June 22, 2020

Dear Civil Procedure Professors,

We are grateful that you have adopted Learning Civil Procedure. We know this is an important decision, and we are honored that you have chosen our coursebook.

We designed Learning Civil Procedure to meet the needs of today’s 1L students and the needs of today’s professors. That statement is true now more than ever. Because COVID-19 may require part or all of fall and spring courses to be taught remotely, many of us now face the daunting prospect of moving our classes online, in whole or in part.

In this letter, we want to first tell you how Learning Civil Procedure is easily adaptable to online and hybrid courses. Second, we will briefly summarize some recent key developments in civil procedure that will hopefully help you better prepare for the year ahead.

Online/Hybrid Teaching

First, for online teaching, LCP’s problem-based approach makes it easier for you to modify your class for an online experience. For example, the “Additional Exercises” at the end of each chapter can easily be assigned and completed in an online format. You can set up an online discussion with the exercise, break your students into virtual groups, or have them complete group work outside of class. These exercises are easy to administer—LCP’s comprehensive teaching manual includes complete answers to every problem, question, and exercise in the book.

Second, LCP offers an array of additional online materials that professors are free to use. Visit our website, where you will find a variety of materials designed to make transitioning to online teaching easier. There are multiple-choice questions that you can integrate into your online teaching platform. There are also short instructional videos covering every major subject in a basic civil procedure course. You can use these videos as required viewing before students attend their online classes, or you can make the videos available to your students as a supplemental resource. Finally, if you intend to create your own videos, the website includes PowerPoints for each subject so that all you have to do is record your voice-over lecture.

Third, a reminder that if any cases you love to teach are missing from the book, we have a library of edited cases on our website that you are free to use. In addition, the book is set up in a modular format, so you can teach the subjects in any order that you like. Also, our comprehensive teaching manual not only includes complete answers to all the problems posed in the book, it also includes a full set of teaching notes. You can find sample syllabi on the book’s website.

In sum, Learning Civil Procedure is suited for today’s students and professors and our new shared reality. We hope you have a chance to see how Learning Civil Procedure can help you prepare for whatever teaching format awaits us.
LCP Supplement

What follows is a summary of recent developments that impact sections of the book. This executive summary includes links to the letter’s appendix where you can find more detailed summaries of cases and other important information. We don’t expect that you will necessarily use all, or even any, of this information in your classrooms, but one or more of updates may fit into your syllabus and even if you don’t affirmatively include the information in your coverage, students sometimes ask about recent developments.

• Unit 1: This unit covers subject matter jurisdiction, personal jurisdiction, venue, and choice of law. There were no major developments in subject matter jurisdiction and venue. For personal jurisdiction, the Court is poised to decide some blockbuster cases in *Ford Motor Co v. Mont. Eighth Judicial Dis. Ct.* and *Ford Motor Co. v. Bandemer.* As of the time of this letter, oral argument for those cases has been postponed. When the cases are decided, we will post edited versions of the cases on our website. For *Erie* and choice of law, in *Rodriguez v. FDIC,* 140 S.Ct. 713 (2020), the Court declined to expand federal common law in a case involving a dispute over a tax refund. A full description of *Rodriguez v. FDIC* and other minor developments in this unit can be found below.

• Unit 2: This unit covers pre-filing investigation, pleading and responsive pleading, basic and complex joinder, and pleading amendments. There were no major developments in this area but a handful of cases addressing sanctions and pleading can be found below.

• Unit 3: In this unit, the coursebook covers case management and discovery. We continue to believe that these topics are critical to preparing our students for practice. While we have no further updates, we hope that you will take good advantage of the additional exercises in the book and the corresponding materials found on our website.

• Unit 4: In this final unit, the book covers summary judgment, jury trials, bench trials, post-trial motions, appeals, remedies, judgments, preclusion, and alternative dispute resolution. There are a handful of interesting Supreme Court cases that apply to this section, including summary judgment cases like *Intel Corp. Inv. Policy Comm. v. Sulyma,* 140 S.Ct. 768 (2020) (reversing a finding of summary judgment in an ADEA case), and preclusion cases like *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, --- U.S. --- (2020) (finding that the failure to raise a defense in a different action would not preclude the raising of a defense in a later separate action). There are a number of other cases summarized below.
Once again, we are grateful that you have adopted our book. Please feel free to reach out with any comments, questions, or suggestions. Have a wonderful year teaching Civil Procedure.

