

**Civil Procedure:
Course Requirements and Syllabus
Professor Lonny Hoffman (Fall 2013)**

Welcome to Civil Procedure. This document describes the course and its requirements, my contact information and the syllabus of assignments.

Course Description

In this course we study disputes that are brought, usually for money damages, in publicly funded courts. Lots of disputes are resolved outside of courtrooms and we'll also talk about these other (formal and informal) modes of dispute resolution, but our main focus is going to be on lawsuits that are filed in civil courts. We will cover a range of laws—including jurisdiction, pleadings, discovery, pretrial and trial motions—that govern how civil courts enforce rights recognized by substantive law.

Course Materials

You do not have to buy a casebook for this class. Instead, I have prepared course materials for you. These are listed as “CM” in the syllabus. They will be available from the copy center in the law school basement (713-743-2193). If you have any problem locating the materials, contact my assistant, Maria Lopez (mslopez2@central.uh.edu).

You also will need access to the procedural rules and statutes that govern federal civil cases. One option is to buy the rulebook that I've reserved in the UH bookstore: West Publishing: FEDERAL RULES OF CIVIL PROCEDURE, 2013-2014 EDUCATIONAL EDITION, ISBN No. 9780314658418. Other published versions of rulebooks will also do if you find one for less. Just be sure to get a book current at least as of December 2011 (when a number of significant statutory changes became effective). However, an alternative to buying any book (used or new) is to access the rules and statutes online. There are several sites you can use, such as <http://www.law.cornell.edu/rules/frcp/>. The rules are also available at <http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf>. Although we will not spend much time on them, the most recent rule changes (to be effective December 1, 2013) are available at <http://www.gpo.gov/fdsys/pkg/CDOC-113hdoc29/pdf/CDOC-113hdoc29.pdf>. Currently enacted statutes can be found in numerous places, such as www.law.cornell.edu/uscode/text. Another good site to use to find relevant procedural statutes is <http://uscode.house.gov/search/prevcode.shtml> because it provides links both to the current version of the U.S. Code, as well as to prior enacted versions (which is helpful when one is comparing changes made over time).

Class Schedule

This class meets Tuesdays at 9:00-10:20 a.m., and Wednesdays and Fridays at 10:30-11:50 a.m.

Grades, Attendance and Participation

There is one final examination. It will be an in-class, closed book examination comprised of two or three medium length essay questions. Most of my past exams are available through a link on my webpage (<http://www.law.uh.edu/faculty/main.asp?PID=179>). I will give you more details about the exam during the semester.

The school's academic rules and I require that you attend at least 80% of the classes. I may lower a final grade or take other appropriate disciplinary action if it is determined that a student is absent from more than 20% of the classes. School rules allow me to improve a student's grade by as much as one-third of a letter grade based on class performance. Typically, a handful of students will earn this participation increase. On rare occasions, I've reduced a student's grade for failure to attend or participate.

The Teaching Assistant Program for this Course

I use a unique teaching assistant program in this class that many students have found to be helpful. We are fortunate to have four student teaching assistants who will be working with us this semester. I will introduce all of them to you and discuss the teaching assistant program in depth when we meet on the first class day.

Contact Information and Office Hours

My office is in the Dean's suite. Stop by during my office hours (Wednesdays and Fridays, 9:30-10:30 am) or call/email in advance to schedule an appointment at another convenient time. Phone is (713) 743-5206; email is lhoffman@uh.edu.

Course Syllabus

Below is the detailed course outline and syllabus. You can use it as a roadmap for where we will be going during the semester. The dates in brackets are estimates of when we will get to this material. Assignments **in bold** are heavier-than-usual reading loads.

I. Introduction to Civil Procedure

A. Introduction to the Course and Overview of Course Themes

1. In advance of our Aug 27 class read:

- Excerpts from Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy* (CM 3-8), article also publicly available at http://works.bepress.com/mary_brigid_mcmanamon/1/
- Excerpts from Paul MacMahon, *Proceduralism, Civil Justice and American Legal Thought* (CM 9-10), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279153
- Lonny Hoffman, *A Parting Reprise* (CM 11-25), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898240

2. Optional additional assignment in advance of Aug 27 class: Watch *Full Faith and Credit*, video by Columbia Law Review students, at <http://www.youtube.com/watch?v=0XgObo75Y0Q> (warning: if this were a movie, it would likely be given an R rating).

