# CHAPTER 2

# TRADITIONAL AND ONLINE DISPUTE RESOLUTION

For your convenience, page references for both the Summarized and Excerpted case versions of Fundamentals of Business Law are included

SUMMARIZED PAGE: Fundamentals of Business Law: Summarized Cases, Eighth Edition

EXCERPTED PAGE: Fundamentals of Business Law: Excerpted Cases, Second Edition

## ANSWERS TO LEARNING OBJECTIVES/ FOR REVIEW QUESTIONS AT THE BEGINNING AND THE END OF THE CHAPTER

Note that your students can read the answers to the even-numbered Review Questions on this text's Web site at www.cengage.com/blaw/fbl. We repeat these answers here as a convenience to you.

1A. 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. The doctrine of judicial review was established in 1803 when the United States Supreme Court decided Marbury v. Madison.

2A. Jurisdiction

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.

### 3A. Trial and appellate courts

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.

### 4A. Pleadings, discovery, and electronic filing

The pleadings include a plaintiff's complaint and a defendant's answer (and the counterclaim and reply). The pleadings inform each party of the other's claims and specify the issues involved in a case. 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). Electronic filing involves the filing of court documents in electronic media, typically over the Internet.

### 5A. Online forums

To resolve disputes, online forums are used in the same ways in which offline forums are used. Most online forums do not automatically apply the law of any specific jurisdiction, however, but apply general, universal legal principles. Any party may appeal from an online forum to a court at any time.

## ANSWER TO CRITICAL ANALYSIS QUESTION IN THE FEATURE

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—FOR CRITICAL ANALYSIS

SUMMARIZED PAGE 45
EXCERPTED PAGE 47

How might a large corporation protect itself from allegations that it intentionally failed to preserve electronic data? Given the significant and often burdensome costs associated with electronic discovery, should courts consider cost shifting in every case involving electronic discovery? Why or why not? 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. A court should consider cost shifting in every case in which the parties' abilities to afford the cost are unequal, because electronic discovery can be expensive. Typically, the cost is more easily borne by, for example, a large corporation rather than a private individual, who might otherwise not request discovery.

## Answers to Critical Analysis Questions in the Cases

### Case 2.1—What If the Facts Were Different?

SUMMARIZED PAGE 35
EXCERPTED PAGE 36

If Mastondrea had not seen Libgo and Allegro's ad, but had bought a Royal Hideaway vacation package on the recommendation of a Liberty travel agent, is it likely that the result in this case would have been different? Why or why not? It is not likely that the court would have concluded there was no personal jurisdiction in this case on the basis of the facts stated in the question. It was the defendant hotel's minimum contacts with the state, and its expectations flowing from those contacts, that served as the basis for the court's assertion of jurisdiction. Those contacts included marketing activities, which were part of the arrangements with Libgo and Liberty. Whether Mastondrea acted in response to an ad placed by Libgo or a verbal suggestion made by a Liberty agent would not seem significant.

### Case 2.2—For Critical Analysis

SUMMARIZED PAGE 48
EXCERPTED PAGE 49

Ethical Consideration The appellate court noted that in this case the district court's decision—which granted benefits to Evans—may arguably have been a better decision under the facts. If the court believed the district court's conclusion was right, then why did it reverse the decision? What does this tell you about the standards for review that judges use? This ruling indicates, among other things, that standards of review, although they "cannot be imprisoned within any form of words," are not arbitrary. There is a certain method in their interpretation and clear limits to their application.

### Case 2.3—For Critical Analysis

SUMMARIZED PAGE 51
EXCERPTED PAGE 53

Social Consideration Why do you think that NCR did not want its alleged claims decided by arbitration? A party is typically reluctant to

enter into a proceeding that he or she (or it) believes will have an unfavorable result. NCR might have had a less complex claim that could have been resolved more favorably in a court, or its claim might have lent itself to a legal, adversarial argument, which would have held less weight in arbitration As stated elsewhere in this chapter, arbitration's disadvantages include the unpredictability of results, the lack of required written opinions, the difficulty of appeal, and the possible unfairness of the procedural rules. NCR might have wanted to avoid arbitration for any or all of these reasons. Also, arbitration can be nearly as expensive as litigation. NCR may have been simply trying to reduce the duration of the dispute and its cost.

## ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. Federal jurisdiction

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.

2A. 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.

3A. Jurisdiction in Illinois

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.

4A. Jurisdiction in Nevada

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.

