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## *Chapter 2*



# **The Court System**

## **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 than some exposure to traffic court. In fact, most persons have more experience with and know more about the executive and legislative branches of government 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 disputes 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.

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 of the chapters represent judgments in decided cases that involved real people in real controversies.

## 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 IN THE UNITED STATES

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. Madison*.

#### ENHANCING YOUR LECTURE—



**MARBURY**

**V.**

**MADISON**

**(1803)**



In the edifice of American law, the *Marbury v. Madison*<sup>a</sup> decision in 1803 can be viewed as the keystone 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 letters 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, refused 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 province 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, as your students will read in Chapter 5, 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 democracy 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 balances designed by the founders. Today, all established constitutional democracies have some form of judicial 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 government. In contrast, the United States Supreme Court does not give advisory opinions; 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 constitution. ***Why might the courts be best suited to handle this task? Can you propose a better alternative?***

## II. Basic Judicial Requirements

Before a lawsuit can be heard in a court, certain requirements must be met. These requirements relate to jurisdiction, venue, and standing to sue.

### 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 property 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 referred to as *in rem* jurisdiction.

##### a. Long Arm Statutes and Minimum Contacts

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.

#### 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 communicating 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, except 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 jurisdiction 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 matrimonial 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.

## 2. Jurisdiction over Subject Matter

Subject-matter jurisdiction involves limitations on the types of cases a court can hear.

### a. General and Limited Jurisdiction

A court of general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court of limited jurisdiction.

### b. Original and Appellate Jurisdiction

Courts of original jurisdiction are trial courts; courts of appellate jurisdiction are reviewing courts.

## 3. 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, a foreign country and an American citizen, or a foreign citizen and an American citizen. 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.

**CASE SYNOPSIS—**

**Case 2.1: *Mala v. Crown Bay Marina, Inc.***

Kelley Mala was severely burned when his boat exploded after being over-fueled at Crown Bay Marina in the Virgin Islands. Mala filed a suit in a federal district court against Crown Bay and sought a jury trial. Crown Bay argued that a plaintiff in an admiralty case does not have a right to a jury trial unless the court has diversity jurisdiction. Crown Bay asserted that it, like Mala, was a citizen of the Virgin Islands. The court struck Mala’s jury demand. From a judgment in Crown Bay’s favor, Mala appealed.

The U.S Court of Appeals for the Third Circuit affirmed that Mala failed to prove diversity “because he did not offer evidence that Crown Bay was anything other than a citizen of the Virgin Islands.”

**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.”

**ANSWERS TO LEGAL REASONING QUESTIONS  
AT THE END OF CASE 2.1**

- 1. *What is “diversity of citizenship?”*** Diversity of citizenship exists when the plaintiff and defendant to a suit are residents of different states (or similar independent political subdivisions, such as territories). When a suit involves multiple parties, they must be completely diverse—no plaintiff may have the same state or territorial citizenship as any defendant. For purposes of diversity, a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located.

**2. How does the presence—or lack—of diversity of citizenship affect a lawsuit?** A federal district court can exercise original jurisdiction over a case involving diversity of citizenship. There is a second requirement to exercise diversity jurisdiction—the dollar amount in controversy must be more than \$75,000. In a case based on diversity, a federal court will apply the relevant state law, which is often the law of the state in which the court sits.

**3. What did the court conclude with respect to the parties’ “diversity of citizenship” in this case?** In the *Mala* case, the court concluded that the parties did not have diversity of citizenship. A plaintiff who seeks to bring a suit in a federal district court based on diversity of citizenship has the burden to prove that diversity exists. Mala—the plaintiff in this case—was a citizen of the Virgin Islands. He alleged that Crown Bay admitted to being a citizen of Florida, which would have given the parties diversity. Crown Bay denied the allegation and asserted that it also was a citizen of the Virgin Islands. Mala offered only his allegation and did not provide any evidence that Crown Bay was anything other than a citizen of the Virgin Islands. There was thus no basis for the court to be “left with the definite and firm conviction that Crown Bay was in fact a citizen of Florida.”

