Chapter 2

Traditional and Online Dispute Resolution

INTRODUCTION

Despite the substantial amount of litigation that occurs in the United States, the experience of many students with the American judicial system is limited to little more that some exposure to traffic court. In fact, most persons have more experience with and know more about the executive and legislative branches of gov - ernment than they do about the judicial branch. This chapter provides an excellent opportunity to make many aware of the nature and purpose of this major branch of our government.

One goal of this text is to give students an understanding of which courts have power to hear what dis - putes and when. Thus, the first major concept introduced in this chapter is jurisdiction. Careful attention is given to the requirements for federal jurisdiction and to which cases reach the Supreme Court of the United States. It might be emphasized at this point that the federal courts are not necessarily superior to the state courts. The federal court system is simply an independent system authorized by the Constitution to handle matters of particular federal interest.

This chapter also covers the nuts and bolts of the judicial process.

Finally, the chapter reviews alternatives to litigation that can be as binding to the parties involved as a court's decree. Thus, alternative dispute resolution, including methods for settling disputes in online forums, is the chapter's third major topic.

Among important points to remind students of during the discussion of this chapter are that most cases in the textbook are appellate cases (except for federal district court decisions, few trial court opinions are even published), and that most disputes brought to court are settled before trial. Of those that go through trial to a final verdict, less than 4 percent are reversed on appeal. Also, it might be emphasized again that in a common law system, such as the United States', cases are the law. Most of the principles set out in the text o f the chapters represent judgments in decided cases that involved real people in real controversies.

ADDITIONAL RESOURCES —

VIDEO SUPPLEMENTS

The following video supplements relate to topics discussed in this chapter—

PowerPoint Slides

To highlight some of this chapter's key points, you might use the Lecture Review PowerPoint slides compiled for Chapter 2.

Business Law Digital Video Library

The Business Law Digital Video Library at www.cengage.com/blaw/dvl offers a variety of videos for group or individual review. Clips on topics covered in this chapter include the following.

- Legal Conflicts in Business

Jurisdiction in Cyberspace—The software company finds itself being sued by a customer in Montana, but the company claims that it doesn't do business in Montana.

Alternative Dispute Resolution: International Sales and Lease Contracts—The advertising firm ordered a quantity of jalapenos from Mexico. When the shipment arrived, the advertiser found that the full quantity was not delivered.

CHAPTER OUTLINE

I. The Judiciary's Role in American Government

The essential role of the judiciary is to interpret and apply the law to specific situations.

A. JUDICIAL REVIEW

The judiciary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as judicial review.

B. THE ORIGINS OF JUDICIAL REVIEW

Judicial review was a new concept at the time of the adoption of the Constitution, but it is not mentioned in the document. Its application by the United State Supreme Court came soon after the United States began, notably in the case of Marbury v. Madision.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 1

What is judicial review? The courts can decide whether the laws or actions of the legislative and executive branches of government are constitutional. The process for making this determination is judicial review.

ENHANCING YOUR LECTURE—

MARBURY V. MADISON (1803)

In the edifice of American law, the Marbury v. Madison[a] decision in 1803 can be viewed as the key-stone of the constitutional arch. The facts of the case were as follows. John Adams, who had lost his bid for reelection to the presidency to Thomas Jefferson in 1800, feared the Jeffersonians' antipathy toward business and toward a strong central government. Adams thus worked feverishly to "pack" the judiciary with loyal Federalists (those who believed in a strong national government) by appointing what came to be called "midnight judges" just before Jefferson took office. All of the fifty -nine judicial appointment let-ters had to be certified and delivered, but Adams's secretary of state (John Marshall) had succeeded in delivering only forty-two of them by the time Jefferson took over as president. Jefferson, of course, re - fused to order his secretary of state, James Madison, to deliver the remaining commissions.

MARSHALL'S DILEMMA

William Marbury and three others to whom the commissions had not been delivered sought a writ of mandamus (an order directing a government official to fulfill a duty) from the United States Supreme Court, as authorized by Section 13 of the Judiciary Act of 1789. As fate would have it, John Marshall had stepped down as Adams's secretary of state only to become chief justice of the Supreme Court. Marshall faced a dilemma: If he ordered the commissions delivered, the new secretary of state (Madison) could simply refuse to deliver them—and the Court had no way to compel action, because it had no police force. At the same time, if Marshall simply allowed the new administration to do as it wished, the Court's power would be severely eroded.

MARSHALL'S DECISION

Marshall masterfully fashioned his decision. On the one hand, he enlarged the power of the Supreme Court by affirming the Court's power of judicial review. He stated, "It is emphatically the prov - ince and duty of the Judicial Department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . So if the law be in opposition to the Constitution

. . . [t]he Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty."

On the other hand, his decision did not require anyone to do anything. He stated that the highest court did not have the power to issue a writ of mandamus in this particular case. Marshall pointed out that although the Judiciary Act of 1789 specified that the Supreme Court could issue writs of mandamus as part of its original jurisdiction, Article III of the Constitution, which spelled out the Court's original jurisdiction, did not mention writs of mandamus. Because Congress did not have the right to expand the Supreme Court's jurisdiction, this section of the Judiciary Act of 1789 was unconstitutional—and thus void. The decision still stands today as a judicial and political masterpiece.

APPLICATION TO TODAY'S WORLD

Since the Marbury v. Madison decision, the power of judicial review has remained unchallenged. Today, this power is exercised by both federal and state courts. For example, several of the laws that Congress has passed in an attempt to protect minors from Internet pornography have been held unconstitutional by the courts. If the courts did not have the power of judicial review, the constitutionality of these acts of Congress could not be challenged in court —a congressional statute would remain law until changed by Congress. Because of the importance of Marbury v. Madison in our legal system, the courts of other countries that have adopted a constitutional democ racy often cite this decision as a justification for judicial review.

---

a. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

ENHANCING YOUR LECTURE— JUDICIAL REVIEW IN OTHER NATIONS

The concept of judicial review was pioneered by the United States. Some maintain that one of the reasons the doctrine was readily accepted in this country was that it fit well with the checks and bal-ances designed by the founders. Today, all established constitutional democracies have some form of ju - dicial review—the power to rule on the constitutionality of laws—but its form varies from country to country.

For example, Canada's Supreme Court can exercise judicial review but is barred from doing so if a law includes a provision explicitly prohibiting such review. France has a Constitutional Council that rules on the constitutionality of laws before the laws take effect. Laws can be referred to the council for prior review by the president, the prime minister, and the heads of the two chambers of parliament. Prior review is also an option in Germany and Italy, if requested by the national or a regional govern - ment. In contrast, the United States Supreme Court does not give advisory opinions; be before the Supreme Court will render a decision only when there is an actual dispute concerning an issue.

FOR CRITICAL ANALYSIS

In any country in which a constitution sets forth the basic powers and structure of government, some governmental body has to decide whether laws enacted by the government are consistent with that con - stitution. Why might the courts be best suited to handle this task? Can you propose a better alternative?

