## Contents

Preface xxv Acknowledgments xxvii

## Chapter 1: An Overview of Procedure 1

Α.	The Idea	and the	Practice of	of Procedure	1
----	----------	---------	-------------	--------------	---

- 1. Locating Procedure 1
- 2. Clients, Lawyers, Procedure, and Strategy 2

#### B. Where Can the Suit Be Brought? 5

- 1. Personal Jurisdiction 6
- Subject Matter Jurisdiction 6
   Hawkins v. Masters Farms, Inc. 7
   Notes and Problems 10
- 3. Service of Process 13

#### C. Stating the Case 13

1. The Lawyer's Responsibility 13

Bridges v. Diesel Service, Inc. 14

Notes and Problems 15

Note: Reading the Rules—Process and Politics 16

2. The Complaint 18

Bell v. Novick Transfer Co. 19

Notes and Problems 19

- 3. The Response—Motions and Answer 21
  - a. Pre-Answer Motions 22

Notes and Problems 23

b. The Answer 24

Notes and Problems 26

4. Amendment of Pleadings 27

#### D. Parties to the Lawsuit 27

Fisher v. Ciba Specialty Chemicals Corp. 28 Notes and Problems 30

E. Factual Development—Discovery 31  Gorson v. T.G.R. Logistics, Inc. 33  Notes and Problems 36	
F. Pretrial Disposition—Summary Judgment 37  Houchens v. American Home Assurance Co.  Notes and Problems 41	38

#### G. Trial 42

Norton v. Snapper Power Equipment 43 Notes and Problems 45

#### H. Former Adjudication 47

*Ison v. Thomas* 48 Notes and Problems 49

#### I. Appeals 50

Reise v. Board of Regents of the University of Wisconsin 51
Notes and Problems 52
Note on Appellate Structure and Jurisdiction 54
Note: Civil Procedure in Your Substantive Courses 55
Assessment Questions—And a Word About Using These
Questions 56
Analysis of Assessment Questions 58

# PART I: THE CONSTITUTIONAL FRAMEWORK FOR U.S. LITIGATION

	Α.	Ap	proac	hing	Civil	Proced	lure (	61
--	----	----	-------	------	-------	--------	--------	----

#### B. Constitutional Limits in Litigation 62

- 1. The Idea of Jurisdiction 62
- 2. Jurisdiction and the Constitution 63
- 3. The Constitution and Choice of Law 65

### **Chapter 2: Personal Jurisdiction** 67

#### A. The Origins 67

Pennoyer v. Neff 68 Notes and Problems 74

#### B. The Modern Constitutional Formulation of Power 77

Redefining Constitutional Power 78
 International Shoe Co. v. Washington 79

 Notes and Problems 84

Contents xiii

	McGee v. International Life Insurance Co. 86
	Hanson v. Denckla 87
	Notes and Problems 88
	2. Absorbing <i>In Rem</i> Jurisdiction 88
	Shaffer v. Heitner 90
	Notes and Problems 97
	3. Specific Jurisdiction: The Modern Cases 99
	World-Wide Volkswagen Corp. v. Woodson 100
	Notes and Problems 106
	J. McIntyre Machinery, Ltd. v. Nicastro 111
	Notes and Problems 120
	Abdouch v. Lopez 121
	Notes and Problems 127
	4. General Jurisdiction 128
	Goodyear Dunlop Tires Operations, S.A. v. Brown 129 Notes and Problems 132
	Daimler AG v. Bauman 133
	Notes and Problems 139
	Bristol-Meyers Squibb Co. v. Superior Court 140
	Notes and Problems 146
	Burnham v. Superior Court 148
	Notes and Problems 154
	Note on the Mechanics of Jurisdiction: Challenge and Waiver 155
	Notes and Problems 156
_	Consent as a Substitute for Power 158
C.	Carnival Cruise Lines, Inc. v. Shute 159
	Notes and Problems 162
	Notes and Froblems 102
D.	Notice 163
	1. The Constitutional Requirements 163
	Mullane v. Central Hanover Bank & Trust Co. 165
	Notes and Problems 170
	2. Beyond the Constitutional Requirements: The Mechanics of Notice and
	Service 172
E.	Self-Imposed Restraints on Jurisdictional Power: Long-Arm Statutes,
	Venue, and Discretionary Refusal of Jurisdiction 177
	1. Long-Arm Statutes as a Restraint on Jurisdiction 177
	Gibbons v. Brown 178
	Notes and Problems 180
	2. Venue as a Further Localizing Principle 181
	Notes and Problems 183
	Thompson v. Greyhound Lines, Inc. 184
	Notes and Problems 186
	3. Declining Jurisdiction: Transfer and Forum Non Conveniens 186
	Piper Aircraft v. Reyno 187

