Civil Procedure IIB
Tuesday, 10:10-12 pm
Room 230

SYLLABUS — Spring 2016

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EDUCATIONAL OBJECTIVES FOR THE COURSE

The first semester of Civil Procedure focuses on identifying the appropriate court to resolve a dispute (choice of forum- personal jurisdiction, subject matter jurisdiction etc.) and deciding on the law to be applied by the court. The second semester of Civil Procedure provides an introduction to the nature and functioning of judicial systems to resolve disputes, including a survey of the major phases of civil litigation under the Federal Rules of Civil Procedure and the lawyer’s role in the process. Major emphasis is given to the reach of judicial authority, pleadings and amendments, pretrial discovery, the right to a jury trial, appellate procedure (including appeals from administrative decisions), and judgments and former adjudication. During the semester, we will consider the relationship of procedure to the substantive law of an underlying case, as well as the purposes and characteristics of procedural rules in light of recent revisions of the rules. Finally, you will have an opportunity to apply what you are learning in the context of a simulated case, Sachs v. JIT.

By the end of the semester, I will expect you to have achieved the following learning outcomes:

• Demonstrate a thorough knowledge of the basic rules of law and policies of federal civil procedure [Law School Learning Outcome 1(a)]. This includes extracting rules
and policy from court opinions, federal rules, federal statutes, and constitutional provisions, as well as analyzing, interpreting, and arguing different interpretations of legal rules [Learning School Learning Outcomes 5(a)].

- Knowledge of civil procedure concepts likely to be tested on the bar examination [Law School Learning Outcomes 2].

- Understanding of a lawyer's role in civil litigation, including the use of procedural tools such as motions and discovery [Law School Learning Objective 6(h)], as well as how to conduct oneself, consistent with the standards of professional conduct [Law School Learning Objective 7(b)].

**BRIEF PERSPECTIVES ON PROCEDURE**

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943) (opinion of Justice Felix Frankfurter)

“Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today’s system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.” Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System 2 (March 11, 2009)

“As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Judge Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 Lectures on Legal Topics 89, 105 (1926).

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” -- Abraham Lincoln, *Notes for a Law Lecture* (1846), *in Life and Writings of Abraham Lincoln* 328 (Philip V. D. Stern ed. 1940).

And do as adversaries do in law,
Strive mightily, but eat and drink as friends.

**COURSE MATERIALS**

Required Texts -- **Please bring all required texts to each class**
(1) Friedenthal, Miller, Sexton, and Hershkoff, Civil Procedure Cases and Materials (West 11th ed. 2013) (casebook)

NOTE: I may also post supplemental material on TWEN, such as recent cases not otherwise covered in the book or the supplement.

(2) Friedenthal, Miller, Sexton, and Hershkoff, Federal Rules of Civil Procedure Supplement (West 2015-16) (Statutory and Case Supplement)

Suggested Texts


GRADING

You will receive one grade for the spring semester of Civil Procedure II (2 credits). Your grade for the spring semester will be based on the following:

Class Participation: 10%
You are expected to come to class on-time, fully prepared, and ready to thoughtfully engage in our discussions. I will take attendance and will take notes about your participation. If you have more than two unexcused absences, I reserve the right to reduce this portion of your grade.

Simulation Performance: 10%
Your grade will also include assessment of your performance in two simulated exercises over the course of the semester. You will be assigned to work in a law firm group.

Complaint Drafting Exercise (5%)
This exercise will involve collaborative work both in and outside of class, wherein you will each be assigned to a small law firm group representing the plaintiff in Sachs v. JIT. Materials giving you background on the case will be distributed on the TWEN page for you. After an introduction to initial pleadings in the first week of class, you will be given an opportunity in the second week of class to work to brainstorm about how to draft the plaintiff’s complaint. After class, you will be asked to work with your group to draft and submit a complaint on behalf of the plaintiff to be filed in a federal court proceeding. Although you are permitted to work with the other members of your group, you are not permitted to collaborate with any other students in the class in connection with this exercise. Your final product will be graded on the thoroughness and accuracy of the legal and factual components of the complaint, as well as your application of the relevant Federal Rules of Civil Procedure and related case law. You will receive written feedback on this exercise and we will have a general discussion in class after the exercises
have been submitted. This assignment will be due **Sunday, January 31st at 12:00 PM.**