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Appendix

Unit I

Chapter 1
Subject-Matter Jurisdiction

Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano, 140 S. Ct. 696 (2020). Following a remand, the Puerto Rico Supreme Court reinstated orders requiring that the Pension Trust for the Roman Catholic and Apostolic Church of Puerto Rico make payment of certain pension benefits. The court held that the Treaty of Paris recognized the “legal personality” of “the Catholic Church” in Puerto Rico, and that the only defendant with separate legal personality, and the only entity that could be ordered to pay the pensions, was the Church. The Supreme Court vacated, declining to address issues under the Free Exercise and Establishment Clauses. After the remand, the Archdiocese removed the case to federal court, arguing that the Trust had filed for bankruptcy and that this litigation was sufficiently related to the bankruptcy to give rise to federal jurisdiction. The Bankruptcy Court dismissed the Trust’s bankruptcy proceeding before the Puerto Rico Court of First Instance issued the relevant payment and seizure orders, but the district court did not remand the case to the Court of First Instance until five months later. The Supreme Court vacated and remanded the rulings of the lower courts and held that a Puerto Rico trial court had no jurisdiction to issue payment and seizure orders after a pension benefits proceeding was removed to federal district court but before the proceeding was remanded back to the Puerto Rico court; thus, the orders were void.

Chapter 2
Due Process: Personal Jurisdiction, Notice, and Opportunity to be Heard

N. Carolina Dep’t of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213, 2217 (2019). The case arose when North Carolina attempted to tax the income earned by the Kimberley Rice Kaestner 1992 Family Trust from 2005 to 2008. During this period, the Kaestner trust’s beneficiaries were all residents of North Carolina, but the trust’s grantor was a resident of New York, and the trust was governed by New York law, where its documents and records were kept. The trust’s asset custodians were in Massachusetts. At no point during the relevant tax period was the trustee a North Carolina resident. Moreover, the trust earned no income in North Carolina. The trust alleged that North Carolina’s imposition of its tax violated the due process clause because the trust lacked the necessary minimum contacts with the state. North Carolina argued that the presence of in-state beneficiaries was sufficient to satisfy the minimum-contacts requirement under the court’s modern jurisprudence.

The Supreme Court affirmed the rulings of the lower courts and held that the Due Process Clause prohibits a state from taxing trust income based solely on its beneficiaries' in-state residency. If the income has not been distributed to the beneficiaries and the beneficiaries have no right to demand that income and are uncertain to receive it, the state has no power to tax the trust income.
In *Rodriguez v. FDIC*, the Supreme Court declined to expand federal common law in a case involving a fight over a tax refund. A bank that was part of a corporate group suffered substantial losses sufficiently severe that it was placed in receivership and taken over by the Federal Deposit Insurance Corporation (FDIC). The corporate group, which was also in enough financial trouble that it filed for bankruptcy and was being run by a Trustee, submitted a group tax return and eventually received a $4 million refund. The Trustee of the bankrupt parent and the FDIC running the subsidiary bank both claimed the refund and disagreed as to the applicable law for resolving the dispute.

The Court, unanimously resolving a circuit split, held that state law applied, emphasizing the Court’s general reluctance to expand specific federal common law and reiterating that per *Erie* there is no general federal common law. In *Rodriguez*, the Court found no sufficient federal interest in who ultimately enjoys use of the refund despite the government’s obvious interest in collecting its fair share of taxes. The decision could also be seen as one contracting federal common law in that a significant number of lower courts appear to have embraced federal common law for deciding intra-group conflicts over tax refunds where there was no controlling agreement of the parties.

Specifically, the Court struck down what tax lawyers had come to refer to as the “Bob Richards Rule,” so named after *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262 (9th Cir. 1973), which had, pursuant to its creation of federal common law, provided that in the absence of a tax allocation agreement of the corporate group, tax refunds belong to the group member that had the losses responsible for the refund, with some jurisdictions requiring that any allocation agreement be unambiguous to avoid application of the Bob Richards Rule. *Rodriguez* arose out of the Tenth Circuit’s strong application of the now-defunct Rule and held that the tax refund belonged to the FDIC.