II. Basic Judicial Requirements

A. JURISDICTION

Jurisdiction is the power to hear and decide a case. Before a court can hear a case, it must have jurisdiction over both the person against whom the suit is brought or the prop erty involved in the suit and the subject matter of the case.

1. Jurisdiction over Persons or Property
   Power over the person is referred to as in personam jurisdiction; power over property is re-ferred to as in rem jurisdiction.

   a. Long Arm Statutes
      Generally, a court's power is limited to the territorial boundaries of the state in which it is located, but in some cases, a state's long arm statute gives a court jurisdiction over a nonresident.

   b. Corporate Contacts
      A corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

2. Jurisdiction over Subject Matter
   Subject-matter jurisdiction involves limitations on the types of cases a court can hear —a court

   of general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court of limited jurisdiction. Courts of original jurisdiction are trial courts; courts of appel-late jurisdiction are reviewing courts.

CASE SYNOPSIS—

Case 2.1: Southern Prestige Industries, Inc v. Independence Plating Corp.

Independence Plating Corp. (IPC) is a New Jersey firm that provides anodizing services. It does not advertise or otherwise solicit business in North Carolina. Southern Prestige Industries, Inc., a North Carolina corporation, contracted with IPC to ship specified machined parts from North Carolina to New Jersey for anodizing. After the parts were anodized, they were shipped back, and Southern Prestige forwarded the parts to a third party. After thirty-two transactions, Southern Prestige filed a suit in a North Carolina state court against IPC, alleging breach. IPC asked the court to dismiss the suit. The court refused, and IPC appealed, arguing that the court lacked personal jurisdiction.

A state intermediate appellate court affirmed. "To satisfy due process requirements, there must be certain minimum contacts between the non-resident defendant and the forum state." Factors for determining whether minimum contacts exist include: "(1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties." Here "the parties had an ongoing business relationship characterized by frequent transactions * * * . Plaintiff filed a breach of contract action against defendant because the machined parts that were * * * shipped back to North Carolina were defective." The state's interest was to provide its residents with a convenient forum to redress injuries. Nothing indicated that "it is more convenient for the parties to litigate this matter in a different forum."

.....

Notes and Questions

What are the factors that the court looked at in determining whether minimum contacts existed between the defendant and the state of North Carolina? The Court of Appeals of North Carolina stated that North Carolina courts "look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience of the parties. After examining all of these factors, the court concluded that the defendant had "sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over [the] defendant without violating the due process clause."

Why did the court state that the convenience of the parties was not "determinative" in this case? The Court of Appeals of North Carolina pointed out that litigation between parties to interstate transactions "inevitably involves inconvenience to one of the parties." Here, said the court, it would be just as inconvenient for the plaintiff to litigate in the defendant's state as it would be for the defendant to litigate in North Carolina. Because the inconvenience to the parties was not weighted in favor of one party or the other, the inconvenience to the parties could not be determining factor in deciding the due process issue.

Suppose that the two parties had engaged in a single business transaction. Would the outcome of this case have been the same? Why or why not? The answer depends most probably on the size of the dispute in question. Had the single transaction been for several million dollars, the trial and appellate courts in North Carolina probably would have decided as they did in the actual case. Had the dispute been for $1,000, the results might have been different.

ANSWER TO CRITICAL ANALYSIS QUESTION IN CASE 2.1

Was it fair for the North Carolina courts to require a New Jersey company to litigate in North Carolina? Explain. Yes, it was fair to require Independence to litigate in North Carolina. The court's ruling did not offend "traditional notions of fair play and substantial justice" because Independence purposely availed itself of the privilege of doing business in North Carolina. Independence had engaged in numerous transactions with Southern for a year and had billed Southern for services in amounts totaling more than $21,000. Therefore, Independence should have expected to be hailed into court in North Carolina in the event of a dispute.

ADDITIONAL BACKGROUND—

Long Arm Statutes

A court has personal jurisdiction over persons who consent to it—for example, persons who reside within a court's territorial boundaries impliedly consent to the court's personal jurisdiction. A state long

arm statute gives a state court the authority to exercise jurisdiction over nonresident individuals under circumstances specified in the statute. Typically, these circumstances include going into or com-municating with someone in the state for limited purposes, such as transacting business, to which the claim in which jurisdiction is sought must relate.

The following is New York's long arm statute, New York Civil Practice Laws and Rules Section 302 (NY CPLR § 302).

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED

CHAPTER EIGHT OF THE CONSOLIDATED LAWS
ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF

COURT § 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state;
or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act;
or

3. commits a tortious act without the state causing injury to person or property within the state, ex cept as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdic-tion over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in mat-rimonial actions accrued under the laws of this state or under an agreement executed in this state.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

3. Original and Appellate Jurisdiction
Courts of original jurisdiction are trial courts; courts of appellate jurisdiction are reviewing courts.

4. Jurisdiction of the Federal Courts

a. Federal Questions
A suit can be brought in a federal court whenever it involves a question arising under the Constitution, a treaty, or a federal law.

b. Diversity of Citizenship
A suit can be brought in a federal court whenever it involves citizens of different states. Congress has set an additional requirement—the amount in controversy must be more than $75,000. For diversity-of-citizenship purposes, a corporation is a citizen of the state in which it is incorporated and of the state in which it has its principal place of business.

ADDITIONAL BACKGROUND—

Diversity of Citizenship

Under Article III, Section 2 of the United States Constitution, diversity of citizenship is one of the bases for federal jurisdiction. Congress further limits the number of suits that federal courts might otherwise hear by setting a minimum to the amount of money that must be involved before a federal district court can exercise jurisdiction.

The following is the statute in which Congress sets out the requirements for diversity jurisdiction, including the amount in controversy.

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in contro versy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional par ties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to re cover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—
(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201 to 203, 102 Stat. 4646 ; Oct. 19, 1996, Pub.L. 104-317, Title II, § 205(a), 110 Stat. 3850.)

5. Exclusive versus Concurrent Jurisdiction

When both state and federal courts have the power to hear a case, concurrent jurisdiction exists. When a case can be heard only in federal courts or only in state courts, exclusive jurisdiction exists. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law. States have exclusive jurisdiction in certain subject matters also—for example, in divorce and in adoptions.

B. JURISDICTION IN CYBERSPACE

The basic question is whether there are sufficient minimum contacts in a jurisdiction if the only connection to it is an ad on the Web originating from a remote location

1. The "Sliding Scale" Method

To date, the answer has generally been no. One approach is the sliding scale, according to which a passive ad is not enough on which to base jurisdiction while doing considerable business online is. Some of the controversy involves cases in which the contact is more than an ad but less than a lot of activity. A firm should attempt to comply with the laws of any jurisdiction in which it targets customers. To exclude customers, however, there are technical problems that need to be solved.