Notes and Problems 193	
Atlantic Marine Construction Co. v. United States District Court	195
Notes and Problems 198	
Assessment Questions 199	
Analysis of Assessment Questions 202	

## Chapter 3: Subject Matter Jurisdiction of the Federal Courts 205

- A. The Idea and the Structure of Subject Matter Jurisdiction 205
- B. Federal Question Jurisdiction 209

Louisville & Nashville Railroad v. Mottley 210 Notes and Problems 213

#### C. Diversity Jurisdiction 218

Redner v. Sanders 220
Notes and Problems 221
Hertz Corp. v. Friend 225
Notes and Problems 228
Note: Amount in Controversy 229

#### D. Supplemental Jurisdiction 232

Notes and Problems 233

In re Ameriquest Mortgage Co. Mortgage Lending Practices Litigation 235

Szendrey-Ramos v. First Bancorp 237 Notes and Problems 249

#### E. Removal 241

Notes and Problems 241

Caterpillar, Inc. v. Lewis 244

Notes and Problems 247

Assessment Questions 249

Analysis of Assessment Questions 251

## Chapter 4: State Law in Federal Courts: *Erie* and Its Entailments 255

#### A. State Courts as Lawmakers in a Federal System 256

- 1. The Issue in Historical Context 256
- 2. Constitutionalizing the Issue 258Erie Railroad v. Tompkins 259Notes and Problems 263

Contents XV

1. Interpreting the Constitutional Command of Erie 268 Guaranty Trust Co. v. York 268 Notes and Problems 269 Byrd v. Blue Ridge Rural Electric Cooperative 272
Notes and Problems 274  2. De-constitutionalizing <i>Erie</i> 274 <i>Hanna v. Plumer</i> 275
Notes and Problems 279 3. Determining the Scope of Federal Law: Avoiding and
Accommodating <i>Erie</i> 282  Note: Interpreting State Law: An Entailment of <i>Erie</i> 283  Assessment Questions 285  Analysis of Assessment Questions 286
THE PROCESS OF LITIGATION
THE I ROCESS OF EITIGATION
A. Approaching Civil Procedure 289
B. Choosing Procedure 290
•
C. A Roadmap for Exploring Choices 291
Chapter 5: Incentives to Litigate 293
A. Litigation in the United States at the Start of the Twenty-First Century 293
Notes and Problems 297
B. Reasons to Litigate: Dollars, Orders, and Declarations 299
1. Damages 299 Troupe v. C & S Wholesale Grocers, Inc. 300 Notes and Problems 303
a. Damage Amounts: Ceilings and Floors 303 b. Categorizing Damages 305
Notes and Problems 306
<ol> <li>Specific Relief 307         Lucy Webb Hayes Natl. Training School v. Geoghegan 308         Notes and Problems 311     </li> </ol>
3. Declaratory Relief 311  Notes and Problems 314
4. Temporary Remedies 315
a. Preliminary Injunctions and Temporary Restraining Orders:

**PART II:** 

<ul> <li>Winter v. Natural Resources Defense Council, Inc. 316</li> <li>Notes and Problems 321</li> <li>b. Provisional Remedies and Due Process 324</li> <li>Fuentes v. Shevin 324</li> <li>Notes and Problems 329</li> </ul>
<ul> <li>C. Financing Litigation 332</li> <li>1. The "American" and "English" Rules About Attorneys' Fees 334     Notes and Problems 336</li> <li>2. Insurance, the Contingent Fee, and Alternative Litigation Finance 336     a. Insurance 337     Notes and Problems 337</li> <li>b. The Contingent Fee 339     Notes and Problems 342</li> <li>c. Alternative Litigation Finance 343     Notes and Problems 345</li> <li>3. Public Subsidies and Professional Charity 347</li> </ul>
Notes and Problems 349  4. From Fee Spreading to Fee Shifting 349  a. The Common Fund 350 Notes and Problems 350 b. By Contract 351 c. By Common Law 351 d. By Statute 351 Notes and Problems 352 Problem: How to Lose by Winning 353 Notes and Problems 354 Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources 355 Notes and Problems 357 Assessment Questions 358 Analysis of Assessment Questions 359
Chapter 6: Pleading 361  A. The Story of Pleading 361  1. Of Stories and Jurisdiction 362    Notes and Problems 362  2. Plaintiff's Story, Defendant's Story 365  3. One Function of Pleading: Establishing the Law 366