**4. How did the court’s conclusion affect the outcome?** The court’s conclusion determined the outcome in this case. Mala sought a jury trial on his claim of Crown Bay’s negligence, but he did not have a right to a jury trial unless the parties had diversity of citizenship. Because the court concluded that the parties did not have diversity of citizenship, Mala was determined not to have a jury-trial right.

The outcome very likely would have been different if the court had concluded otherwise. The lower court had empaneled an advisory jury, which recommended a verdict in Mala’s favor. This verdict was rejected, however, and a judgment issued in favor of Crown Bay. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the lower court’s judgment.

#### 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 controversy 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 parties; 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 therefore 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 recover 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.)

#### 4. Exclusive versus Concurrent Jurisdiction

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—for example, divorce and adoptions. When both state and federal courts have the power to hear a case, concurrent jurisdiction exists. Factors for choosing one forum over another include—

- Availability of different remedies.
- Distance to the courthouse.
- Experience or reputation of the judge.
- The court’s bias for or against the law, the parties, or the facts in the case.

**B. JURISDICTION IN CYBERSPACE**

The basic question in this context 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” Standard**

One approach is the sliding scale, according to which—

- Doing substantial business online is a sufficient basis for jurisdiction.
- Some Internet interactivity may support jurisdiction.
- A passive ad is not enough on which to base jurisdiction.

**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 Huoqing**

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.

**ANSWER TO “WHAT IF THE FACTS WERE DIFFERENT?”  
QUESTION IN CASE 2.2**

***Suppose that Gucci had not presented evidence that Wang Huoqing had made one actual sale through his Web site to a resident of the court’s district (the private investigator). Would the court still have found that it had personal jurisdiction over Wang 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.

**ANSWER TO “THE LEGAL ENVIRONMENT DIMENSION”  
QUESTION IN CASE 2.2**

***Is it relevant to the analysis of jurisdiction that Gucci America’s principal place of business is in New York 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.

**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 real and substantial, as opposed to hypothetical or academic.
- There must be a causal connection between the injury and the conduct complained of.
- It must be likely, as opposed to speculative, that a favorable court decision will remedy, or make up for, the injury suffered.

**III. The State and Federal Court Systems**

**A. THE STATE COURT SYSTEMS**

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

## ANSWERS TO BUSINESS QUESTIONS IN THE FEATURE— MANAGERIAL STRATEGY

**1. *What are some of the costs of increased litigation delays caused by court budget cuts?*** Most attorneys require a retaining fee. The longer this fee is held by the attorney, the higher the present value cost of the litigation. In addition, the opportunity cost of all of the company employees who work on the litigation must be included, too. Also, if there is any negative press during the litigation, that will have an impact on the company's revenues. Uncertainty about the results of the litigation may cause investors to back away. Uncertainty about the outcome of the litigation may also cause managers to forestall new projects.

**2. *In response to budget cuts, many states have increased their filing fees. Is this fair? Why or why not?*** Some argue that those businesses that avail themselves of the court system should pay a higher percentage of the actual costs of that court system. Others point out that the higher the costs imposed by the states to those businesses that wish to litigate, the less litigation there will be. And some of that reduced litigation may be meritorious.

### 1. Trial Courts

#### a. General Jurisdiction

Trial courts with general jurisdiction include county, district, and superior courts.

#### b. Limited Jurisdiction

Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts.

### 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 retried 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 intermediate level of appellate courts.

### 3. Highest State Courts

In all states, there is a higher court, usually called the state supreme court. The decisions 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.

## 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 called district courts. (A district may consist of an entire state or part of a state. A district court has geographical jurisdiction corresponding to the territory of its district. Congress determines the number of districts.) Trial courts of limited jurisdiction include U.S. Tax Courts and U.S. Bankruptcy Courts.

### 2. U.S. Courts of Appeals

U.S. courts of appeal hear appeals from the decisions of the district courts located within their respective circuits. (The U.S. and its territories are divided into twelve judicial circuits. The

jurisdiction of a thirteenth circuit—the federal circuit—is national but limited to certain subject matter.) The decision of each 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 federal system 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 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. Judicial Procedures: Following a Case through the Courts

### A. PROCEDURAL RULES

Procedural requirements are introduced in the text, principally through a brief discussion of the Federal Rules of Civil Procedure (FRCP).