ANSWER TO VIDEO QUESTION NO. 1

What standard would a court apply to determine whether it has jurisdiction over the out-of-state computer firm in the video? A court would apply a "sliding-scale" standard to determine if the defendants (Wizard Internet) had sufficient minimum contacts with the state for the court to assert jurisdiction. Generally, the courts have found that jurisdiction is proper when there is substantial business conducted over the Internet (with contracts, sales, and so on). When there is some interactivity through a Web site, courts have also sometimes held that jurisdiction is proper. Jurisdiction is not proper, however, when there is merely passive advertising.

ANSWER TO VIDEO QUESTION NO. 2

What factors is a court likely to consider in assessing whether sufficient contracts existed when the only connection to the jurisdiction is through a W eb site? The facts in the video indicate that there might be some interactivity through Wizard Internet's Web site. The court will likely focus on Wizard's Web site and determine what kinds of business it conducts over the Web site. The court will consider whether a person could order Wizard's products or services via the Web site, whether the defendant entered into contracts over the Web, and if the defendant did business with other Montana residents.

ANSWER TO VIDEO QUESTION NO. 3

How do you think the court would resolve the issue in this case? Wizard Internet could argue that the site is not "interactive" because software cannot be downloaded from the site (according to Caleb). That would be the defendant's strongest argument against jurisdiction. The court, however, would also consider any other interactivity. The facts state that Wizard has done projects in other states and might have clients in Montana (although Anna and Caleb cannot remember). If Wizard does have clients in Montana who purchased software via the Web site, the court will likely find jurisdiction is proper because the defendant purposefully availed itself of the privilege of acting in the forum state. Also, if Wizard Internet regularly enters contracts to sell its software or consulting services over the Web— which seems likely given the type of business in which Wizard engages—the court may hold jurisdiction

is proper. If, however, Wizard simply advertises its services over the Internet and persons cannot place orders via the Web, the court will likely hold that this passive advertising does not justify asserting jurisdiction.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 2

Before a court can hear a case, it must have jurisdiction. Over what must a court have jurisdiction? How are the courts applying traditional jurisdictional concepts to cases involving Internet transactions? To hear a case, a court must have jurisdiction over the person against whom the suit is brought or over the property involved in the suit. The court must also have jurisdiction over the subject matter. Generally, courts apply a "sliding-scale" standard to determine when it is proper to exercise jurisdiction over a defendant whose only connection with the jurisdiction is the Internet.

2. International Jurisdictional Issues

The minimum-contact standard can apply in an international context. As in cyberspace, a firm should attempt to comply with the laws of any jurisdiction in which it targets customers.

CASE SYNOPSIS—

Case 2.2: Gucci America, Inc v. Wang Huoquing

Gucci America, Inc., a New York corporation, makes footwear, belts, sunglasses, handbags, and wallets. Gucci uses twenty-one trademarks associated with its goods. Wang Huoqing, a resident of the People's Republic of China, offered for sale through his Web sites counterfeit Gucci goods. Gucci hired a private investigator in California to buy goods from the sites. Gucci then filed a suit against Huoqing in a federal district court, seeking damages and an injunction preventing further trademark infringement. The court first had to determine whether it had jurisdiction.

The court held that it had personal jurisdiction over Wang Huoqing. The U.S. Constitution's due process clause allows a federal court to exercise jurisdiction over a defendant who has had sufficient minimum contacts with the court's forum. Huoqing's fully interactive Web sites met this standard. Gucci also showed that within the forum Huoqing had made at least one sale—to Gucci's investigator. The court granted Gucci an injunction.

....

Notes and Questions

What do the circumstances and the holding in this case suggest to a business firm that actively attempts to attract customers in a variety of jurisdictions? This situation and the ruling in this case indicate that a business firm actively attempting to solicit business in a jurisdiction should be prepared to appear in its courts. This principle likely covers any jurisdiction and reaches any business conducted in any manner.

Is it relevant to the analysis of jurisdiction that Gucci America's principal place of business is in New

York state rather than California? Explain. The fact that Gucci's headquarters is in New York state was not relevant to the court's analysis here because Gucci was the plaintiff. Courts look only at the defendant's location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff's location is irrelevant to this determination.

ANSWER TO "WHAT IF THE FACTS WERE DIFFERENT?" QUESTION IN CASE 2.2

Suppose that Gucci had not presented evidence that Wang Huaqing had made one actual sale through his Web site to a resident (the private investigator) of the court's district. Would the court still have found that it had personal jurisdiction over Huoqing? Why or why not? The single sale to a resident of the district, Gucci's private investigator, helped the plaintiff establish that the defendant 's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is that courts cannot exercise jurisdiction over foreign defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

C. VENUE

A court that has jurisdiction may not have venue. Venue refers to the most appropriate location for a trial. Essentially, the court that tries a case should be in the geographic area in which the incident occurred or the parties reside.

D. STANDING TO SUE

Before a person can bring a lawsuit before a court, the party must have standing. The party must have suffered a harm, or been threatened a harm, by the action about which he or she is complaining. The controversy at issue must also be justifiable (real and substantial, as opposed to hypothetical or academic).

III. The State and Federal Court Systems

A. STATE COURT SYSTEMS

Many state court systems have several tiers—a level of trial courts and two levels of appellate courts.

1. Trial Courts

Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts. Trial courts with general jurisdiction include county, district, and superior courts. At trial, the parties may dispute the facts, what law applies, and how that law should be applied.

2. Appellate, or Reviewing, Courts

In most states, after a case is tried, there is a right to at least one appeal. Few cases are re-tried on appeal. An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court below. In about half of the states, there is an in - termediate level of appellate courts.

3. Highest State Courts

In all states, there is a higher court, usually called the state supreme court. The de cisions of this highest court on all questions of state law are final. If a federal constitutional issue is involved in the state supreme court's decision, the decision may be appealed to the United States Supreme Court.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 3

What is the difference between a trial court and an appellate court? A trial court is a court in which a lawsuit begins, a trial takes place, and evidence is presented. An appellate court reviews the rulings of trial court, on appeal from a judgment or order of the lower court.

B. THE FEDERAL COURT SYSTEM

The federal court system is also three-tiered with a level of trial courts and two levels of appellate courts, including the United States Supreme Court.

1. U.S. District Courts

Federal trial courts of general jurisdiction are district courts. Federal trial courts of limited jurisdiction include U.S. Tax Courts and U.S. Bankruptcy Courts. Federal district courts have original jurisdiction in federal matters. Some administrative agencies with judicial power also have original jurisdiction.

2. U.S. Courts of Appeals

U.S. courts of appeal, or circuit courts of appeal, hear appeals from the decisions of the district courts located within their respective circuits. The decision of a court of appeals is binding on federal courts only in that circuit.

3. The United States Supreme Court

The court at the top of the three federal tiers is the United States Supreme Court to which further appeal is not mandatory but may be possible.

a. Appeals to the Supreme Court

A party may ask the Supreme Court to issue a writ of certiorari, but the Court may deny the petition. Denying a petition is not a decision on the merits of the case. Most petitions are denied.

b. Petitions Granted by the Court

Typically, the Court grants petitions only in cases that at least four of the justices view as involving important constitutional questions.