## ANSWERS TO QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER

### HYPOTHETICAL SCENARIOS AND CASE PROBLEMS

2.1A. Arbitration

SUMMARIZED PAGES 50–51
EXCERPTED PAGES 51–53

An arbitrator's decision has the binding force of law only because the two parties in an arbitration proceeding agree (contract) to be legally bound by the arbitrator's decision. The success of arbitration, and its status as an alternative to court settlement of disputes, rests on this underlying agreement between the parties to be bound by the results. If a person feels that an arbitrator's opinion is unjust, that person may appeal the dispute to a court. Courts, however, are very reluctant to judge the validity of an arbitrator's decision, which is regarded as final in all cases except where serious misconduct or corruption can be proved.

2.2A. HYPOTHETICAL QUESTION WITH SAMPLE ANSWER

Marya can bring suit in all three courts. The trucking firm did business in Florida, and the accident occurred there. Thus, the state of Florida would have jurisdiction over the defendant. Because the firm was headquartered in Georgia and had its principal place of business in that state, Marya could also sue in a Georgia court. Finally, because the amount in controversy exceeds $75,000, the suit could be brought in federal court on the basis of diversity of citizenship.

2.3A. Standing to sue
SUMMARIZED PAGE 38
EXCERPTED PAGES 38–39

The court ruled that Lamar did not have standing because it "had failed to show that its injuries were redressable through this litigation." The court reasoned that the ordinance's sign-subject restrictions could be split from its sign-size limits. Thus, even if the subject restrictions were held to be invalid, Lamar would never be able to erect the signs for which it sought permits because its proposed signs were larger than the size limits in those areas. Lamar appealed the ruling to the U.S. Court of Appeals for the Second Circuit, which vacated this part of the lower court's judgment. The appellate court held that Lamar did have standing to challenge the ordinance. To have standing, "a plaintiff must allege an actual or threatened injury to himself that is fairly traceable to the allegedly unlawful conduct of the defendant," and "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." The court pointed out that the signs Lamar sought permission to erect were smaller than the largest signs the ordinance allowed in other areas. "Were Lamar to succeed on the merits of its claims, it likely would be able to erect at least some of the signs it has asserted an intent to build, even if the size restrictions were held valid and severable. The district court, therefore, erred in concluding that Lamar had not established that its injuries were redressable."

2.4A. Jurisdiction
SUMMARIZED PAGES 34–35

EXCERPTED PAGES 37–38

The court found that the defendants' contacts with Illinois were sufficient to establish personal jurisdiction. The court set out the "sliding scale" standard for exercising jurisdiction over parties whose sole contact with a jurisdiction is over the Web. In this case, among other things, the "[d]efendants maintain websites that fall into the middle ground of the . . . 'sliding scale' [standard]. These Sites allow visitors to post messages (to which Defendants sometimes respond), purchase books, and make donations." The court concluded that "[t]hese Sites are a far cry from passive websites." Their "level of interactivity is enough . . . for the court to exercise jurisdiction over Defendants." The court also pointed out that "[d]efendants' Internet activities more than satisfy the minimum contacts standard . . . . By purposefully reaching out to the state of Illinois, and conducting business with Illinois citizens, Defendants are on notice that they may be subject to suit in this state." In other words, "the exercise of personal jurisdiction over Defendants would be reasonable in this case."

2.5A. Appellate review

SUMMARIZED PAGES 39–40

EXCERPTED PAGE 40

The U.S. Court of Appeals for the Sixth Circuit affirmed the lower court's ruling. In reviewing a trial court's decisions, said the appellate court, "we will not set aside findings of fact * * * unless they are clearly erroneous. However, the district court's interpretation and construction of a contract is a matter of law, and such matters this Court reviews de novo." In this case, "[t]he district court's critical finding was the existence of a binding contract between Detroit Radiant and BSH: a reduced price per burner unit and an agreement to absorb tooling and research and development costs, in exchange for a purchase of at least 30,000 units. There was nothing clearly erroneous about this finding, especially because the district court was in the best position to gauge the credibility of the actors whose words and actions gave rise to the contract. And given this finding, BSH's * * * argument holds little water—that is, given the district court's finding that the parties had entered into a binding contract at the outset, it may be implied that * * * the 2003 purchase order did not replace the 2001 order, since the two purchase orders, only when added together, were consistent with the 30,000-unit figure." The court concluded that "Detroit Radiant was left with a warehouse of burners and component parts that it could not unload * * * . And Detroit Radiant was further left without its anticipated profits—i.e., the benefit of the bargain that it had entered into with BSH." The court added that "contract law, not to mention common sense, dictates that BSH should pay up."

