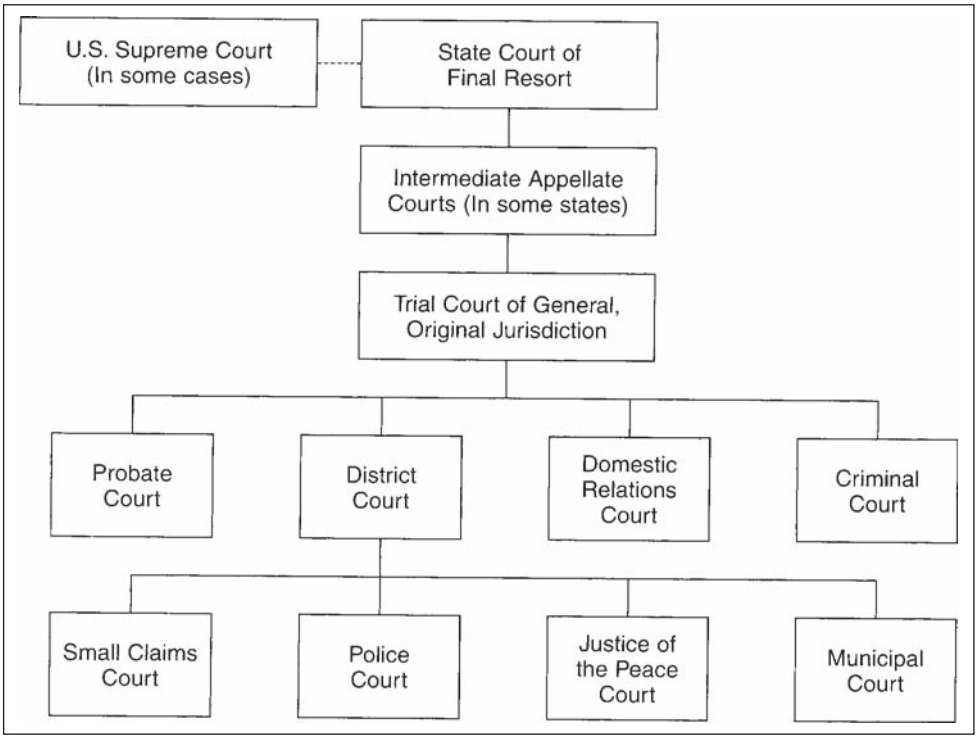


FIGURE 4.1 A State Court System

Source: Adapted from Arnold J. Goldman and William D. Sigismond, Business Law: Principles & Practices, 2d 3d. Copyright © 1988 by Houghton Mifflin Company.

questions the court's jurisdiction. Once a court has acquired jurisdiction, it keeps it throughout the case, even if a party changes domicile or removes property from the state. When more than one court has a basis for jurisdiction, the first to exercise it has exclusive jurisdiction until the case is concluded. Questions about jurisdiction should be resolved before the court concerns itself with other matters involved in the case.

The primary function of trial courts is to exercise original jurisdiction. This term refers to the court's power to take note of a suit at its beginning, try it, and pass judgment on the law and the facts of the controversy. In many states, trial courts also exercise appellate jurisdiction over decisions of courts of limited subject matter jurisdiction.

Some state judicial systems provide that appeals from the decisions of trial courts go directly to the state's highest court (usually, but not always, called the supreme court). Many states, however, usually require review by an intermediate appellate court (often called a court of appeals) before the matter can be heard by the state's highest court. The state's highest court reviews appeals of major questions emanating from the lower state courts, and at the state level, its decision is final. A typical example of a state court system can be seen in Figure 4.1.

Subject Matter Jurisdiction in State Court

Legislatures, in accordance with state constitutions, have the right to allocate the workload throughout

the state's judicial system. This means that the legislature usually enacts statutes that define each court's subject matter jurisdiction (the types of controversies that can be litigated in that court). The parties to a lawsuit cannot by consent confer subject matter jurisdiction on a court.

Legislatures often create specialized trial courts, including the land court, probate court (which handles deceased persons' estates), juvenile court, environmental court, and housing court, to exercise original subject matter jurisdiction over particular types of controversies. Subject matter jurisdiction may also be limited by the dollar amount involved in the controversy, as in small claims court, or by territory such as in municipal courts. All these courts would be possessed of limited subject matter jurisdiction.

Legislatures also create trial courts to exercise original subject matter jurisdiction over all other controversies. These courts, which go by various names such as the court of common pleas, district court, superior court, circuit court, county court, or even—in New York State—the trial division of the supreme court, are classified as courts of general or residual jurisdiction.

In the following case, the plaintiff/appellant filed suit in the Franklin County Municipal Court against the defendant/appellee for breach of contract and was awarded a default judgment when the defendant failed to answer the plaintiff's complaint. Approximately 11 months later, the defendant filed a motion asking the municipal court to vacate its own judgment, claiming that the court lacked subject matter jurisdiction to rule in the case. The case was brought before the Ohio Supreme Court. Notice how Judge Moyer's opinion refers to an Ohio court known as the Court of Common Pleas. The first court bearing this name was established in 1178 by England's King Henry II. Besides Ohio, courts of common pleas also exist in Delaware, Pennsylvania, and South Carolina. The Court of Common Pleas in Ohio is a court with general jurisdiction over civil and criminal matters.

Cheap Escape Co., Inc. v. Haddox, LLC
900 N.E.2d 601
Supreme Court of Ohio
December 11, 2008

Moyer, C. J.

I

This appeal requires us to determine whether municipal courts have subject-matter jurisdiction over matters lacking connections to their geographical territories. . . .

II

Appellant, Cheap Escape Company, Inc., d.b.a. JB Dollar Stretcher ("Cheap Escape"), produces a magazine that features business advertisements. Haddox, L.L.C., a construction firm located in Summit County, entered into two contracts with Cheap Escape to run ads in this magazine; appellee, Jeffrey L. Tessman, signed both agreements as a guarantor. The contracts provided that "in the event either party is in noncompliance with any provision of this Agreement the proper venue for litigation purposes will be in the Franklin County Municipal Court or Franklin County Common Pleas." The parties agree that the events relevant to these transactions occurred outside Franklin County and that the only connection to that forum arises from the forum-selection clauses in the contracts between them.

After Haddox allegedly defaulted on the agreements, Cheap Escape filed a breach-of-contract action against Haddox and Tessman in the Franklin County Municipal Court, seeking $1,984 in damages. Neither defendant filed a responsive pleading, and the municipal court eventually entered default judgment for Cheap Escape. Nearly 11 months later, Tessman moved to vacate the default judgment, arguing that the municipal court lacked subject-matter jurisdiction because none of the relevant events occurred in Franklin County. . . . The municipal court denied this motion.

Tessman appealed. The court of appeals . . . held that the municipal court did not have subject-matter jurisdiction over the case, regardless of the forum-selection clause. . . . The court of appeals therefore reversed the municipal court's decision and remanded the case for dismissal. . . .

III

This case requires us to examine the limits of municipal court jurisdiction. Unfortunately, jurisdiction is a vague term. . . . Several distinct concepts, including territorial jurisdiction, monetary jurisdiction, personal jurisdiction, and subject-matter jurisdiction, must be demonstrated for a municipal court to be able to hear a specific case.

While the parties agree that the Franklin County Municipal Court had territorial jurisdiction [because the municipal court deciding the case was situated in Columbus Ohio, which is geographically within Franklin County], monetary jurisdiction [because the amount in dispute was less than $15,000 monetary statutory ceiling for breach of contract cases], and personal jurisdiction in this case, they disagree sharply on the issue of municipal court subject-matter jurisdiction. "Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits" and "defines the competency of a court to render a valid judgment in a particular action." Morrison v. Steiner (1972). . . .

Unlike courts of common pleas [which in Ohio is the name given to what other states call the county courts], which are created by the Ohio Constitution and have statewide subject-matter jurisdiction, . . . municipal courts are statutorily created, . . .and their subject-matter jurisdiction is set by statute . . . . R.C. 1901.18(A) provides the applicable law in this regard: "Except as otherwise provided in this division or section 1901.181 of the Revised Code, subject to the monetary jurisdiction of municipal courts as set forth in section 1901.17 of the Revised Code, a municipal court has original jurisdiction within its territory in all of the following actions or proceedings. . . ." The list of enumerated actions includes breach-of-contract cases, which is the cause of action here. . . .

To resolve this case, we must specifically determine what the phrase "original jurisdiction within its territory" means. Appellant interprets the phrase to mean that a municipal court has subject-matter jurisdiction over any statutorily prescribed action, regardless of where the underlying events occurred. Conversely, appellee argues that the phrase limits subject-matter jurisdiction to those actions with a territorial connection to the court (e.g., the relevant events occurred within the territorial limits of the court). . . .

Appellant argues that the words "within its territory" refer to "jurisdiction" and not the various types of actions listed in R.C. 1901.18(A)(1) through (12). Under this reading, R.C. 1901.18(A) grants a municipal court subject-matter jurisdiction to hear one of those actions if the court convenes within its geographical territory, regardless of whether the case has a territorial connection to the forum. Thus, appellant claims that the Franklin County Municipal Court had jurisdiction over this case because it was operating in Columbus, as required by R.C. 1901.02(A), even though the relevant events occurred in Summit County. . . .

Appellee argues that this approach renders the phrase "within its territory" irrelevant and that R.C. 1901.18 should instead be read to give municipal courts subject-matter jurisdiction only over events having a territorial connection to the court. This interpretation requires us to read "within its territory" as referring to the types of actions that a municipal court may hear. . .

After reviewing these arguments and the plain text of R.C. 1901.18(A), we find the statute to be ambiguous. . . . It is simply unclear from the statutory language whether the General Assembly intended to limit municipal court subject-matter jurisdiction to territorial matters or to give municipal courts subject-matter jurisdiction over all matters suitable for municipal court review so long as the court sits within its territory when it disposes of a dispute. Both interpretations are reasonable. . . .

To resolve this ambiguity, we must rely on additional methods of statutory interpretation. Because R.C. 1901.18 is part of a complex series of statutes related to jurisdiction, it is appropriate to review the statutes in pari materia. . . . Under this canon of construction, we read all statutes relating to the same general subject matter together and interpret them in a reasonable manner that "give[s] proper force and effect to each and all of the statutes.". . . .

As noted above, appellant argues that "within its territory" means that a municipal court may hear any of the actions enumerated in R.C. 1901.18(A)(1) through (12) so long as it sits within its geographical territory. . . .

Thus, appellant's interpretation would make the phrase "within its territory" in R.C. 1901.18 mere surplusage. . . . If the General Assembly had intended to merely repeat the provisions of these statutes, it could have incorporated them by reference. . .

However, the General Assembly chose to use the unique phrase "original jurisdiction within its territory" in R.C. 1901.18, and we must afford those words some meaning. "It is axiomatic in statutory construction that words are not inserted into an act without some purpose." . . . .Because "within its territory" does not refer to the areas in which a municipal court may sit, the only other logical way to read the phrase is as a limit on the types of actions that a court may hear. Thus, the phrase "original jurisdiction within its territory in all of the following actions" means that a

municipal court may hear only those matters listed in R.C. 1901.18(A)(1) through (12) that have a territorial connection to the court.

This reading makes sense in view of. . . R.C. 1901.20 [which] provides that municipal courts have subject-matter jurisdiction in criminal matters only when the crime was committed "within its territory" or "within the limits of its territory." R.C. 1901.20(A)(1) and (B). We find no reason that the General Assembly would have granted municipal courts statewide subject-matter jurisdiction over civil matters but only territorial subject-matter jurisdiction over criminal matters. Further, the fact that the General Assembly used the words "within its territory" in both sections suggests that the phrase should carry the same meaning in both.

We therefore hold that R.C. 1901.18(A) limits municipal court subject-matter jurisdiction to actions or proceedings that have a territorial connection to the court. Because the parties admittedly did not have territorial connections to the Franklin County Municipal Court, the court lacked subject-matter jurisdiction in this matter. Although the parties entered into contracts with what appear to be valid forum-selection clauses, such clauses may be used only to choose from among venues that have subject-matter jurisdiction; litigants cannot vest a court with subject-matter jurisdiction by agreement. . . .

Case Question

1. The parties to this case contractually agreed that in the event of a breach that suit could be brought in either the Franklin County Municipal Court or the Franklin County Court of Common Pleas. Why did the Ohio Supreme Court conclude that this contractual term could not be enforced?

Jurisdiction Over the Person

The establishment of personal jurisdiction is constitutionally required for a court to impose binding liability on a person.

Imagine what would happen in our country if there were no jurisdictional limits on a state judicial system's ability to exercise personal jurisdiction over nonresidents. Every state would try to maximize its power, and total chaos would result. It was for this reason that jurisdictional rules were created: to prevent courts from deciding the merits of a case unless they have jurisdiction over the particular parties to the suit.

In the 1860s there were two methods of establishing a basis for jurisdiction over a person (*in personam* jurisdiction). The first involved showing that the party had been served within the boundaries of the state in which the lawsuit was filed (called the forum state) with a summons originating from within the state (see Figure 4.2).

The constitutionality of this method was upheld by the U.S. Supreme Court in the 1990 case of *Burnham v. Superior Court*. The Court rejected Burnham's argument that basing personal jurisdiction on someone's mere presence within the forum state when served is unfair where minimum contacts between the person and the forum state do not exist. California, said the Court, was entitled to exercise personal jurisdiction over a nonresident from New Jersey, who voluntarily traveled to California and was served with a California summons while he was in San Francisco for the weekend to visit his children.[1] The summons had nothing to do with his actions within California.[2]

A second traditional method of establishing personal jurisdiction not involving the existence of "sufficient minimum contacts" was based on consent. For example, a plaintiff implicitly consents to personal jurisdiction in a state when he or she files a lawsuit with a clerk of court. Defendants can also consent to personal jurisdiction in the following circumstances:

1. The defendant makes a general appearance in a case. If the defendant argues the substantive facts of the case, he or she is implicitly consenting to personal jurisdiction. Thus, a defendant wishing to challenge *in personam* jurisdiction must notify the court that she or he is making a special appearance for the limited purpose of contesting jurisdiction.

STATE OF WISCONSIN _____ Court _____ County

_____, Plaintiff

v. Summons File No. _____

_____, Defendant

The State of Wisconsin

To each person named above as a defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statues, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is . . . . , and to . . . . , plaintiff's attorney, whose address is . . . . . You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated: . . . . . , 20 . . .

[signed] _____
Attorney for Plaintiff

Address: _____

FIGURE 4.2 State of Wisconsin Statutory Form of Summons Tort Actions [Sec. 801.095]

2. A nonresident defendant allegedly commits a tortious act within the forum state.
3. A nonresident drives a motor vehicle on the roads of the forum state and becomes involved in a collision. Under the laws of most states, the motorist impliedly appoints an official of the forum state to be his agent for receiving service of the plaintiff's summons arising from the accident.