*Discovery Plan Exercise (5%)*
This exercise will involve primarily individual work. You will again be assigned to represent either the plaintiff in *Sachs v. JIT* after a complaint and answer is filed in federal court. After we have completed the reading on discovery, we will take time during class to brainstorm collectively about potential options for formal discovery. You will then be asked to work individually to draft a proposed discovery plan for either the plaintiff or the defendant. *No collaboration is permitted outside of class.* After all discovery plans have been submitted, we will collectively review sample model discovery plans for both sides in class. In addition, you will receive written feedback on your own discovery plan. You will be graded on the thoroughness of your discovery plan, as well as your knowledge and reference to the relevant Federal Rules of Civil Procedure and any related case law. This assignment will be due on **Sunday, March 20th at 12:00 p.m.**

**Mid-Term Assessments:**  10%
The mid-term assessments are designed to provide you and me with an assessment of your understanding of the material we are covering and to provide you with a sense of what to expect on the final exam. The assessments will be online and I will review the results in class. In addition, I invite each of you to meet with me in my office if you are experiencing any difficulties with the material.

**Final Exam:**  70%
The final exam will be a 2-hour open-book exam and will be some combination of multiple choice, short-answer, and essay questions. I will provide more information later in the semester to help you prepare for it.

**CLASS COMMUNICATION**
There will inevitably be times throughout the semester when you will want to talk with me or other students in the class. As I have administrative responsibilities that often require immediate attention, I do not schedule specific times for office hours, but I will generally be in my office throughout the week. That said, I tend to have a number of meetings scheduled throughout the day. Feel free to stop by anytime – if I am busy, my secretary, Maria Filotti will be happy to set up an alternative time to meet. You may also e-mail me or Ms. Filotti to make an appointment at a designated time.

**TEACHING FELLOWS**
Our teaching fellows, Sean Brucher and Edward Warnke, will continue to be invaluable resources for you. They will provide you with information about how best to reach them.
In addition to helping with study sessions and general advice, they will also be playing a primary role in our simulated exercises later in the semester.

CLASS SCHEDULE AND ASSIGNMENTS

NOTE: Each reading assignment should be done for class on the date under which it is listed. Updates and changes to the list below will be provided on-line at TWEN.

Rescheduled Classes: Unfortunately, because of pre-existing commitments to various good causes, I may have to reschedule one or more classes. These commitments are important meetings that I simply can’t miss and they were scheduled well before the Hofstra class schedule was created.

I have included tentative class cancellations and make up dates in the schedule below. The dates and times are tentative, but fairly firm. As of this writing I am checking on the availability of rooms for the dates and times of the make ups. I will confirm the dates as soon as I know that rooms are available. I tried to schedule classes at times when you do not have other classes. I will tell you as early as I can if something changes.

Please note the tentative dates for the make-up classes in your calendars now and be sure to attend. I am aware that make up classes are an inconvenience and I do not do this lightly. My goal in scheduling make ups is to conduct them as close as possible to the date of the cancelled class so that we would not fall too far behind and have to cram everything in at the end. I have also tried to spread them out over the semester.
WEEKLY ASSIGNMENTS*

* Please note that the assignments may change throughout the course of the semester if I feel that we need to slow down, speed up, or skip some of these readings. I will give you advance notice both in class and on TWEN so that you can plan your class preparation accordingly.

TUESDAY, JANUARY 12th: MODERN PLEADING REQUIREMENTS

**In Class:**

Introduction to the Course/Review of Syllabus

Pleading Requirements Under the FRCP

-Diouardi v. Durning (1944)
-Conley v. Gibson (1957)
-Bell Atlantic Corp. v. Twombly (2007)
-Ashcroft v. Iqbal (2009)
-Johnson v. City of Shelby (2014)

Pleading Standards and Pro Se Litigation


Pleading Special Matters

-Denny v. Carey (1976)
-Denny v. Barber (1978)

**Assignment:**

Casebook: pp. 558-93, 599-602; Supplement: FCRP 8(a) and 9; pp. 322-49 (Complaints from Iqbal and Twombly and Erickson); pp. 374-375 Register for the Course TWEN site and read the syllabus before class.