IV. Following a State Court Case

The common law system is an adversary system. Each adversary is entitled to present his or her version of the facts through an advocate. An attorney is the client's advocate. A judge assumes an unbiased role, but this role is not entirely passive. A judge is responsible for the appropriate application of the law and does not have to accept the adversaries' arguments. There are rules of procedure to govern the way in which disputes are handled in courts. These rules differ from court to court, but there are similarities.

A. THE PLEADINGS

In a civil case, the pleadings inform each party of the other's claims and specify the issues. The pleadings consist of a complaint and an answer.

1. The Plaintiff's Complaint

The complaint (or petition or declaration) is filed with the clerk of the trial court. It contains a statement alleging jurisdictional facts; a statement of facts entitling the complainant to relief; and a statement asking for a specific remedy. A copy of the complaint and a summons is served on the party against whom the complaint is made. The summons notifies the de fendant of his or her options—file a motion to dismiss, file an answer, or default.

2. The Defendant's Answer

An answer admits or denies the allegations in the complaint and sets out any defenses and counterclaims (the plaintiff can file a reply to any counterclaim).

3. Motion to Dismiss

A motion to dismiss may be based on any of several grounds. A motion to dismiss for failure to state a claim on which relief can be granted alleges that according to the law, even if the facts in the complaint are true, the defendant is not liable.

ADDITIONAL BACKGROUND—

Motions to Dismiss and Other Pre-Answer Motions

Besides a plaintiff's failure to state a claim on which relief can be granted, a defendant's pre -answer motion to dismiss may be based on the court's lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, and the plaintiff's failure to join a party needed for a just adjudication of the controversy. Or the defendant may raise these defenses in his or her answer. In fact, some of these must be raised at this stage, or they are deemed waived. A defendant may also move for dismissal on the ground of the plaintiff's failure to diligently prosecute his or her claim, or to comply with procedural rules or a court order.

Other pre-answer motions include: a motion for a more definite statement (which may be made if a pleading is so vague or ambiguous that a response cannot reasonably be framed); a motion to strike such matters as, for example, an insufficient defense; and a motion for summary judgment (through which, as discussed below, the moving party asserts that there is no genuine issue of material fact, and he or she is entitled to judgment as a matter of law).

B. PRETRIAL MOTIONS

After the pleadings are filed, either party can file a motion for judgment on the pleadings o r a

motion for summary judgment. A trial might be avoided if no facts are in dispute and only questions of law are at issue. In ruling on a motion for summary judgment, a court can consider evidence outside the pleadings.

ADDITIONAL BACKGROUND—

Motions for Judgment on the Pleadings and Other Motions That May Be Made after the Pleadings Are Closed

A motion for judgment on the pleadings is more akin to a motion for summary judgment than it is to a motion to dismiss for failure to state a claim on which relief can be granted. The grounds on which motions to dismiss can be made can be divided into four categories, including challenges to the com plaint itself. These challenges point to defects on the face of a complaint —that is, a plaintiff may actually have a claim, but has not properly phrased it. A motion for judgment on the pleadings "attack[s] the substantive sufficiency of the allegations." In other words, a motion for judgment on the pleadings challenges not only the sufficiency of an opponent's pleading, but whether a substantive right to relief even exists on the facts as pleaded. (For example, the text notes that this motion would be appropriate if the facts as shown in the pleadings reveal that the applicable statute of limitations has run.) Also, be-fore a motion for judgment on the pleadings can be made, both a complaint and an answer must have been filed (unlike a motion to dismiss for failure to state a claim on which relief can be granted, which is a pre-answer motion).

Other motions that may be made after the pleadings are closed include the defendant's motion to dismiss on the basis of the court's lack of subject matter jurisdiction, or the plaintiff's failure to state a claim on which relief can be granted or to join an indispensable party. At this point, a defendant may also move for dismissal on the ground of the plaintiff's failure to diligently prosecute his or her claim, or to comply with procedural rules or a court order. At this time, a party may also object to the other's failure to state a legal defense to a claim.

C. DISCOVERY

To prepare for trial, parties obtain information from each other and from witnesses through the process of discovery.

1. Depositions and Interrogatories

A deposition is a record of the answers of a party or witness to questions asked by the attor-neys of both plaintiff and defendant. Interrogatories are written questions asked of a party, who responds in writing.

2. Requests for Other Information

A request for an admission is a request that a party admit the truth of a matter. A request for documents, objects, and entry on land is a request to inspect these items. A request for a physical or mental examination will be granted only if the court decides that the need for the information outweighs the examinee's right of privacy.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 4

What is discovery, and how does electronic discovery differ from traditional discovery? Discovery is the process of obtaining information and evidence about a case from the other party or third parties. Discovery entails gaining access to witnesses, documents, records, and other types of evidence. Electronic discovery differs in its subject (e-media rather than traditional sources of information).

3. Electronic Discovery

Information stored electronically, such as e-mail and other computer data, can be the object of a discovery request. This may include data that was not intentionally saved by a user, such as concealed notes and earlier versions. The Federal Rules of Civil Procedure deal with the preservation, retrieval, and production of electronic data.

ANSWER TO CRITICAL ANALYSIS QUESTION IN THE FEATURE—ADAPTING THE LAW TO THE ONLINE ENVIRONMENT

How might a large corporation protect itself from allegations that it intentionally failed to preserve electronic data? A corporation might defend against charges of intentional destruction or loss of data by showing, for example, that the absence is due to the implementation of a policy to periodically purge electronic systems. Such charges might be avoided by not destroying the data but instead storing it.

D. PRETRIAL CONFERENCE

After discovery, a pretrial hearing is held.

E. JURY SELECTION

If the right to a jury trial has been requested, the jury is selected. Prospective jurors undergo voir dire (questioning by the attorneys to determine impartiality).

F. THE TRIAL

Once a jury is chosen, the trial begins with the attorneys' opening statements. Because the plaintiff has the burden of proving his or her case, the plaintiff's attorney presents the plaintiff's evidence and witnesses. The defendant's attorney challenges the evidence and cross-examines the witnesses. After the plaintiff's case, the defendant can move for a directed verdict (or judgment as a matter of law). If this motion is denied, the defendant's attorney presents the defendant's case.

1. Expert Witnesses

A party can present the testimony of an expert witness—one who, by virtue of education, training, skill, or experience, has scientific, technical, or other knowledge beyond that of an average person. Unlike other witnesses, experts can offer opinions and conclusions about evidence in their areas of expertise.

CASE SYNOPSIS—

Case 2.3: Downey v. Bob's Discount Furniture Holdings, Inc.