Upon remand, the Circuit Court will need to apply relevant state law (most likely that of Colorado, headquarters of both the parent and subsidiary) to decide the dispute. The Supreme Court emphasized its indifference to the refund question and that it “did not take this case to decide how this case should be resolved under state law or to determine how IRS regulations might interact with state law.” Rather, it “took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking.” It characterized Bob Richards as having “made the mistake of moving too quickly past important threshold questions at the heart of our separation of power.” *Rodriguez* thus “supplies no rule of decision, only a cautionary tale.” 140 S. Ct. at 718.

*Rodriguez* demonstrates continuing modern commitment to the *Erie* Doctrine and also reflects the potential for delay in obtaining correction of what are eventually deemed mistakes by lower courts. Bob Richards had a nearly 50-year run before its demise. In addition, *Rodriguez* may reflect either a resurgence of *Erie* and resistance to creating federal common law in that the Supreme Court of 1974 might have been more receptive to the rule than the 2020 Court or *Rodriguez* may reflect differences in the composition of the Court and lower courts. It appears that only the Sixth Circuit
had expressly rejected Bob Richards (albeit in an en banc decision that expressly addressed the question rather than implicitly using or ignoring the issue but also with a concurrence defending the Bob Richards case). The originating Ninth Circuit and the Second, Fifth, and Tenth Circuits had used the federal common law approach. Yet Bob Richards was unanimously buried by the Rodriguez Court after a half-century despite any evidence that it was causing problems.

In a case like Rodriguez, the unanimity may be only superficial. The stakes of the case are not particularly high. Once of the troubled banking entities (or both if state law provides for proportional recovery) will get the tax refund. Further, because federal common law usually reflects dominant state common law, the choice of law will not make a difference in most cases. Under these circumstances, Justices in the minority who preferred the uniform impact of federal common law in such cases might well decide that an express dissent was not worth the effort, particularly in light of the Court’s other business.

Unit II

Chapter 5
Pre-Filing Investigation and Sanctions Rules

Westech Aerosol Corp. v. 3M Co., 927 F.3d 1378 (Fed. Cir. 2019). Westech filed suit against 3M Company for patent infringement. The District Court allowed Westech to amend its complaint, however it was given a “warning to do so ‘consistent with its Rule 11 obligations.’” Instead of pleading facts to support proper venue, Westech simply quoted 28 U.S.C §1400(b) and said that the defendants committed acts of infringement. The District Court granted a motion to dismiss, and when Westech appealed, 3M motioned for sanctions.

The Court of Appeals denied the motion for sanctions, stating, “Westech’s behavior on appeal borders on sanctionable, but we cannot fault Westech for pursuing an appeal when the question of who shoulders the burden of establishing proper venue under §1400(b) had yet to be answered.” 927 F.3d at 1383.

Chapter 6
Pleading

Hernandez v. Mesa, 140 S. Ct. 735 (2020). Mesa, a United States Border Patrol Agent, shot and killed Adrián Hernández Güereca, a 15-year-old Mexican national, in a cross-border incident. Mesa was standing on US soil when he fired his gun, and Hernández was on Mexican soil after he ran back over the border following his entry into the United States. Mesa alleged that Hernández was part of an illegal border crossing attempt, however Hernández’s parents alleged that he was playing a game with his friends. The petitioners sued for damages under Bivens v. Six Unknown Federal Narcotics Agents. The District Court dismissed their claims, and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court affirmed the rulings of the lower courts and held that Bivens’ holding did not extend to claims based on a cross-border shooting. The Court stated, “expansion of Bivens is ‘a disfavored judicial activity.’” 140 S. Ct. at 742 (quoting Ashcroft v. Iqbal).
Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media, 140 S. Ct. 1009 (2020). While not ultimately a pleading case, this case is good for professors and students interested in discrimination cases more generally. Entertainment Studios Network (ESN), an African-American Owned television network operator, sought to have Comcast cover its channels. Comcast refused, “citing lack of programming demand, bandwidth constraints, and a preference for programming not offered by ESN. ESN sued Comcast, alleging its conduct violated 42 U.S.C. §1981. The Court held that “the plaintiff bears the burden of showing that the plaintiff’s race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit.” The Court used the holding from Iqbal to show what a complaint must have on its face, stating “[t]o prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right. We do not, however, pass on whether ESN’s operative amended complaint ‘contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face’ under the but-for causation standard.”