2.6A. CASE PROBLEM WITH SAMPLE ANSWER

Based on a recent holding by the Washington state supreme court, the federal appeals court held that the arbitration provision was invalid as unconscionable. Because it was invalid, the restriction on class action suits was also invalid. The state court held that for consumers to be offered a contract that class action restrictions placed in arbitrations agreements improperly stripped consumers of rights they would normally have to attack certain industry practices. Such suits are often brought in cases of deceptive or unfair industry practices when the losses suffered by the individual consumer are too small to warrant a consumer bringing suit. That is, the supposed added cell phone fees are small, so no one consumer would be likely to litigate or arbitrate the matter due to the expenses involved. Eliminating that cause of action by the arbitration agreement violates public policy and is void and unenforceable.

2.7A. Jurisdiction

SUMMARIZED PAGES 34–35

EXCERPTED PAGES 37–38

A court can exercise personal jurisdiction over a non-resident defendant under the authority of a long arm statute. First, however, it must be shown that the defendant had sufficient minimum contacts with the jurisdiction in which the court is attempting to assert its authority. Generally, this means that the defendant's connection to the jurisdiction must be enough for the assertion of authority to be fair. In this case, Texas's long arm statute applied. The court concluded that Poverty Point had sufficient minimum contacts with Texas based on the workers' "recruitment in Texas for work in Louisiana" and "their transportation from Texas to Louisiana." The workers signed their contracts and other employment documents in Texas. The terms of the work were revealed in Texas. Although the Leals had handled the "recruitment" and transportation of the workers in Texas, the Leals had acted on Poverty Point's behalf. They had been told "how many workers to hire, when to hire them for, where to send them, . . . what information to include in their employment agreements," what documents to have them sign, and what to have them do in the field at the job site. As for the fairness of requiring Poverty Point to appear in a Texas court, "litigation of this case in Texas would not pose a substantial burden on Defendants. Plaintiffs, however, would be severely hampered in their ability to pursue their claims if they are required to litigate them in Louisiana." Also, "Texas has an interest in protecting its citizens from exploitation by nonresident employers, particularly when its citizens are the targets of recruitment for out-of-state employment."

2.8A. Arbitration

SUMMARIZED PAGES 50–51

EXCERPTED PAGES 51–53

The arbitration agreement was not binding on the homeowners, so they could sue the builder, Osborne, in court. Osborne signed the contract with HBW; that did not bind the homeowners to the agreement because they were not parties to the agreement. The appeals court held the arbitration agreement to be "oppression" against the homeowners. As such, the agreements were one-sided and unconscionable. The homeowners were handed the warranty agreement at the time of closing (final sale) on their houses, but they did not know the terms of the warranty and had no chance to bargain over it. They did not give up their right to sue Osborne for breach of contract and other claims.

2.9A. A Question of Ethics

1. This is very common, as many hospitals and other health-care provides have arbitration agreements in their contracts for services. There was a valid contract here. It is presumed in valid contracts that arbitration clauses will

be upheld unless there is a violation of public policy. The provision of medical care is much like the provision of other services in this regard. There was not evidence of fraud or pressure in the inclusion of the arbitration agreement. Of course there is concern about mistreatment of patients, but there is no reason to believe that arbitration will not provide a professional review of the evidence of what transpired in this situation. Arbitration is a less of a lottery that litigation can be, as there are very few gigantic arbitration awards, but there is no evidence of systematic discrimination against plaintiffs in arbitration compared to litigation, so there may not be a major ethical issue.

2. McDaniel had the legal capacity to sign on behalf of her mother. Someone had to do that because she lacked mental capacity. So long as in such situations the contracts do not contain terms that place the patient at a greater disadvantage than would be the case if the patient had mental capacity, there is not particular reason to treat the matter any differently.

## CRITICAL THINKING AND WRITING ASSIGNMENTS

### 2.10A. CRITICAL LEGAL THINKING

No, the statute would not violate litigants' constitutional right of access to the courts because it provides the parties with an opportunity for a court trial in the event either party is dissatisfied with an arbitrator's decision. The burdens on a person's access to the courts would likely be upheld as long as they were reasonable. The statute would not violate a constitutional right to a jury trial if the required payment of arbitration costs were not an unreasonable burden. A court would also most likely interpret the arbitration procedures mandated by the statute as reasonably related to the legitimate government interest of attaining speedier and less costly resolution of disputes.

IHI ANSWER TO VIDEO QUESTION NO. 2.11 IHI

### Jurisdiction in Cyberspace

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.

2. What factors is a court likely to consider in assessing whether sufficient contacts existed when the only connection to the jurisdiction is through a Web 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.

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.