### B. STAGES OF LITIGATION

Most cases follow the same basic steps, from the pleadings through the appeal (if any). The text uses a hypothetical to illustrate various stages in litigation.

### C. CONSULTING WITH AN ATTORNEY

The text outlines what an attorney might tell a client about a lawsuit, including the probability of success, and the procedures, money, and time involved. How an attorney's fees may be calculated and who might be liable for them is explained. It is also noted that an attorney's fees do not include other costs related to a case, such as court fees.

#### 1. Types of Attorneys' Fees

An attorney may charge—

- Fixed fees
- Hourly fees
- Contingency fees

### ADDITIONAL BACKGROUND—

#### Who Pays an Attorney's Fee?

Generally, unless statutorily or contractually authorized, attorneys' fees are not awardable to a winning party. Thus, the basic answer is that everyone pays his or her own **attorney's fee**. There are exceptions. In some circumstances (for example, in certain cases involving indigent criminal defendants), the government pays, win or lose. Fees may be awarded if the losing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or if the litigation confers a substantial benefit on the members of an ascertainable class and the court's subject matter jurisdiction makes possible an award to spread the costs among them. In a civil rights action, a court may award fees to a prevailing defendant, if the action is interpreted as frivolous,

unreasonable, or without foundation. (Most, if not all, civil rights laws expressly provide that attorneys' fees may be awarded to a prevailing plaintiff.)

Of course, the sources of the funds to pay attorneys' fees vary. Under a contingent fee arrangement, an attorney might agree to accept as compensation a percentage—typically, about thirty to forty percent—of whatever amount is recovered. (If nothing is recovered, the attorney receives nothing.) Sometimes parties not directly involved in the litigation pay. (For example, an individual who favors prayer in the schools might pay the defense's expenses in an appropriate case.) Sometimes attorneys pay their own fees. (Attorneys refer to this work as *pro bono*. For example, attorneys handling cases for the American Civil Liberties Union pay their own fees.)

## 2. Settlement Considerations

Factors that determine whether to pursue or settle a claim include—

- A client's willingness to devote time, effort, and funds to a case
- A defendant's ability to pay damages

## D. PRETRIAL PROCEDURES

### 1. 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.

#### a. 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.

#### b. Service of Process

A copy of the complaint and a summons is served on the party against whom the complaint is made. The summons notifies the defendant of his or her options—file a motion to dismiss, file an answer, or default.

#### c. Method of Service

Corporate defendants can be served by delivering process to their registered agents.

#### d. Waiver of Formal Service of Process

In federal cases, service can be waived.

#### e. The Defendant's Response

The defendant's answer admits or denies the allegations in the complaint.

**f. Affirmative Defenses**

If a defendant’s answer admits the truth of a complaint but wants to raise new facts to show there is no liability, this is called an affirmative defense.

**g. Counterclaims**

The plaintiff can make a counterclaim to an affirmative defense.

**2. Dismissals and Judgments before Trial**

**a. Motion to Dismiss**

A defendant’s 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.~~

**CASE SYNOPSIS—**

**Case 2.3: Espresso Disposition Corp. 1 v. Santana Sales & Marketing Group, Inc.**

Espresso Disposition Corp. 1 and Santana Sales & Marketing Group, Inc., entered into an agreement that included a mandatory forum selection clause. The clause stated that “the venue with respect to any action pertaining to this Agreement shall be the State of Illinois.” When Santana filed a suit against Espresso in a Florida state court, the defendant filed a motion to dismiss based on the clause. Santana responded that the clause was a mistake made at the time the agreement was drafted—an agreement between different parties had been copied, and by mistake, the venue provision had not been changed from Illinois to Florida. The court denied Espresso’s motion to dismiss. Espresso appealed.