Notes and Problems 368

Notes and Problems 372

Notes and Problems 374

Haddle v. Garrison (S.D. Ga. 1996) 371

Haddle v. Garrison (11th Cir. 1997) 374

Contents xvii

Haddle v. Garrison (525 U.S. 121 (1998)) 375	
Notes and Problems 378	
4. Another Function of Pleading: Sorting Strong Cases from Weak	
Cases? 380	
a. The "Ordinary" Case: How Much Detail in a Complaint? 381	
Notes and Problems 382	
Ashcroft v. Iqbal 385	
Notes and Problems 395	
b. Special Cases: Requiring and Forbidding Specificity in Pleading	397
Stradford v. Zurich Insurance Co. 397	
Notes and Problems 400	
5. Allocating the Elements of a Claim 402	
Jones v. Bock 403	
Notes and Problems 406	
B. Ethical Limitations in Pleading—and in Litigation Generally 409	
Notes and Problems 410	
Walker v. Norwest Corp. 412	
Notes and Problems 414	
Christian v. Mattel, Inc. 416	
Notes and Problems 420	
C. Responding to the Complaint 421	
1. Default 422	
2. The Pre-Answer Motion (and a Close Post-Answer Relative) 422	
Notes and Problems 423	
Notes and Problems 424	
Notes and Problems 426	
3. Answer 427	
a. Denials 427	
Zielinski v. Philadelphia Piers, Inc. 428	
Notes and Problems 431	
b. Affirmative Defenses 433	
Notes and Problems 433	
4. Reply 435	
Notes and Problems 435	
5. Amendments 437	
Notes and Problems 437	
a. The Basic Problem: Prejudice 438	
Beeck v. Aquaslide 'N' Dive Corp. 438	
Notes and Problems 442	
b. Statutes of Limitations and Relation Back 444	
Moore v. Baker 445	
Bonerb v. Richard J. Caron Foundation 446	
Notes and Problems 448 Assessment Questions 450	
Analysis of Assessment Questions 452	

### Chapter 7: Discovery 455

A. N	Modern	Discovery	455
------	--------	-----------	-----

- Discovery Before Discovery: Obligations and Spoliation 456
   Zubulake v. UBS Warburg LLP 456
   Notes and Problems 459
- 2. Getting the Story Straight: Crafting a Discovery Plan 461

#### B. The Tools of Discovery 462

1. Required Disclosures—First Round 465

Notes and Problems 465

2. Documents, Things, Land, and Bytes: Requests for Production (Rules 34 and 45) 466

Notes and Problems 468

3. Asking Questions in Writing, Seeking Admissions: Interrogatories and Admissions (Rules 33 and 36) 468

Notes and Problems 470

 Asking Questions in Person: Depositions (Rule 30) and Physical and Mental Evaluations (Rule 35) 471

Notes and Problems 473

Pretrial Witness Lists and the Pretrial Order 477
 David and Goliath Do Discovery: A Taxonomy of Problems 477

#### C. The Scope of Discovery 478

1. Relevance 479

Favale v. Roman Catholic Diocese of Bridgeport 480 Notes and Problems 482

2. Proportionality, Burden, and Privacy 483

Cerrato v. Nutribullet, LLC 484

Wagoner v. Lewis Gale Medical Center, LLC 485

Rengifo v. Erevos Enterprises, Inc. 488

Notes and Problems 491

3. Privilege 492

Notes and Problems 493

4. Trial Preparation Material 495

Hickman v. Taylor 495

Notes and Problems 499

#### D. Experts 501

Notes and Problems 503
Thompson v. The Haskell Co. 504
Chiquita International Ltd. v. M/V Bolero Reefer 505
Notes and Problems 506

