. What kind of notice is "good enough" notice for constitutional purposes? When must notice be given, and what must the defendant be told?

Class Session # 6 : The Constitutional Protection

Understanding Mullane & Mullane v. Central Hanover Bank (Supp. 200; FP 143-152)

Smith v. The Islamic Emirate of Afghanistan, et al., (Supp. 201-205)

Rule 4 Requirements: RIO, Mensik, & Scotto (FP 152-161; Supp. 206-217)



Subject Matter Jurisdiction

Not all courts are empowered to hear all kinds of disputes. Even if a court has jurisdiction over all of the parties involved in the dispute, it must also have jurisdiction over the subject matter of the dispute. We will focus primarily on the scope of federal courts' subject matter jurisdiction. As courts of constitutionally limited jurisdiction, federal trial courts may hear only cases that fall within specified types of disputes. In this section of the class, we will examine the boundaries of federal courts' subject matter jurisdiction.

Class Session # 7: Diversity Jurisdiction

Please bring your laptops to class for this day.

General vs. Limited Subject Matter Jurisdiction (FP 177-180)

Diversity Jurisdiction (FP 180-182)

Complete Diversity: *Strawbridge v. Curtiss* (FP 182-184)

Citizenship of Individuals: *Mas v. Perry* (FP 184-190)

Citizenship of Entities (FP 191-203)

Representative Suits and Assignment (FP 203-205)

Amount in Controversy (FP 206-209)

Class Session # 8: Federal Question Jurisdiction

Removal Jurisdiction (FP 229-238)

Fraudulent Joinder: *Rose v. Giamatti* (Supp. 218-222)

Well-Pleaded Complaint: *Mottley* (FP 210-218)

Centrality: *Grable v. Darue* (FP 218-228)

Coleman v. Beazer Homes (Supp. 223-227)



Venue, Choice of Forum, Choice of Law

A final component to the question of choosing an appropriate forum for adjudication is that of venue. As you know (or will know well by this point in the course), there are multiple courts within the federal system and multiple courts within each state court system. How appropriate is the chosen court when compared with other courts within the same court system? How much deference should we accord to the initial choice of the plaintiff in selecting a court in which to bring an action? What recourse is available to defendants who are inconvenienced by the plaintiff's selection? Are there times when the court itself may disrupt the plaintiff's choice?

In this section of the course, we will also preliminarily examine the question of what law should be applied in resolving the dispute. Some students are surprised to learn that this is even an issue, but differences in laws are a fundamental feature of federalism. The federal rules of civil procedure are not identical to states' rules of civil procedure. Furthermore, each state's substantive laws may differ from other states' laws. Given all this variation, how should a court decide which of the various laws should be applied to a particular situation? We will only begin to scratch the surface of this question in this course. Entire upper-level courses address nothing but this question, but you should be aware of its basic parameters because it affects a number of the strategic procedural decisions we studied earlier in the course.

Class Session # 9: Venue

Please bring your laptops to class for this day.

Basic Venue Rules (FP 239-251)

As part of your assignment, please complete Questions 1 & 2, pages 245-246

Change of Venue (FP 251-257)

Forum Non Conveniens: Punyee (Supp. 228-236; FP 267-271 Notes 2, 3, 6, 8, 10 & 11)

Class # 10: Choice of Law

Piper v. Reyno (FP 257-271)

Which State's Law? Klaxon v. Stentor (Supp. 237-238)

Determining the Content of State Law (FP 581-582)

DeWeerth v. Baldinger; Notes (FP 582-587)

Introduction and Integration (FP 533-535)

Erie v. Tompkins (FP 535-544, Notes 3, 7-12)

Class # 11: Choice of Law

Early Efforts to Describe When State Law Applies (FP 546-548)

Hanna v. Plumer (Supp. 239-244)

Notes on Understanding Hanna (FP 562-567, Notes 1 & 2)

Chamberlain v. Giampapa, Long v. Adams (Supp. 245-253)

An Introduction to Arbitration (*Blackboard*)

Preemption in Action: Southland v. Keating (Supp. 254-262)

Arbitration research assignment (*instructions given in class*)



Pleadings and Initial Motions

There are a limited number of ways in which a party communicates with a court. In most instances, these communications are written. Pleadings represent an opportunity for litigants to learn more about each other's contentions. In the initial pleading, the complaint, a plaintiff sets out a statement of why she or he believes that she or he is entitled to relief from the defendant. The defendant may respond to a complaint in a number of different ways, including by motion, by filing an answer, or by defaulting and waiting to raise a jurisdictional challenge later on. We will examine the mechanics of complaints, answers, and motions. We then turn to the question of amendments. At what point(s) should we allow parties to change their assertions about what happened, what they will try to prove, or what they want as relief? As you will see, the answers to these questions have evolved over the course of the past two hundred years. Finally, we will examine the question of veracity in pleadings. How can we know that parties submitting pleadings are not lying? What sanctions are appropriate for those who submit false pleadings or pleadings that are otherwise improper?