# ALTERNATE CASE PROBLEM ANSWERS

# CHAPTER 2

# TRADITIONAL AND ONLINE DISPUTE RESOLUTION

For your convenience, page references for both the Summarized and Excerpted case versions of Fundamentals of Business Law are included

SUMMARIZED PAGE: Fundamentals of Business Law: Summarized Cases, Eighth Edition

EXCERPTED PAGE: Fundamentals of Business Law: Excerpted Cases, Second Edition

2.1A. Jurisdiction
SUMMARIZED PAGES 34–35
EXCERPTED PAGES 37–38

A court can exercise personal jurisdiction over nonresidents under the authority of a long arm statute. Under a long arm statute, it must be shown that the nonresident had sufficient contacts with the state to justify the jurisdiction. In regard to business firms, this requirement is usually met if the firm does business within the state. In this case, the parties to the sponsorship agreement contemplated that substantial activities to further their joint venture would take place in Florida. Sutton lived in Florida, and he was expected to and did play in tour events in Florida. Sutton was to be provided health care insurance in Florida. All earnings from Sutton's golf-related activities in Florida and elsewhere were to be paid by the Professional Golfing Association from its headquarters and bank account in Florida to the ARS & Associates account in Michigan; the partnership was to disburse funds from the account to Sutton's account in Florida to enable him to perform golf-related activities and participate in tour events for the benefit of the joint venture. After ARS failed to fund health insurance for Sutton, it instructed Sutton to obtain medical care in return for providing golf lessons to a physician in Florida. These facts—the provision of health care insurance in

Florida, the exchange of funds to and from Florida, the instruction to Sutton to perform certain work in Florida—showed that the members of the joint venture were operating, conducting, engaging in, or carrying on their business venture in Florida. When an agreement for a joint venture made outside a state contemplates and results in performance in substantial part within the state, the nonresident members of the venture exercise sufficient minimum contacts within the state to support the state's exercise of personal jurisdiction over them. Thus, ARS could be subjected to the Florida court's exercise of jurisdiction and could be required to appear to defend itself in that state.

2.2A. Motion for summary judgment
SUMMARIZED PAGES 42 & 43
EXCERPTED PAGES 43 & 44

The Florida Supreme Court affirmed the appellate court's decision. The evidence was sufficient to indicate that it was a question of fact whether the bar knew that Hoag was an alcoholic. Therefore, summary judgment was inappropriate, and the case should proceed to trial. The court's one-page opinion in this case was mostly a summary of Hoag's drinking habits. Hoag had testified that over the two-year period prior to the accident, he (1) normally consumed a case of beer during the day while on his construction job; (2) drank hard liquor every evening at various bars; (3) went to Peoples twice a week, becoming overtly intoxicated on each occasion (exhibiting slurred speech, red eyes, and unsteady appearance); and (4) was well known to the bartenders at Peoples, who never refused to serve him on any occasion. Hoag stated that on the night of the accident, he had been served the equivalent of twenty shots of hard liquor and was so intoxicated that he did not recall leaving the bar, eating dinner, or much about the accident. Given this record, the court concluded that "the circumstantial evidence adduced was sufficient to permit a jury to find that the employees of Peoples knew of Hoag's addiction, based on his repeated behavior and appearance."

2.3A. Motion for a new trial
SUMMARIZED PAGE 46
EXCERPTED PAGES 45–46

The state trial court denied the motion, holding that the juror's "inadvertent" failure to respond to a question during *voir dire* did not "rise to the level of juror misconduct which would require the grant of a new trial." Hummel appealed. The state intermediate appellate court held that the juror's failure to hear the question violated the juror's duty to be attentive during *voir dire* proceedings. The trial court's decision was thus reversed. The appellate court stressed how important it was for jurors to respond truthfully to questions asked of them during *voir dire*. If a litigant cannot depend on jurors to answer questions truthfully, "then he cannot be certain he is getting a fair, just and impartial trial as guaranteed by the Constitution." The court went on to state that it is just as

important for jurors to tell the truth as it is for trial witnesses to tell the truth and that a "failure to respond is tantamount to giving an untruthful answer." Noting that the voir dire questions regarding cancer filled sixteen pages of the trial transcript, the court concluded that "in view of all the conversation that transpired between counsel and the other jurors" on the issue of cancer, the juror's claim not to have heard the question "amounts to an admission that he was grossly inattentive to the whole voir dire process."

2.4A. Procedure
SUMMARIZED PAGES 39–40 & 47
EXCERPTED PAGES 39–40 & 46–48

The Nevada Supreme Court held, among other things, that the conduct of the trial judge was "inappropriate and potentially prejudicial" and remanded the case for a new trial before a different judge. The court noted first that "[a] trial judge is charged with providing order and decorum in trial proceedings." The court explained that "[t]he average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is oftentimes formed on circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby."