Unit IV

Chapter 15
Summary Judgment

Babb v. Wilkie, 140 S.Ct. 1168 (2020). In general, a plaintiff bears both the burden of presenting evidence of the elements of a claim and the burden of persuasion that it has produced facts that make more likely than not that each element has been satisfied. Ordinarily, that means showing that “but for” wrongdoing, the plaintiff would not have been hurt. See, e.g., Comcast Corp. v. National Ass’n of African American-Owned Media, 140 S. Ct. 1009 (finding but for causation required to sustain a claim for race discrimination in contracting pursuant to 42 U.S.C. § 1983). And, as students learn in Torts, in many cases even a showing of but for cause-in-fact may not be enough to constitute legally sufficient “proximate” cause.

But for some claims, a lower standard and burden may apply – and this can of course affect not only Rule 12(b)(6) motions to dismiss (as was the case in Comcast) but also summary judgment. In Wilkie, an Age Discrimination in Employment Act (ADEA) case, a near-unanimous Supreme Court ruled that it was sufficient to withstand summary judgment if plaintiff could introduce evidence that age discrimination played a role in an adverse employment action even if age was not the but for cause of the action. This was because the ADEA (29 U.S.C. § 633(a(a)) provides that personnel decisions involving persons 40 or older “shall be free from any discrimination based on age,” language the Court found sufficient to provide for liability if age prejudice played a role even if not the decisive role.

Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768 (2020). In this decision, the Supreme Court ruled that a breach of fiduciary duty claim against Intel retirement plan trustees was timely. Christopher Sulyma worked at Intel Corporation from 2010 to 2012, and during his time there he participated in two retirement plans. When the stock market crashed in 2008, the committee increased the funds of alternative assets instead of their typical stocks and bonds. When the stock market rebounded, Sulyma’s funds lagged because of the change in investments. In 2015, Sulyma brought suit against Intel and the administrators of the plans alleging that they irresponsibly handled the plans. However, Intel countered that the suit was untimely under 29 U. S. C. § 1113(2)
because Sulyma brought the suit three years after disclosure of the investment decisions. The Court affirmed the ruling of the lower courts and held that under the requirement in the Employee Retirement Income Security Act of 1974, plaintiffs with “actual knowledge” of an alleged fiduciary breach must file suit within three years of gaining that knowledge; a plaintiff does not necessarily have “actual knowledge” of the information contained in disclosures that he receives but does not read or cannot recall reading.

Because Intel had, like most employers with benefit plans, regularly sent reams of information to workers and because plaintiff had visited the retirement plan website on multiple occasions, it argued that plaintiff should be viewed as having actual knowledge of the disclosures made concerning alternative investments, something Intel did not hide and apparently viewed as a wise move to increase plan returns during a time of poor stock market performance. The Court unanimously ruled, however, that even if these facts might permit an inference of constructive knowledge, ERISA required “actual” knowledge to trigger application of the shorter 3-year statute of limitations rather than the longer six-year limitations period. At his deposition, plaintiff stated that he did not remember reading any of the notifications or information about plan investment actions involving alternative investments. In the absence of evidence sufficient to conclusively refute this testimony, Intel could not gain dismissal of the complaint via summary judgment.

Chapter 16
Jury Trial Right: The Seventh Amendment

Ramos v. Louisiana, 140 S. Ct. 1390 (2020). In Ramos, the Supreme Court overruled Apodaca v. Oregon, 406 U.S. 404 (1972), which had ruled that unanimous jury verdicts were not constitutionally required in state court criminal proceedings. Ramos now requires unanimity in criminal convictions. Ramos appears to have impact only in Oregon and Louisiana as those appear to be the only states that permit criminal convictions by super-majority verdicts rather than requiring unanimous verdicts. But in those two states, the consequences could be substantial if Ramos is determined to have retroactive impact requiring the states to reopen decades of criminal convictions involving less than unanimous verdicts (the Dissent sees this as a real threat; the majority thinks that pursuant to Teague v. Lane, 489 U.S. 288 (1989) successful collateral attack on criminal convictions will be minimal). The number of cases of non-unanimous conviction in the two states during the past 50 years is not readily apparent.