Class Session # 12: The Plaintiff's Story

Please bring your laptops to class for this day.

Historical Background on Pleadings (FP 283-286)

The Complaint (FP 286-298; Supp. 259)

Heightened Specificity: Bell, Garst (FP 311-316; Supp. 264-267)

Inconsistent Pleadings (FP 317-321)

Optional: Pleadings in the Age of Settlement (*Handout*)

Class Session # 13: Defendants' Choices

Defendant's Response (FP 324-331; *Handout*)

Default and Default Judgment (FP 331-334)

Kirksey v. R.J. Reynolds, King Vision v. J.C. Dimitri's (Supp. 268-272)

Jurisdictional Challenges (FP 273-276)

Collateral Attacks vs. Direct Attacks: Baldwin (FP 277-282; Supp. 273)

Arbaugh v. Y & H Corp. (Supp. 274-277)

Regents of Univ. of Cal. v. Golf Marketing (Supp. 278-279)

Voluntary and Involuntary Dismissal (FP 321-324)

Class Session # 14: Amendments and Sanctions

Amendments to Pleadings (FP 334-342)

Rule 11 (FP 343-347, through Note 2)

Other sanctions (FP 355)

Christian v. Mattel; Bower v. Weisman (Supp. 280--297)



Discovery

The discovery phase of litigation is among the most important phases, particularly given the way our adjudication process is currently structured. Nevertheless, because upper-level courses cover discovery in detail, we will merely survey certain aspects of discovery's role in the litigation process. Briefly, discovery is the primary opportunity each side has for learning about the information available to the other side. Discovery practice raises important questions about veracity (How do we know they're telling the truth?), confidentiality (Can't I keep this information out of their hands?), and policy (Who should bear the costs of producing all of this information?).

Class Session # 15: Discovery Groundwork

Introduction to Discovery (FP 357-359)

Overview of Discovery Devices (Supp. 298-301)

Goble v. Gable (Supp. 302-312)

Discovery Exercise (*Handout*)

Cost of Discovery & Rule 26(b): Zubulake v. UBS Warburg (Supp. 313-316)

Class Session # 16: Privilege, Work Product, and Discovery in Context

Privilege and Work Product (FP 384-387)

Hickman v. Taylor (Supp. 318-324)

State Farm v. Hawkins (Supp. 325-329)

International Discovery (FP 410-412)

"Discovery in Global Perspective: Are We Nuts?" (Supp. 330-338)

Class Session # 17: Sanctions for Discovery Misconduct

Yablon, *Stupid Lawyer Tricks* (excerpt posted on the web)

Washington State v. Fisons (FP 418-431)

Holmgren v. State Farm (Supp. 339-343)

Avista Management v. Wasau (Supp. 390-391)

Adjudication without Trial

In some cases, parties will go through discovery and one or more of them will believe that there is no real reason to have a trial. Since trials are designed to resolve issues of fact, a party might come to the conclusion that there are no disputes of fact sufficient to warrant a trial. In that event, that party might ask the court to resolve the issue. In this section of the course, we look at the scope of summary judgments and the standards courts adopt in considering a motion for summary judgment.

Class Session # 18: Adjudication without a Trial

Rule 56 Background (FP 482-485)

Anderson v. Liberty Lobby (FP 485-497)

Celotex v. Catrett (FP 497-507)

EEOC v. Papin Enterprises (Supp. 344-350)



Adjudication with a Trial

In other cases, a trial is necessary to resolve the factual dispute raised by the parties' pleadings. The focus of this course in Civil Procedure is not on the details of trial. Several advanced courses, such as Evidence and Trial Practice, highlight the mechanics and strategies of trial. From a procedural perspective, there are nonetheless three important questions related specifically to trials we will address in this class. First, in what circumstances are juries involved in a civil trial? Second, if there is a jury, how should its members be selected? Finally, what devices allow a court to guide or control the jury's behavior? A jury is not given completely free reign to decide any and every question that may occur to it. How can a court narrow the scope of what the jury considers? Are there steps a court may take if it believes the jury has performed its task improperly?