A state intermediate appellate court reversed and remanded for the entry of an order of dismissal. Under Florida law, a forum selection clause is only considered unjust or unreasonable if a party establishes that enforcement would result in “no forum at all.” Espresso failed to establish this “since the designated forum— Illinois—does not result in \* \* \* ‘no forum at all.’” If a forum selection clause unambiguously mandates that litigation be subject to a certain forum, then it is wrong for a court to ignore the clause.

**Notes and Questions**

**What impact will the court’s decision most likely have on the parties to this dispute? Explain.** The effect of the court’s granting Espresso’s motion to dismiss was a ruling that the venue for any action relating to a controversy under the parties’ agreement “shall be the State of Illinois.” This means that the appropriate forum for resolving the parties’ dispute is a court in Illinois (not in Florida, where this suit was filed). Santana may have an opportunity to amend its complaint, but it is not likely that this suit will continue in a Florida court.

**How could the parties, particularly the defendant, have avoided this dispute?** The parties could have avoided this dispute by drafting their agreement more carefully. The court points out that some of the steps in document preparation have been eliminated by computers but “what has not been eliminated is the need to actually read and analyze the text \* \* \*, especially where it is to have legal significance.”

### **ANSWER TO “THE LEGAL ENVIRONMENT DIMENSION” QUESTION IN CASE 2.3**

**What is the effect of granting a motion to dismiss?** Granting a motion to dismiss in a case dismisses all or part of the suit without necessarily resolving the dispute. In this case, for example, the effect of the court’s granting the appellants’ motion to dismiss was a ruling that the venue for any action relating to a controversy under the parties’ agreement “shall be the State of Illinois.” This means that the appropriate forum for resolving the parties’ dispute is a court in Illinois (not in Florida, where this suit was filed). When a court grants a motion to dismiss, the party against whom it is entered is given time to file an amended complaint. Thus, here, the appellees may have an opportunity to amend their complaint. Ultimately, however, it is not likely that this suit will continue in a Florida court.

### **ANSWER TO “THE ETHICAL DIMENSION” QUESTION IN CASE 2.3**

**Why did the appellants in this case file a motion to dismiss? Explain.** The appellants in this case filed a motion to dismiss to avoid litigating the dispute in the court in which the related suit was filed. The contract provided that the sole forum for controversies arising under the agreement was Illinois, not Florida, where the suit was filed. The appellees’ vigorous objection to the motion suggests that Illinois was not a convenient location for these parties. This suggests that the appellants may have sought to resolve the dispute through means other than litigation—negotiation, mediation, or some other form of alternative dispute resolution—or to avoid resolving the dispute at all.

#### **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. Motion for Judgment on the Pleadings**



After the pleadings are filed, if no facts are in dispute and only questions of law are at issue, either party can file a motion for judgment on the pleadings. A trial might be avoided if no facts are in dispute and only questions of law are at issue.

**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 complaint 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, before 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. Motion for Summary Judgment**

Like a motion for judgment on the pleadings, after the pleadings are filed, if no facts are in dispute and only questions of law are at issue, either party can file 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.

**3. Discovery**

To prepare for trial, parties obtain information from each other and from witnesses through the process of discovery. These devices save time by preserving evidence, narrowing the issues, preventing surprises at trial, and avoiding a trial altogether in some cases.

**a. Discovery Rules**

Generally, discovery is allowed regarding any information that is relevant to any party’s claim or defense. Of course, parties are protected from undue harassment, and privileged or confidential information is protected from disclosure.

**b. Depositions**

A deposition is a record of the answers of a party or witness to questions asked by the attorneys of both plaintiff and defendant.

**c. Interrogatories**

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

**d. Requests for Admissions**

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

**e. Requests for Documents, Objects, and Entry upon Land**

A request for documents, objects, and entry on land is a request to inspect these items.

**f. Requests for Examinations**

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.

**g. 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.

**h. E-Discovery Procedures**

The Federal Rules of Civil Procedure deal specifically with the preservation, retrieval, and production of electronic data.

**i. Advantages and Disadvantages of E-Discovery**

E-mail can provide useful, and sometimes damaging, information. But preserving, providing, and reviewing e-evidence can be time-consuming and expensive.