2.5A. Jurisdiction
SUMMARIZED PAGES 34–35
EXCERPTED PAGES 37–38

This suit was initially filed in a California state court and removed to a federal district court. The federal court dismissed the case for lack of personal jurisdiction, and Gordy appealed. The U.S. Court of Appeals for the Ninth Circuit reversed the dismissal, holding that personal jurisdiction existed even though the newspaper had only thirteen to eighteen subscribers in California. The court concluded that "[b]y publishing an allegedly defamatory article the effects of which would clearly be felt in California, and by regularly circulating newspapers in California, Rush and the Daily News purposefully availed themselves of the privilege of conducting activities in California. Gordy's claim arises from those activities."

2.6A. Jurisdiction
SUMMARIZED PAGES 34–35
EXCERPTED PAGES 37–38

The district court granted Cybersell FL's motion, and Cybersell AZ appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision.

The appellate court stated, "[T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." The court emphasized that "Cybersell FL has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name 'CyberSell,' which Cybersell AZ was in the process of registering as a federal service mark. * * * It entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from Cybersell AZ. * * * In short, Cybersell FL has done no act and has consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law."

2.7A. Standing

SUMMARIZED PAGE 38

EXCERPTED PAGES 38-39

The court held that the Blues had standing and denied the tobacco companies' motion to dismiss the case. The defendants argued in part that any injury to the plaintiffs was indirect and too remote to permit them to recover, and that it would be too difficult to determine whether the plaintiffs' injuries were due to the defendants' conduct or to intervening third causes. The court reasoned that the damages claimed in this case were separate from the damages suffered by smokers. The plaintiffs "seek recovery only for the economic burden of those medical claims and procedures which they directly paid as a result of tobacco use." The Blues had paid for the smokers' health care, and thus only the Blues could recover those amounts. As to whether the injuries were too remote, the court said that if "as alleged, the defendants conducted a decades long scheme to deceive the American public and its health providers concerning the addictive characteristics and health hazards of their tobacco products, and if they conspired to deprive smokers of safer or less addictive tobacco products, then their actions can properly be characterized as illegal and deliberate criminal fraud." If so, the plaintiffs' injuries would have been foreseeable and direct. The court also noted that the plaintiffs might have reliable statistical and expert evidence to show the percentage of damage caused by the defendants' actions.

Note: The Blues filed suits in three federal district courts. Two of the courts refused to dismiss the suits, applying the reasoning set out above. The third court agreed with the defendants, however. See Regence Blueshield v. Philip Morris, Inc., 40 F.Supp.2d 1179 (W.D.Wash.1999). In that case, the court concluded that the Blues' injuries were "derivative" of personal injuries to smokers because it would be impossible to separate the smokers' injuries from those of the insurers and there would thus be a possibility of "duplicative

recovery."

2.8A. Jury selection
SUMMARIZED PAGES 45–46
EXCERPTED PAGE 45

As stated in the chapter, attorneys (and/or judges) question prospective jurors during voir dire to determine if they have any bias or are connected with any party in the case. The purpose of this questioning is to determine whether the potential juror could be fair in deciding the issues of case. If the juror exhibits a bias that will influence her or his ability to be fair and follow the judge's instructions, the attorneys can challenge the juror for cause. If the judge agrees that there is a good reason for the individual not to serve on the jury, the judge then excludes the person from the jury panel. In this situation, a prospective juror, Leiter, indicated that her past business experience would "definitely sway" her judgment in the case, and also stated "I can't say that it's not going to cloud my judgment." Because these statements demonstrate that Leiter herself doubted whether she could be fair, she probably should have been dismissed from the jury. The judge refused to strike Leiter for cause, however, and then collectively asked the jurors who were selected to hear the case, including Leiter, whether they would follow his instructions on the law even if they did not agree with them and whether they would be able to suspend judgment until they had heard all the evidence. All of them nodded their heads or said yes, and Leiter was allowed to remain. When the judge entered a judgment on the jury's verdict in favor of Altheimer & Gray, Thompson appealed to the U.S. Court of Appeals for the Seventh Circuit. The appellate court reversed and remanded the case for a new trial, holding that the trial judge's failure to strike Leiter for cause was an abuse of discretion and a violation of Thompson's constitutional right to an impartial tribunal. The court explained that the trial judge should have pressed Leiter for "unwavering affirmations" of her ability to follow the law after she stated that her business background might cloud her judgment in hearing the case. This background, coupled with her belief that some people sue their employers because they do not get what they want, might have impeded her "in giving due weight to the evidence and following the judge's instructions." This question "was not adequately explored." In other words, the trial judge should have asked her individually "whether she would follow his instructions on the law and suspend judgment until she had heard all the evidence." If Leiter had answered no to this question, she should have been excused from the jury.