Because nonresident defendants rarely consent to being sued, and can avoid being served within the forum state by never going there, a new theory for jurisdiction was necessary. To remedy this problem, the U.S. Supreme Court developed its "sufficient minimum contacts" rule.

The sufficiency of the defendant's contacts with the forum state is determined by looking at the particular facts of each case. Sufficient minimum contacts, for example, exist in the state in which the defendant is domiciled. A person's domicile is the state in which the defendant has established his or her permanent home and to which the defendant returns after temporary absences. Factors such as where a person is licensed to drive, votes, and is employed are considered in determining domicile.

Long-Arm Statutes

Every state has enacted what are called long-arm statutes (see Figure 4.3) that permit the exercise of personal jurisdiction over nonresident defendants who have had sufficient minimum contacts with the forum state. A long-arm statute allows the plaintiff to serve the forum state's summons on the defendant in some other state.

When a plaintiff successfully uses the long-arm statute, the defendant can be required to return to the forum state and defend the lawsuit. If the defendant fails to do so, he or she risks the entry of a default judgment.

The consequences of not establishing personal jurisdiction are significant. Assume, for example, that a plaintiff has won a lawsuit and been awarded a judgment (the court document declaring the plaintiff the victor and specifying the remedy) entitling the plaintiff (now called the judgment creditor) to collect money damages from the defendant (now called the judgment debtor) and the judgment debtor fails to pay. If the trial court had proper personal jurisdiction over the defendant, the judgment creditor would be entitled to take the judgment to any state in which the judgment debtor owns property and there have it enforced. If the court issuing the judgment lacked *in personam* jurisdiction over the defendant, however, that judgment would be unenforceable.

The advent of the Internet has impacted many aspects of contemporary life in this country. The following case is about a dispute resulting from the auction of a motor vehicle via eBay. The purchaser of the vehicle, a Kentucky resident, chose to file suit against the seller in Kentucky rather than in Missouri, the state in which the seller resided. Because the seller could not be served with a summons within Kentucky, the buyer sought to invoke the Kentucky long-arm statute, which permits the service of the Kentucky summons outside of Kentucky. In this case of first impression, the Kentucky Court of Appeals had to decide whether sufficient minimum contacts existed between Kentucky and the Missouri seller of the vehicle to permit the exercise of personal jurisdiction over the seller.

The procedural posture of the case is also interesting. The seller was served with a Kentucky summons within Missouri and filed both an answer and a motion to dismiss for lack of *in personam* jurisdiction. The Kentucky trial court denied the motion and shortly thereafter entered a default judgment against the seller. The seller subsequently appealed to the Kentucky Court of Appeals.

Robey v. Hinners
Court of Appeals of Kentucky.
May 29, 2009

Buckingham, Senior Judge:
Brad Robey, d/b/a as Robey's Pawn World, appeals from a default judgment of the Kenton Circuit Court in favor of Gerald S. Hinners resulting from Robey's sale of a vehicle to Hinners through eBay. Robey, a Missouri resident, contends that the circuit court lacked personal jurisdiction to enter the judgment against him. . . .

Robey operates a pawn business in Sikeston, Missouri, and Hinners is a resident of Kentucky. eBay is a widely used auction site on the Internet. It provides an

online forum for sellers to list items for auction and for prospective buyers to bid.

On or about September 15, 2005, Robey listed a 2002 Cadillac Escalade automobile for auction on eBay Motors, a division of the eBay auction site. The auction listing stated that the vehicle was "clean, better than average" and that "the engine runs like a dream." The listing also stated that there was a "1 month/1,000 mile Service Agreement."

Hinners successfully outbid others at $25,869 and won the auction. He traveled to Missouri to close the transaction, paid Robey the renegotiated amount of $23,000 rather than the bid amount, and took possession of the vehicle.

Hinners claims that after returning to Kentucky, he began to experience problems with the vehicle. After attempts to resolve his complaints were unsuccessful, on December 22, 2005, Hinners filed a civil complaint against Robey in the Kenton Circuit Court. The complaint alleged that the vehicle began to have mechanical troubles immediately after delivery and that a mechanic examined it and determined that it had been rolled and had suffered extensive physical damage. The complaint further alleged that the vehicle had severe electronic problems and was unsafe to drive.

Robey filed an answer and also a motion to dismiss on the ground of lack of personal jurisdiction. The trial court denied the motion. . . . Thereafter, Robey failed to respond to discovery requests, and the court entered an order compelling discovery. When Robey failed to comply with the order compelling discovery, the court granted Hinners's motion to strike Robey's answer and entered a default judgment. The judgment against Robey is in the amount of $36,320.05, an amount that exceeds the purchase price by more than $13,000. Robey's appeal herein followed. . . .

The U.S. Supreme Court stated . . . that personal jurisdiction is "an essential element of the jurisdiction" of a court and that without such jurisdiction a court is "powerless to proceed[.]". . . The Supreme Court stated . . . that "[i]t has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." . . . . The Sixth Circuit of the U.S. Court of Appeals explained that "[i]t is elemental that a judgment rendered by a court lacking personal jurisdiction over the defendant is void as to that defendant.". . .

Because judgments against defendants over whom the courts lack personal jurisdiction are void, the inquiry for our purposes becomes whether the issue of personal jurisdiction may be raised by Robey in this appeal even though a default judgment was entered . . . .

Foremost Ins. Co. v. Whitaker . . . is very similar to this case. In that case, the trial court entered a default judgment against a Michigan corporation. The nonresident corporation then moved the court to set aside the default judgment on the ground that the court lacked personal jurisdiction to enter the judgment . . . . The court denied the motion, and the corporation appealed. This court held as follows:

> A void judgment is not entitled to any respect or deference by the courts. *Mathews v. Mathews*. . . . A void judgment is a legal nullity, and a court has no discretion in determining whether it should be set aside. . . . Therefore, because the trial court had no jurisdiction over Foremost at the time default judgment was entered, the judgment was *void ab initio* [void from the beginning] and the trial court erred as a matter of law in refusing to set it aside. . . .

Even though this case involves a default judgment, Robey actually contested the issue of personal jurisdiction by moving the court to dismiss Hinners's complaint on that ground. By raising the issue of personal jurisdiction on appeal, Robey is alleging that the judgment against him is void. We conclude that under the foregoing authorities, he may raise this issue on appeal.

Hinners asserts that the court had personal jurisdiction over Robey under the Kentucky long-arm statute. . . .

The Kentucky long-arm statute "extends personal jurisdiction over nonresidents only to the limits of the Constitution's due process clause.". . . . The requirements of due process in this regard were set forth by the U.S. Supreme Court in the landmark case of *International Shoe Co. v. State of Washington*. . . . In that case, the Supreme Court stated as follows:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend `traditional notions of fair play and substantial justice.' . . .

In Kentucky, the courts have established a "three-pronged analysis to determine the outer limits of personal jurisdiction based upon a single act.". . . . The test is stated as follows:

> The first prong of the test asks whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state. The second prong considers whether the cause of action arises from the alleged in-state activities.

The final prong requires such connections to the state as to make jurisdiction reasonable. . . . The Wilson court [*Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002)] also stated that "[e]ach of these three criteria represents a separate requirement, and jurisdiction will lie only where all three are satisfied." . . . .this court held that "[i]n terms of a due process analysis, the defendant's connection must be such `that he should reasonably anticipate being haled into court there.'". . . Further, the court in *Sunrise Turquoise* stated that "[t]he requirement of `purposeful availment' is significant since it assures that the defendant will not be haled into a jurisdiction as a result of `random,' `fortuitous,' or `attenuated' contacts.". . .

"Whether personal jurisdiction may be exercised over a defendant is a fact-specific determination, and '[e]ach case involving the issue of personal jurisdiction over a nonresident defendant must be decided on its own facts'". . . .

The issue of personal jurisdiction in the context of an eBay transaction between a resident buyer and a nonresident seller is an issue of first impression in the appellate courts of this state. . . .

. . . . The circuit court began its analysis by stating that Robey's listing of the automobile on eBay was "not alone sufficient for the exercise of personal jurisdiction over defendant to comport with due process requirements." The court further held that "at the time of the posting of the ad, the defendant did not demonstrate purposeful availment to Kentucky as a state of proper jurisdiction over him."

The court next stated that because Robey accepted Hinners's Application for Kentucky Certificate of Title/Registration when the car was picked up, the transaction became "more than a random, fortuitous or attenuated contact with this state. Acceptance of the application created a continuing obligation between the defendant and the plaintiff." The court further noted that "the consequences of the sale of the car are in Kentucky" and that "[t]he defendant clearly had knowledge that the car was being brought back into this state."

In addition, the court held that "jurisdiction in Kentucky is reasonable" because the plaintiff was an individual, "whereas defendant is in the business of selling cars through his pawn shop." The court emphasized that Robey "placed the vehicle into the stream of commerce, sold it to a Kentucky consumer, and accepted the Kentucky resident's application for a Kentucky title." The court also stated that Robey had a "continuing obligation regarding the title and perhaps other matters (such as the alleged warranty) [.]" Finally, the court held that "Kentucky has a manifest interest in providing its resident, the consumer, a convenient forum to redress the damages, if any, caused by the defendant.". . .

However, in *Burger King Corp. v. Rudzewicz*. . . (1985) . . . the U.S. Supreme Court held that the formation of a contract with a nonresident defendant was not, standing alone, sufficient to create jurisdiction. . . .

Hinners argues in his brief that by advertising on eBay, Robey "solicited purchasers from all jurisdictions." Thus, he maintains that "[b]y engaging in such conduct, it is clear that [Robey] should foresee suits in foreign jurisdictions.". . .

We conclude, as did the trial court, that merely placing the vehicle for auction on eBay did not alone create personal jurisdiction over Robey in Kentucky. We further conclude that merely accepting the Application for Kentucky Certificate of Title/Registration did not create personal jurisdiction. In addition, the fact that Hinners took the vehicle to Kentucky and determined there that it was not as advertised did not create personal jurisdiction. Also, there was no evidence that Robey used eBay through which to sell automobiles on any occasion other than this one. Finally, we conclude that the language in the eBay listing referring to a "1 month/1,000 mile Service Agreement" also did not create jurisdiction.

Contrary to the conclusion of the circuit court, we conclude that the transaction was a random, fortuitous, and attenuated contact with this state. . . . In short, we conclude that Robey did not have sufficient minimum contacts with Kentucky to allow a Kentucky court to assert personal jurisdiction over him.

Based upon the foregoing authority from the U.S. Supreme Court and on the persuasive reasoning of the courts from other jurisdictions that have addressed this issue, we reverse the judgment of the Kenton Circuit Court and remand for the entry of an order dismissing Hinners's complaint.

Case Questions

1. What did the trial court conclude with respect to Hinners's assertion that Robey should have understood, when he auctioned the vehicle on eBay, that he would be subject to suits in jurisdictions other than Missouri?
2. As a result of the Kentucky Court of Appeals decision, does Hinners still have any other options?

454.210. Personal jurisdiction of courts over nonresident—Process, how served—Venue

(1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this Commonwealth.

(2) (a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;

2. Contracting to supply services or goods in this Commonwealth;

3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he 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 this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

5. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this Commonwealth, if he also 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 this Commonwealth;

6. Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated;

7. Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting;

…

(3) (a) When personal jurisdiction is authorized by this section, service of process may be made on such person, or any agent of such person, in any country in this Commonwealth, where he may be found, or on the Secretary of State who, for this purpose, shall be deemed to be the statutory agent of such person;
…

(4) When the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the country wherein the plaintiff resides or where the cause of action or any part thereof arose.

(5) A court of this Commonwealth may exercise jurisdiction on any other basis authorized in the Kentucky Revised Statutes or by the Rules of Civil Procedure, notwithstanding this section.

FIGURE 4.3 Excerpt from Kentucky Long-Arm Statute, KRS 454.210

INTERNET TIP

The Kentucky Supreme Court has agreed to review this case, and after it rules, the majority opinion will be posted on the textbook's website with the Chapter IV materials.

Interested readers can find a case discussing the sufficient minimum contacts rule, personal jurisdiction, and the Internet on the textbook's website. The case is captioned *David Mink v. AAAA Development LLC.*

In Personam Jurisdiction Over Corporations

Every corporation has been incorporated by one of the fifty states and is therefore subject to the *in personam* jurisdiction of that state's courts. A corporation may also consent to *in personam* jurisdiction in other states. Generally, a state will require that all corporations doing business within its borders register with it and appoint a state government official as its agent. This official will be authorized to receive service of process relating to litigation arising in the wake of its presence and its business activities conducted within that state. Soliciting orders, writing orders, and entering into contracts would establish a corporate presence that would be sufficient for *in personam* jurisdiction. The mere presence of corporate officers within the forum state or the occasional shipping of orders into the forum is not sufficient for personal jurisdiction.

Jurisdiction Over Property—*In Rem* Jurisdiction

A state has jurisdiction over property located within the state. The property may be real (land and buildings) or personal (clothes, cars, televisions, checking accounts, antique clocks, etc.). This is called *in rem* jurisdiction, or jurisdiction over things. An *in personam* decision imposes liability on a person and is personally binding. A decision *in rem*, however, is directed against the property itself and resolves disputes about property rights. A court can determine the rights to property that is physically located within the forum state regardless of whether the court has personal jurisdiction over all interested individuals. For example, if two parties—one of whom is from out of state—dispute the ownership of a piece of land in Montana, the courts of Montana can determine ownership because it relates to property located within that state.

Procedural Due Process Requirements

In addition to establishing a basis for jurisdiction over the person or the property that is in dispute, a court must give proper notice to a defendant. The statutes of each jurisdiction often make distinctions between the type of notice required for *in personam* actions and *in rem* actions. This subject is covered in more detail in Chapter V.

Venue

Venue requirements determine the place where judicial authority should be exercised. Once personal jurisdiction has been established, a plaintiff has to litigate in a court that has subject matter jurisdiction over the controversy and in a place that the legislature says is a permissible venue.

State legislatures enact venue statutes to distribute the judicial workload throughout the system. They often provide for venue in the county or district where the cause of action arose, the county or district in which the defendant resides, and the county or district in which the plaintiff resides. In cases where the venue requirements can be satisfied in more than one district, the plaintiff's choice will usually prevail.

Parties wishing to challenge venue must assert their objections promptly, or they may be waived. In both civil and criminal cases, venue may be considered improper for several reasons. A court may decline to hear a case for fear of local prejudice, for the convenience of litigants and witnesses, or in the interests of justice.