Yvette Downey called Allegiance Pest Control about bugs in her home. Edward Gordinier, a licensed , experienced exterminator, found an infestation of bed bugs. He identified the source to be bedroom furniture that Downey had bought from Bob's Discount Furniture Holdings, Inc. Bob's retrieved the furniture and refunded the price. Downey and her daughter Ashley filed a suit in a federal district court against Bob's to recover more. The plaintiffs named Gordinier as a witness. Bob's argued that he could not testify about the source of the bugs because the plaintiffs did not file a written report setting out his

testimony and qualifications as an expert. The plaintiffs countered that he had not been retained as an expert. The court limited Gordinier's testimony to the facts—no opinions—and granted a judgment in Bob's favor. The Downeys appealed.

The U.S. Court of Appeals for the First Circuit reversed and remanded for a new trial. Gordinier should have been allowed to offer his opinion. A written report is required only for a witness who is "retained or specially employed" to provide expert testimony. Gordinier was not this type of witness. He did not hold himself out "for hire as a purveyor of expert testimony" and did not charge a fee.

....

Notes and Questions

If Gordinier were not licensed or experienced, would his testimony be admissible? Possibly, but his credibility might have less weight, particularly if the basis for his statements, or his articulateness, or his demeanor, indicated a lack of trustworthiness.

Hearsay is literally what a witness says he or she heard another person say. Suppose Gordinier could testify only that Downey told him the bugs came from the bedroon set. W hat makes the admissibility of such evidence potentially unethical? Hearsay is inadmissible as evidence in a suit when it is offered to prove the truth of the matter asserted because it has dubious trustworthiness. When a witness repeats what another person has said, there is a reasonable likelihood that that he or she might misinterpret the statements. There is no opportunity to verify the accuracy of the statements because the declarant is not present in court to be questioned. These features make the use of hearsay potentially unethical.

Is it fair to require plaintiffs who hire expert witnesses to pay for and submit written reports that specify what the experts will say at trial? Why or why not? Yes, it is fair that plaintiffs have to pay for and produce reports for the experts that they intend to call as witnesses at trial. After all, the rule applies not only to plaintiffs but also to defendants who intend to have expert witnesses testify on their behalf at trial. It makes sense that if either plaintiffs or defendants need experts to establish their claims, they should have to pay for and produce reports of what the experts will say. Because both sides have to pay for and produce written reports specifying what their experts will say at trial, the rule is fair.

ANSWER TO CRITICAL ANALYSIS QUESTION IN CASE 2.3

Why can only an expert testify about the source of a bedbug infestation? Only experts can testify about their opinions or conclusions. Ordinary witnesses are confined to testifying about the facts of a case — that is, what they personally observed. The reason for this is simple, experts have knowledge or experience beyond that of an ordinary person, which enables them to make informed opinions about a particular situation. The law seeks to make sure that the information presented in court —especially in front of a jury—is at least somewhat reliable. In the case of bed bugs, an ordinary person may not have ever seen a bed bug, and clearly could not reliably testify about the source of a bed-bug infestation. Someone who has specialized training in the field, such as a pest exterminator, has more knowledge and experience in locating and identifying bed bugs. Additionally, a pest exterminator would likely be able to form an opinion about where the bugs are coming from, as it is part of their job. Therefore, only an

expert can reliably testify as to the source of a bed-bug infestation.

2. Closing Arguments

After the plaintiff's challenges to the defendant's case, the attorneys present their closing argu-ments. The jury is instructed in the law that applies and retires to consider a verdict.

ADDITIONAL CASES ADDRESSING THIS ISSUE —

Recent cases considering the written report requirement for expert testimony include the following.

• Goodman v. Staples The Ofice Superstore, LLC, __ F.3d __ (9th Cir. 2011) (store patron was required to disclose written reports for her treating physicians in her personal injury action against store when the physicians were specifically retained to render expert testimony beyond the scope of the treatment rendered, and, to form their opinions, the physicians reviewed information provided by patro n's attorney that they had not reviewed during the course of treatment).

• Banister v. Burton, __F.3d __ (7th Cir. 2011) (city was not required to file expert witness report before having treating emergency room physician testify as to whether shooting victim had the physical ability to throw something or crawl after being shot, in shooting victim's action against police officers and city).

• Tokai Corp. v. Easton Enterprises, Inc., __F.3d __ (Fed. Cir. 2011) (rule governing disclosure of expert testimony contemplates an employee-expert exception to its requirement for expert written reports for individuals who are employed by a party and whose duties do not regularly involve giving expert testimony).

• Drew v. Lee, 2011 UT 15, __ P.3d __ (2011) (a court must evaluate proposed testimony on a case-by-case basis to determine whether a physician's opinion is based on the care and treatment of the patient or if it was formed from outside sources of information—if the physician will testify to matters learned outside the scope of treatment, the physician must file an expert report)

G. POSTTRIAL MOTIONS

After the verdict, the losing party can move for a new trial or for a judgment notwithstanding the verdict (judgment n.o.v.). If these motions are denied, he or she can appeal.

ADDITIONAL BACKGROUND—

Motions for a Directed Verdict and Motions for Summary Judgment

Under the Federal Rules of Civil Procedure, a party may move for a directed verdict: (a) after his or her opponent's opening statement, (b) at the conclusion of the opponent's case, or (c) at the close of all the evidence. Basically, a directed verdict is proper if the party with the burden of proof has presented no or insufficient evidence on a critical issue. A party with the burden of persuasion on an issue is rarely enti-tled to a directed verdict, since the party bears the risk of nonpersuasion, and usually, reasonable jurors may differ on what evidence to believe. Thus, even if a party with the burden of per suasion produces

substantial evidence of, for example, the other party's negligence, so that the jury could reason ably con-clude that the other party was negligent, the motion will be denied, since the jury may also disbelieve the evidence.

A motion for a directed verdict is a procedural device available in both civil and criminal proceedings in which the trial is by jury. Either side may move for a directed verdict whenever the other side rests -- for example, after the plaintiff presents his or her evidence, the defendant may move for a directed verdict; after the defendant rests, the plaintiff may so move; after the plaintiff's rebuttal; after the de-fendant's rejoinder; and so on. On determining that the evidence is such that reasonable jurors could not disagree and, thus, the moving party is entitled to a favorable verdict as a matter of law, the judge grants the motion and takes the case from the jury's consideration.

A motion for summary judgment is a procedural device available only in civil proceedings. Either side may move for summary judgment before the trial on any or all of the issues --the defendant at any time (for example, when the pleadings do not allege a contradictory statement of material facts, and thus, there is nothing for a jury to decide); the plaintiff not until after twenty days from commencement of the action or within twenty days after an adverse party moves for summary judgment. On determining that there is no genuine issue of material fact and the moving party is entitled to prevail on the issue or issues as a matter of law, the judge grants the motion. If there is any doubt as to any of the facts nec - essary to determine the outcome of the issue or issues, the court will deny the motion.

H. THE APPEAL

1. Filing the Appeal

To appeal, the appellant files the record on appeal, which contains the pleadings, a trial tran-script, copies of the exhibits, the judge's rulings, arguments of counsel, jury instructions, the verdict, posttrial motions, and the judgment order from the case below. The appellant files a brief, which contains statements of facts, issues, applicable law, and grounds for reversal. The appellee files an answering brief.