2.9A. Arbitration
SUMMARIZED PAGES 50–51
EXCERPTED PAGES 51–53

The court denied Auto Steigler's motion. A state intermediate appellate court reversed this ruling, and Little appealed to the California Supreme Court, which

held that the appeal provision was unenforceable but which also held that the provision could be cut from the agreement and the agreement could then be enforced. Auto Stiegler argued in part that the "provision applied evenhandedly to both parties." The court stated, "[I]f that is the case, [the defendant fails] to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that Auto Stiegler was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant." The court acknowledged that "parties may justify an asymmetrical arbitration agreement when there is a legitimate commercial need," but added that the "need must be other than the employer's desire to maximize its advantage in the arbitration process. There is no such justification for the $50,000 threshold. The explanation for the threshold * * * that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review * * * makes sense only from a defendant's standpoint and cannot withstand scrutiny."

## 2.10A. A QUESTION OF ETHICS

1. On further appeal, the United States Supreme Court held that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. The Court concluded that the state's gender-based peremptory challenges could not survive the higher standard of equal-protection scrutiny that the Court affords distinctions based on gender. The Court stated that the state's rationale (that its decision to strike virtually all males in the case may reasonably have been based on the perception, supported by history, that men otherwise totally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action, while women equally qualified might be more sympathetic and receptive to the arguments of the child's mother) was virtually unsupported and was based on "the very stereotypes the law condemns."

2. On the one hand, it can be said that whether a trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are fair and free from discrimination. On the other hand, some agree, with Justice Scalia in his dissent in this case, that the two sexes differ, both biologically and in experience. In that case, it is not merely stereo-

typing to say that these differences may produce a difference in outlook that is brought to the jury room. Thus, the use of peremptory challenges on the basis of sex is not the sort of derogatory and invidious act that peremptory challenges directed at black jurors may be. Because all groups are subject to the peremptory challenge (and will be made the object of it, depending on the nature of a particular case), it can be hard to see how any group is denied equal protection. Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. This is not discrimination.

3. It can be argued, as the Supreme Court held in this case, that the conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. So long as gender does not serve as a proxy for bias, unacceptable jurors may still be removed, including those who are members of a group or class that is normally subject to a lesser standard of review ("rational basis") under the equal protection clause and those who exhibit characteristics that are disproportionately associated with one gender. As Justice Scalia, citing Blackstone, noted in his dissent in this case, "Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. In point of fact, that may well be its greater value."

# ALTERNATE CASE PROBLEMS

# CHAPTER 2

# TRADITIONAL AND ONLINE DISPUTE RESOLUTION

2.1. Jurisdiction. Alex Sutton, a professional golfer living in Middleburg, Florida, entered into a sponsorship agreement with ARS & Associates, a Michigan partnership. Among other things, the agreement provided that (1) ARS would sponsor Sutton on a Professional Golfing Association (PGA) tour, (2) ARS would pay all of Sutton's expenses, (3) ARS and Sutton would split the proceeds (whatever remained after ARS had been reimbursed for expenses) fifty-fifty, and (4) ARS would provide health insurance for Sutton. Preliminary negotiations were carried out mostly over the phone. ARS drew up the agreement in Michigan and sent it to Sutton in Florida; Sutton signed and returned the contract to ARS. ARS then signed the agreement and sent a copy of it to Sutton. Sutton subsequently participated in several senior PGA events, including two tournaments in Florida. While playing golf in a senior PGA tournament in Palm Springs, California, Sutton suffered a heart attack and, as a result, later incurred costs of more than $100,000 for open-heart surgery and related medical expenses. Because ARS had not obtained health-insurance coverage for Sutton, Sutton sued ARS in a Florida state court for breach of the agreement. ARS moved to dismiss the action for lack of personal jurisdiction. Can the Florida court, under its long arm statute, exercise personal jurisdiction over the Michigan defendant in this case? Discuss. [Sutton v. Smith, 603 So.2d 693 (Fla.App. 1992)]