In a civil case, the most common reason given for a court to decline to exercise jurisdiction is that it believes the case can proceed more conveniently in another court. This is known as the doctrine of *forum non conveniens*. The doctrine is applied with discretion and caution. One frequent ground for

applying the doctrine occurs when the event that gave rise to the suit took place somewhere other than in the forum state. The difficulties of securing the attendance of out-of-state witnesses and applying foreign law may make decision making inconvenient. The court balances the conveniences between the forum court and another court and weighs the obstacles to a fair proceeding against the advantages.

INTERNET TIP

You can see an example of a venue statute and read *Massey v. Mandell*, a Michigan venue case, on the textbook's website.

THE FEDERAL COURT SYSTEM

Article III, Section 1, of the U.S. Constitution is the basis of our federal court system. It provides that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish." Congress first exercised this power by passing the Judiciary Act of 1789, which has been amended and supplemented many times in order to establish the various federal courts, as well as their jurisdiction and procedures.

The federal court system consists of the district courts, exercising general, original jurisdiction; the courts of appeals, exercising intermediate appellate jurisdiction; and the U.S. Supreme Court, sitting as the highest court for both federal and state cases involving federal questions. Federal courts of limited jurisdiction include the U.S. Court of Federal Claims, which decides non-tort claims filed against the United States; the U.S. Tax Court, which reviews decisions of the secretary of the treasury with respect to certain provisions of the Internal Revenue Code; the U.S. Court of International Trade, which has jurisdiction over civil actions relating to embargoes on imports, customs duties, and revenues from imports or tonnage; the Federal Bankruptcy Court, which hears bankruptcy cases; and the Court of Appeals for the Armed Forces, which is a court of last resort in military criminal appeals. An organizational chart of the federal judiciary can be seen in Figure 4.4.

The U. S. Supreme Court is undoubtedly the best-known federal court, and at the opposite end of the continuum are probably the least known federal courts, the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR). The FISC and FISCR were established in 1978 in the aftermath of a Senate Select Committee's groundbreaking and comprehensive study of the federal government's domestic intelligence operations over the preceding four decades. The Committee, which was appointed in 1975, was headed by the late U.S. Senator Frank Church. After an extensive investigation, the Church Committee concluded that "domestic intelligence activity has threatened and undermined the constitutional rights of Americans to free speech, association and privacy. It has done so primarily because the constitutional system for checking abuse of power has not been applied."[3] Among the many Church Committee recommendations was one urging the Congress to ". . . [T]urn its attention to legislating restraints upon intelligence activities which may endanger the constitutional rights of Americans.

Congress responded in 1978 by enacting the Foreign Intelligence Surveillance Act (FISA). The legislation centralized the federal government's surveillance activities and provided for judicial oversight of the surveillance process. Pursuant to this legislation, Congress established the FISC and FISCR to protect Americans from executive branch abuses such as had happened in the past and required that government obtain warrants from FISC.

Congress, however, did not require that federal officers investigating domestic espionage and terrorism comply with the same warrant requirements that apply in all other criminal prosecutions. Instead they established separate and less stringent requirements for national security operations.

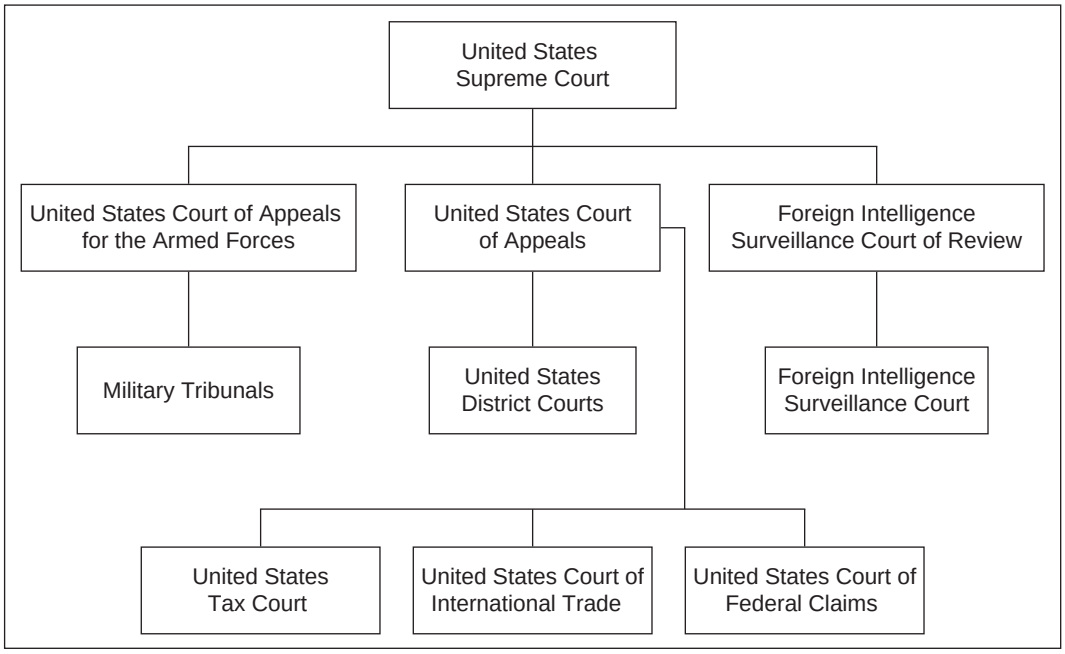


FIGURE 4.4 The Federal Court System

Source: Adapted from Arnold J. Goldman and William D. Sigismond, Business Law: Principles & Practices, 2d ed. Copyright © 1988 by Houghton Mifflin Company.

INTERNET TIP

Because of space limitations, it is not possible to continue this discussion to include the Protect America Act of 2007 and the FISA Amendments Act of 2008. The topic is fascinating and can readily be pursued online by interested readers.

The Chief Justice of the United States appoints the eleven members of the Foreign Intelligence Surveillance Court and chooses one of these appointees to be the Chief Judge. The judges serve nonrenewable seven-year terms.

FISC proceedings are closed and only Department of Justice (DOJ) lawyers are present at hearings. The DOJ attorneys try to persuade the FISC judges to approve the issuance of surveillance warrants. The FISC, which conducts its business in secret, can approve an electronic surveillance upon Justice Department certification that "a significant purpose" of its intended surveillance is to gather foreign intelligence information. You will notice in Figure 4.5 that the FISC almost always approves the issuance of such warrants. Congress also permitted the government to appeal any adverse rulings handed down by the FISC to a specially created court called the Foreign Intelligence Surveillance Court of Review (FISCR). By creating a special appeals court for national security investigation appeals, Congress bypassed the traditional intermediate appellate courts in the federal system, the U.S. Courts of Appeal.

The FISCR has three federal judges, all of whom are appointed by the Chief Justice. These judges serve nonrenewable seven-year terms. It is interesting to note that the no cases were appealed

Action Taken	2006	2007	2008
New applications submitted for Court approval	2,181	2,371	2,081
Applications approved by Court	2,176	2,368	2,080
Applications denied by Court	1	3	1
Applications substantively modified by Court	73	86	2
Applications withdrawn prior to Court ruling and not resubmitted for approval	4	0	0

FIGURE 4.5 Foreign Intelligence Surveillance Court: Applications Submitted, Approved, Denied, Substantively Modified, and Withdrawn Prior to Court Ruling and Not Resubmitted

Sources: U.S. Department of Justice's Annual Reports to Congress for years 2006, 2007, and 2008, as required by Sections 1807 and 1862 of the Foreign Intelligence Surveillance Act of 1978.

to the FISCR between 1978 and 2002, when the DOJ appealed the FISC's decision in *In re: Sealed Case No. 02-001.*

Under FISCA, in the most unlikely event that the DOJ loses in both the FISC and the FISCR, the government can still seek review in the U.S. Supreme Court.

INTERNET TIP

It is unusual for FISC or FISCR opinions to be published in the Federal Reports. An exception to this rule was the opinion written in the first case ever appealed to the FISCR by the government in a case captioned *In re: Sealed Case No. 02-001,* 310 F.3d 717 (2002). It can be found by searching for that citation online.

INTERNET TIP

You can read selected excerpts from the Foreign Intelligence Surveillance Act (Title 50 United States Code Sections 1803–1805) on the textbook's website.

THE U.S. DISTRICT COURTS

There are ninety-four federal district courts, with at least one in each state and territory in the United States. They are the courts of original jurisdiction and serve as the trial court in the federal court system. The federal district courts are given limited subject matter jurisdiction by the Constitution and by Congress. Article III provides that federal courts have jurisdiction over "all cases . . . arising under . . .the laws of the United States."

Because there are no federal common law crimes, all federal criminal actions must be based on federal statutes. In civil actions, Congress has authorized federal courts to exercise subject matter jurisdiction in two categories of cases:

1. Federal question jurisdiction exists where the case involves claims based on the Constitution, laws, or treaties of the United States. Such claims would include suits by the United States and civil rights, patent, copyright, trademark, unfair competition, and admiralty suits.
2. Diversity of citizenship jurisdiction exists if a suit is between citizens of different states or between a citizen of a state and an alien, and if the amount in controversy exceeds $75,000 (the jurisdictional amount). Diversity jurisdiction provides qualifying plaintiffs with a choice of a federal or state forum for many types of civil actions. However, federal courts have traditionally declined to exercise diversity jurisdiction in divorce actions, child custody cases, and probate matters.

State citizenship is a key concept in diversity cases. For natural citizens, state citizenship is closely related to the establishment of a principal residence (domicile). Thus, a person who presently makes her home in Texas is a citizen of Texas. If she spends the summer working in Colorado and plans to return to Texas in September, she would still be a citizen of Texas.

Federal diversity jurisdiction requires that the diversity of citizenship be complete. This means that in a multiple-party suit, no one plaintiff and one defendant can be citizens of the same state. Thus, if a citizen of New York brings suit against two defendants, one a citizen of Wisconsin and one a citizen of Michigan, there would be total diversity of citizenship. A federal district court would have jurisdiction over the subject matter if the plaintiff were suing in good faith for over $75,000. If, however, one of the defendants were a citizen of New York, there would not be complete diversity of citizenship necessary for jurisdiction.

Congress has provided special citizenship rules for corporations. A corporation is considered a citizen in the state where it is incorporated, as well as in the state of its principal place of business. For example, a corporation incorporated in Delaware with its principal place of business in New York cannot sue or be sued by citizens of either of the two states in a diversity case in a federal district court.

Diversity jurisdiction avoids exposing the defendant to possible prejudice in the plaintiff's state court. There are many who argue against diversity jurisdiction, claiming that the fear of possible prejudice does not justify the expense of the huge diversity caseload in federal courts. See Figure 4.6 for data regarding civil cases brought in the U.S. District Courts from 2004 to 2008.

	Cases Commenced				
Type of Case	**2004**	**2005**	**2006**	**2007**	**2008**
Cases Total	**281,338**	**253,273**	**259,541**	**257,507**	**267,257**
Contract Actions, Total	29,404	28,020	30,044	33,939	34,172
Real Property Actions, Total	5,845	4,561	4,414	5,180	5,072
Tort Actions, Total	55,023	51,335	68,804	61,359	72,011
Personal Injury, Total	50,594	47,364	64,734	57,244	68,121
Personal Property Damage, Total	4,429	3,971	4,061	4,115	3,890
Actions under Statutes, Total	191,017	169,265	156,177	156,916	155,939
Civil Rights, Total	40,239	36,096	32,865	31,756	32,132
Voting	173	166	150	118	145
Employment	19,746	16,930	14,353	13,375	13,219
Housing & Accommodations	1,222	885	643	665	644
Welfare	61	54	56	27	48
Other Civil Rights	19,037	16,459	15,295	15,253	15,398
Environmental Matters	978	714	871	767	920
Deportation	316	201	130	115	130
Prisoner Petitions, Total	55,330	61,238	54,955	53,945	54,786
Habeas Corpus—General	23,344	24,633	22,745	22,192	21,298
Habeas Corpus—Death Penalty	225	240	239	246	192
Prison Condition	7,971	8,609	7,811	7,309	7,610
Intellectual Property Rights	9,590	12,184	11,514	10,783	9,592
Securities, Commodities & Exchanges	3,094	2,038	1,621	1,394	1,637
Social Security Laws	15,873	15,487	13,847	12,974	13,138
Constitutionality of State Statutes	317	310	304	277	254

FIGURE 4.6 U.S. District Courts-Civil Cases Commenced 2004–2008

Source: Administrative Office of the United States Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts*. Washington, D.C.: U.S. Government Printing Office, 2009.

The Plaintiff's Choice of Forum

There are various factors that influence plaintiffs in their choice of a federal or state forum. One forum may be more attractive than another because it is closer and more convenient for the plaintiff. The plaintiff's attorney may be influenced by the reputation of the county or court in terms of the size of verdicts awarded there, by whether the forum is rural or urban, by socioeconomic factors, or by the reputations of the plaintiff and defendant within the forum. Plaintiffs may also be influenced to file in a federal forum if the federal procedural rules are more liberal than the corresponding state rules.

In the following case, a plaintiff whose diversity suit was dismissed by a federal district court for failing to satisfy the jurisdictional amount requirement appealed that decision to the U.S. Court of Appeals for the Eighth Circuit.

Kopp v. Kopp
280 F.3d 883
U.S. Court of Appeals for the Eighth Circuit
February 19, 2002

Morris Sheppard Arnold, Circuit Judge
Donna Kopp appeals from the order of the district court dismissing her tort claim for lack of subject-matter jurisdiction. . . .

I
Ms. Kopp was attacked, restrained, and sexually assaulted in her own home by her ex-husband, Donald Kopp. When Mr. Kopp . . .pleaded guilty . . .and was sentenced to four years in prison, Ms. Kopp then sued Mr. Kopp in federal court, claiming violations of the Violence Against Women Act of 1994 . . .and of state tort law as well. After the district court dismissed the federal claim because of the decision in *United States v. Morrison*, 529 U.S. 598 (2000) [declaring the Violence Against Women Act unconstitutional], it also dismissed the state law claims because it concluded that they did not satisfy the requirements for diversity jurisdiction.

When the two parties to an action are citizens of different states, as they are here, a federal district court's jurisdiction extends to "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs," 28 U.S.C. § 1332(a). Although Ms. Kopp's medical bills fall well below the requisite amount, she argues that in the circumstances of this case she could well recover punitive damages and damages for emotional distress that would exceed $75,000.

We have held that "a complaint that alleges the jurisdictional amount in good faith will suffice to confer jurisdiction, but the complaint will be dismissed if it 'appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount.'" *Larkin v. Brown* . . . (8th Cir. 1994). . . . If the defendant challenges the plaintiff's allegations of the amount in controversy, then the plaintiff must establish jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936) . . . .

. . .The district court has subject matter jurisdiction in a diversity case when a fact finder could legally conclude, from the pleadings and proof adduced to the court before trial, that the damages that the plaintiff suffered are greater than $75,000. We emphasize that McNutt does not suggest that . . . damages in some specific amount must be proved before trial by a preponderance of the evidence. . . .