TUESDAY, JANUARY 19th: PROVIDING NOTICE & OPPORTUNITY TO BE HEARD

**In Class:**

The Requirement of Reasonable Notice:

-Mullane v. Central Hanover Bank & Trust Co. (1950)
-Greene v. Lindsey (1982)
-Dusenberry v. United States (2002)

Mechanics of Giving Notice

Opportunity to Be Heard


Introduction to Complaint Drafting Assignment

**Assignment:**

Casebook: pp. 201-221, 227-235, 243-258; Supplement: Review FCRP 4 and Forms 4, 5 and 6 in Appendix of Forms; Review Complaint Drafting Assignment on TWEN
TUESDAY, JANUARY 26th: RESPONDING TO THE COMPLAINT

In Class: Responding to the Complaint  
Amendments to the Complaint  
*Beeck v. Aquaslide ‘N’ Dive Corp.* (1977)  
Supplemental Pleadings  
Assignment: Casebook: pp. 610-611, 617-626, 627-630, 633-640, Supplement:  
Review FRCP 7(a), 8, 12, 15

COMPLAINT DRAFTING ASSIGNMENTS DUE SUNDAY, JAN. 31st AT 12:00 PM

TUESDAY, FEBRUARY 2nd: POLICING PLEADING PROCESS/MANAGING THE CASE

In Class: Provisions to Deter Frivolous Pleadings  
*Surowitz v. Hilton Hotels Corp.* (1966)  
Federal Rule 16 and the Development of Case Management Techniques  
The Operation of Federal Rule 16  
Extrajudicial Personnel: Magistrate Judges  
The Final Pretrial Order  
*Payne v. S.S. Nabob* (1962)  
Assignment: Casebook: pp. 641-57; pp. 917-34, 938-46; Supplement:  

TUESDAY, FEBRUARY 9th: JOINDER OF CLAIMS AND PARTIES [This class may be rescheduled to Thursday, February 11th from 10:10 pm to 12:00 noon]

In Class: Permissive Joinder of Claims By Plaintiffs Under FRCP 18  
*Sporn v. Hudson Transit* (1942)  
Addition of Claims by Defendant  
Counterclaims  
Crossclaims  
*Lasa Per L’Industria Del Marmo Societa Per Azioni v. Alexander* (1969)  
Identifying Parties Who May Sue and Be Sued  
*Ellis Canning Co. v. International Harvester Co.* (1953)
Assignment: Casebook: pp. 661-683; Supplement: Review FRCP 13, 17, 18

TUESDAY, FEBRUARY 16TH

NO CLASS – MONDAY CLASS SCHEDULE

TUESDAY, FEBRUARY 23RD: JOINDER OF PARTIES AND CLAIMS

In Class: Claims Involving Multiple Parties  
Permissive Joinder of Parties  
Ryder v. Jefferson Hotel Co. (1922)  
Mandatory Joinder of Persons  
Bank of Cal. Nat. Ass’n v. Superior Court (1940)  
Provident Tradesmens Bank & Trust Co. v. Patterson (1968)  
Impleader  
Jeub v. B/G Foods, Inc. (1942)  
Interpleader  
Pan Amer. Fire & Casualty Co. v. Revere (1960)  
State Farm Fire & Cas. Co. v. Tashire (1967)  
Republic of the Phillipines v. Pimentel (2008)  
Intervention  
Smuck v. Hobson (1969)  
Joinder and “Aggregate” Litigation


The Mid-Term Assessment will become available on TWEN on FEBRUARY 26TH AT 5:00 PM. You must complete it by 12:00 PM on Sunday, February 28th.

TUESDAY, MARCH 1ST: CLASS ACTIONS

In Class: Review of Mid-Term Assessment  
Class Action Overview and Themes, History of the Class Action  
Operation of the Class Action Device  
Wal-Mart Stores, Inc. v. Dukes (2011)  
Class Action Waivers  
AT&T Mobility LLC v. Concepcion (2011)

Assignment: Complete Mid-Term Assessment; Casebook: pp. 747-81, 823-27; Supplement: Review FRCP 23.