2. Appellate Review

The court reviews these records, the attorneys present oral arguments, and the court affirms the lower court's judgment or reverses it and remands the case for a new trial.

3. Appeal to a Higher Appellate Court

If this court is an intermediate appellate court, the losing party can file a petition for leave to appeal to a higher court. If the petition is granted, the appeal process is repeated.

I. ENFORCING THE JUDGMENT

A judgment may not be enforceable because a defendant may not have sufficient assets to pay it.

V. The Courts Adapt to the Online World

A. ELECTRONIC FILING

Filing court documents may involve a transfer over the Internet, a transmission via e-mail, or a delivery of a computer disk. The text mentions some of the details of specific systems and their problems. Courts are also using electronic case-management systems.

B. COURTS ONLINE

Most courts also have Web sites, though they do not generally contain vast archives of case law.

C. CYBER COURTS AND PROCEEDINGS

Next on the horizon are virtual courtrooms, or cyber courts.

VI. Alternative Dispute Resolution

The advantage of alternative dispute resolution (ADR) is its flexibility. Normally, the parties themselves can control how the dispute will be settled, what procedures will be used, and whether the de cision reached (either by themselves or by a neutral third party) will be legally binding or nonbinding. Approximately 95 percent of cases are settled before trial through some form of ADR.

A. NEGOTIATION

One form of ADR is negotiation, in which the parties attempt to settle their dispute informally, with or without attorneys. They try to reach a resolution without the involvement of a third party.

B. MEDIATION

In mediation, the parties attempt to negotiate an agreement with the assistance of a neutral third party, a mediator. Mediation is essentially a form of "assisted negotiation." The mediator takes an active role in resolving the dispute but does not make a decision on the matter being disputed.

C. ARBITRATION

A more formal method of ADR is arbitration, in which a neutral third party or a panel of experts hears a dispute and renders a decision. The decision can be legally binding. Formal arbitration resembles a trial. The parties may appeal, but a court's review of an arbitration proceeding is more restricted than a review of a lower court's proceeding. An arbitrator's award will be set aside only if the arbitrator's conduct or "bad faith" substantially prejudiced the rights of a party, if the award violates public policy, or if the arbitrator exceeded his or her powers.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 5

What are three alternative methods of resolving disputes? The traditional method of resolving a legal dispute is through litigation. Alternative methods include negotiation, mediation, and arbitration. In negotiation, the parties attempt to settle their dispute informally without the involvement of a third party acting as mediator. In mediation, the parties attempt to come to an agreement with the assistance of a neutral third party, a mediator, who does not, however, make a decision in the dispute. In arbitration, a neutral third party or a panel of experts hears a dispute and renders a decision.

1. Arbitration Clauses and Statutes

Virtually any commercial matter can be submitted to arbitration. Often, parties include an arbitration clause in a contract. Parties can also agree to arbitrate a dispute after it arises. Most states have statutes (often based on the Uniform Arbitration Act of 1955) under which arbitration clauses are enforced, and some state statutes compel arbitration of certain types of disputes. At the federal level, the Federal Arbitration Act (FAA), enacted in 1925, enforces arbitration clauses in contracts involving maritime activity and interstate commerce.

2. The Issue of Arbitrability

A court can consider whether the parties to an arbitration clause agreed to submit a particular dispute to arbitration. The court may also consider whether the rules and procedures that the parties agreed to are fair.

3. Mandatory Arbitration in the Employment Context

Generally, mandatory arbitration clauses in employment contracts are enforceable.

States in which local state court has—		federal court has—	
Arbitration	Mediation	Arbitration	Mediation
Alabama	Alabama	Alabama	California
Alaska	Alaska	Arizona	Delaware
Arizona	Arizona	California	Florida
California	California	Connecticut	Indiana
Delaware	Connecticut	Florida	Kansas
Florida	Delaware	Georgia	Kentucky
Georgia	Florida	Idaho	Louisiana
Hawaii	Georgia	Michigan	Minnesota
Illinois	Hawaii	Missouri	Missouri
Michigan	Indiana	New Jersey	Nebraska
Minnesota	Illinois	New York	New Jersey
Missouri	Iowa	Ohio	New York
Nevada	Kansas	Oklahoma	North Carolina
New Hampshire	Kentucky	Pennsylvania	Ohio Oklahoma
New Jersey New	Louisiana	Rhode Island	Oregon
Mexico New	Maine	Texas	Pennsylvania
York	Michigan	Utah	Rhode Island
North Carolina	Minnesota	Washington	South Carolina
Ohio Oregon	Missouri		Tennessee
Pennsylvania	Montana		Texas
Rhode Island	Nebraska		Utah
Texas	Nevada		Virginia
	New Hampshire		

Washington	New Jersey New Mexico New York North Carolina Ohio Oklahoma Oregon Pennsylvania Rhode Island South Carolina South Dakota Tennessee Texas Utah Vermont Virginia Washington West Virginia Wisconsin		West Virginia Washington Wisconsin

Source: Richard Reuben, "The Lawyer Turns Peacemaker," ABA Journal (August 1996), p. 56.

D. OTHER TYPES OF ADR

- In early neutral case evaluation, the parties select a neutral third party (generally an expert in the subject of the dispute) to evaluate their positions. This forms the basis for negotiations.
- In a mini-trial, each party's attorney argues the party's case. Typically, a neutral third party (often an expert in the disputed subject) acts as an adviser. If the parties fail to reach an agreement, the adviser renders an opinion as to how a court would likely decide the issue.
- In binding mediation, the mediator can make a legally binding decision.
- In mediation-arbitration (med-arb), if mediation is unsuccessful, arbitration is applied.
- A form of ADR used in the federal system is the summary jury trial (SJT). The litigants present their arguments and evidence, and a jury renders a nonbinding verdict. Mandatory negotiations follow.

E. PROVIDERS OF ADR SERVICES

A major provider of ADR services is the American Arbitration Association (AAA). Most of the largest law firms in the nation are members of this nonprofit association. For-profit firms around the country also provide dispute-resolution services.

VII. Online Dispute Resolution

When outside help is needed to resolve a dispute, there are a number of Web sites that offer online dispute resolution (ODR). ODR may be best for resolving small to medium business claims, which may not be worth the expense of litigation or traditional ADR. Most online forums do no automatically apply the law of any jurisdiction. Any party may appeal a dispute to a court at any time.

TEACHING SUGGESTIONS

1. To impress on students one of the reasons for the legal system's observance of procedural technicalities, emphasize the finality of courts' rulings, that people's lives are often changed by a court's decision. If it were the students' person or their property hanging in the balance, would they prefer a series of well-defined steps or a less formal process? What if the decision reached in the less formal process was not binding?