2.2. Motion for Summary Judgment. Mary Sabo suffered injuries in an automobile accident caused by Daniel Hoag, an intoxicated driver. Hoag had just left Peoples Restaurant after having consumed a large number of drinks. Sabo sued Peoples for damages, alleging that the restaurant had violated a state statute that provided that any person who "knowingly serves" an individual who is "habitually addicted" to alcohol may be held liable for any injuries or damages caused by the intoxication of that individual. In spite of evidence indicating that

for the two years prior to the accident, Hoag had gone to Peoples twice a week and on each occasion had drunk liquor until he was intoxicated, the trial court granted Peoples' motion for summary judgment. The court held that Sabo had failed to show that Peoples had knowledge that Hoag was an alcoholic and the bar had therefore not "knowingly" served an alcohol addict. Sabo appealed. The appellate court reversed the trial court's ruling, and Peoples appealed the case to the Supreme Court of Florida. Was summary judgment for Peoples appropriate in this case? [Sabo v. Peoples Restaurant, 591 So.2d 907 (Fla. 1991)]

2.3. Motion for a New Trial. Ms. Hummel sued Dr. James Strittmatter and his professional corporation, the Gainesville Radiology Group, P.C. ("the Group"), for medical malpractice. Hummel alleged that the Group was negligent in failing to timely diagnose her breast cancer after a mammogram examination. During voir dire, jurors were asked if any of them had family members who had been diagnosed with breast cancer or other forms of cancer, how the cancer had been diagnosed, and whether there had been any recurrence. One juror made no response, but it was later discovered that the juror's wife had died of breast cancer some years before. When the trial court jury returned a verdict for the Group, Hummel moved for a new trial on the ground that the juror had violated his oath and failed to disclose pertinent information during voir dire. In opposing the motion, the Group submitted an affidavit signed by the juror in which the juror averred that he had not answered the question because he had not heard it and that the cause of his wife's death had not influenced his judgment in the case. Did the juror's failure to hear the question about cancer constitute juror misconduct to the extent that Hummel's motion for a new trial should be granted? [Hummel v. Gainesville Radiology Group, P.C., 205 Ga.App. 157, 421 S.E.2d 333 (1992)]

2.4. Procedure. Washoe Medical Center, Inc., admitted Shirley Swisher for the treatment of a fractured pelvis. During her stay, Swisher suffered a fatal fall from her hospital bed. Gerald Parodi, the administrator of her estate, and others, filed an action against Washoe in which they sought damages for the alleged lack of care in treating Swisher. During voir dire, when the plaintiffs' attorney returned a few minutes late from a break, the trial judge led the prospective jurors in a standing ovation. The judge joked with one of the prospective jurors, whom he had known in college, about the judge's fitness to serve as a judge and personally endorsed another prospective juror's business. After the trial, the jury returned a verdict in favor of Washoe. The plaintiffs appealed, arguing that the tone set by the judge during voir dire prejudiced their right to a fair trial. Should the appellate court agree? Why or why not? [Parodi v. Washoe Medical Center, Inc., 111 Nev. 365, 892 P.2d 588 (1995)]

2.5. Jurisdiction. George Rush, a New York resident and columnist for the New York Daily News, wrote a critical column about Berry Gordy, the founder and former president of Motown Records. Gordy, a California resident, filed suit in a California state court against Rush and the newspaper (the defendants), alleging defamation (a civil wrong, or tort, that occurs when the publication of false statements harms a person's good reputation). Most of the newspaper's subscribers are in the New York area, and the paper covers mostly New York events. Thirteen copies of its daily edition are distributed to California subscribers, however, and the paper does cover events that are of nationwide interest to the entertainment industry. Because of its focus on entertainment, the newspaper also routinely sends reporters to California to gather news from California sources. Can a California state court exercise personal jurisdiction over the New York defendants in this case? What factors will the court consider in deciding this question? If you were the judge, how would you decide the issue, and why? Discuss fully. [Gordy v. Daily News, L.P., 95 F.3d 829 (9th Cir. 1996)]

2.6. Jurisdiction. Cybersell, Inc., is an Arizona corporation (Cybersell AZ) that provides Internet marketing services. Cybersell AZ applied with the U.S. Patent and Trademark Office (USPTO) to register "Cybersell" as a service mark. Before the application was granted, unrelated parties formed Cybersell, Inc., a Florida corporation (Cybersell FL), to provide consulting services for marketing on the Internet. Cybersell FL put up a Web site using the name "Cybersell," but its interactivity was limited to taking a surfer's name and address. No one in Arizona contacted Cybersell FL, or even hit on its Web page, before the USPTO granted Cybersell AZ's service mark application. Cybersell AZ then told Cybersell FL to stop using "Cybersell" and filed a suit in a federal district court in Arizona against Cybersell FL, alleging, among other things, trademark infringement. Cybersell FL filed a motion to dismiss for lack of jurisdiction. How should the court rule? Why? [Cybersell, Inc., an Arizona Corporation v. Cybersell, Inc., a Florida Corporation, 130 F.3d 414 (9th Cir. 1997)]