#### E. Ensuring Compliance and Controlling Abuse of Discovery 507

- 1. Types of Discovery Disputes 508
- 2. Ensuring Compliance 508 Notes and Problems 509

xix Contents

	3. Remedies: Management and Sanctions 510  Mueller v. Swift 511  Notes and Problems 515  Security National Bank of Sioux City v. Abbott Laboratories 515  Notes and Problems 517  Assessment Questions 519  Analysis of Assessment Questions 521
Cł	napter 8: Resolution Without Trial 523
A.	<ul> <li>The Pressure to Choose Adjudication or an Alternative 524</li> <li>1. Default and Default Judgments 524</li></ul>
B.	<ol> <li>Avoiding Adjudication 532</li> <li>Negotiation and Settlement: Why Settle? And How? 532         Jane Smart v. GrowCo, Inc. 534         a. Contracting to Dismiss 535         Notes and Problems 535         b. Third-Party Participation in Settlement: Facilitation, Encouragement, and Coercion 540         Notes and Problems 541         c. Contracting for Confidentiality 543         Notes and Problems 543         <i>Kalinauskas v. Wong</i> 546         Notes and Problems 548</li> <li>Contracting for Private Adjudication: Arbitration and Its Variants 550         a. The Idea and Practice of Arbitration 550         b. Federalism and Arbitration: Herin of Preemption 552         <i>Ferguson v. Countrywide Credit Industries, Inc.</i> 554         Notes and Problems 558         <i>Epic Systems v. Lewis</i> 559         Notes and Problems 566</li> </ol>
C.	Adjudication Without Trial: Summary Judgment 569  Notes and Problems 569  1. Summary Judgment in Action: The Burdens on the Moving and Nonmoving Parties 572  Celotex Corp. v. Catrett 573  Notes and Problems 576
	<ol> <li>Summary Judgment in Action: How Courts Should Assess the Evidence 579         Tolan v. Cotton 579     </li> </ol>

Notes and Problems 583

Bias v. Advantage International, Inc. 583

Notes and Problems 586

Assessment Questions 588

Analysis of Assessment Questions 590

### **Chapter 9: The Trier and the Trial** 593

#### A. Choosing and Challenging Judges 594

Notes and Problems 596

Caperton v. A.T. Massey Coal Co. 597

Notes and Problems 604

#### B. Sharing Power with a Jury 606

- 1. When May a Jury Decide? 606 Notes and Problems 610
- 2. Choosing Jurors 612
- 3. Challenging Jurors 614 Notes and Problems 617

## C. What Will Trial Be About? The Final Pretrial Conference and Order 619

Monfore v. Phillips 619 Notes and Problems 622

#### D. Judges Guiding Juries 623

- 1. Instruction and Comment 623
- 2. Excluding Improper Influences 624
- 3. Size and Decision Rules 625

#### E. Judges Controlling Juries: Judgment as a Matter of Law 626

Notes and Problems 627

 Judgment as a Matter of Law: How Courts Should Assess the Evidence 629

Pennsylvania Railroad v. Chamberlain 629

Notes and Problems 633

 Judgment as Matter of Law in Action: Judgments and Renewed Judgments 636

Notes and Problems 636 *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.* 637 Notes and Problems 641

#### F. Judges Undoing Verdicts: The New Trial 642

- 1. The Justifications for New Trials 642
  - a. Flawed Procedures 642
  - b. Flawed Verdicts 643Lind v. Schenley Industries 644Notes and Problems 647

Contents XXi

Contents
<ul><li>2. Conditional New Trials 648</li><li>a. New Trial Limited to Damages 648</li><li>b. Remittitur and Additur 649</li></ul>
G. The Limits of Judicial Power: The Reexamination Clause and the Jury as a Black Box 650  Peterson v. Wilson 650  Notes and Problems 654  Assessment Questions 657  Analysis of Assessment Questions 658
Chapter 10: Appeal 661
A. Who Can Appeal? 662  1. A Losing Party: Adversity 663    Notes and Problems 663    Aetna Casualty & Surety Co. v. Cunningham 664    Notes and Problems 665  2. Who Raised the Issue Below: Of Waivers and Sandbags 666    Notes and Problems 667  3. Who Was Not Deterred from Appealing 670
B. When a Decision May Be Reviewed: "Finality" 672  1. The Final Judgment Rule 672  a. Appellate Jurisdiction and the Final Judgment Rule 673  Liberty Mutual Insurance Co. v. Wetzel 673  Notes and Problems 677  b. Defining the Moment of Judgment 679  Notes and Problems 680  2. Exceptions to the Final Judgment Rule 681  a. Practical Finality 682  Lauro Lines s.r.l. v. Chasser 682  Notes and Problems 686  b. Injunctions 688  Notes and Problems 688  c. Interlocutory Appeals 689  d. Mandamus 689  Notes and Problems 690
C. Scope of Review 691  1. Law and Fact 691  Anderson v. Bessemer City 692  Notes and Problems 696  2. Harmless Error 697  Van Zee v. Hanson 697  Notes and Problems 699  Assessment Questions 700  Analysis of Assessment Questions 701