Confusion may arise because the relevant jurisdictional fact, that is, the issue that must be proved by the preponderance of evidence, is easily misidentified. The jurisdictional fact in this case is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are: In other words, an amount that a plaintiff claims is not "in controversy" if no fact finder could legally award it. In one of our more extensive discussions of this issue, we upheld jurisdiction even though the jury ultimately awarded less than the statutory minimum, because jurisdiction is "measured by the amount properly pleaded or as of the time of the suit, not by the end result." . . .If access to federal district courts is to be further limited it should be done by statute and not by court decisions that permit a district court judge to prejudge the monetary value of [a] . . . claim." . . .

As we see it, the federal court has jurisdiction here unless, as a matter of law, Ms. Kopp could not recover punitive damages or damages for emotional distress, the amount of damages that she could recover is somehow fixed below the jurisdictional amount, or no reasonable jury could award damages totaling more than $75,000 in the circumstances that the case presents.

Under Missouri law, which is applicable here, punitive damages "may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others. . . ." We have no trouble reconciling the facts of this case with those criteria, as the defendant admitted in his pretrial deposition that he attacked, restrained, and raped his ex-wife who ultimately had to flee to a neighbor's house for safety. Furthermore, we have discovered no statutory or judicially created limits on punitive damages or damages for emotional distress in Missouri, nor has the defendant directed our attention to any. Finally, we conclude that an award of damages of more than $75,000 would not have to be set aside as excessive under Missouri law, nor would such an award be so "grossly excessive" as to violate the due process clause of the United States Constitution. . . .

Based on the present record, therefore, it seems clear to us that Ms. Kopp has demonstrated that her case falls within the diversity jurisdiction of the federal courts.

For the foregoing reasons, the order of the district court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Case Questions

1. Inasmuch as Ms. Kopp's medical bills were well below the jurisdictional amount, how could she make a good faith claim that she had enough damages to satisfy the jurisdictional amount requirement?
2. How closely do you believe federal district court judges should scrutinize a plaintiff's assertions in the complaint about having sufficient damages to satisfy the jurisdictional amount in cases in which federal subject matter jurisdiction is based on diversity of citizenship (i.e., plaintiff brings a diversity action)?
3. Assume that a plaintiff brings a diversity action in federal district court. Assume further that the plaintiff is ultimately awarded a money judgment for $60,000. Is the fact that plaintiff's damage award was for less than the jurisdictional amount of any jurisdictional significance if the case is appealed to a federal court of appeals?

In Rem and *In Personam* Jurisdiction

In order for a district court to hear a civil case, it must have, in addition to jurisdiction over the subject matter, jurisdiction over the property in an *in rem* proceeding or over the person of the defendant in an *in personam* proceeding. Jurisdiction over the person is normally acquired by serving a summons within the territory. In an ordinary civil action, the summons may be properly served anywhere within the territorial limits of the state in which the district court is located. A federal summons may also be served anywhere that a state summons could be served pursuant to the state's long-arm statute.

Venue in Federal Courts

Congress has provided that venue generally exists in the federal district where any defendant resides, if all defendants reside in the same state. It also exists where the claim arose or the property is located. If these choices are inappropriate, venue will exist in a diversity case in the federal district in which the defendant is subject to personal jurisdiction at the time the action is filed. In federal question cases, the alternative venue is the federal district in which any defendant can be found.[4]

A corporate defendant is subject to suit in any federal district in which it is subject to personal jurisdiction when the suit is filed.

Removal from State to Federal Courts (Removal Jurisdiction)

Except in those areas in which federal courts have exclusive jurisdiction, a suit does not have to be brought in a federal district court just because that court could exercise jurisdiction over the subject matter and over the person or property. A plaintiff may bring a dispute in any state or federal court that has jurisdiction.

A defendant sued in a state court may have a right to have the case removed to the federal district

Year	2004	2005	2006	2007	2008
Removals	34,443	30,178	29,437	30,282	30,065

FIGURE 4.7 Removal from State Courts to U.S. District Courts 2004–2008

Source: Administrative Office of the United States Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts*. Washington, D.C.: U.S. Government Printing Office, 2009.

court. Any civil action brought in a state court that could originally have been filed in a district court is removable. Thus, removal jurisdiction is permissible where a federal question is raised or where the requirements for diversity of citizenship jurisdiction are met. Where the basis of removal jurisdiction is diversity of citizenship, that basis must exist at the time of filing the original suit and also at the time of petitioning for removal. To initiate the removal process, the defendant must file notice of removal with the federal court within thirty days after service of the complaint. In recent years, U.S. District Court judges have approved the removal of approximately 31,000 cases per year from state to federal court (see Figure 4.7).

The plaintiff in the following case sought to prevent Wal-Mart from removing her tort action from the Louisiana court system to federal district court. The defendant asserted that the federal district court could exercise jurisdiction in this case because of diversity of citizenship.

Catherine Gebbia v. Wal-Mart Stores, Inc.
233 F.3d 880
U.S. Court of Appeals for the Fifth Circuit
December 4, 2000

Robert M. Parker, Circuit Judge

. . .Plaintiff brought this action on September 23, 1998, in the Twenty-First Judicial District Court of Louisiana, alleging claims arising from her injuries suffered in one of Defendant-Appellee Wal-Mart Stores, Inc.'s ("Defendant") stores in Hammond, Louisiana, on October 5, 1997. Plaintiff suffered her injuries when she went into the produce section of the store and slipped and fell in liquid, dirt, and produce on the floor. Plaintiff alleged in her original state court petition that she sustained injuries to her right wrist, left knee and patella, and upper and lower back. . . . Plaintiff alleged damages for medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity, and permanent disability and disfigurement. . . . . Consistent with Article 893 of the Louisiana Code of Civil Procedure, which prohibits the allegation of a specific amount of damages, Plaintiff did not pray for a specific amount of damages.

Defendant removed this action to the district court on October 13, 1998, pursuant to diversity jurisdiction as provided by 28 U.S.C. § 1332. It is undisputed that the parties are completely diverse, as Plaintiff is a citizen of Louisiana and Defendant is a citizen of Delaware with its principle place of business in Arkansas. Defendant stated in its Notice of Removal that the $75,000 amount in controversy requirement was satisfied because Plaintiff's alleged injuries and damages, exclusive of interests and costs, exceeded that amount.

The district court scheduled this action for trial on March 20, 2000, and the parties proceeded with pretrial discovery until March 2, 2000, when Plaintiff questioned the court's diversity jurisdiction by filing a motion to remand arguing that the $75,000 amount in controversy requirement was not satisfied. In the motion, accompanied by Plaintiff's affidavit, Plaintiff argued that due to continuing medical treatment of her injuries, Plaintiff was unable to confirm the amount of damages claimed. Plaintiff added that only after conducting discovery and receiving information from her treating physicians was she able to ascertain that the amount of claimed damages would be less than $75,000. In light of such information, Plaintiff argued that the amount in controversy was less than

$75,000, and that the district court should remand this action for lack of subject-matter jurisdiction.

The district court denied the motion to remand on March 14, 2000, finding that the court had subject-matter jurisdiction because Plaintiff's petition at the time of removal alleged injuries that exceeded the $75,000 requirement. In the Revised Joint Pretrial Order filed on March 16, 2000, Plaintiff again disputed the court's jurisdiction because Plaintiff stipulated, based on medical evidence, that her claims did not amount to $75,000. Plaintiff then filed a motion to reconsider the district court's denial of her motion to remand in light of the stipulation, and re-urged the district court to remand for lack of subject-matter jurisdiction. On March 16, 2000, the district court denied Plaintiff's motion for reconsideration, restating its finding that because Plaintiff's claims at the time of removal alleged claims in excess of $75,000, the court was not inclined to reconsider its previous denial of the motion to remand.

Thereafter, this action was tried on March 20, and a jury found for Defendant on Plaintiff's claims. On March 22, the district court entered a judgment in favor of Defendant and dismissing Plaintiff's claims with prejudice. Plaintiff timely appealed the judgment, and now argues that the district court erred in denying her motion to remand.

Analysis

. . . Any civil action brought in a state court of which the district courts have original jurisdiction may be removed to the proper district court. 28 U.S.C. § 1441(a). District courts have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between citizens of different states. . . . §1332(a)(1). As noted above . . . the only issue on this appeal is whether the district court erred in deciding that the amount in controversy exceeded the sum or value of $75,000, exclusive of interest and costs.

We have established a clear analytical framework for resolving disputes concerning the amount in controversy for actions removed from Louisiana state courts pursuant to § 1332(a)(1) . . . Because plaintiffs in Louisiana state courts, by law, may not specify the numerical value of claimed damages . . .the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000. . . . The defendant may prove that amount either by demonstrating that the claims are likely above $75,000 in sum or value, or by setting forth the facts in controversy that support a finding of the requisite amount. . . .

Moreover, once the district court's jurisdiction is established, subsequent events that reduce the amount in controversy to less than $75,000 generally do not divest the court of diversity jurisdiction. . . . The jurisdictional facts that support removal must be judged at the time of the removal . . . . Additionally, if it is facially apparent from the petition that the amount in controversy exceeds $75,000 at the time of removal, post-removal affidavits, stipulations, and amendments reducing the amount do not deprive the district court of jurisdiction. . . .

In this action, the district court properly denied Plaintiff's motion to remand. It is "facially apparent" from Plaintiff's original petition that the claimed damages exceeded $75,000. In *Luckett* [*v. Delta Airlines, Inc.*, 171 F.3d 295, (5th Cir. 1999)], we held that the district court did not err in finding that the plaintiff's claims exceeded $75,000 because the plaintiff alleged damages for property, travel expenses, an emergency ambulance trip, a six-day stay in the hospital, pain and suffering, humiliation, and temporary inability to do housework after hospitalization. . . . In this action, Plaintiff alleged in her original state court petition that she sustained injuries to her right wrist, left knee and patella, and upper and lower back. Plaintiff alleged damages for medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity, and permanent disability and disfigurement. Such allegations support a substantially large monetary basis to confer removal jurisdiction . . . and therefore the district court did not err in denying Plaintiff's motion to remand. Because it was facially apparent that Plaintiff's claimed damages exceeded $75,000, the district court properly disregarded Plaintiff's post-removal affidavit and stipulation for damages less than $75,000, and such affidavit and stipulation did not divest the district court's jurisdiction. . . .

Affirmed.

Case Questions

1. In this case, which party had to prove that the jurisdictional amount requirement was met?
2. How did the court in this case assure itself as to the extent and nature of the plaintiff's damages?
3. What provision of the Louisiana Code of Civil Procedure makes it more difficult for litigants to determine the amount of a plaintiff's damages?

Federal statutes contain some limitations to removal jurisdiction. One statute limits a defendant who is a citizen of the state in which the lawsuit is filed to removing claims that raise a federal question. For example, if a citizen of New York sued a citizen of Ohio in a state court in Ohio for breach of contract or tort, the defendant could not have the case removed.

The plaintiffs in the next case filed suit in state court against the defendants after the plaintiffs defaulted on a loan and subsequently lost their home as a result of foreclosure. The defendants, not wishing to litigate in state court, sought to remove the case from the state court to the U.S. District Court for the Southern District of California. The defendants based their removal on the existence of a federal question. The plaintiffs responded by dismissing their federal claim and filing a motion seeking an order remanding the case to the state court.

The following opinion was written by the federal judge who ruled on the remand motion.

Gilmore v. Bank of New York
09-CV-0218-IEG
United States District Court, Southern District
July 9, 2009

Irma Gonzalez, District Judge
Plaintiffs Karen and Larry Gilmore ("Plaintiffs") have filed a motion to remand this case to state court. . . . Defendants Bank of New York ("BNY"), Countrywide Home Loans ("Countrywide"), America's Wholesale Lender ("AWL"), and Bank of America ("BOA") (collectively, "Defendants") have filed a motion to dismiss Plaintiffs' first amended complaint. . . .

Factual and Procedural Background
Plaintiffs Karen and Larry Gilmore's claim arises from a loan Ms. Gilmore received to purchase a home. The following facts are drawn from Plaintiffs' first amended complaint. On March 9, 2006 Karen Gilmore purchased an Oceanside, California home ("the property") for $780,000.

Using the services of a mortgage broker, Defendant American Mortgage Professional, Inc. ("AMP"), she obtained a loan from AWL for 80 percent ($624,000) of the purchase price. Ms. Gilmore agreed to make monthly payments on the loan in an amount of $4,591.74 at an interest rate of 7 percent for a period of 10 years . . . Ms. Gilmore financed the remaining 20 percent ($156,000) of the purchase price though a home equity line of credit ("HELOC"), allegedly funded by BOA. She agreed to monthly payments in an amount of $1,586.71 at an interest rate of 12.375 percent. The combined monthly payment on Plaintiffs' two loans equaled $6,178.45, at a time when Plaintiffs earned a combined monthly income of $7,500. At an undisclosed point in time, AWL allegedly transferred the servicing of the two loans to its parent company, Countrywide. Plaintiffs defaulted on their loans, resulting in a trustee's sale of the property on September 29, 2008 to BNY, as agent for Countrywide.

Plaintiffs brought the instant action in the Superior Court of California for the County of San Diego on January 12, 2009. Defendants removed the case to this Court on February 5, 2009. . . . The complaint alleged: "wrongful foreclosure;" "action to set aside trustee sale;" violation of California Civil Code §§ 1573 (constructive fraud) and 2923.5; violation of California Financial Code §§ 4973(f) and (n); violation of 12 U.S.C. §§ 2607(a) and (b) (the Real Estate Settlement Procedures Act, hereinafter "RESPA"); and "breach of fiduciary duties." Plaintiffs filed a first amended complaint on April 10, 2009 . . . alleging the following claims: "set aside of trustee sale;" conspiracy to defraud; violation of Cal. Civ. Code §§ 1573, 1667, 1708, 1770 and 2923.5; violation of Cal. Fin. Code § 4973; "breach of fiduciary duties;" and "contractual rescission."

On April 27, 2009, Defendants filed a motion to dismiss the first amended complaint. . . . On May 13, 2009 Plaintiffs filed a motion to remand the case to state court. . . . The Court finds the motions appropriate for disposition without oral argument. . . .

Discussion

I. Plaintiffs' Motion to Remand

A. Legal Standard

"Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). . . . Removal jurisdiction may be based on diversity of citizenship or on the existence of a federal question. 28 U.S.C. § 1441 (b); . . . .The removal statute also provides that "[w] henever a separate and independent claim or cause of

action . . . is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates." 28 U.S.C. § 1441 (c). . . .

The Ninth Circuit "strictly construe[s] the removal statute against removal jurisdiction." . . . Accordingly, "[t]he `strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." . . . Whether removal jurisdiction exists must be determined by reference to the well-pleaded complaint. . . .