**4. Pretrial Conference**

After discovery, a pretrial hearing is held to clarify the issues, consider a settlement, and set rules for trial.

**5. The Right to a Jury Trial**

The Seventh Amendment to the U.S. Constitution—and most state constitutions guarantee the right to a jury trial in certain cases. Unless a jury is requested, however, the right is presumed to be waived.

**6. Jury Selection**

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

**E. THE TRIAL**

**1. Opening Statements**

The trial begins with the attorneys' opening statements. These statements concern facts that they expect to prove during the trial.

**2. Rules of Evidence**

These rules ensure that evidence presented during a trial is fair and reliable. Evidence must be relevant to the issues. Hearsay evidence is not admissible.

**3. Examination of Witnesses and Potential Motions**

Because the plaintiff has the burden of proving his or her case, the plaintiff's attorney calls and examines the first witness. This is called direct examination. The defendant's attorney cross-examines the plaintiff's witness, after which there is an opportunity for redirect and recross-examinations.

**a. 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.

**b. Potential Motion and Judgment**

In a jury trial, after the plaintiff's case is presented, the defendant can move for a directed verdict, which the judge grants if he or she believes that the jury could not find for the plaintiff. If this motion is denied, the defendant's attorney presents the defendant's case.

**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 entitled 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 persuasion produces substantial evidence of, for example, the other party's negligence, so that the jury could reasonably conclude 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 defendant'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 necessary to determine the outcome of the issue or issues, the court will deny the motion.

**c. Defendant's Evidence**

The defendant's attorney presents the evidence and witnesses for the defendant, after which there is an opportunity for redirect and recross-examinations. At the end of the defendant's case, either party can move for a directed verdict. If this motion is denied, the plaintiff's attorney can refute the defendant's case in a rebuttal, and the defendant's attorney can meet that evidence in a rejoinder.

**4. Closing Arguments, Jury Instructions, and Verdict**

After both sides have rested, the attorneys present their closing arguments. The jury is instructed in the law that applies to the case. The jury retires to consider a verdict, specifying the factual findings and the damages.

**F. POSTTRIAL MOTIONS**

After the jury has rendered its verdict, either party may make a posttrial motion. The prevailing party usually files a motion for a judgment in accordance with the verdict.

**1. Motion for a New Trial**

The non-prevailing party frequently files a motion for a new trial (which may be granted on the ground that the jury verdict is the obvious result of a misapplication of the law or a misunderstanding of the evidence, or on the grounds of newly discovered evidence, misconduct by the participants, or error by the judge).

**2. Motion for Judgment *N.O.V.***

The nonprevailing party may file a motion for a judgment n.o.v. (or judgment as a matter of law), which will be granted if the jury's verdict was unreasonable and erroneous.

**G. THE APPEAL**

**1. Filing the Appeal**

To appeal, the appellant files the record on appeal, which contains the pleadings, a trial transcript, copies of the exhibits, the judge's rulings, arguments of counsel, jury instructions, the verdict, post-trial 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. Higher Appellate Courts

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.

## H. ENFORCING THE JUDGMENT

The text notes some of the options available to a party to enforce a judgment. Those discussed include the collection of money or the transfer of property to satisfy an award of damages.

### TEACHING SUGGESTIONS

1. 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.

2. In the courtroom, changes are being wrought by television. There is an increasing reliance on video testimony. Children who allege physical or sexual abuse, for example, may give video testimony outside a courtroom to be shown during trial proceedings. Lawyers who represent accident victims often commission videos to visually show the court the impact of accident-related injuries on the daily lives of their clients. In criminal trials, judges have allowed juries to see filmed reenactments of crimes. To further blur the line between simulation and reality is the increasing number of cameras that videotape the commission of alleged crimes and other wrongs. ***What effect are these uses of television having on the judicial system? Could jurors watch trials on their televisions at home and reach a verdict by interactive cable? Through a familiarity with movies and TV shows, could jurors come to expect more excitement than is generated in the usual courtroom when at least some of the proceeding is on video? Will lawyers argue their cases to appeal to home audiences? And what effect might all of this have on the U.S. judicial system's impartiality and fairness?***

3. 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?***

4. 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 attorney 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.

