CHAPTER 2: DISPUTE SETTLEMENT

LECTURE OUTLINE

1. The introductory Plastix hypothetical raises the two main themes of the chapter: (1) how to resolve disputes outside of a traditional lawsuit, and, (2) how a lawsuit would proceed, including basic jurisdictional and procedural concepts, when a lawsuit is brought.

    a. The hypo can be used to point out the advantages of resolving a dispute through direct discussion and compromise. These advantages include maintaining good relations (especially with long-time customers) and avoiding expense (especially in a dispute involving a relatively small amount like $2,000).

    b. The first Plastix question invites a discussion of the various means of dispute settlement that do not involve a lawsuit. Since lawsuits get the attention of the media, it is easy for students to overlook what may be preferable alternatives. Compare the advantages and disadvantages of each alternative.

        (1) Point out that *arbitration* and *mediation* are the forms of ADR most commonly used by businesspeople. Discuss the differences between mediation and arbitration, and what qualities make one more appropriate for certain types of disputes than the other. Point out that contracts between consumers and businesses increasingly require that disputes be arbitrated. An example from an insurance or securities contract could be used.

        (2) Employment contracts also increasingly require arbitration. Some courts and legislators view such contracts as contracts of adhesion and

disallow them. Ask the students if they feel they have a choice in agreeing to such a term if they want the job.

(3) Note that there is now a combined *Med/arb* ADR mechanism.

(4) Discuss international arbitration and the international treaties that facilitate it. Most often international contracts require arbitration. Be certain that students understand the great deference that courts give arbitration – particularly in the international environment. Note the existence of the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and its effect on enforcement. Compare it to the WTO rules. Point out that regional trade organizations, such as NAFTA, also have ADR mechanisms.

(5) Discuss the differences between a *minitrial* and a *summary jury trial*. Point out that a minitrial is a nonbinding settlement procedure. The Center for Public Resources Legal Program has developed model minitrial procedures. They recommend that the model minitrial agreement be incorporated into major contracts between companies, especially where there are terms that may give rise to serious dispute. That agreement should prohibit either party from initiating litigation before the minitrial is concluded. Note that the use of a summary jury trial is generally directed by the court.

(6) Contrast *private judging* with the other forms of ADR.

(7) You may want to note that settlement negotiations are now taking place on the Web. Services such as Cybersettle, clickNsettle, and U.S. Settlement Corp., offer rounds of bidding to settle cases. For example, lawyers can negotiate for three rounds, and when they arrive at an agreed-upon range (usually 30% or $5,000) the case automatically settles for the medium amount.

c. Discuss the disadvantages of using ADR mechanisms. Note that increased reliance on some forms of ADR could lead to a two-tier justice system, one for the rich, and the public system for the poor. ADR places many disputes outside the evolutionary common law system and avoids open proceedings, written decisions, and appellate review. Also, when cases go through ADR, there is no public reporting of them, or oversight, and knowledge of important issues such as discrimination or safety may be lost. For example, Ford and Firestone arbitrated more than fifty cases involving deadly tire-tread separation. Only after years of possibly preventable deaths and injuries were journalists and consumer advocates able to piece together information of individual lawsuits. Also, discuss why businesses would file suit instead of using ADR. Point out that sometimes a lawsuit is filed in order to get stalled negotiations moving again. However, this is risky because it can make it impossible to continue the business relationship.

d. The material at the end of the chapter dealing with court problems and solutions could be dealt with here. Certainly the problems of delay and expense are illustrative of why more people are turning to alternatives. It was put at the end of the chapter because it was felt that the material would be more meaningful after the students had a better understanding of how the courts work. Discussion points could include:

(1) Why we are such a litigious society.

(2) The backlogs in our courts, including the impact of drug trials on delays of civil suits. It can take up to four years for a civil suit to get a trial date in some states. The underfunding of the system and

politics delaying judicial appointments are also problems.

(3) Whether the large number of lawyers contributes to the problem.