B. Analysis

Defendants originally premised their removal of this case upon Plaintiffs' allegations that Defendants violated RESPA, a federal statute. . . . Defendants further argued the Court had supplemental jurisdiction over Plaintiffs' state law claims . . . because those claims arose from the same set of operative facts as Plaintiffs' federal claim.

Plaintiffs' first amended complaint eliminates the RESPA claim. . . . However, Defendants argue the Court should retain supplemental jurisdiction over the amended complaint because Plaintiffs' "voluntary amendment to their complaint after removal to eliminate the federal claim does not automatically defeat federal jurisdiction." . . .

Plaintiffs' argument that the Court should remand the case . . . because they have abandoned their federal cause of action misstates the applicable legal rule. Section 1447 (c) provides, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." . . . Notwithstanding this rule, removal jurisdiction based on a federal question is determined from the complaint as it existed *at the time of removal*. . . . Therefore, when removal, as in this case, is based on federal-question jurisdiction and all federal claims are eliminated from the lawsuit, "[i]t is generally within a district court's discretion either to retain jurisdiction to adjudicate the pendent state claims or to remand them to state court." . . . Accordingly, because Plaintiffs have abandoned their federal claim, the Court must exercise its discretion to determine whether to retain supplemental jurisdiction over the remaining state claims.

The Supreme Court has held, and the Ninth Circuit has reiterated [sic] that "`in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.". . . . Moreover, this discretionary decision "depend[s] upon what `will best accommodate the values of economy, convenience, fairness, and comity. . . ." . . . The Court finds this case to be a "usual case" in which the balance of factors weighs in favor of remanding the remaining state claims to state court.

While Defendants argue the Court should exercise its discretion to retain the case because "Plaintiffs' filing of the [First Amended Complaint] is a blatant attempt to forum shop" . . . and the Supreme Court has held "[a] district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case," the Ninth Circuit has held it is not improper for a plaintiff to exercise the tactical decision to move for remand soon after removal . . . .("If the defendant rejects the plaintiff's offer to litigate in state court and removes the action, the plaintiff must then choose between federal claims and a state forum. Plaintiffs in this case chose the state forum. They dismissed their federal claims and moved for remand with all due speed after removal. There was nothing manipulative about that straight-forward tactical decision.") . . . Furthermore, Plaintiffs have abandoned their federal claim early in the case. There is also no indication that proceeding in state court would be wasteful or duplicative because no court or party has yet invested substantial resources into this case. The Court therefore finds that the concerns of economy, convenience, and comity would be served by returning this case to state court, and grants Plaintiffs' motion to remand. . . .

Conclusion

For the reasons stated herein, the Court orders that this action be remanded to the Superior Court of California for the County of San Diego. The Court denies as moot Defendants' motion to dismiss the complaint and request for judicial notice.

It is so ordered.

Case Questions

1. Why were the Gilmores allowed to file the amended complaint, manipulate the process to their advantage, and thereby deny the defendant the opportunity of removing the case to federal court?
2. Why, according to the court, does the defendant have the burden of proof in a removal proceeding?

The *Erie* Doctrine

In adjudicating state matters, a federal court is guided by a judicial policy known as the *Erie* doctrine. In the 1938 landmark case of *Erie Railroad Company v. Tompkins*, 304 U.S. 64, the U.S. Supreme Court decided that federal questions are governed by federal law. In other cases, however, the substantive law that should generally be applied in federal courts is the law of the state. The law of the state was defined as including judicial decisions as well as statutory law. In addition, there is no federal general common law governing state matters. A federal district court is bound by the statutes and precedents of the state in which it sits.

This restriction prevents a federal court and a state court from reaching different results on the same issue of state law.

The *Erie* doctrine, which goes to the heart of relations between the state and federal courts, is one of the most important judicial policies ever adopted by the U.S. Supreme Court. Many of the civil cases brought subsequent to this landmark case have been affected by the decision.

Where state and federal procedural rules differ, the *Erie* doctrine does not normally apply. Federal courts do not generally apply state procedural rules. Instead, the Federal Rules of Civil Procedure apply in federal courts unless they would significantly affect a litigant's substantive rights, encourage forum shopping, or promote a discriminatory application of the law. The Federal Rules of Civil Procedure were not designed to have any effect upon the rules of decision.

It is important to remember that the *Erie* doctrine does require that federal judges apply the same conflict-of-law rule that would be applied in the courts of the state in which the federal court is situated. In the following case, a district court sitting in Indiana had to determine whether it should apply Indiana law or that of California in reaching its decision.

INTERNET TIP

Interested readers will find an excellent case that illustrates the *Erie* doctrine, *Carson v. National Bank,* on the textbook's website. This case was "retired" in the ninth edition after initially appearing in the second edition of the textbook, twenty-eight years ago. It can be found with other "Retired Cases."

Readers may recall reading the Chapter III conflict of law case from Indiana of *Hubbard Manufacturing Co. v. Greeson*. In that 1987 case the Indiana Supreme Court decided to apply the significant relationship rule in tort cases where a conflict of law issue is raised but the place where the tort was committed was an unimportant fact in the case.

We see that precedent followed in the next 2001 federal appeals case, which illustrates the working of the *Erie* doctrine.

The federal district court, sitting in Indiana, at the request of Yamaha Motor Corporation granted Yamaha's motion for summary judgment, thereby declaring Yamaha the prevailing party in this lawsuit. Summary judgment is granted only if no genuine issues of material fact exist or the opposing party cannot possibly prevail at trial because the facts necessary to establish that party's case are not provable or are not true. This pretrial motion is not granted if there are important facts in dispute between the parties, because it would deprive them of their right to a trial.

The key issue at trial and on appeal was whether Indiana or California law should be applied to this product liability case. Yamaha argued that Indiana law should be applied, and Charles and April Land maintained that California law should control. As we learned in Chapter III, the outcome of disputes as to which state's law should be applied in a case depends on the conflict of laws rule (also known as choice of law rule) that has been adopted in the forum state. The district court, following the principles of the *Erie* doctrine, concluded after applying Indiana's choice of law rule that Indiana

law should apply. It determined that an Indiana statute required that product liability suits like this one be brought within ten years of the date when *the product was first purchased from the manufacturer (here, Yamaha).* Therefore, said the district court, inasmuch as the Lands had not started their suit within that time period, there was no way that they could prevail at trial. Yamaha, the court concluded, was entitled to summary judgment. The Lands subsequently appealed to the Seventh Circuit, arguing that the district court had wrongfully applied Indiana law instead of California law.

Charles and April Land v. Yamaha Motor Corporation
272 F.3d 514
U.S. Court of Appeals for the Seventh Circuit
December 10, 2001

Flaum, Chief Judge.
The district court granted summary judgment in favor of defendants Yamaha Motor Corporation, U.S.A. ("YMUS") and Yamaha Motor Co., Ltd. ("YMC"), holding plaintiffs Charles and April Land's product liability suit [was] barred by the Indiana Statute of [Limitations]. . . .

When appellant Charles Land, an Indiana resident, attempted to start a Yamaha WaveRunner Model WR500G on Heritage Lake in Indiana on June 25, 1998, the vehicle exploded and caused Land permanent back injury. The plaintiffs contend that the WaveRunner was defective in design: it allowed fuel fumes to accumulate in the hull of the boat, posing serious risk of fire upon ignition. . . . For purposes of the summary judgment motion, the district court assumed that the plaintiffs could prove their product liability claim on the merits. That is, it assumed that when the WaveRunner left the possession and control of the defendants, it was in a defective condition unreasonably dangerous to anticipated users. Furthermore, it is undisputed that the Lands filed suit on December 23, 1999, and that both the injury and the filing of the suit occurred more than ten years after the WaveRunner was delivered to Wallace Richardson, the first user.

The Indiana Statute of Repose provides in relevant part that product liability actions must be commenced within ten years after the delivery of the product to the initial user or consumer. YMC, a Japanese corporation with its principal place of business in Japan, designed, manufactured, and tested the WaveRunner in Japan. It petitioned for an exemption from the United States Coast Guard's requirement that every vehicle like the WaveRunner have a fan to ventilate fuel fumes out of the hull of the boat. YMUS knew of the test results, and, according to the Lands, gave false information to the Coast Guard as to the known danger of the WaveRunner design in order to keep its exemption from the fan requirement. YMUS, which maintains its principal place of business in California, participated in developing the WaveRunner and imported it to the United States. YMUS, while it has no office in Indiana, is authorized and does business in the state. On July 7, 1987, YMUS sold and shipped the vehicle to a boating store in Kentucky. On July 28, 1987, Wallace Richardson, an Indiana resident, purchased the WaveRunner. Larry Bush, another Indiana resident, subsequently bought the WaveRunner in 1989 or 1990. Bush was the registered owner when the WaveRunner caused Land's injury. From the time of Bush's purchase, the boat was registered, garaged, and serviced in Indiana.

Between 1988 and 1998, 24 other WaveRunners were reported to have exploded. YMUS twice recalled certain models of WaveRunners for modifications to reduce the likelihood of fuel leakage. It never recalled the WR500 series. . . .

Appellants argue that although they did not commence their action until well over ten years after delivery to the initial user, their case is not barred because . . . California law, which includes no statute of repose, governs the action . . . .

We review a grant of summary judgment de novo [i.e., take a fresh look at the evidence], construing the evidence in the light most favorable to the nonmoving party. . . . Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. . . .

Choice of Law
A federal court sitting in diversity jurisdiction must apply the substantive law of the state in which it sits, 304 U.S. 64 . . . (1938). . . . The *Erie* doctrine extends to choice-of-law principles and requires the court to apply the conflicts rules of the forum state. . . . Therefore, the district court properly applied the choice-of-law rule of Indiana.

Indiana applies a two-step conflicts analysis. *Hubbard Mfg. v. Greeson* (Ind. 1987). First, the court must determine if the place where the last event necessary to make the defendant liable—that is, the place of the injury—is insignificant. . . . If it is not, the law of that state applies. . . . Only if the court finds that the place of injury is insignificant does it move to step two which requires the court to consider "other factors such as: 1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered." . . . In the instant case, we, like the district court, arrive at the inevitable conclusion that the place of the injury—Indiana—is not insignificant. Therefore, we apply Indiana law and need not address the second prong in Indiana's choice-of-law analysis. . . .

Charles Land was injured while operating the WaveRunner in Indiana. He was a resident of Indiana, the owner of the boat was a resident of Indiana, and the boat had been garaged and serviced in Indiana for a decade before it caused Land's injury. There is no evidence in the record that the WaveRunner was ever used outside of Indiana. It was not mere fortuity that the injury occurred in Indiana, as the Lands suggest by comparing this choice-of-law determination with those involving pass-through automobile or airplane accidents in which the place of the injury is given little weight, and the argument that Indiana's contacts have little or no relevance to the legal action simply cannot withstand scrutiny. Therefore, our analysis of Indiana choice-of-law policy must end with step one.

The Lands argue that California, where YMUS was incorporated and where the defendant's tortious conduct occurred, has greater relevance. Maybe so. . . . This analysis belongs in step two of the Indiana conflicts policy, however, which we cannot reach. Some states use the "most significant relationship" approach suggested by the Restatement (Second) of Conflict of Laws. If Indiana did so, we would skip step one of our analysis and instead "isolate the pertinent issue, examine each state's connection to the occurrence, identify the governmental policies espoused by each state relevant to the issue, and proclaim applicable the law of the state with the superior interest." . . . That case might have a different outcome from the one at hand. Indiana does not adhere to the most significant relationship analysis, however, and the Supreme Court of Indiana has not signaled that it intends to overrule *Hubbard*. Although *Hubbard* does note some discomfort with the rigid place of injury, or *lex loci delicti*, approach, it still adheres to an analysis that uses the place of injury as a baseline. . . . If the place of injury is not insignificant, we must apply its law regardless of the greater interest another state may have. The Lands propose an approach whereby the law of the place of the tortious conduct is controlling in product liability cases. The state of Indiana has given us no-indication that it intends to change its choice-of-law policy to reach such a result, and we decline to make that policy decision for it. Indiana's contacts to this case are not insignificant. Therefore, its law, including the Statute of Repose, applies.

Because Indiana law governs this case and because the Indiana Statute of Repose bars product liability actions that, like this one, are brought more than ten years after delivery of the product to the initial user or consumer, we find that the district court properly granted summary judgment in favor of the defendants. We AFFIRM.

Case Questions

1. What was the basis for federal jurisdiction in this case?
2. Since the case was heard in federal court, why didn't the judge apply the law as generally applied in the nation, rather than the law of Indiana?

THE THIRTEEN U.S. COURTS OF APPEALS

The United States has been divided by Congress into eleven circuits (clusters of states), and a court of appeals has been assigned to each circuit. A court of appeals has also been established for the District of Columbia. In 1982, Congress created a new court of appeals with broad territorial jurisdiction and with very specialized subject matter jurisdiction. This court is called the Court of Appeals for the Federal Circuit. Its job is to review appeals from the U.S. district courts throughout the nation in

such areas as patent, trademark, and copyright cases; cases in which the United States is the defendant; and cases appealed from the U.S. Court of International Trade and the U.S. Court of Federal Claims. Figure 4.8 shows the boundaries of the thirteen circuits.

These appellate courts hear appeals on questions of law from decisions of the federal district courts in their circuits and review findings of federal administrative agencies. For most litigants, they are the ultimate appellate tribunals of the federal system. Appeal to these courts is a matter of right, not discretion, so long as proper procedures are followed.

When attorneys wish to appeal decisions of lower tribunals, they must follow such procedures to get the cases before a court of appeals. Notice of appeal must be filed within thirty days from the entry of judgment (sixty days when the United States or an officer or agent thereof is a party). A cost bond (in civil cases) may be required to ensure payment of the costs of the appeal. Both the record on appeal and a brief must be filed.

Attorneys must then persuade the judges that the lower tribunals committed errors that resulted in injustices to their clients. On appeal, the court

FIGURE 4.8 The Thirteen Federal Judicial Circuits

of appeals does not substitute its judgment for that of the lower tribunal's finding of fact. It does reverse the lower court's decision if that decision was clearly erroneous as a matter of law. See Figure 4.9 for statistical information regarding cases filed and terminated by U.S. Courts of Appeals between 2005 and 2008.

THE U.S. SUPREME COURT

The U.S. Supreme Court has existed since 1789. Today the court consists of a chief justice and eight associate justices. It exercises both appellate and original jurisdiction. Its chief function is to act as the last and final court of review over all cases in the federal system and some cases in the state system.

Supreme Court review is not a matter of right. A party wishing to have its case reviewed by the Supreme Court (called a petitioner) is required by statute to file a petition for a writ of certiorari with the court. The other party, called the respondent, will have the right to oppose the granting of the writ. The court grants certiorari only where there are special and important reasons for so doing. If four or more justices are in favor of granting the petition, the writ issues and the case are accepted. The court thus controls its docket, reserving its time and efforts for the cases that seem to the justices to deserve consideration. Figure 4.10 shows what happened to certiorari petitions filed by litigants in the U.S. Courts of Appeals seeking review by the U.S. Supreme Court over a twelve-month period in 2007–2008.