**5. What do your students think that jurors discuss when they retire to consider a verdict? What 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.

### **Cyberlaw Link**

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 Web 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. ***What is the difference between a court of general jurisdiction and a court of limited jurisdiction?*** A court with general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court with limited jurisdiction. Trial courts with general jurisdiction include county, district, and superior courts. Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts. Thus, for example, small claims disputes are typically assigned to courts that hear only small claims disputes.
3. ***What is the role of a court with appellate jurisdiction?*** Courts of appellate jurisdiction are reviewing courts—they review cases brought on appeal from trial courts, which are courts of original jurisdiction. In most states, after a case is tried, there is a right to at least one appeal. An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court below.
4. ***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 \$50,000. 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.
5. ***When may the United States Supreme Court hear a case?*** The United States Supreme Court has original in only a few situations. The Supreme Court can review any case decided by a federal court of appeals and any case decided by a state's highest court in which a federal constitutional issue is involved.
6. ***What are the first steps in bringing a legal action?*** A complaint (or petition or declaration) is filed with the clerk of the trial court. A copy of the complaint and a summons is served on the party against whom the complaint is made.

7. **What are the defendant's possible responses?** The defendant files a motion to dismiss the complaint, files an answer, or defaults. If the defendant files an answer including a counterclaim, the plaintiff can file a reply to any counterclaim.
8. **What is discovery?** Discovery is the process through which parties prepare for trial by obtaining information from each other and from witnesses. What devices can be used to obtain this information? Discovery can involve the use of depositions, interrogatories, requests for admission, requests for physical or mental examinations, and requests for documents, objects, and entry upon land. A deposition is a record of the answers of a party or witness to questions asked by the attorneys of both plaintiff and defendant. Interrogatories are written questions asked of a party, who responds in writing. A request for an admission is a request that a party admit the truth of a matter. 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. A request for documents, objects, and entry upon land is a request for access to these items to inspect them.
9. **Hearsay is literally what a witness says he or she heard another person say. What 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.
10. **Who can appeal from a trial court's decision?** Either party—the party against whom the judgment of the trial court runs, or the party who was granted relief that was less than, or different from, the relief he or she sought.

## ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students prepare a chart showing the relationships between the various courts having jurisdiction in your state. (There is a digest of each state's 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)? Which 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?**
2. 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.

## EXPLANATION OF SELECTED FOOTNOTES IN THE TEXT

**Footnote 5:** In *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), 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 continuous,” 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 substantial justice to permit the state to enforce the obligation” that the company incurred there.

**Footnote 10:** In *Zippo Manufacturing Co. v. Zippo Dot.Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997), a federal district court proposed three categories for classifying the types of Internet business contact: (1) substantial business conducted online, (2) some interactivity through a Web site, and (3) passive advertising. Jurisdiction is proper for the first category, improper for the third, and may or may not be appropriate for the second. Zippo Manufacturing Co. (ZMC) makes, among other things, “Zippo” lighters. ZMC is based in Pennsylvania. Zippo Dot Com, Inc. (ZDC), operates a Web page and an Internet subscription news service. ZDC has the exclusive right the domain names “zippo.com,” “zippo.net,” and “zipponews.com.” ZDC is based in California, and its contacts with Pennsylvania have occurred almost exclusively over the Internet. Two per cent of its subscribers (3,000 of 140,000) are Pennsylvania residents who contracted over the Internet to receive its service. ZDC has agreements with seven ISPs in Pennsylvania to permit their subscribers to access the service. ZMC filed a suit in against ZDC, alleging trademark infringement and other claims, based on ZDC's use of the word “Zippo.” ZDC filed a motion to dismiss for lack of personal jurisdiction. Holding that ZDC's connections to the state fell into the first category, the court denied the motion.