B. Procedure as Strategy; American Reliance on Private Enforcement of Law. In advance of our Aug 28 class read:

- Excerpt from Charles Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story* (CM 26-33).
- Excerpts from Paul MacMahon, *Proceduralism, Civil Justice and American Legal Thought* (CM 34-37), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279153

C. Adoption of the Rules, and Rulemaking. In advance of our Aug 30 class read:

- Excerpt from Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective* (CM 38-44).
- Excerpt from Thomas Baker, *An Introduction to Federal Court Rulemaking Procedure* (CM 45-49).

II. The Civil Lawsuit

A. Notice Pleading [Sept 3, 4, 6 and 10 classes]

1. In advance of our Sept 3 class read:

- **Questions to Think About in Advance of Discussion of Notice Pleading (CM 50)**
- **Fed. R. Civ. P. 8 and 9, as well as Form 11 in the Appendix of Forms following the rules**
- ***Swierkiewicz* Opinion and Plaintiff's Complaint (CM 51-67). Note: you can mostly skim through this material, especially the complaint which is there just for illustrative purposes.**
- ***Bell Atlantic v. Twombly* (CM 68-84).**
- ***Ashcroft v. Iqbal* (CM 85-102)**

2. In advance of our Sept 4 class read:

- *Roman-Oliveras v. Puerto Rico Elec. Power Authority* (CM 103-08).
- Burbank, et al, *Private Enforcement of Statutory and Administrative Law* (CM 109-13), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781047
- Brian Fitzpatrick, *Twombly and Iqbal Reconsidered* (CM 114-20), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091622

3. In advance of our Sept 6 class, come prepared to discuss Practice Problem for Notice Pleading (CM 121). For the Sept 6 class, you will not turn in anything, though you may want to prepare a skeletal outline of an answer to use for your own reference as we discuss the problem together in class on Sept 6.
4. In advance of our Sept 10 class, prepare your written answer to Practice Problem for Notice Pleading. Turn in answer to your TA by 9:00am on Sept 9. In class, we will discuss student answers together.
5. Optional additional reading (Note: throughout the semester, I will make suggestions of optional additional reading. They are meant to help deepen understanding of the subject for anyone who thinks they might want/need more, but they are not required):

- Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L. J. 1 (2010), article publicly available at <http://scholarship.law.duke.edu/dlj/vol60/iss1/1/>

- Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, article publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123325

B. Motions, Answers and Affirmative Defenses [Sept 11, 13 classes]

1. Defendant's Answer and (some) Rule 12 Motions: Rules 12(b)(6), 12(c) and Rule 12(e) [Sept 11 class]
 - a. In advance of our Sept 11 class read Rules 8(b) and 8(c), 12(b)(6), 12(c) and 12(e)
 - b. In advance of our Sept 11 class prepare Exercise on Timing and Waiver (CM 122). You do not need to turn anything in. Prepare only for class discussion purposes.

2. Rule 11: Certifications and Sanctions. In advance of our Sept 13 class read:

- Questions to Think About in Advance of Discussion of Rule 11 (CM 123)
- Fed. R. Civ. P. 11 and text of advisory committee notes accompanying 1983 and 1993 amendments
- Excerpt from Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011* (CM 124-41), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807123

C. Amendments [September 17, 18 and 20 classes]

1. In advance of our Sept 17 class read:

- Rule 15
- *Swartz v. Gold Dust Casino* (CM 142-45)
- *Kimmel v. Gallaudet University* (CM 146-47)
- Susan Hauser, *The 2009 Amendment to Federal Rule 15(a)(1) – A Study in Ambiguity* (CM 148-59), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1929795

2. In advance of our Sept 18 class read:

- *Krupski v. Costa Crociere S. P. A.* (CM 160-63)
- Robert Lusardi, *Rule 15(c) Mistake: The Supreme Court in Krupski...*, (CM 164-70), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971291

3. In advance of our Sept 20 class prepare the Practice Problem for Amendments (CM 171-72). Turn in your answer to your TA before class. We will work the problem together in class.

D. Joinder of Claims and Parties; and Counterclaims and Cross-Claims.

1. In advance of our Sept 24 class read:
 - Rules 18, 20 and 23
 - Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure* (CM 173-77)
 - Excerpts from Robin Effron, *The Shadow Rules of Joinder*, (CM 178-82), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911317
 - Rules 13, 14 and 19
 - Excerpts from Robin Effron, *The Shadow Rules of Joinder*, (CM 183-88)
2. In advance of our Sept 25 class prepare Problem on Joinder and Amendments (CM 189). Turn in your answer to your TA before class. We will work the problem together in class.
3. Sept 27 class day reserved. Assignment TBA.