The U.S. Supreme Court is the only court specifically created in the Constitution. All other federal

	2005	2006	2007	2008
Cases Filed	68,473	66,618	58,410	61,104
Cases Terminated	61,975	67,582	62,846	59,096

FIGURE 4.9 U.S. Court of Appeals—Appeals Commenced and Terminated During 48-Month Period Ending September 30, 2008

Source: Administrative Office of the United States Courts, *2007 & 2008 Annual Reports of the Director: Judicial Business of the United States Courts*. Washington, D.C.: U.S. Government Printing Office, 2008, 2009.

Nature of Proceeding	Pending on Oct. 1, 2007	Filed	Granted	Pending on Sept. 30, 2008
Total	3,861	6,154	259	3,300
Criminal	1,567	2,673	170	1,112
U.S. Civil	536	780	22	501
Private Civil	1,612	2,545	50	1,565
Administrative Appeals	146	156	17	122

FIGURE 4.10 Petitions for Review on Writ of Certiorari to the Supreme Court during the 12-Month Period Ending September 30, 2008

Source: Administrative Office of the United States Courts, *2008 Annual Report of the Director: Judicial Business of the United States Courts*. Washington, D.C.: U.S. Government Printing Office, 2009.

courts are statutorily created by the Congress. The Constitution provides for the court's original jurisdiction. Original jurisdiction is the power to take note of a suit at its beginning, try it, and pass judgment on the law and the facts of the controversy. The Constitution has given the court the power to perform the function of trial court in cases affecting ambassadors, public ministers, and consuls, and in controversies in which a state is a party. Usually the power is not exclusive, nor is the court required to hear all cases over which it has original jurisdiction.

Article III authorizes Congress to determine the court's appellate jurisdiction. A history-making example occurred in 1983 when Congress enacted the Military Justice Act. This act conferred jurisdiction on the Supreme Court to directly review designated categories of appeals from the Court of Military Appeals. These appeals are brought to the court pursuant to the writ of certiorari procedure. This marked the first time in the history of the United States that any Article III court was authorized to review the decisions of military courts.

CHAPTER SUMMARY

In this chapter readers have learned how federal and state court systems are organized and about the different functions of trial and state courts. Explanations were also provided as to the procedural differences between jury trials and bench trials. The fundamental requirements for subject matter and personal jurisdiction in federal and state courts were summarized, and the importance of venue was explained. Students also learned the circumstances under which cases can be removed from state court to federal court and why federal trial courts need to be concerned about the *Erie* doctrine.

CHAPTER QUESTIONS

1. Bensusan Restaurant Corporation owns and operates a popular, large New York City jazz club called "The Blue Note." Richard King owns and has operated a small cabaret, also called "The Blue Note," in Columbia, Missouri, since 1980. King's establishment features live music and attracts its customers from central Missouri. In 1996, King decided to establish a website for the purpose of advertising his cabaret. King included a disclaimer on his website in which he gave a plug to Bensusan's club and made it clear that the two businesses were unrelated. He later modified this disclaimer by making it even more explicit and said that his "cyberspot was created to provide information for Columbia, Missouri area individuals only."

   Bensusan brought suit in the U.S. District court for the Southern District of New York against King seeking monetary damages and injunctive relief. The plaintiff maintained that King had infringed on his federally protected trademark by calling his cabaret "The Blue Note." King moved to dismiss the complaint for lack of personal jurisdiction. He contended that he had neither engaged in business within New York nor committed any act sufficient to confer *in personam* jurisdiction over him by New York. The U.S. District Court agreed with King, and the case was appealed to the United States Court of Appeals for the Second Circuit. Should the Second Circuit affirm or reverse the District Court? Why?

   Bensusan Restaurant Corporation v. Richard B. King, Docket No. 96-9344 (1997)

2. Dorothy Hooks brought a class action suit against Associated Financial Services, Inc. and others for breach of contract, fraud, and conspiracy. In her complaint, Hooks stipulated for the members of the class that the plaintiffs would waive both the right to recover more than $49,000 in damages and any right to recover punitive damages. The defendant nevertheless sought removal predicated on diversity of citizenship jurisdiction. Should the U.S. District Court grant the plaintiff's petition to remand this case back to the state courts?

   Hooks v. Associated Financial Services Company, Inc. et al. 966 F. Supp. 1098 (1997)

3. David Singer was injured when his automobile was struck by an uninsured motorist. David was insured against this type of accident up to a policy limit of $30,000 by State Farm Mutual Automobile Insurance Company. When State Farm stalled on paying on his insurance claim, David filed suit in state court, alleging breach of contract and breach of good faith and fair dealing. David did not demand any specified amount of money damages in his complaint because state law prohibited him from so doing. State Farm filed a removal petition in U.S. District Court, alleging that the federal court had subject matter jurisdiction based on diversity of citizenship. The defendant alleged that damages existed in excess of $50,000 (the jurisdictional amount at the time the suit was filed). Has the defendant followed the correct procedure, under these circumstances, for establishing the existence of the jurisdictional amount? How should the U.S. Court of Appeals for the Ninth Circuit rule?

   Singer v. State Farm, No. 95-55441 (1997)

4. Sludge Inc., a Wisconsin corporation, has a website in Wisconsin in which it advertises its wares. This website is accessible in every state in the nation. Can a Colorado corporation that believes Sludge has infringed on its trademarks successfully establish a basis for *in personam* jurisdiction if suit is brought in a Colorado court? Shout it make a difference if the website had generated several thousand messages, as well as 500 contacts, and 10 percent of its sales from Colorado? What argument would you make in favor of jurisdiction over Sludge? What argument would you make in opposition to jurisdiction over Sludge?

5. Mr. and Mrs. Woodson instituted a product liability action in an Oklahoma state court to recover for personal injuries sustained in Oklahoma in an accident involving a car that they had bought in New York while they were New York residents. The Woodsons were driving the car through Oklahoma at the time of the accident. The defendants were the car retailer and its wholesaler, both New York corporations, who did no business in Oklahoma. The defendants entered a special appearance, claiming that the Oklahoma state court did not have personal jurisdiction. Would there be enough "minimum contacts" between the defendants and the forum state for the forum state to have personal jurisdiction over the defendants?

   World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)

6. In this hypothetical diversity of citizenship case, federal law requires complete diversity of citizenship between plaintiffs and defendants and an amount in controversy greater than $75,000 in order for federal courts to entertain jurisdiction of an action. Tom Jones and Leonard Woodrock were deep-shaft coal miners in West Virginia, although Leonard lived across the border in Kentucky. Tom purchased a new Eureka, a National Motors car, from Pappy's Auto Sales, a local firm. National Motors Corporation is a large auto manufacturer with its main factory in Indiana, and is incorporated in Kentucky. When Tom was driving Leonard home from the mine, the Eureka's steering wheel inexplicably locked. The car hurtled down a 100-foot embankment and came to rest against a tree. The Eureka, which cost

$17,100, was a total loss. Tom and Leonard suffered damages of $58,000 apiece for personal injuries. Can Tom sue National Motors for damages in a federal court? Why? Can Leonard? Can Leonard and Tom join their claims and sue National Motors in federal court?

7. National Mutual Insurance Company is a District of Columbia corporation. It brought a diversity action in the U.S. District Court of Maryland against Tidewater Transfer Company, a Virginia corporation doing business in Maryland. National Mutual contends that, for diversity purposes, a D.C. resident may file suit against the resident of a state. Tidewater Transfer disagrees. What should be taken into consideration in deciding whether the District of Columbia can, for diversity purposes, be regarded as a state?

National Mutual Insurance v. Tidewater Transfer Co., 337 U.S. 582 (1949)

8. Several Arizona citizens brought a diversity suit in a federal district court against Harsh Building Company, an Oregon corporation. All parties involved in the suit stipulated that the defendant had its principal place of business in Oregon. During the trial, evidence showed that the only real business activity of Harsh Building Co. was owning and operating the Phoenix apartment complex, which was the subject of the suit. The plaintiffs lost the suit. On appeal, they claimed that the district court did not have jurisdiction because of lack of diversity of citizenship. Did the plaintiffs waive their right to challenge jurisdiction?

Bialac v. Harsh Building Co., 463 F.2d 1185 (9th Cir. 1972)

ENDNOTES

1. *In personam* jurisdiction will generally not be recognized where someone is duped into entering the state for the purpose of making service. *Townsend v. Smith*, 3 N.W.439 (1879) and *Jacobs/ Kahan & Co. v. Marsh*, 740 F.2d 587 (7th Cir. 1984). Similarly, a person who enters a state to challenge jurisdiction cannot be validly served. *Stewart v. Ramsay*, 242 U.S. 128 (1916).
2. *Burnham v. Superior Court*, 495 U.S. 604 (1990).
3. Senate Select Committee Report on Governmental Operations with Respect to Intelligence Operations, Part IV, Conclusions and Recommendations, p. 290.
4. 28 U.S.C 1391.

V

Civil Procedure

CHAPTER OBJECTIVES

1. *Understand the importance of procedure in our civil legal system.*
2. *Describe the basic steps of the civil litigation process.*
3. *Identify the functions of the complaint, answer, and reply.*
4. *Explain the use of pretrial motions to dismiss and for summary judgment.*
5. *Summarize modern discovery tools and their use.*
6. *Describe the procedural steps in the conduct of a trial.*

Courts are a passive adjudicator of disputes and neither initiate nor encourage litigation. The court system does nothing until one of the parties has called on it through appropriate procedures. Detailed procedural rules create the process that is used to decide the merits of a dispute. At the beginning of the process, these rules explain what a plaintiff must do to start a lawsuit and how the plaintiff can assert a legal claim against a defendant. Defendants are similarly told how to raise defenses and claims once they have been notified of a suit. Procedural rules govern what documents must be prepared, what each must contain, and how they should be presented to the court and the defendant. Once the lawsuit has been initiated, procedures govern how the parties discover relevant information and evidence, especially when it is in the possession of one's opponent. Rules also govern the conduct of trials, any enforcement procedures necessary after trial, the conduct of appeals, and the imposition of sanctions on rule violators. The principal objective of procedural law is to give the parties to a dispute an equal and fair opportunity to present

their cases to a nonprejudiced and convenient tribunal. If procedural rules are correctly drafted and implemented, both parties to the dispute should feel that they have been fairly treated.

Although all procedures must satisfy constitutional due process requirements, the state and federal governments, as separate sovereigns, have promulgated separate rules of civil procedure that govern the litigation process in their respective forums. This means, for example, that Oregon lawyers have to learn two sets of procedural rules. If they are litigating in the state courts of Oregon, they comply with the *Oregon Rules of Civil Procedure*, and when litigating in the U.S. District Court for Oregon, they follow the provisions of the *Federal Rules of Civil Procedure* (FRCP).

The purpose of this chapter is to explain the procedures that govern a civil suit from the time a litigant decides to sue until final court judgment. Indispensable to an understanding of these systems is a familiarity with the various stages and terms that are encountered in a civil proceeding.

PROCEEDINGS BEFORE A CIVIL TRIAL

The first step in civil litigation involves a triggering event that injures the plaintiff or damages his or her property (see Figure 5.1). The second step usually involves the plaintiff selecting an attorney. It is important to understand that, in general, each party pays for his or her attorney's fee irrespective of who ultimately prevails in the substantive dispute. This is subject to exceptions where statutory law provides otherwise and where common law judicial doctrines permit the court to order the loser to pay the winner's attorney fees.

Hiring a Lawyer

The period between the event that gives rise to the suit (the triggering event) and the filing of a complaint is known as the **informal discovery** period. The court has neither knowledge of nor interest in the plaintiff's cause of action against the defendant.

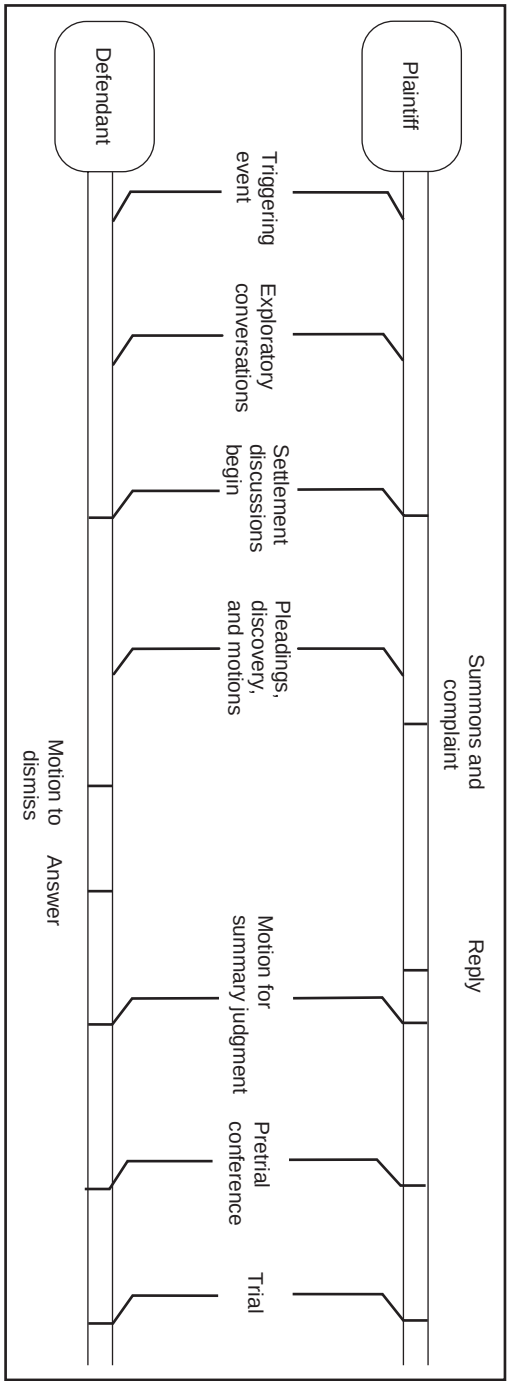


FIGURE 5.1 Proceedings Before a Civil Trial

During this time, the plaintiff contacts an attorney and describes the circumstances that led to the injury. The attorney discusses in general terms the legal alternatives available and usually asks for an opportunity to conduct an independent investigation to assess the value of the claim. This meeting is known as an exploratory conversation. At this point, the plaintiff and the attorney are not contractually bound to each other.

After the exploratory conversation and further investigation, the plaintiff meets again with the attorney to determine which course of action should be taken. The attorney presents an evaluation of the case in terms of the remedies available, the probability of achieving a favorable verdict, and the nature and probability of the award likely to be granted. At this point, the plaintiff retains the attorney as a representative in the judicial proceedings that are likely to follow.