TUESDAY, MARCH 8TH: PRE-TRIAL DEVICES FOR OBTAINING INFORMATION:
DEPOSITIONS AND DISCOVERY

In Class: General Scope of Discovery
   
   In Re Petition of Sheila Roberts Ford (1997)

Mandatory Disclosure and the Discovery Plan
Introduction to the Discovery Plan Assignment

Assignment: Casebook: pp. 831-55; Supplement: Review FRCP 26; Review Discovery Plan Assignment on TWEN

TUESDAY, MARCH 15th: DISCOVERY

In Class: Mechanics of Requested Discovery
   
   Depositions
   Polycast Tech. Corp. v Uniroyal, Inc. (1990)

   Interrogatories
   In re Auction Houses Antitrust Litigation (2000)
   Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc. (1997)

   Discovery and Production of Property, E-Discovery
   Zubulake v. UBS Warburg LLC (2003)

   Physical and Mental Examinations
   Schlagenhauf v. Holder (1964)

   Requests to Admit
   Duty to Supplement Responses

   Sanctions and Judicial Supervision of Discovery
   Cine 42nd St. Thr. Corp. v. Allied Artists Pic. Corp. (1979)

Assignment: Casebook: pp. 855-81, 909-16; Supplement: Review FRCP 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 45; Readings posted on TWEN

DISCOVERY PLAN ASSIGNMENT DUE SUNDAY, MARCH 20TH AT 12:00 PM

TUESDAY, MARCH 22nd: ADJUDICATION WITHOUT TRIAL

In Class: Summary Judgment
   
   Celotex Corp. v. Catrett (1986)
   Bias v. Advantage Intern., Inc. (1990)
   Scott v. Harris (2007)
   Anderson v. Liberty Lobby, Inc. (1986)

Assignment: Casebook: pp. 947-76; Supplement: Review FRCP 5
TUESDAY, MARCH 29th:

NO CLASS – SPRING BREAK

TUESDAY, APRIL 5th: TRIAL
This class may have to be rescheduled. The tentative make up date is Thursday, April 21st from 10:10-12. If this class has to be rescheduled it will be held on Tuesday, April 12th. The class on Trials will be then held on Tuesday, the 19th. The class on Binding Effect of Judgments will be held on Thursday, the 21st. The final class will be held on the 26th as scheduled.

In Class:  Trial by Jury
            *Beacon Theatres, Inc. v. Westover (1959)*
            *Dairy Queen, Inc. v. Wood (1962)*
            *Ross v. Bernhard (1970)*
            *Curtis v. Loether (1974)*
            *Chauffeurs, Teamsters, Helpers Local 391 v. Terry (1990)*

            The Province of Judge and Jury
            *Markman v. Westview Instruments, Inc. (1996)*
            *Warger v. Shaurs (2014)*

            Demand and Waiver of Trial by Jury


TUESDAY, APRIL 12th: TRIAL

In Class:  Taking the Case from the Jury
            *Galloway v. United States (1943)*
            *Neely v. Martin K. Eby Constr. Co. (1967)*

            Motions for Judgment as a Matter of Law
            *Denman v. Spain (1961)*
            *Reeves v. Sanderson Plumbing Prod., Inc. (2000)*

            Motion for Judgment as a Matter of Law After the Verdict
            *Baltimore & Carolina Line, Inc. v. Redman (1935)*

            Findings and Conclusions in Non-Jury Cases
            *Roberts v. Ross (1965)*

            Challenging Errors: New Trial
            *Aetna Cas. & Surety Co. v. Yeatts (1941)*
            *Aunitherm Food Systems, Inc. v. Swift-Eckrich Inc. (2006)*

Assignment: Casebook: pp. 1054-72, 1091-95, 1111-16, 1123-31;
Supplement: Review FRCP 50, 52, 59, 60, and 61
TUESDAY, APRIL 19th: BINDING EFFECT OF PRIOR DECISIONS: RES JUDICATA AND COLLATERAL ESTOPPEL

In Class: Terminology
Claim and Defense Preclusion
- Rush v. City of Maple Heights (1958)
- Jones v. Morris Plan Bank of Portsmouth (1937)
- Mitchell v. Federal Intermediate Credit Bank (1932)

Issue Preclusion
- Cromwell v. County of Sac (1876)
- Russell v. Place (1876)
- Rios v. Davis (1963)
- United States v. Moser (1924)
- Commissioner of Internal Revenue v. Sunnen (1948)

Assignment: Casebook: pp. 1211-58

TUESDAY, APRIL 26th: APPEALS & PRECLUSION

In Class: Persons Benefitted and Persons Bound by Preclusion
- Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found. (1971)
- Parklane Hosiery Co. v. Shore (1979)
- Montana v. United States (1979)

Assignment: Casebook: pp. 1271-1300