2. Divide students into small groups and assign one of the text chapter's end-of-chapter problems to each group. Have each group determine whether or not the assigned problem is one that would lend itself to alternative dispute resolution. If not, why not? If so, which form of alternative dispute resolution would the group recommend?

3. Obtain a standard arbitration agreement form from a national arbitration organization such as the American Arbitration Association. Ask students to discuss specific features of these agreements and the factors that might make them hesitant to submit a dispute to arbitration.

4. Some students may find it enlightening to be reminded the law corresponds to the many ways in

which people organize the world. That is, the law includes customs, traditions, rules, and objectives that people have held in different circumstances at different times. While it often seems that the law creates meaningless distinctions, it is in fact the real needs of real people that create them.

5. Emphasize the factors—economic and non-economic—in deciding whether or not to pursue legal action. Are they prepared to pay for going to court? Engaging in legal action can be expensive. A good at-torney may charge as much as $300 an hour, or more, plus expenses, and more for trial work. Do they have the patience to pursue a case through the judicial system? Court calendars are crowded. In some cases, it may be years before the matter comes to trial—and then there is the appeal. Is there an alternative to legal action? A settlement might be preferable to a suit, even if the former represents a lesser dollar amount, once their bottom lines are adjusted for future expenses, time lost, aggravation, and so on. Many controversies lend themselves to faster, less expensive methods of dispute resolution. Students should also be reminded that a decision should only be made with the advice of a competent legal professional.

6. W hat do your students think that jurors discuss when they retire to consider a verdict? W hat should they discuss? Research indicates that discussion in the jury room focuses primarily on what procedures the jury should follow, their opinions about the case, and relevant personal reminiscences. Much less time is spent discussing testimony from the trial and the judge's instructions. In many cases, jury verdicts are not different from the decisions that the judges would have made. Studies reveal that 80 percent of the time, the court agrees with the jury's verdict. In civil cases, judges and juries almost always agree; in criminal cases, a jury is more likely to acquit a defendant than a judge is.

7. All students have different requirements in regards to the amount of study time that they need to prepare for a class or an exam. Everyone faces the same temptation: putting off until tomorrow what should be done today. Your students might be reminded that the best remedy for this temptation is not to give into it but to remain disciplined. They might simply set up a schedule and make every ef fort to stick to it to achieve their best results.

Cyberlaw Link

Many jurisdictions have implemented online filing systems, and some have set up cyber courts in which part, or all, of a case is presented online. W hat issues are likely to occur in these circumstances?

Ask your students to what extent those who send e-mail over the Internet should be liable for the content of their messages in states other than their own (or nations other than the United States). Is the existence of a W eb site a sufficient basis to exercise jurisdiction?

DISCUSSION QUESTIONS

1. If a corporation is incorporated in Delaware, has its main office in New York, and does business in California, but its president lives in Connecticut, in which state(s) can it be sued? Delaware, New York, and California—a corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

2. **Why might a defendant prefer to be sued in one state rather than in another?** The law, and the circumstances in which the law is applied, vary from state to state. These factors might favor a particular defendant's position in one state over another.

3. **When can a court exercise jurisdiction over a party whose only connection to the jurisdiction is via the Internet?** One way to phrase the issue is when, under a set of circumstances, there are **sufficient minimum contacts** to give a court jurisdiction over a remote party. If the only contact is an ad on the Web originating from a remote location, the outcome to date has generally been that a court cannot exercise jurisdiction. Doing considerable business online, however, generally supports jurisdiction. The "hard" cases are those in which the contact is more than an ad but less than a lot of activity.

4. **Should a plaintiff be required to serve a defendant with a summons and a copy of a complaint more than once? Why or why not?** More than one service is not more likely to receive a response. Besides, it would be unfair to the plaintiff to require more than one service. For example, a plaintiff who has provided evidence that a person authorized to receive mail on behalf of a corporation in fact received an item that was mailed to an officer of the corporation should not be held responsible for any failure on the part of the corporate defendant to effectively distribute that mail. **If a mailed summons actually reached the individual to be served, would that be sufficient to establish valid service, even if the summons was not addressed correctly or was signed for by someone who did not have the authority to do so?** Probably. If a plaintiff can provide evidence that a corporate officer or an agent for service of process actually received a summons, this would likely be sufficient to establish that the plaintiff substantially effected service.

5. **What are the advantages of effecting service of process via e-mail?** The chief advantages are lower cost and faster process. Any businessperson who is involved in litigation will benefit, through lower legal costs, by the time and cost savings resulting from service by e-mail. The legal profession, the court systems, and other plaintiffs will also realize the cost-saving advantages of effecting service of process over the Internet. **Federal Rules of Civil Procedure** permit service by e-mail in certain circumstances, but generally, a party will have to obtain a court's permission.

6. **When may a federal court hear a case?** Federal courts have jurisdiction in cases in which federal questions arise, in cases in which there is diversity of citizenship, and in some other cases. When a suit involves a question arising under the Constitution, a treaty, or a federal law, a federal question arises. When a suit involves citizens of different states, a foreign country and an American citizen, or a foreign citizen and an American citizen, diversity of citizenship exists. In diversity suits, there is an additional requirement—the amount in controversy must be more than $75,000. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law.

7. **What are the advantages of discovery?** Discovery saves time by preserving evidence, narrowing the issues, preventing surprises at trial, and avoiding a trial altogether in some cases. A trial might also be avoided if no facts are in dispute and only questions of law are at issue. Either party then files a motion for summary judgment.

8. **After a trial, a court issues a judgment that includes a grant of relief for the plaintiff, but the relief is not as much as the plaintiff wanted. Neither the plaintiff nor the defendant is satisfied with this result. Who can appeal to a higher court?** Either a plaintiff or a defendant, or both, can appeal a judgment to a higher court. An appellate

court can affirm, reverse, or remand a case, or take any of these actions in combination. To appeal successfully, it is best to appeal on the basis of an error of law, because appellate courts do not usually reverse on findings of fact.

9. W hat is the principal difference between negotiation and mediation? The major difference between negotiation and mediation is that mediation involves the presence of a third party called a mediato r. The me-diator assists the parties in reaching a mutually acceptable agreement. The mediator talks face to face with the parties and allows them to discuss their disagreement in an informal environment. The mediator's role, however, is limited to assisting the parties. The mediator does not decide a controversy; he or she only aids the
process by helping the parties more quickly find common ground on which they can begin to reach an agreement for themselves.

10. What is arbitration? The process of arbitration involves the settling of a dispute by an impartial third party (other than a court) who renders a legally binding decision. The third party who renders the decision is called an arbitrator. Arbitration combines the advantages of third-party decision making—as provided by judges and juries in formal litigation—with the speed and flexibility of rules of procedure and evidence less rigid than those governing courtroom litigation.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Ask your students to visit a court, observe the proceedings, and report their observations. Ask them to find out how long it might be before a petition filed in the court would be granted a hearing (that is, how clogged is the court's calendar) and to what any delay might be attributed.