Class Session # 19: The Right to a Jury

Right to Jury Trial Background (FP 435-436)
Historical Test: Actions at Common Law (FP 436-453)
Merger and the Federal Rules (FP 453-454)

Class Session # 20: The Jury

Juries in State Courts (FP 455)
Jury Selection (FP 455-476)
Juror Questionnaire (Supp. 392)
Jury Selection Assignment (*Handout*)
Voir Dire Reading (*Optional*) (*Handout*)
The Unanimity Requirement (Supp. 351-353)

Class Session # 21: Controlling and Second-Guessing Juries

Judgment as Matter of Law: Directed Verdict & JNOV (FP 508-517)
New Trials: *Dadurian v. Underwriters* (FP 517-526, Supp. 326-329)
Other Techniques and Motions to Set Aside the Judgment (FP 526-532)
Unitherm v. Swift-Eckrich (Supp. 358-361)
Correcting Misconduct: *US v. Microsoft* (Supp. 362-364)

Litigation Incentives

We pause at this point in the course to consider the real-world incentives that drive litigants' behavior. As you have undoubtedly heard, only a small percentage of disputes reaches trial. Nevertheless, the risks and opportunities presented by trial inform litigants' (and even prospective litigants') behaviors. We will focus, in particular, on the economic incentives at play throughout the course of a piece of litigation.

Class Session # 22: Dollars and Sense in Litigation (*Handout*)



Preclusion

A popularly held notion suggests that everyone is entitled to a day in court. Some of the earlier sections will help you to understand the truth (and fiction) in this notion. In this section, roughly put, we examine the question of how many days in court one may be entitled to. If a plaintiff litigates an issue and loses, can she or he simply try again in some other court? What if she or he wins? The doctrine that may prevent subsequent re-litigation of issues or claims is known as preclusion. When can a party assert that another party's claim or assertion on a particular issue is precluded? Are there any limits on who may claim a right to preclusion? Against whom may it be asserted? Particularly as we consider questions of efficiency, the scope of preclusion becomes an important policy question.

Class Session # 23: Claim Preclusion or Res Judicata

The Preclusion Doctrines (FP 589-591)

Scope of a Claim & Parties in Privity (FP 591-602)

Valid, Final Judgment on the Merits (FP 602-605)

Exceptions (FP 606-608)

The following questions should help to organize your notes and thoughts:

- 1) Who or what is a party in privity?
- 2) What is a claim (or cause of action)?
- 3) What is required for a judgment to be "valid"?
- 4) What makes a judgment "final"?
- 5) What makes a judgment "on the merits"?
- 6) What exceptions apply to res judicata?
- 7) When is res judicata waived? (Hint: look at FRCP 8)

Class Session # 24: Issue Preclusion or Collateral Estoppel

Same Issue Litigated and Determined (FP 609)

Lumpkin v. Jordan (Supp. 365-369)

Notes 4-7 (FP 612-614)

Essential to Judgment (FP 615-618)

Assertion Against Whom? (FP 618-624)

Assertion By Whom? (FP 624-634)

Exceptions & Federalism Problems (FP 635-640)

As part of your assignment, please complete all of the "Sally and Joe" hypothetical scenarios contained within this reading, and be prepared to discuss your answers in class.



Scope of the Dispute – The Joinder Doctrines

When a plaintiff files a lawsuit, she or he names the defendant(s) being sued and the reason(s) the plaintiff believes she or he is entitled to relief from that defendant(s). In some simple transactions, this may represent the only dispute to be resolved. What if one of the parties decides that there is another dispute that ought to be resolved at the same time? What if one of the parties decides that there is an absent party who ought to be included in this adjudication? The focus of this section of the class is on joinder, the term used to describe the process of adding a claim or a party to an existing piece of litigation.

A very particular structural tool available to litigants in modern Civil Procedure is the class action. Unlike most other forms of litigation, class actions are representative actions, in which one or a small number of parties bring or defend an action on behalf of many others similarly situated. It is one of the most controversial components of modern Civil Procedure. After surveying the basic procedural tool, we will explore briefly some of the policy considerations inherent in the class action.