2. Discuss the kinds of issues that courts will not hear such as *moot* or *hypothetical* cases. Also point out that there are certain kinds of disputes that courts generally will not hear, such as "educational malpractice" cases, or cases involving political questions. You might want to discuss the Supreme Court's decision to hear the Florida presidential voting case in this context. Discuss the reasoning behind such refusals. The students should understand that the courts *do not* provide a remedy for every wrong.

3. The second question in the Plastix hypo raises issues of *jurisdiction*. In your discussion of jurisdiction, emphasize that the idea relates to which governmental entity has the power to issue binding legal decisions affecting people, property and activities. Discuss personal jurisdiction.

   a. You may want to explain venue, and differentiate it from jurisdiction.

   b. You may want to point out that the Internet and the transnational flows of people and products have raised new issues for jurisdiction. The *Attaway* case illustrates the issue of personal jurisdiction over on-line activities.

Attaway v. Omega, pg. 32

The sale of a car by an Indiana resident to a buyer on eBay and paid for through PayPal raised jurisdictional issues when problems with the transaction arose. The court holds that it does have jurisdiction over the Idaho buyers.

Points for Discussion: This is a good case to outline or have the students do so because of the many parties and steps involved. It is increasingly clear that modern businesses no longer require an actual physical presence in a state in order to engage in commercial activity there. With the advent of "e-commerce," business may set up shop without ever actually setting foot in the state where they intend to sell their wares. Use of PayPal further complicated the jurisdictional issue here. Note how many avenues of relief and resolution were involved here.

Our conceptions of jurisdiction must be flexible enough to respond to the realities of the modern marketplace. Businesses who structure their activities to take full advantage of the opportunities that virtual commerce offers can reasonably anticipate that these same activities will potentially subject them to suit in the locales that they have targeted. Might this cause some businesses to avoid on-line transactions with "high risk" jurisdictions? According to a global survey on internet jurisdiction, it appeared that some companies seemed to avoid business with such jurisdictions and employed various legal and technological tools to influence jurisdictional outcomes. The survey suggested that North American companies are generally more worried about expansive Internet-related jurisdiction exposure than were their counterparts in Europe and Asia. Discuss the ways

that expansive notions of jurisdiction shape the way organizations transact business, both in the States and abroad. In a global business context, as internet jurisdiction "grows," so too does the need for companies to familiarize themselves with the laws of the countries in which they do transactions.

4. For your discussion of the *state courts*, you may wish to prepare a diagram of the state court system in your state if it differs significantly in terminology or structure from the California system presented in the text.

    a. Students should be made familiar with how cases are brought in the *small claims court*, if any, in their city. Note that a small claims court was used in the *Attaway* case.

        (1). An assignment the students are likely to find interesting and fun is to watch one of the televised judge shows such as *People's Court*, brief one of the situations (for practice when cases are read) and describe how the court differs in procedure and jurisdiction from a trial court. Tell them to assume that *People's Court* is the same as a small claims court.

        (2). Note that small claims court can be seen as a form of ADR, and shares many of its advantages.

        (3). Plastix, if it decided to sue, would be advised to seek recovery of its $2,000 in small claims court. This would be a good time to discuss how expensive it is to litigate, if this has not already been done.

    b. Stress that *trial courts* determine the facts as well as render a decision, while *appellate courts* only decide questions of law.

    c. Stress that an appeal is not a "second trial" as the students usually think of it, and that the overwhelming majority of appeals are not successful. Appellate procedure is discussed later in the chapter.

5. Point out that the basic structure of the *federal courts* is similar to that of the state courts except there are no courts like small claims courts.

    a. Discuss *diversity jurisdiction*, and how it arose. Point out that the reasons for its creation no longer exist, and that there is a strong movement for its elimination, primarily because of the burden it puts on the federal court system, and the forum shopping that it engenders.

        (1). Note that the jurisdictional amount is $75,000.

        (2). Point out the fact that federal courts typically apply state law in

diversity cases.