Attorney's fees may be determined in several ways. Attorneys may charge the client by the hour. They may contract with the client to take a specified percentage of the money collected as compensation pursuant to what is called a **contingent fee** agreement. If no money is recovered for the client, an attorney is not entitled to any fee. However, the client will still be responsible for expenses. An attorney may be on a retainer, in which case the client pays the attorney an agreed-upon sum of money to handle all of or specified portions of a client's legal problems for a specified period of time such as a year. Last, an attorney may charge a flat rate for certain routine services.

After the plaintiff's lawyer has been officially retained, he or she normally contacts the defendant. This information puts the defendant on notice that the plaintiff is preparing to seek an adjudicative settlement of the claim. If the defendant has not already retained an attorney, this is the time to do so. The attorneys meet, with or without their clients, to discuss a reasonable settlement. These discussions are referred to as **settlement conferences**. If they prove unsuccessful, the judicial machinery is set in motion.

Clients always have the right to discharge their lawyers at any time, with or without cause. Readers will see in the next case, however, that discharged attorneys may still be entitled to compensation from their former clients.

Virginia Atkinson and James Howell, the lawyers in the next case, entered into a contingent fee contract with Joy Salmon. After Salmon discharged them, they sued requesting that the court award them a ***quantum meruit*** **recovery** ("as much as they deserved"). The lawyers, at the client's request, had engaged in legal work prior to their discharge date. Because of their discharge, they argued, the terms of the contingency fee agreement no longer applied. Under these circumstances, they asserted, their former client should have to pay them immediately a reasonable sum for the work they had completed on her behalf. The case was tried to a jury, which found in favor of the attorneys in the amount of $7,200. The client argued that the attorneys were not entitled to recover any fees. The Arkansas Supreme Court was called upon to decide.

Joy Salmon v. Virginia Atkinson

137 S.W.3d 383
Supreme Court of Arkansas
December 11, 2003

Donald L. Corbin, Justice

This case involves an issue of first impression: Whether an attorney who enters into a contingent-fee contract with a client and is later discharged by the client may bring an action for a *quantum-meruit* fee prior to the resolution of the former client's lawsuit. Appellant Joy Salmon contends that the discharged attorney's cause of action does not accrue unless and until the client is successful in recovering an award. She thus contends that the Pulaski County Circuit Court erred in awarding Appellees Virginia Atkinson and James Howell legal fees in the amount of $7,200 for work they performed in representing Appellant prior to date that she discharged them....

The essential facts are not disputed. In June 2000, Appellant hired Appellees to pursue a claim for

damages against the estate of George Brown. Appellant had lived with Brown for some time prior to his death and had cared for him as his nurse. Additionally, Appellant believed that she was married to Brown and, as his widow, she wanted to pursue a claim against Brown's estate. Appellees agreed to take Appellant's case on a contingency basis, in which Appellees would receive fifty percent of any recovery awarded to Appellant, plus costs and expenses. The contingent-fee contract was entered into on June 19, 2000, and it provided in pertinent part: "It is understood that in the event of no recovery, no fee shall be charged by Atkinson Law Offices."

Appellees then began to work on Appellant's case. They interviewed multiple witnesses, researched Appellant's claim of marriage to Brown, researched the general law, and negotiated with the estate's attorneys.... Based on their investigation and research, Appellees drew up a petition for Appellant to file in the probate case. Sometime in late July, they presented the petition to Appellant for her signature. Appellant indicated that she wanted to think about filing the claim, and she took the petition with her. The next communication Appellees received from Appellant was a letter, dated August 1, informing them that their services were no longer required.

Thereafter, in a letter dated August 21, 2000, Appellees informed Appellant that she had abrogated the June 19 contract without justification and that, therefore, she was required to pay Appellees for their services from June 19 to July 31. The letter reflects in part: "In investigation of your claims, legal research, and negotiation with the estate we expended 48 hours. At our customary billing rate of $150 per hour, the total fee payable at this time is $7,200." The letter also informed Appellant that the last date for which she could file her claim against Brown's estate was September 1, 2000. The record reflects that on September 1, 2000, Appellant filed a petition against the estate, *pro se*.

On May 10, 2001, Appellees filed suit against Appellant in circuit court, seeking recovery in *quantum meruit* for work they had performed on Appellant's case prior to the date that she discharged them. Following a trial on December 3, 2002, the jury returned a verdict in favor of Appellees. Thereafter, Appellant filed a motion for judgment notwithstanding the verdict (JNOV), arguing that because the contingent-fee contract specifically provided that no fee would be charged unless there was a recovery, and because there had not yet been any recovery, the jury verdict was not supported by substantial evidence. The trial court denied that motion on December 17, 2002. The judgment was also entered of record on that date. On January 2, 2003, Appellant filed a motion for new trial and a renewed motion for JNOV. The trial court denied those motions on February 4, 2003. Appellant then filed a notice of appeal on February 28, 2003.

On appeal, Appellant argues that allowing Appellees to collect a *quantum meruit* fee directly conflicts with the language of the contract providing that no fee would be charged in the event that Appellant did not recover on her probate claim. Thus, she asserts that because she has not yet recovered on her claim, it was error to award a fee to Appellees. She contends further that the award of fees to Appellees under the circumstances impaired her absolute right, as the client, to discharge Appellees and terminate their services.

As stated above, the issue of when a discharged attorney's cause of action for a *quantum meruit* fee accrues is one of first impression in this court. However, this court has consistently held that a discharged attorney may be paid for the reasonable value of his or her services notwithstanding that the parties originally entered into a contingent-fee contract.... The plain rationale behind this rule is that where the attorney has conferred a benefit upon the client, *i.e.*, legal services and advice, the client is responsible to pay such reasonable fees.

The question in this case is not whether the discharged attorney may recover a *quantum meruit* fee, but whether recovery of such a fee is dependent upon the contingency originally agreed to in the contract, *i.e.*, the successful prosecution of the client's case. There is a split amongst the states on this issue. Some states adhere to the "California rule," which provides that the discharged attorney's cause of action does not accrue unless and until the occurrence of the stated contingency.... Under this rule, a discharged attorney is barred from receiving any fee if the client does not recover on the underlying matter. This is true even if the attorney was discharged without cause.

Other states subscribe to the "New York rule," which provides that the discharged attorney's cause of action accrues immediately upon discharge and is not dependent upon the former client's recovery.... The courts that subscribe to this rule do so primarily for two reasons. First, they reason that when the client terminates the contingent-fee contract by discharging the attorney, the contract ceases to exist and the contingency term, *i.e.*, whether the attorney wins the client's case, is no longer operative. As the New York Court of Appeals explained: "Either [the contract] wholly stands or totally falls."... Because the contract is terminated, the client can no longer use the contract's term to prevent the discharged attorney from recovering a fee in *quantum meruit*. "A client cannot terminate the agreement and then resurrect the contingency term when the discharged attorney files a fee claim."...

The second primary reason that courts subscribe to the "New York rule" is that they believe that forcing the discharged attorney to wait on the occurrence of the contingency is unfair in that it goes beyond what the parties contemplated in the contract. The New York Court of Appeals said it best:

> The value of one attorney's services is not measured by the result attained by another. This one did not contract for his contingent compensation on the hypothesis of success or failure by some other member of the bar.... In making their agreement, the parties may be deemed to have estimated this lawyer's pecuniary merit according to his own character, temperament, energy, zeal, education, knowledge and experience which are the important factors contributing to his professional status and constituting in a large degree, when viewed in relation to the volume of work performed and the result accomplished, a fair standard for gauging the value of services as prudent counsel and skillful advocate....

An additional reason for holding that a discharged attorney does not have to wait on the occurrence of the contingency is that the attorney is not claiming under the contingent-fee contract. The Illinois Supreme Court explained:

> *Quantum meruit* is based on the implied promise of a recipient of services to pay for those services which are of value to him. The recipient would be unjustly enriched if he were able to retain the services without paying for them. The claimant's recovery here should not be linked to a contract contingency when his recovery is not based upon the contract, but upon *quantum meruit*....

We believe that the "New York rule" is the better rule. Applying that rule to the facts of this case, we hold that the trial court did not err in awarding a *quantum meruit* fee to Appellees. The undisputed evidence showed that Appellant hired Appellees to pursue a claim against the estate of George Brown. She entered into a contingency-fee agreement, whereby she agreed to pay Appellees fifty percent of any recovery they obtained for her, plus costs and expenses. For the next six weeks or so, Appellees performed work on Appellant's case, which involved interviewing multiple witnesses, performing document research and general legal research, negotiating with the estate's attorneys, and, finally, preparing a petition for Appellant to file in the probate matter.

Appellees reviewed the prepared petition with Appellant and presented it to her for her signature. She declined to sign the petition at that time, indicating that she wanted to think about it. She then took the petition with her. The next communication Appellees had with Appellant was a letter in which Appellant discharged them without explanation....

Based on the foregoing evidence, we hold that Appellees' cause of action to recover reasonable attorney's fees, under the theory of *quantum meruit*, accrued immediately upon their being discharged by Appellant. While we are mindful of the client's right to discharge his or her attorney at any time, we do not believe that our holding in this case in any way impairs that right. To the contrary, this court has previously determined that the client's right to discharge the attorney is not compromised by allowing the discharged attorney to recover in *quantum meruit*.... We thus affirm the trial court's judgment.

Case Questions

1. How do contracts between attorneys and their clients differ from other contracts?
2. List the pros and cons of contingent fees.
3. Should a court uphold a contingent fee contract between attorney and client that prohibits a settlement by the client?

Assume Attorney Smith orally contracted to represent a client in a real estate transaction and had performed satisfactorily for six months. Assume further that the client, who had been completely satisfied with Smith's work until this point, discharged him from employment without legal cause after learning that Attorney Brown would perform the remaining legal work for 30 percent less than the client was currently obligated to pay Smith.

The Pleadings

The pleading stage begins after the client has chosen a lawyer and decides to bring suit. The role of pleadings in Anglo-American law goes back to the earliest days of the English common law system and writ system.[1] In the twelfth century, persons wishing to litigate in the royal courts had to purchase an original writ (such as the Writ of Right) from the king or chancellor in order to establish the court's jurisdiction. Each writ specified the procedures and substantive law to be followed in deciding the dispute.[2] The writ would often require the plaintiff to make an oral recitation (a **pleading**) in which the claims would be stated, after which the defendant would be entitled to respond orally. In this way the parties would inform the court of the nature of the dispute.[3] In time, the practice of oral pleadings was replaced with written documents, and the common law and equitable pleading process became very complex, overly technical, cumbersome, and long.

In 1848, New York merged the common law and equity courts and replaced its writ system with a newly enacted Code of Civil Procedure. Thus began a reform movement that swept the country and produced modern code pleading at the state level. The popularity of code pleading convinced Congress to enact the Rules Enabling Act in 1934, which led to the development and adoption in 1938 of the Federal Rules of Civil Procedure.

Today's pleadings are written documents and consist of the plaintiff's **complaint**, the defendant's **answer**, and, rarely, the plaintiff's **reply**. The pleadings are somewhat less important under modern rules of civil procedure, because the current procedural rules provide each side of a dispute with the right to engage in extensive discovery. This means that litigants have a variety of available tools for obtaining evidence relevant to the case of which the opponent has knowledge or which is in the possession of an opponent. The pleadings continue to be important, however, because they establish the basis for jurisdiction, briefly state facts giving rise to the complaint, aid in the formulation of the issues, and indicate the relief sought.

The complaint is a document in which the plaintiff alleges jurisdiction, sets forth facts that he or she claims entitle the plaintiff to relief from the defendant, and demands relief. Figure 5.2 provides a sample of a federal complaint. The complaint is filed with the court and served on the defendant.

The answer is a responsive pleading in which the defendant makes admissions or denials, asserts legal defenses, and raises counterclaims. Figure 5.3 provides a sample of a federal answer.

Admissions help to narrow the number of facts that are in dispute. The plaintiff will not have to prove facts at the trial that have been admitted by the defendant in the answer. A denial in the answer, however, creates a factual issue that must be proven at trial. Defendants often will plead one or more **defenses** in the answer. Each defense will consist of facts that the defendant contends may bar the plaintiff from recovery. The defendant may also make a claim for relief against the plaintiff by raising a **counterclaim** in the answer. A counterclaim is appropriate when the defendant has a **cause of action** against a plaintiff arising out of essentially the same set of events that gave rise to the plaintiff's claim. For example, assume that *P* observes *D* fishing without permission on *P*'s land and tells *D* to vacate. If *P* kicks *D* in the back as *D* leaves the property, *P* is committing a battery against *D*. *P* could bring suit against *D* for trespass, and *D* could counterclaim against *P* for the battery. *P* could file a pleading called the **reply** to the defendant's counterclaim. In this reply, the plaintiff may admit, deny, or raise defenses against the factual allegations raised in the counterclaim.

Methods of Service

The complaint is usually served on the defendant at the same time as the **writ of summons**. (Readers saw an example of a summons in Chapter IV, see Figure 4.2.) A summons warns the defendant that a default judgment can be awarded unless the defendant responds with an answer within a stated period of time (often between twenty and forty-five days).[4]

UNITED STATES DISTRICT COURT
. . . . . District of . . . . . .

. . . . . Plaintiff

V.

. . . . . Defendant

Civil Action No. . . . . .

COMPLAINT

JURY TRIAL DEMANDED

This is a civil action seeking damages under the laws of the State of . . . . . for injuries to the person of the plaintiff, and to her automobile, caused by the defendant's negligent and/or willful, wanton, or reckless conduct.

1. The court has jurisdiction of this matter by virtue of the fact that the plaintiff is a citizen of the State of . . . . . , and the defendant, ... is a citizen of the State of . . . . . and the amount in controversy exceeds $75,000 exclusive of interest and costs.
2. This suit is brought pursuant to Section . . . . . of the Revised Statutes.
3. The plaintiff . . . . . is, and at all times material to this action was, a resident of the City of . . . . . , State of . . . . . .
4. The defendant, ... is, and at all times material to this action was, a resident of the City of . . . . . , State of . . . . . .
5. At all times hereinafter mentioned, plaintiff was in the exercise of all due care and caution for her own safety and the safety of others.
6. On January . . . . . 200 . . . . at or about . . . . P.M., plaintiff . . . . . was operating her automobile in a northerly direction along United States Route . . . . at or about . . . . miles north of . . . .
7. On January . . . . . 200 . . . . at or about . . . . P.M., defendant was operating her motor automobile in a southerly direction along United States Route . . . . at or about . . . . miles north of . . . .
8. At that date and time, defendant, ... , negligently operated her vehicle in one or more of the following ways:
   a. Improperly failed to give a signal of her intention to make a turn.
   b. Negligently made an improper left-handed turn, without yielding the right-of-way to traffic coming in the opposite direction.
   c. Negligently failed to yield the right-of-way.
   d. Operated her vehicle on the wrong side of the road.
   e. Negligently failed to keep said vehicle under proper control.
   f. Operated her vehicle in a negligent manner.
   g. Negligently failed to stop her vehicle when danger to the plaintiff was imminent.
9. As a result of one or more of the acts or omissions complained of, the vehicle driven by . . . . . was caused violently to collide with the vehicle driven by . . . . . .
10. As a direct and proximate result thereof, the plaintiff suffered painful, severe and permanent injuries, loss of income, and has incurred, and will continue to incur expenses for medical care and further was caused to expend the sum of $ . . . . to repair the damages to her automobile caused by the accident.