Chapter 11: Respect for Judgments 703	
A. Claim Preclusion 704  1. Precluding the "Same" Claim 704  a. Efficiency 704  Frier v. City of Vandalia 705  Notes and Problems 710  Semtek Intl. Inc. v. Lockheed Martin Corp. 713  Notes and Problems 717  b. Consistency—The Logical Implications of the Former Judgment 7  Notes and Problems 719  2. Between the "Same" Parties 720  Taylor v. Sturgell 720  Notes and Problems 726  3. After a Final Judgment 729  4. After a Judgment "on the Merits" 730  Notes and Problems 730  Gargallo v. Merrill Lynch, Pierce, Fenner & Smith 732  Notes and Problems 735	18
<ul> <li>B. Issue Preclusion 735</li> <li>1. The Same Issue 736     Notes and Problems 737</li> <li>2. An Issue "Actually Litigated and Determined" 737     Illinois Central Gulf Railroad v. Parks 738     Notes and Problems 740</li> <li>3. An Issue "Essential to the Judgment" 741     Notes and Problems 742</li> <li>4. Between Which Parties? 744     Parklane Hosiery Co. v. Shore 745     Notes and Problems 750</li> </ul>	
<ul><li>C. The Boundaries of Preclusion 755</li><li>1. Claim Preclusion 755</li><li>2. Issue Preclusion 756</li></ul>	
<ul> <li>D. Repose: Collateral Attack and Reopened Judgments 757</li> <li>1. Full Faith and Credit as a Bar to Collateral Attack 758  V.L. v. E.L. 759  Notes and Problems 762</li> <li>2. The Reopened Judgment as an Alternative to Collateral Attack 765  United States v. Beggerly 766  Notes and Problems 768  Assessment Questions 770  Analysis of Assessment Questions 772</li> </ul>	

Contents XXIII

# PART III: PROBING THE BOUNDARIES: ADDITIONAL CLAIMS AND PARTIES

### Chapter 12: Joinder 777

#### A. Joinder of Claims 777

- 1. Joinder of Claims by Plaintiff 778
  - a. Historical Background 778
  - b. The Federal Rules 778
  - c. Joinder and Jurisdiction 779 Notes and Problems 780
- Claims by the Defendant: Counterclaims and Crossclaims 782
   Cordero v. Voltaire, LLC 782
   Notes and Problems 785

#### B. Joinder of Parties 788

1. By Plaintiffs 788

Mosley v. General Motors Corp. 788

Notes and Problems 792

2. By Defendants: Third-Party Claims 794

Price v. CTB, Inc. 794

Notes and Problems 797

3. Compulsory Joinder 802

Temple v. Synthes Corp. 802

Notes and Problems 804

Helzberg's Diamond Shops v. Valley West Des Moines Shopping

Center 806

Notes and Problems 809

#### C. Intervention 812

Natural Resources Defense Council v. United States Nuclear Regulatory Commission 813 Notes and Problems 817 Martin v. Wilks 819 Notes and Problems 823

#### D. Interpleader 825

Southern Farm Bureau Life Ins. Co. v. Davis 827 Notes and Problems 828

#### E. Class Actions 829

- 1. Introduction 829
- 2. The Class Action and the Constitution 830
  - a. Representative Adequacy 830

    Hansberry v. Lee 831

    Notes and Problems 836

#### **XXIV** Contents

	b. Personal Jurisdiction 837		
	Phillips Petroleum v. Shutts	837	,
	Notes and Problems 842		
3.	The Class Action and Federalis	sm	8
	0. 1 174 7 0 77	-	

- The Class Action and Federalism 842

  Standard Fire Ins. Co. v. Knowles 844

  Notes and Problems 848
- 4 Statutory Requirements 850 Notes and Problems 854 *Wal-Mart Stores, Inc. v. Dukes* 855 Notes and Problems 865
- Settlement of Class Actions and the "Settlement Class" 867
   Notes and Problems 869
  - a. Fees 870 Notes and Problems 871
  - b. Damages and Injunctive Relief 872
  - c. Settlement and Dismissal 872

    Amchem Products, Inc. v. Windsor 873

    Notes and Problems 880

    Assessment Questions 883

    Analysis of Assessment Questions 885

Table of Cases 000
Table of Citations to the Judicial Code (28 U.S.C.) 000
Table of Citations to the Federal Rules of Civil Procedure 000
Table of Authorities 000
Index 000