2.7. Standing. Blue Cross and Blue Shield insurance companies (the Blues) provide 68 million Americans with health-care financing. The Blues have paid billions of dollars for care attributable to illnesses related to tobacco use. In an attempt to recover some of this amount, the Blues filed a suit in a federal district court against tobacco companies and others, alleging fraud, among other things. The Blues claimed that beginning in 1953, the defendants conspired to addict millions of Americans, including members of Blue Cross plans, to cigarettes and other tobacco products. The conspiracy involved misrepresentation about the safety of nicotine and its addictive properties, marketing efforts targeting children, and agreements not to produce or market safer cigarettes. The

defendants' success caused lung, throat, and other cancers, as well as heart disease, stroke, emphysema, and other illnesses. The defendants asked the court to dismiss the case on the ground that the plaintiffs did not have standing to sue. Do the Blues have standing in this case? Why or why not? [Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 36 F.Supp.2d 560 (E.D.N.Y. 1999)]

2.8. Jury Selection. Ms. Thompson filed a suit in a federal district court against her employer, Altheimer & Gray, seeking damages for alleged racial discrimination in violation of federal law. During voir dire, the judge asked the prospective jurors whether "there is something about this kind of lawsuit for monetary damages that would start any of you leaning for or against a particular party?" Ms. Leiter, one of the prospective jurors, raised her hand and explained that she had "been an owner of a couple of businesses and am currently an owner of a business, and I feel that as an employer and owner of a business that will definitely sway my judgment in this case." She explained, "I am constantly faced with people that want various benefits or different positions in the company or better contacts or, you know, a myriad of issues that employers face on a regular basis, and I have to decide whether or not that person should get them." Asked by Thompson's lawyer whether "you believe that people file lawsuits just because they don't get something they want," Leiter answered, "I believe there are some people that do." In answer to another question, she said, "I think I bring a lot of background to this case, and I can't say that it's not going to cloud my judgment. I can try to be as fair as I can, as I do every day." Thompson filed a motion to strike Leiter for cause. Should the judge grant the motion? Explain. [Thompson v. Altheimer & Gray, 248 F.3d 621 (7th Cir. 2001)]

2.9. Arbitration. Alexander Little worked for Auto Stiegler, Inc., an automobile dealership in Los Angeles County, California, eventually becoming the service manager. While employed, Little signed an arbitration agreement that required all employment-related disputes to be submitted to arbitration. The agreement also provided that any award over $50,000 could be appealed to a second arbitrator. Little was later demoted and terminated. Alleging that these actions were in retaliation for investigating and reporting warranty fraud and thus were in violation of public policy, Little filed a suit in a California state court against Auto Stiegler. The defendant filed a motion with the court to compel arbitration. Little responded that the arbitration agreement should not be enforced because, among other things, the appeal provision was unfairly one sided. Is this provision enforceable? Should the court grant Auto Stiegler's motion? Why or why not? [Little v. Auto Stiegler, Inc., 29 Cal.4th 1064, 63 P.3d 979, 130 Cal.Rptr.2d 892 (2003)]

### 2.10. A Question of Ethics

The state of Alabama, on behalf of a mother (T.B.), brought a paternity suit against the alleged father (J.E.B.) of T.B.'s child During jury selection, the state, through peremptory challenges, removed nine of the ten prospective male jurors. J.E.B.'s attorney struck the final male from the jury pool. As a result of these peremptory strikes, the final jury consisted of twelve women. When the jury returned a verdict in favor of the mother, the father appealed, asserting that the trial court erred in overruling his objection to the state's removal of potential male jurors through the use of its peremptory challenges. The father argued that the use of peremptory challenges to eliminate men from the jury constituted gender discrimination and violated his rights to equal protection and due process of law. The father requested the court to extend the principle enunciated in a United States Supreme Court case that prohibited peremptory strikes based solely on race, to include gender-based strikes. The appellate court, following a precedent established by the state's supreme court, refused to do so and affirmed the lower court's decision that J.E.B. was the child's father and had to pay child support. [J.E.B. v. State, 606 So.2d 156 (Ala.App. 1992)]

1. Do you agree with J.E.B. that the state's exercise of its peremptory challenges violated his right to equal protection and due process? Why or why not?
2. If you were the judge, how would you rule on this issue?
3. The late United States Supreme Court Justice Thurgood Marshall urged that peremptory challenges be banned entirely. Do you agree with this proposal? Discuss fully.