Although not a civil procedure case per se, Ramos is extremely interesting because of the varying discussions of stare decisis in Justice Gorsuch’s opinion for the Court that featured some Justices refusing to join the portion of the opinion dealing with stare decisis and in the concurrences of Justices Sotomayor (joined by Justices Ginsburg and Breyer), Kavanaugh and Thomas as well as the dissent of Justice Alito (joined by Chief Justice Roberts and in part by Justice Kagan). One could teach a jurisprudence seminar from the various opinions.

Chapter 18
Post-Trial Motions

Banister v. Davis, --- U.S.--- (2020). Over two decades ago, Banister struck and killed a bicyclist while driving a car in Texas. He was charged with aggravated assault with a deadly weapon and
was found guilty. He was sentenced to 30 years in prison, but Banister turned to Federal District Court for habeas relief. His petition argued that his trial and appellate counsel provided him with constitutional ineffective assistance. The district court denied his application. Banister timely filed a Rule 59(e) motion asking the district court to reconsider its judgment and to fix “manifest errors of law and fact.” The court issued a one-paragraph order explaining that it stood by its decision after reviewing the facts. Banister filed an appeal to challenge the Court’s rejection of his habeas application. The Court of Appeals dismissed the motion as untimely, stating it “attack[ed] the federal court’s previous resolution of [his] claim on the merits,” and held that the motion “must be construed as a successive habeas petition.” The Supreme Court reversed and remanded, holding that a Federal Rule of Civil Procedure 59(e) motion to alter or amend the habeas court’s judgment is not a second or successive habeas petition under 28 U.S.C. § 2244(b).

Chapter 19
Appeals

*Ritzen Group Inc. v. Jackson Masonry*, 139 S. Ct. 2614 (2019). In a contract dispute over land, Ritzen sued Jackson Masonry in a Tennessee state court. Days before trial, Jackson filed for bankruptcy under Chapter 11 and the state litigation was put on hold. Ritzen filed with the bankruptcy court and was denied a request for relief from the automatic stay. The bankruptcy Code and Federal Rules of Bankruptcy Procedure require parties to appeal from a final order “within 14 days after entry” of the order being appealed. Ritzen did not appeal. Litigation in the bankruptcy court proceeded and Ritzen was found to be in breach. Ritzen attempted to appeal, but the district court denied that appeal because the order denying relief from the automatic stay was a final, appealable order and Ritzen missed the 14-day deadline. The Court of Appeals agreed. The Supreme Court agreed and found that the bankruptcy court’s order denying the motion for relief from the automatic stay was final, and thus, the district court’s dismissal of Ritzen’s appeal as untimely was correct.

Chapter 20
Remedies, Judgments, and Preclusion

*Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, --- U.S. --- (2020). In the second of three rounds of litigation between the two parties over substantially the same trademark disputes, Lucky Brand argued for its interpretation of the 2003 settlement agreement of round one. It moved to dismiss, arguing that Marcel released the claims in the 2003 settlement agreement. The district court denied the motion without prejudice, concluding that it was premature to determine which claims were subject to release in the 2003 agreement and noting that Lucky Brand was “free to raise the issue . . . again after the record is more fully developed.” Lucky Brand raised the defense again in its answer and as an affirmative defense, but not again during the litigation. After a jury trial, the district court entered judgment for Marcel, declaring that Lucky Brand infringed on Marcel’s “Get Lucky” trademark and enjoining Lucky Brand from using the “Get Lucky” mark. Lucky Brand did not appeal. In 2011, Marcel filed round three, alleging that Lucky Brand continued to use the “Lucky Brand” mark after the injunction. Lucky Brand moved to dismiss, raising the defense it had raised in round two—that the 2003 agreement barred Marcel’s claims. Marcel opposed the motion on the grounds that the doctrine of “defense preclusion” prohibited Lucky Brand from asserting the defense. The Supreme Court held that there is no separate doctrine
of “defense preclusion.” Instead, Marcel’s preclusion argument must be analyzed under traditional claim and issue preclusion doctrines. The Court concluded that Marcel was not precluded from raising the defense because the trademark action at issue challenged conduct that occurred after the previous two rounds of litigation—and raised different claims—from the earlier actions between the parties. Therefore, the claims and issues in round three were not, and could not have been, litigated in the earlier rounds and thus were not subject to preclusion.