(3). Point out that for diversity jurisdiction purposes, a corporation is deemed to be a citizen of both the state where it has been incorporated and the state where it has its principal place of business.

(4). *Example:* Problem Case number 7.

b. In your discussion of the *Supreme Court* you may want to bring up the controversy about whether the Court is too activist, and makes law in areas that should be left to the legislature. The abortion decisions are an excellent focus for the discussion. The recent abortion decisions are also a good focus for a discussion of the impact of different personnel on the outcome of cases, Reagan's and Bush's influence on the Court, and whether the current Court is being equally "activist" in changing precedent.

(1). In your discussion of *certiorari*, point out that this is the way almost all cases come to the Supreme Court. Congress eliminated the *right of appeal* in 1988. Note that the Supreme Court hears very few cases appealed to it. Stress that a denial of *cert*. is *not* a decision on the merits, and should not be interpreted as such. Also stress that most cases cannot be appealed from state courts to the Supreme Court.

(2). Explain *concurring* and *dissenting* opinions, and point out that they can occur in any court opinion, not just in Supreme Court opinions.

6. Explain the *adversary system*, and discuss its pros and cons. Note that it is at work in each stage of a lawsuit.

7. There are two primary reasons why basic *procedure* should be learned. One is so that if students or their employers become involved in a lawsuit, an understanding of procedure will make them better clients and permit their lawyer to do a better job of representing their interests, as well as enabling them to understand what is going on. Second, it will facilitate understanding the cases in subsequent chapters. The third question in the Plastix case raises procedural questions.

a. Stress that the basic purpose of procedure is *fairness*.

b. Discuss *class actions*, and point out that even outside of class actions, lawsuits often involve more than one party on each side.

(1) Discuss the Class Action Fairness Act and the reasons it was enacted.

Wal-Mart Stores, Inc. v. Dukes pg. 38

A class made up of 1.5 million Wal-Mart employees was denied the right to bring a class action suit for sex discrimination.

Points for Discussion: Explain why there must be a "commonality" among the plaintiffs. Have the students explain why the Court found it lacking. Do they think the size of the class was a cause of finding no commonality? Ask them what recourse most of those in the class have if they can't sue as a class. Can most individually afford a lawyer? Point out that the EEOC could bring a suit on their behalf. Should the lack of a general policy of discrimination preclude a suit for discrimination? Is this decision likely to further the policy of nondiscrimination?

Additional Example: Problem Case number 6. Point out that Wong would not now be able to bring the suit due to the Supreme Court case. Explain that without a class action, the damages are too small to be worth suing about. However, state attorney generals could sue.

c. Discuss the various steps and documents that make up the *pleadings*. The students may be interested to know that the pleadings appearing in the book come from an actual case, although fact changes have been made.

(1). In your discussion of *summons*, you may want to discuss the problem of permitting service of a summons by delivery to a place of business or residence rather than service on the person. One result is the phenomenon known as "sewer service. " Process servers have been known to attest to the fact they have delivered a batch of summons to the specified addresses when they have only burned them or tossed them into the sewer. The defendant, often poor and unfamiliar with his or her rights, then is saddled with a default judgment. Service by mail is more reliable because the officer in charge can more closely supervise a mailing than personal delivery. Point out that if a summons is not answered, a default judgment can be entered.

(2). Make sure students can distinguish between legal facts and evidence. (Evidence is the testimony of witnesses and exhibits, such as the signed contract in a breach of contract suit, presented at the trial. The legal facts are the basic facts necessary to be proved by the evidence in order for the plaintiff to win the case. For example, in a breach of contract suit the legal facts required would include the making of a contract, the failure of the defendant to

perform an obligation under it, and economic injury to the plaintiff resulting from the breach.) Why is numbering of separate paragraphs for each legal fact required? (For clarity and so that after the answer is filed all concerned can determine which legal facts are being contested and which are not; also whether all necessary facts have been alleged by the plaintiff.)

(3). Discuss an *affirmative defense*. Ask the students to determine whether World Press or Herbert Miller stated an affirmative defense in their answer.