Class Session # 25: Rules 18 & 20

- Background (FP 641-642)
- Real Party in Interest (FP 642-645)
- Claim Joinder by Plaintiffs (FP 645-654)
- Maier v. GSI Lumonics (Supp. 370-372)
- Permissive Party Joinder by Plaintiffs (FP 654-666)

Class Session # 26: Rules 13 & 14

- Exxon-Mobil v. Allapattah Services (FP 753-762)
- Claim Joinder by Defendants (FP 666-678)
- Overriding Plaintiff's Party Structure: Impleader (FP 678-693)

Class Session # 27: Rules 19, 23 & 24

- Compulsory Joinder - Necessary & Indispensible Parties (Supp. 373)
- Intervention (Supp. 374)
- Class Actions Background (FP 727-728)
- Certification & Maintenance: Kurcz v. Eli Lilly (FP 737-740, Supp. 375-381)

Class Session # 28: Class Actions

- Policy & Ethical Considerations (FP 728-730)
- Notice and Settlement (FP 747-752)



Appeals

Often one (and sometimes both) of the parties to a dispute will be unhappy with the resolution reached in adjudication. If a party is unhappy with the outcome and he or she believes that the disliked outcome is the product of a mistake by the judge, he or she may file an appeal with a different court. An appeal essentially asks the next court “up” the chain in a court system to review the decisions of the court below. Most of the opinions you read in law school come from appellate courts.

A Note About Alternative Dispute Resolution (ADR)

Litigation represents one mechanism through which parties resolve their disputes. Most disputes are not resolved through adjudication. Indeed, most prospective disputants never even file a lawsuit. Still, the adjudicative process established by Civil Procedure is important to understanding even non-adjudicative dispute resolution. Throughout the course, we will consider whether the adjudication structure best serves the disputants’ and the public’s interests in various circumstances.

Because litigation represents only one mechanism by which disputes are resolved, and because one significant aspect of lawyering involves preventing or resolving disputes for your clients, you should plan to study other dispute resolution processes (such as negotiation, mediation, or arbitration) sometime during your next three years. Settlement dynamics shape the cadence of litigation, just as litigation informs settlement dynamics. To be an effective advisor and advocate for your client, you will almost certainly need to understand multiple ways of addressing disputes.



A Sample Outline Structure

Creating an outline of Civil Procedure materials will almost certainly be important to your understanding (and to your performance on the final exam). I will address the question of outlining several times during the semester. I strongly encourage you *not* to try to create an outline on any particular topic until we have completed our treatment of the topic in class. Therefore, because we will spend about three weeks on personal jurisdiction at the start of class, I encourage you not even to give thought to your outline until at least the end of September. I recognize that students nevertheless prefer to have guidance about how they might structure an outline. Below, I have provided a basic structure I would use for my outline, were I preparing for a Civil Procedure exam. I hope you find it helpful.

1. Personal Jurisdiction
 - 1.1. Traditional bases
 - 1.2. Long-Arm Statutes
 - 1.3. Shoe and Its Progeny
 - 1.4. In-Rem and Quasi-In-Rem
 - 1.5. Transient Presence
2. Notice
 - 2.1. Mullane standard
 - 2.2. Service Rules
3. Subject Matter Jurisdiction
 - 3.1. Diversity Jurisdiction
 - 3.1.1. Complete diversity
 - 3.1.2. Citizenship
 - 3.1.3. Amount in controversy
 - 3.2. Federal Question
 - 3.3. Removal
4. Venue
 - 4.1. Venue statutes
 - 4.2. Transfer of venue
 - 4.3. Forum non conveniens
5. Choice of Law
 - 5.1. Horizontal
 - 5.2. Vertical
 - 5.3. Preemption
6. Pleadings and Motions
 - 6.1. Historical background
 - 6.2. Complaint standards
 - 6.3. Rule 12 motions
 - 6.4. Collateral attacks
 - 6.5. Answers
 - 6.6. Dismissals
 - 6.7. Defaults
 - 6.8. Amendments
 - 6.9. Rule 11
7. Discovery
 - 7.1. Initial disclosures
 - 7.2. Interrogatories
 - 7.3. Depositions
 - 7.4. Privilege and Work-Product
 - 7.5. Sanctions
8. Control Over Outcome
 - 8.1. Right to a jury
 - 8.2. Empanelling a Jury
 - 8.3. Summary Judgment
 - 8.4. Directed verdict
 - 8.5. JNOV
 - 8.6. New Trial
 - 8.7. Misconduct
9. Preclusion
 - 9.1. Collateral Estoppel
 - 9.2. Res Judicata
10. Joinder
 - 10.1. Claim joinder
 - 10.2. Permissive party joinder
 - 10.3. Compulsory party joinder
 - 10.4. Third-party practice
 - 10.5. Other joinder devices
11. Class actions
 - 11.1. Certification
 - 11.2. Maintenance
 - 11.3. Notice
 - 11.4. Settlement
12. Litigation incentives