III. Personal Jurisdiction and Related Issues

- A. Introduction to Personal Jurisdiction: the Traditional Conception of Jurisdiction. In advance of our Oct 1 class read:
- Questions to Think About in Advance of Reading *Pennoyer v. Neff* (CM 190)
 - *Pennoyer v. Neff* (CM 191-97)
 - Watch <http://www.youtube.com/watch?v=s5Z9jC81cWQ>
 - Excerpts from Wendy Collins Perdue, *What's "Sovereignty" Got To Do With It? Due Process, Personal Jurisdiction, and the Supreme Court* (CM 198-201), article also publicly available at [http://files.sclawreview.org/volumes/63/3/63.3\(13\)perdue.pdf](http://files.sclawreview.org/volumes/63/3/63.3(13)perdue.pdf)

B. The Modern Conception of Personal Jurisdiction. In advance of our Oct 2 class read:

- *International Shoe v. Washington* (CM 202-07)
- Excerpt from Lonny Hoffman, *The Case Against Vicarious Jurisdiction* (CM 208-09), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893652

C. Long-Arm Statutes and other Non-Constitutional Limits on Judicial Jurisdiction. In advance of our Oct 4 class read:

- *Gray v. American Radiator* (CM 210-15)
- Ohio Long Arm Statute (CM 216)
- Rule 4(k)(1)(a)

D. Minimum Contacts Analysis in Operation

1. General Jurisdiction. In advance of our Oct 8 class read:

- *Goodyear v. Brown* (CM 217-30)
- Excerpts from James Pielemeier, *Goodyear Dunlop: A Welcome Refinement of the Language of General Personal Jurisdiction* (CM 231-38), article also publicly available at <http://law.lclark.edu/live/files/11851-lcb163art4pielemeierpdf>
- Excerpt from Hoffman, *Further Thinking About Vicarious Jurisdiction*: CM 239-42), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2263715

2. Intentional Wrongs and Contract Cases. In advance of our Oct 9 class read

- *Calder v. Jones* (CM 243-46)
- *Burger King v. Rudzewicz* (CM 247-60)

3. Products Liability. In advance of our Oct 11 class read:
- *World-Wide Volkswagen case v. Robinson* (CM 261-67)
 - Questions to Think About in Advance of Reading *McIntyre* (CM 268)
 - *McIntyre v. Nicastro* (CM 269-88)
 - Adam Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre...* (CM 289-95), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049896
4. Practice Problem for Personal Jurisdiction.
- In advance of our Oct 15 class prepare Practice Problem (CM 296-97). Turn in your answer to your TA before class. We will work the problem together in class.
- E. Choice of Forum, Exclusive Jurisdiction Clauses and Mandatory Arbitration. In advance of our Oct 16 class read:
- *Carnival Cruise Lines v. Shute* (CM 298-302)
 - Linksys Terms and Conditions, eBay User Agreement (CM 303-08)
 - *AT & T v. Concepcion* (CM 309-18)
 - Excerpt from Eisenberg et al, *Arbitration's Summer Soldiers* (CM 319-29), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1076968
 - Excerpt from Jean Sternlight, *Tsunami* (CM 330-33), article also publicly available at <http://law.uoregon.edu/org/olr/volumes/90/3/docs/Sternlight.pdf>

Note: We will not have class on October 18. We will make up this class at the semester's end with an additional class session for exam review.

F. Notice

1. In advance of our Oct 22 class read:
 - *Jones v. Flowers* (CM 334-51)
 - Fed. R. Civ. P. 4
2. In advance of our Oct 22 class prepare Notice Practice Problem (Fall 2007 exam question) (CM 352). You do not need to turn anything in; prep only for discussion purposes.

G. Venue

1. In advance of our Oct 23 class read 28 U.S.C. § 1391
2. In advance of our Oct 23 class prepare Venue Problems (CM 353). You do not need to turn anything in; prep only for discussion purposes.

H. Transfer of Venue and Forum Non Conveniens

1. In advance of our Oct 25 class read
 - Questions to Think About in Advance of *Piper Aircraft v. Reyno* (CM 354)
 - 28 U.S.C. §§ 1404, 1406
 - *Piper Aircraft* (CM 355-67)
 - Whytock and Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments* (CM 368-71), article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1895011
2. In advance of our Oct 29 class prepare Practice Question for FNC (CM 372). Turn in your answer to your TA before class. We will work the problem together in class.