#### REVIEWING—



### THE COURT SYSTEM



Ronald Metzgar placed his fifteen-month-old son, Matthew, awake and healthy, in his playpen. Ronald left the room for five minutes and on his return found Matthew lifeless. A toy block had lodged in the boy's throat, causing him to choke to death. Ronald called 911, but efforts to revive Matthew were to no avail. There was no warning of a choking hazard on the box containing the block. Matthew's parents hired an attorney and sued Playskool, Inc., the manufacturer of the block, alleging that the manufacturer had been negligent in failing to warn of the block's hazard. Playskool filed a motion for summary judgment, arguing that the danger of a young child choking on a small block was obvious. Using the information presented in the chapter, answer the following questions.

- 1. Suppose that the attorney the Metzgars hired agreed to represent them on a contingency-fee basis. What does that mean?** If the Metzgars lose, the lawyer does not receive pay for work provided. If they win a verdict in court or receive a settlement, the lawyer takes a percentage of that, usually around 30 percent.
- 2. How would the Metzgars' attorney likely have served process (the summons and complaint) on Playskool, Inc.?** A copy would be handed to a company representative by a process server or possibly by mail.



**3. Should Playskool’s request for summary judgment be granted? Why or why not?** No, because even if the facts of the accident are not in dispute, the question of liability is one to be determined at trial. The basic facts may not be in dispute, but there is no clear conclusion to be drawn from the facts. If the toy was properly made and generally safe, then there may be no liability. That is an issue to be determined at trial.

**4. Suppose that the judge denied Playskool’s motion and the case proceeded to trial. After hearing all the evidence, the jury found in favor of the defendants. What options do the plaintiffs have at this point if they are unsatisfied with the verdict?** The plaintiffs may make a motion for a judgment n.o.v. and, if that is unsuccessful, may appeal the decision reached at trial to the court of appeals.



### DEBATE THIS



**Some consumer advocates argue that high attorney contingency fees—sometimes reaching 40 percent—unfairly deprive winning plaintiffs of too much of their awards. Should the government put a cap on contingency fees at, say, 20 percent of the award? Why or why not?** In theory and in practice, poorer plaintiffs opt for contingency fee contracts with their attorneys because they cannot afford to pay straight hourly legal fees plus all of the related expenses that occur during discovery, before trial, during trial, and after trial. Therefore, empirically, poorer plaintiffs often end up paying the most in contingency fees. If the government capped such fees at a maximum percent, say 20 percent, then winning plaintiffs would keep the lion’s share of their awards. This would be fairer.

There are many who do not believe that the contingency-fee arrangements between willing clients of litigation attorneys should be regulated. After all, those seemingly high contingency fees that winning plaintiff attorneys collect are used in part to compensate for the contingency-fee cases that plaintiff attorneys lose. In the latter, they receive nothing. If the government capped such fees, fewer cases would be brought because plaintiff attorneys would only take on the ones that they were more certain they could win. Fewer would-be plaintiffs would be able to find legal representation.



### EXAMPREP—



### ISSUE SPOTTERS



**1. Sue uses her smartphone to purchase a video security system for her architectural firm from Tipton, Inc., a company that is located in a different state. The system arrives a month after the projected delivery date, is of poor quality, and does not function as advertised. Sue files a suit against Tipton in a state court. Does the court in Sue’s state have jurisdiction over Tipton? What factors will the court consider?** Yes, the court in Sue’s state has jurisdiction over Tipton on the basis of the company’s minimum contacts with the state.

Courts look at the following factors in determining whether minimum contacts exist: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action to the contacts, the interest of the forum state, and the convenience of the parties. Attempting to exercise jurisdiction without sufficient minimum contacts would violate the due process clause. Generally, courts have found that

jurisdiction is proper when there is substantial business conducted online (with contracts, sales, and so on). Even when there is only some interactivity through a Web site, courts have sometimes held that jurisdiction is proper. Jurisdiction is not proper when there is merely passive advertising.

Here, examining all of these factors, particularly the sale of the security system to a resident of the state and the relative inconvenience of the plaintiff to litigate in the defendant's state, the defendant had sufficient minimum contacts with the state to justify the exercise of jurisdiction over the defendant without violating the due process clause.

**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 her relief. The judge grants the motion if there is insufficient evidence to raise an issue of fact.