2. Have students prepare a chart showing the relationships between the various courts having jurisdic tion in your state. (There is a digest of each state' courts in Martindale-Hubbell Law Directory, which might be placed on reserve in the library.) Assign a few jurisdiction hypotheticals. For example—Through which of these courts could a divorce decree be appealed? Which court(s) would have original jurisdiction in a truck accident involving out-of-state residents (does the dollar amount of injuries and damage make a difference)? W hich court(s) would have jurisdiction to render a judgment in a case arising from food poisoning at a local cheeseburger stand that is part of a nationwide corporate chain? In which court(s) could you file a suit alleging discrimination, and if you lost, to which court could you appeal the decision?

3. Ask the class to research the reasons behind the earlier hostility of the courts towards arbitration pro - cedures. W ere they concerned solely with parties being divested of their rights or did they see arbitration as a challenge to their own authority?

4. Have students investigate the dispute resolution services discussed in this chapter by going online and reading some the disputes submitted for resolution or the results in individual cases (on the ICANN Web site, for example).

EXPLANATION OF A SELECTED FOOTNOTE IN THE TEXT

Footnote 2: In International Shoe Co. v. State of Washington, the state of Washington sought unemployment contributions from the International Shoe Company based on commissions paid to its sales representatives who lived in the state. International Shoe claimed that its activities within the state were not sufficient to manifest its "presence." It argued that (1) it had no office in Washington; (2) it employed sales representatives to market its product in Washington, but no sales or purchase contracts were made in the state; and (3) it maintained no inventory in Washington. The company claimed that it was a denial of due process for the state to subject it to suit. The Supreme Court of Washington ruled in favor of the state, and International Shoe appealed to the United States Supreme Court.

The United States Supreme Court affirmed the Washington Supreme Court's decision—International Shoe had sufficient contacts with the state to allow the state to exercise jurisdiction constitutionally over it. The Court found that the activities of the Washington sales representatives were "systematic and continu ous," resulting in a large volume of business for International Shoe. By conducting its business within the state, the

company received the benefits and protections of the state laws and was entitled to have its rights enforced in state courts. Thus, International Shoe's operations established "sufficient contacts or ties with the state * * * to make it reasonable and just according to our traditional conception of fair play and substan tial justice to permit the state to enforce the obligation" that the company incurred there.

ANSWERS TO ESSAY QUESTIONS IN STUDY GUIDE TO ACCOMPANY FUNDAMENTALS OF BUSINESS LAW : SUMMARIZED CASES, NINTH EDITION EXCERPTED CASES, THIRD EDITION

1. What is jurisdiction? How does jurisdiction over a person or property differ from subject matter jurisdiction? What does a long arm statute do? To consider a case, a court must have power over the person or the property involved in the action. Power over the person is often referred to as in personam jurisdiction. In personam jurisdiction is required before a court can enter a personal judgment against a party to the action. Power over property is often referred to as in rem jurisdiction. An in rem proceeding is taken directly against property. Subject matter jurisdiction involves limitations on the types of cases a court can hear—a court of general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court of limited jurisdiction.

Generally, a court's power is limited to the territorial boundaries of the state in which it is located. Thus, a court has jurisdiction over the person of anyone who can be served with a summons within those boundaries. Additionally, the court has jurisdiction over a person who is a resident of the state or does busi ness within the state. Finally, in some cases in which an individual has committed a wrong, a court can exercise jurisdiction using the authority of a long arm statute, even if the individual is outside the state. A long arm statute is a state law permitting courts to obtain jurisdiction over nonresident defendants.

2. What are the advantages and disadvantages of alternative dispute resolution? The cost and delay involved in litigation is avoided. Methods of alternative dispute resolution tend to be less formal than court proceedings, and they are more private—no public record is made. Unlike a court's ruling, the decision in an alternative dispute resolution can be binding or nonbinding.

REVIEWING—

TRADITIONAL AND ONLINE DISPUTE RESOLUTION

Stan Garner resides in Illinois and promotes boxing matches for SuperSports, Inc., an Illinois corporation. Garner created the concept of "Ages" promotion—a three-fight series of boxing matches pitting an older fighter (George Foreman) against a younger fighter, such as John Ruiz or Riddick Bowe. The concept included titles for each of the three fights ("Challenge of the Ages," "Battle of the Ages," and "Fight of the Ages"), as well as promotional epithets to characterize the two fighters ("the Foreman Factor"). Garner contacted George Foreman and his manager, who both reside in Texas, to sell the idea, and they arranged a meeting at Caesar's Palace in Las Vegas, Nevada. At some point in the negotiations, Foreman's manager signed a nondisclosure agreement prohibiting him from disclosing

Garner's promotional concepts unless the parties signed a contract. Nevertheless, after negotiations between Garner and Foreman fell through, Foreman used Garner's "Battle of the Ages" concept to promote a subsequent fight. Garner filed suit against Foreman and his manager in a federal district court located in Illinois, alleging breach of contract. Ask your students to answer the following questions, using the information presented in the chapter.

1. On what basis might the federal district court in Illinois exercise jurisdiction in this case? The federal district court can exercise jurisdiction in this case because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from different states and that the dollar amount of the controversy exceed $75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of a series of boxing matches with George Foreman, the amount in controversy likely exceeded the required threshold amount.

2. Does the federal district court have original or appellate jurisdiction? Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that is courts in which lawsuits begin, trials take place, and evidence is presented. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

3. Suppose that Garner had filed his action in an Illinois state court. Could an Illinois state court exercise personal jurisdiction over Foreman or his manager? Why or why not? No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were located out of the state, the court would have to determine whether they had sufficient contacts with the state for the Illinois to exercise jurisdiction based on a long arm statute. Here, the defendants never came to Illinois, and the contract that they are alleged to have breached was not formed in Illinois. Thus, it is unlikely that an Illinois state court would find that sufficient minimum contacts existed to exercise jurisdiction.

4. Assume that Garner had filed his action in a Nevada state court. Would that court have personal jurisdiction over Foreman or his manager? Explain. Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if the defendants had sufficient contacts with the state. Here, the parties met and negotiated their contract in Nevada, and a court would likely hold that these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

EXAMPREP—

ISSUE SPOTTERS

1. Sue contracts with Tom to deliver a quantity of computers to Sue's Computer Store. They disagree over the amount, the delivery date, the price, and the quality. Sue files a suit against Tom in a state court. Their

state requires that their dispute be submitted to mediation or nonbinding arbitration. If the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, will a court hear the case? Explain. Yes. Submission of the dispute to mediation or nonbinding arbitration is mandatory, but compliance with a decision of the mediator or arbitrator is voluntary.

2. At the trial, after Sue calls her witnesses, offers her evidence, and otherwise presents her side of the case, Tom has at least two choices between courses of actions. Tom can call his first witness. What else might he do? Tom could file a motion for a directed verdict. This motion asks the judge to direct a verdict for Tom on the ground that Sue presented no evidence that would justify granting Jan relief. The judge grants the motion if there is insufficient evidence to raise an issue of fact.