3. Optional suggested reading: Excerpt from Lonny Hoffman, *Forum Non Conveniens in Federal Statutory Cases*, article publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898854

IV. Subject-Matter Jurisdiction and Related Issues

A. Diversity of Citizenship. In advance of our Oct 30 class read

- *Mas v. Perry* (CM 373-76)
- *Hertz v. Friend* (CM 377-86)
- U.S. Const. Article III, §2; 28 U.S.C. §1332

B. Federal Question.

1. In advance of our Nov 1 class, read:

- U.S. Const. Article III, §2; 28 U.S.C. §1331
- *Louisville & Nashville R.R. Co. v. Mottley* (CM 387-88)
- *Grable v. Darue Eng.* (CM 389-96)

2. In advance of our Nov 5 class prepare Practice Question for Federal Question Jurisdiction (Short Answer Question No. 2 from Fall 2005 Final Exam) (CM 397). Turn in your answer to your teaching assistant before class. We will work the problem together in class.

4. Optional suggested reading: Excerpt from Lonny Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law and the "Reliance Principle"*, 81 TUL. L. REV. 283 (2006), article publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886725

B. Supplemental Jurisdiction.

1. In advance of our Nov 6 class read:
 - Questions to Think About in Advance of Discussing Supplemental Jurisdiction (CM 398)
 - *UMW v. Gibbs* (CM 399-403)
 - 28 U.S.C. §1367
2. In advance of our Nov 8 class read *Exxon Mobil Corp. v. Allapattah Services, Inc* (CM 404-16)
3. In advance of our Nov 8 class prepare Practice Problem on Supplemental Jurisdiction (to be distributed). You do not need to turn anything in; prep only for discussion purposes.

C. Removal. In advance of our Nov 12 class read:

- 28 U.S.C. §§ 1441, 1446
- *Martin v. Franklin Capital* (CM 417-21)

V. The Choice of Law Problem in Federal Court: Federal or State Law

- A. In advance of our Nov 13 class read *Erie Railroad v. Tompkins* (CM 422-28)
- B. In advance of our Nov 13 class read 28 U.S.C. §§ 1652, 2071, 2072
- C. Excerpt from Adam Steinman, *What is the Erie Doctrine?* (CM 429-35) article also publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115336

VI. Discovery

A. Introduction to Discovery and Overview of Discovery Mechanisms

In advance of our Nov 15 class read (in this order) Fed. R. Civ. P. 26(a)(1), (a)(2) and (a)(3), and 16(b); then read the rest of Rule 26 and Rules 27, 30, 31, 33, 34, 35, 36, and 37

B. Focus on Electronic Discovery. In advance of our Nov 15 class read:

- Withers and Latin, *Living Daily With Weekley Homes* (CM 436-38) article also publicly available at www.litigationsection.com
- Raymond, *Tackling E Discovery on a Budget* (CM 439-42) article also publicly available at www.litigationsection.com
- Epperson *E-Discovery/In-House* (CM 443-46) article also publicly available at www.litigationsection.com

D. Examining Use, Management and Control of Discovery by the Courts. In advance of our Nov 19 class read:

- Lee & Willging, *Defining the Problem of Cost in Federal Civil Litigation* (CM 447-69) article also available at <http://scholarship.law.duke.edu>.
- Optional, suggested reading: Lonny Hoffman, *The Case Against LARA 2011*, article publicly available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807123, pp. 13-20 and 29-31

C. Attorney-Client Communications, Work Product and Experts.

1. In advance of our Nov 20 class read:

- Questions to Think About in Advance of *Hickman v. Taylor* and *Upjohn* cases (CM 470)
- *Hickman v. Taylor* (CM 471-79)
- *Upjohn v. United States* (CM 480-88)
- Fed. R. Civ. P. 26(b)(3) and (b)(4)

2. In advance of our Nov 20 class prepare Discovery Practice Exercises (CM 489-500). You will not turn in an answer. Prepare the problem only for class discussion purposes.

D. Discovery: Guest lecture for Nov 22 class

VII. Judgment As a Matter of Law

A. Summary Judgment

1. In advance of our Dec 3 class read:

Celotex v. Catrett (CM 501-12)

Scott v. Harris (CM 513-25)

Fed. R. Civ. P. 56

2. In advance of our Dec 4 class prepare Practice Question on Summary Judgment (CM 526).

The last day of class, December 6, will be devoted to course summation and initial review for the final exam. I will hold one additional review session for the exam on Saturday, December 14 starting at 10:00 a.m. The reason to have this second review session is that your first final exam is Contracts on Dec 13. Holding the review session after your Torts final gives you a better opportunity to use the review session more productively to prepare for your Civil Procedure final. One final note: this additional review class will make up for the cancelled Oct 18 class session.