CIVIL PROCEDURE

A MODERN APPROACH

Updated Fourth Edition

Richard L. Marcus
Martin H. Redish
Edward F. Sherman

American Casebook Series®

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A MODERN APPROACH

Updated Fourth Edition

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Preface to Updated Fourth Edition

This is an "updated" 4th edition for one reason only—the restyling of the Federal Rules of Civil Procedure. It means that students will be alerted to the new numbering and wording of the Rules, but also that teachers can continue to use their current versions of the 4th edition as originally published.

On December 1, 2007, the "restyled" Federal Rules went into effect. They resulted from an effort to reword the rules stem to stern (including the Official Forms) to bring them into conformity with modern style conventions of the rules process and also to bring them into conformity with each other in terms of word usage. For example, use of "shall" was avoided, usually being changed to "must." In addition, certain rules were renumbered in ways that make them easier to cite. For example, examine restyled Rule 14(a) and compare the previous undifferentiated multisentence provision.

The hope is that this restyling will pay dividends for decades, and that beginning law students will be among the first beneficiaries. For them, the restyled rules will be the only rules they will know in their professional careers. We assume that most teachers will have their students read and learn from the restyled rules.

But this watershed does not change what's in the decided cases under the rules as they were written before Dec. 1, 2007. So students may find it unnerving for their rule pamphlets to say something different from what they find quoted in the cases in the casebook. Moreover, the renumbering and rewording was not reflected in the 4th edition when it was published in 2005 since these developments had not occurred yet.

The "updated" 4th edition is designed to deal with these issues. It is not a "new edition." It has been changed only to reflect changes in numbering or wording of the rules that resulted from the restyling project. Teachers who have been using the 4th edition as published in 2005 can continue to use it; they need not start working afresh with the updated 4th edition. To facilitate that continued use of the existing book, we intend to prepare and circulate a listing of all the small changes made in response to restyling. Teachers will therefore be able simply to annotate their copies of the original 4th edition and have the equivalent of what the students possess in the updated 4th edition.

In addition, due to this reprinting, we have taken the opportunity to include an Appendix containing two post-publication decisions that we have previously handled by circulating edited versions suitable for class handouts—*Bell Atlantic Corp. v. Twombly* and *Exxon Mobil Corp. v. Alla-*

pattah Services, Inc. We have included footnotes on the pages where we recommend substituting these cases to refer readers to them.

In 2009, we expect to publish a real new edition—the 5th edition. That will, of course, be based on the restyled rules, but it will also move far beyond the minimal accounting for small numbering and wording changes resulting from restyling. We are delighted to announce that Professor James Pfander, of Northwestern University Law School, will be joining us as co-author on that 5th edition.

We are indebted to Cara Sherman, Hastings class of 2009, for research assistance in connection with preparation of this updated fourth edition.

RICHARD MARCUS
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EDWARD SHERMAN

March, 2008

Preface to Fourth Edition

In this new edition, we have retained the framework of the past edition, which was well-received by its users. We include new materials to reflect the ever-changing face of this subject within the existing framework of the book. For example, we include treatment of recent rule amendments and legislation affecting class actions and the emerging issues regarding discovery of electronically stored information. In order to assure that the book will continue to have a manageable length, we have condensed the focus of the personal and subject matter jurisdiction chapters. All in all, we believe that the new edition provides an entirely up-to-date and comprehensive treatment of the subject.

An enduring reality for civil procedure teachers is the fact that many students perceive this to be the most difficult and least comprehensible course in their first-year curriculum. To a considerable extent, students' difficulty stems from the fact they have not encountered these issues before even though some of these issues have begun to arise in more general political discourse. Students have usually had some personal experience with the subject matter covered in torts, contracts, and even property courses, and most have some attitudes about criminal law and constitutional law (a subject in the first-year curriculum in many law schools). Few, however, have been personally involved with the intricacies of court rules and procedures. Although issues in substantive law courses relate to "real life" situations, issues of procedure may seem to involve only technical matters that students just beginning the study of law may find difficult to appreciate. For many, developing a taste for procedure is a gradual process; the reality that it will become second nature to many when they are in practice is likely to provide cold comfort at the outset.

This book is premised on the belief that a taste for civil procedure is worth cultivating and that students will find the study of civil procedure more challenging and rewarding than they might have expected. The procedure governing a trial or other dispute resolution process provides the ultimate context for enforcing substantive rights in society, and it is a commonplace that bears repeating that procedure is often critical to the outcome of a case. The initial impression of some law students that civil procedure is a rote-like study of precise rules should give way to an appreciation that procedure, no less than substantive law, is a complex subject that defies a simplistic approach. The perpetual tension between certainty and flexibility in the law is no less important in matters of procedure, and problems of generality and ambiguity are as inconsistent in procedure as they are in substantive law. Similarly, the impression that procedure does not go to the "heart" of what the law really is needs to be tempered with the realization that procedural rules reflect fundamental

value judgments and social policies. The manner in which society chooses to resolve its disputes, and its notion of what constitutes procedural fairness, bear directly on social choices about the conduct we want to encourage or discourage and on the allocation and distribution of resources.