(4). The defendant can move to dismiss the case for failure to state a cause of action for which a remedy can be granted. In the past this was called a *demurrer*. In most states today it is merely called a *motion to dismiss*. After such a motion has been filed the attorneys for the two parties then give the judge arguments as to why the motion should be sustained or overruled. If sustained the case ends, unless the judge permits the plaintiff to amend the complaint. If the motion is overruled the defendant must answer.

(a). Explain that at any point in the trial process that it becomes clear that one party should win, the *process is stopped*.

d. You may want to elaborate on the various kinds of *discovery*, especially a *deposition*. Also you could talk about e-discovery.

e. Discuss the *pre-trial conference*, and the inducement this is to settlement. Point out that over 90 per cent of cases filed are settled or disposed of in some other way before they get to trial.

e. When discussing the *trial*, you may want to discuss jury selection, or *voir dire*. Stress the different roles of the judge and jury at the trial—e.g., law versus facts.

(1). Explain burden of proof, and preponderance of the evidence.

(2). Explain the role of objections at trial and their necessity for appeals.

(3). You may want to discuss *general and special verdicts*, and *directed verdicts* at this point.

(4). Point out that *judgment n.o.v.* is a jury policing device designed to take the case away from the jury in certain situations. This could lead to a general discussion of the wisdom and necessity of having juries today.

10. Stress that a judgment is "just a piece of paper" and does not mean that payment automatically follows for the plaintiff. Collection can be time consuming and expensive. Discuss the various ways a *judgment* can be *enforced*.

11. Contrast *appellate procedure* with trial procedure. Point out that an appeal is essentially a written process that is designed to ensure that the parties got their "fair day in court." Make sure the students understand what a *material* error is.

    a. An overruling of the finding of facts in the trial court is possible if the appellate court finds that there was no competent evidence on which an unbiased and rational fact finder could base the finding. However, such a determination by an appellate court is rare and students should realize this.

12. Discuss the problems with the courts, and the pros and cons of various solutions, if this was not done earlier.

ANSWERS TO QUESTIONS AND PROBLEM CASES pg. 48

1. One difference is that a trial has a jury (or sometimes a judge) determine the truth from the evidence presented but new evidence is not introduced on appeal. There is not a trial at the appellate level; the appeal is mainly conducted by writings such as briefs and trial transcripts. Attorneys generally conduct the trial but can only appear on appeal if allowed by the judges and if allowed, they have a very limited role.

2. Depositions are examinations under oath in the presence of the attorney from the other party. Interrogatories are written questions which are answered in writing under oath.

3. The judge's role in the adversary system is essentially one of a referee, making sure the lawyers follow the rules of procedure and fairness is maintained. The judge also instructs the jury on the law, and rules on evidentiary questions raised at trial. In a code system, the judge plays a much more active role in directing proceedings in court, requesting certain evidence, and questioning witnesses.

4. In mediation, the parties to a dispute choose a third party to help them settle it. The mediator usually proposes bases for settlement, but does not determine the outcome. Arbitration differs from mediation in that the person to whom the dispute is submitted decides the outcome.

5. The burden of proof in a civil case is preponderance of the evidence. The jury determines whether the plaintiff has met that burden.

6. Arbitration agreements can take a back seat to public policy in some cases if the agreement waives plaintiff's substantive rights or remedies. The federal statute

does not encompass plaintiff's claim, which is essentially a billing dispute and should be decided under state law. If the class action waiver were enforced, consumers would effectively not be able to vindicate their rights because their damages are too small to make arbitration worthwhile. *Wong v. T-Mobile USA, Inc.*, 2006 U.S. Dist. LEXIS 49444 (E. Dist. Mich. July 20, 2006).

7. The suit can be brought in federal court under diversity jurisdiction because plaintiff and defendant are from different states, and Connie is suing for more than $75,000 in damages. She could also bring the suit in California. If she did, the restaurant could ask that the case be removed to federal court.