We have chosen the subtitle "A Modern Approach" in the belief that this casebook has a focus that puts a distinctive cast on the subject of civil procedure. Recent and ongoing developments have had a significant impact on the way we resolve disputes in this country. It is not so much that the basic procedural rules and mechanisms have been materially altered as that the way they are applied in dispute resolution processes has been affected. To mention only a few of the developments and their impacts on procedure:

• New and often more complex causes of action created by courts and legislatures demand more satisfactory ways to reach a resolution of the dispute;

• New causes of action and our strong societal impulse towards resolving disputes through litigation have resulted in serious court crowding and delay;

• For a generation, the high cost of legal services has prompted experiments with ways to cut costs and time in lawsuits through resort to alternative dispute resolution methods;

• Broader standards of legal responsibility and liability have enlarged the number of parties in suits and have complicated the procedural posture;

• The class action, in particular, has emerged as a prominent vehicle for "wholesale" redress and as the object of concerns about a variety of perceived abuses;

• The influence of such disciplines as economics, social science, and psychology has resulted in a more sophisticated approach to procedural issues involving questions of allocation of resources, fundamental fairness, and analysis of competing considerations in dispute resolution.

• Technological developments increasingly offer the possibility of very different methods of presenting evidence at trials and in the form of dispute resolution that could depart markedly from the traditional Anglo-American trial format.

This book attempts to reflect the impact of these kinds of contemporary developments without losing sight of the fact that much of civil procedure still concerns traditional rules and mechanisms and time-honored policies. Modern civil procedure has fortunately not been called upon to reinvent the wheel. In order to understand the contemporary "system" of civil procedure, students must still acquire a sense of its historical development, the traditional interrelationship of procedural devices, and the proper interaction of doctrine and policy. Thus history, doctrine, and key precedents remain important parts of this casebook.

The book also proceeds on the recognition that students cannot cover or absorb all the ramifications of recent developments in a first-year course. Thus the assumption is that there will be upper division offerings in complex litigation, federal courts, alternate dispute resolution, conflicts of law, and the like to reinforce and build on the teachings of the introductory course.

The book roughly follows the chronological order of a lawsuit—proceeding from the initial complaint and pleadings to appeal and the binding effect of a judgment. The first two chapters, however, deviate from the generally-chronological order of presentation, providing an overview of the policies and features of our adversary system (Chapter I) and of the remedies available in civil litigation (Chapter II). The chapters on jurisdiction and the choice between state and federal law (the *Erie* problem) follow the chapters on trial preparation and trial in the belief that students are better able to handle the conceptual complexities of these matters once they have an appreciation of the adjudication process.

We think this book offers some distinctive approaches that are not as comprehensively treated in other civil procedure casebooks. These include:

• A continuing reexamination of the policies and mechanisms of our American adversary system, including criticisms of the system and the procedural innovations (such as sanctions and early-decision devices) that attempt to remedy the shortcomings;

• A reflection, through choice of cases and descriptive material, of the impact that the development of public law and complex litigation has had on procedure;

• Treatment, both in an introductory chapter on remedies (Chapter II) and in a separate chapter on judicial supervision of pretrial and promotion of settlement (Chapter VII) of the developing processes and techniques of alternative dispute resolution;

• Examination of the new management techniques of trial courts, including the devices (such as docket and trial-preparation trial control, discovery, and use of surrogate judicial personnel) and the strengths and weaknesses of such responses;

• Use of interdisciplinary materials reflecting practices in other countries and various states to introduce the student to alternative ways of dealing with various procedural issues.

We hope that a student will come away from this course with a sense of the process called civil procedure, with an appreciation of both its strengths and weaknesses and the range of other solutions that are possible in particular solutions. We have put some emphasis on practice materials in the belief that one must be able to work effectively with the Federal Rules of Civil Procedure and the various doctrines to claim a mastery of civil procedure. But we also try to ensure that the practice materials

force the student to think about the policies underlying the practice and to relate it to the general process themes of the book.

Finally, some comments on format: We have tried to make this text accessible to students by editing out unimportant materials and by minimizing the use of asterisks to indicate those omissions. Whenever we have deleted material from a case or other source, we have indicated that omission either by a bracketed summary of the omitted material or by asterisks. Where quoted material includes deletions by the court or other primary source, there is a conventional ellipse rather than asterisks. We have not indicated the deletion of case and source citations, and have made some effort to remove unimportant citations. We have omitted footnotes from cases and source materials unless they seemed to add something of use, but have retained their original numbering for footnotes we have not deleted.

Throughout the book, we have included substantial notes and questions because we believe they shed light on the principal cases and provide important backup information and citations for those who wish to pursue a matter further. The questions we have asked fall basically into three categories: (1) questions that ask the student to ascertain the answer from the applicable rule or statute; (2) questions, often leading questions, that challenge or provide new perspectives on the assertions made in the principal cases; and (3) questions that invite reflection on the underlying process issues we have tried to raise throughout the book. We hope students will quickly learn to identify the different types of questions and to appreciate the different mental activity called for by them.

We are indebted to many people for their help and guidance during the years we have been working on this book and the previous editions. Most of all, we want to thank our families for their understanding of the demands of the project, and particularly our spouses, Caren Redish, Andrea Saltzman, and Alice Sherman, for their advice, help, and patience. We also want to thank the research assistants who have helped out on this edition: Zhuanjia Gu of Hastings, and Katina Austin, Alexander Bilus, Nathan Larsen and Vanessa Zimmer of Northwestern.

Professor Laurens Walker of the University of Virginia Law School collaborated with Professor Sherman on an early version of portions of these materials. His contributions are gratefully acknowledged.

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RICHARD MARCUS
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EDWARD SHERMAN

April, 2005

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