WHEREFORE, plaintiff prays for judgment against the defendant, ... in the sum of dollars ($ . . . .) plus costs.

Plaintiff requests a jury trial.

. . . . . .
Attorney for Plaintiff
Office and P.O. Address
. . . . . .

FIGURE 5.2 Complaint Document

UNITED STATES DISTRICT COURT
. . . . . District of . . . . . .

. . . . . Plaintiff	:	
	:	Civil Action No. . . . .
V.	:	ANSWER
	:	
. . . . . Defendant	:	
	:	JURY TRIAL DEMANDED

Now comes the defendant in the above-captioned action and gives the following answers to the plaintiff's complaint:

1. Denies the allegations of paragraphs 1 and 2 of the complaint.
2. Admits the allegations of paragraphs 3 and 4 of the complaint.
3. Denies the allegations of paragraphs 5 through 10 of the complaint.

FIRST AFFIRMATIVE DEFENSE

This court lacks subject matter jurisdiction as the amount in controversy does not exceed $75,000, exclusive of interest and cost.

SECOND AFFIRMATIVE DEFENSE

Plaintiff was guilty of negligence which was a contributing cause of the accident in that the plaintiff was negligently operating her automobile at the time that same collided with defendant's automobile. The plaintiff is therefore barred from recovery.

WHEREFORE, the defendant demands that the plaintiff's complaint be dismissed and that the costs of this action be awarded the defendant.

Defendant claims a trial by jury.

. . . . . .
Attorney for Defendant
Office and P.O. Address
. . . . . .
. . . . . .

FIGURE 5.3 Answer

The summons must be served in time for the defendant to take action in defense. This right is constitutionally guaranteed by the state and federal due process clauses. Several methods to serve the summons can be found in the statute books of each state. These requirements must be precisely followed, and service in *in personam* actions may differ from service in *in rem* actions. Clearly, the most desirable method is to deliver the summons personally to the defendant. Some jurisdictions require that the summons be served within a specified period of time. The Federal Rules of Civil Procedure, for example, require service within 120 days of the filing of the complaint. The summons, sometimes called **process**, is generally served by a process server or sheriff.

The federal rules reward defendants who voluntarily waive their right to be formally served with process. These defendants are allowed sixty days, instead of just twenty days, to respond to the complaint. The benefit to plaintiffs is in not having to pay someone to serve the summons and complaint. Defendants who refuse to honor a requested waiver of service can be required to pay the service costs unless they can show good cause for the refusal.

In addition to having the summons personally served on a defendant, many states permit service by certified or registered mail, return receipt requested. This method is increasingly preferred because it is inexpensive and generally effective.

When **personal service** of a summons and the complaint to a defendant is not possible, the law often permits what is called **substituted service**. This method involves mailing the summons and complaint to the defendant by certified mail and leaving these documents at the defendant's home with a person who resides there and who is of "suitable age and discretion." Traditionally this means someone age fourteen or over. If the plaintiff is suing a corporation, the statutes usually authorize the use of substituted service on a designated agent or even a state official such as the secretary of state or the commissioner of insurance. The agent or official then sends a copy of the documents to the corporation. In some circumstances, the statutes provide for **constructive service**, which means publishing the notice of summons in the legal announcements section of newspapers. Traditionally the law has required that the summons be published for three weeks.

A defendant who has been properly served with a summons and complaint *defaults* by failing to file a written answer in a timely manner. The court can then award judgment to the plaintiff for the sum of money or other legal relief that was demanded in the complaint. In a default judgment, the defendant loses the right to object to anything that is incorrect in the complaint.

In the following case, the plaintiff was awarded a default judgment against the defendant. The defendant in *Dorsey v. Gregg* sought to vacate the default judgment because the trial court lacked jurisdiction over his person due to the inadequacy of the service.

Dorsey v. Gregg
784 P.2nd 154
Court of Appeals of Oregon
January 13, 1988

Richardson, Presiding Judge

Defendant seeks vacation of a default judgment, contending that the trial court lacked jurisdiction over him. We reverse.

Plaintiff's complaint was filed on December 5, 1985. Defendant, a student of the University of Oregon, lived in Eugene. He was a member of a fraternity but did not reside at the fraternity house. Personal service was attempted at the fraternity house from December 29 through February 19, 1986. No attempt was made to serve defendant at his residence even though his address was available from the university. On March 4, the trial court granted plaintiff's motion for alternative service. The motion was supported by the affidavit of Hoyt, which states:

> "I am an employee of Barristers' Aid, Inc., a civil process service corporation engaged in delivery of documents among attorneys and in serving civil process in the Lane County area. From on or about December 29, 1985, [to] February 18, 1986, I have made numerous attempts to serve the Defendant, Joseph Gregg, at his fraternity. On various occasions I would call in advance and find that his vehicle was there, or that they expected him to eat dinner at the fraternity that evening. However, upon arriving there in the evening for purposes of serving Mr. Gregg, various individuals there would profess that he no longer resides at the fraternity, nor that he ever eats at the facility nor visits.
>
> "It has become apparent to me and other individuals in our office who have attempted service upon Mr. Gregg, that the members of the fraternity are 'covering' for him, and are not cooperating in allowing us to learn his whereabouts at any given time.
>
> "It is my opinion that, if service was made upon a member of the fraternity, due notice of that would be conveyed to Mr. Gregg from earlier statements of members that he remained in the Eugene-Springfield area, and attended fraternity house functions."

The trial court authorized service "upon a person in charge or other resident member present" at the fraternity and by certified mail, return receipt requested,

addressed to defendant's father at a Beaverton address.

Defendant first contends that the trial court erred in ordering the alternative service, because Hoyt's supporting affidavit was insufficient under ORCP 7D(6)(a). That rule provides, in relevant part:

> "On motion upon *a showing by affidavit that service cannot be made by any method otherwise specified in these rules* or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of defendant, return receipt requested, deliver to addressee only; or posting at specified locations." (Emphasis supplied.)

In *Dhulst and Dhulst*, 657 P.2d 231 (1983), the trial court ordered alternative service on the husband by publication and registered mail. The supporting affidavit addressed the reasons why the husband could not be personally served, but it was silent about the other types of service authorized by ORCP 7D(3)(a)(I). We held that, because the affidavit was insufficient to support alternative service under ORCP 7D(6)(a), "the trial court [had] erred in ordering [the alternative service]. Because [the alternative service] was improper, the trial court lacked personal jurisdiction over [the] husband." The default decree against the husband was therefore set aside.

Here, Hoyt's affidavit makes no mention of any attempt to locate and serve defendant at his "dwelling house or usual place of abode." ORCP 7D(3)(a)(I). It only details attempts to serve defendant at the fraternity house where he had not resided for at least a year before the filing of this action.... The affidavit fails to comply with the requirement of ORCP 7D(6)(a), and the trial court erred in ordering alternative service. The alternative service was therefore invalid, and the trial court lacked personal jurisdiction over defendant.

Reversed and remanded with instruction to vacate the judgment.

Case Questions

1. Why is the law so concerned with proper service of process?
2. Why did the Oregon Court of Appeals rule that the alternative service of process was invalid?
3. If the circumstances allow a court in the plaintiff's state to assert jurisdiction over an out-of-state defendant, what is the proper method of serving process?

Pretrial Motions

The second stage of the litigation process involves decisions about whether motions are filed prior to trial. Sometimes a defendant's lawyer, after receiving the plaintiff's complaint, will decide to challenge the complaint because of legal insufficiency. For example, the complaint might be poorly drafted and so vague that the defendant can't understand what is being alleged, whether the venue might be wrong, or whether there might be some problem with service. In such situations the attorney may choose to file a **motion to dismiss** (sometimes also called a **demurrer** or a "12(b) motion" in some jurisdictions) prior to preparing the answer. A motion to dismiss is often used by a defendant to challenge perceived defects in the plaintiff's complaint. Common grounds for this motion include the lack of subject matter jurisdiction or *in personam* jurisdiction, improper or inadequate service of the summons, and failure to state a claim upon which relief can be granted. The motion to dismiss is decided by a judge, and jurisdictions differ about permitting the attorneys to argue orally the merits of the motion. If the judge grants the motion, the plaintiff will often try to cure any defect by amending the complaint. If the judge denies the motion, the defendant will normally submit an answer. Alleged defects in the answer and reply can also be raised through a motion to dismiss or an equivalent motion used for that purpose in a particular jurisdiction.

INTERNET TIP

In *DuPont v. Christopher*, the defendants claimed that DuPont had failed to state a claim upon which relief could be granted. The defendants maintained that their conduct was not prohibited by Texas statutory or case law. You can read this "retired case" on the textbook's website.

The **motion for summary judgment** can be made by either or both parties. It is intended to dispose of controversies when no genuine issues of material fact exist, or when the facts necessary to prove the other party's case are not provable or are not true. The motion is supported with proof in the form of affidavits and depositions. This proof is used to illustrate that there is no need to conduct a trial because there is no factual dispute between the parties. The party opposing the motion will present affidavits and depositions to prove the existence of contested issues of fact. Such proof may also be used to show the impossibility of certain facts alleged by an opposing party. For example, a complaint might accuse a defendant of various counts of negligence in operating a car. However, if the defendant was in jail that day, it could be proved that he or she could not possibly have committed the acts in question. The defendant in this instance would move for a summary judgment. Motions for summary judgment are disfavored by courts because, when granted, a party is denied a trial.

Summary judgment should not be granted if there is a genuine issue of material fact because it would deprive the parties of their right to a trial.

Discovery and Pretrial Conference

To prevent surprise at the trial, each party is provided with tools of **discovery** before trial in order to identify the relevant facts concerning the case. Discovery is based on the premise that prior to a civil action each party is entitled to information in the possession of others. This includes the identity and location of persons, the existence and location of documents, known facts, and opinions of experts.

There is a distinction between the right to obtain discovery and the right to use in court the statements or information that are the product of discovery. The restrictions that are made concerning the admissibility in court of the product of discovery are discussed later in the chapter. The requirements for discovery are as follows: The information sought cannot be privileged, it must be relevant, it cannot be the "work product" of an attorney, and if a physical or mental examination is required, good cause must be shown.

The most common tools of discovery are **oral depositions**, written interrogatories to parties, production of documents, physical and mental examinations, and requests for admissions. In an **oral deposition**, a witness is examined under oath outside court before a person legally authorized to conduct depositions (usually a court reporter, or if the deposition is being videotaped, by a video technician who is similarly authorized by law). The party wishing the deposition must give notice to the opposing party to the suit so that person may be present to cross-examine the witness. The questioning of the witness at an oral deposition is thus much the same as it would be in a courtroom. **Written interrogatories** to the parties are lists of questions that must be answered in writing and under oath. Interrogatories are submitted only to the parties to the case, not to witnesses. Because the rules of discovery can differ in federal and state courts, lawyers may take this into consideration in making a choice of forum. A state court, for example, might only permit an attorney to ask a party to answer thirty questions by written interrogatories, whereas fifty questions might be permissible under the federal rules.

One party to the suit may compel the **production of documents** or things in the possession of the other party for inspection. When the mental or physical condition of a party is at issue, a court may order the party to submit to a **mental examination** or **physical examination** by a physician. Finally, one party may send to the other party a **request for admissions or denials** as to certain specified facts or as to the genuineness of certain documents. If no reply is made to such a request, the matters are considered admitted for the purpose of the suit.

All discovery except for physical examinations can be done without a court order. In case of noncompliance, the discovering party may request a court order to compel compliance. Failure to comply with the court order results in imposition of the sanctions provided in the discovery statute.

Discovery may begin after the filing of the complaint, but usually commences after the answer is filed and continues until trial. In addition, a **pretrial conference** may be called by the judge to discuss the issues of the case. A judge and the two opposing lawyers discuss and evaluate the controversy informally. They consider the simplification and sharpening of the issues, the admissions and disclosure of facts, possible amendments to the pleadings, the limitation of the number of witnesses, the possibility of reaching an out-of-court settlement, and any other matters that may aid in the speedy and just disposition of the action.

The importance of discovery cannot be overestimated. Discovery results in the disclosure of unknown facts and reveals the strengths and weaknesses of each side's proof, and is an educational process for the lawyers and their clients. Each side is, in sports terminology, "scouting" their opponent and learning what they plan to prove and how they intend to do it if the case goes to trial. Justice is not supposed to be determined based on surprise witnesses, trickery, and deceit. Discovery allows the parties to identify the core issues, pin witnesses down so they can't easily change their views at trial, determine witness credibility, especially in the case of experts, and clarify where impeachment and cross-examination will be effective.

Lawyers who fail to comply with discovery rules can gain an outcome-determinative tactical advantage over their opponents when a case comes to trial. When this occurs, the injured party has the right to ask for judicial intervention and seek the imposition of sanctions against the offending party.

The defendant in the following case brought a motion to sanction the defendant for not complying with the rules of discovery with respect to written interrogatories. The defendant alleged that because of plaintiff's conduct it had become necessary for the defendant to ask the court to compel defendant to answer the interrogatories. The trial court appointed an attorney to hold a hearing and investigate the facts of this matter and report to the court. The appointed attorney, called the "discovery referee," advised the court that the plaintiff had not acted in good faith and had violated the rules of discovery, and recommended that the court sanction the plaintiff. The trial court followed the discovery referee's recommendation and the plaintiff appealed this decision to the state intermediate appellate court.

Michael H. Clement v. Frank C. Alegre
A123168
Court of Appeals of California, First District, Division Two
September 23, 2009

Kline, P. J.
Twenty-three years ago, the Legislature enacted the Civil Discovery Act of 1986… (the Act), a comprehensive revision of pretrial discovery statutes, the central precept of which is that civil discovery be essentially self-executing. More than 10 years ago, *Townsend v. Superior Court* (1998) … (*Townsend*) lamented the all too often interjection of "ego and emotions of counsel and clients" into discovery disputes, warning that "[l]ike Hotspur on the field of battle, counsel can become blinded by the combative nature of the proceeding and be rendered incapable of informally resolving a disagreement…. *Townsend* counseled that the "informal resolution" of discovery disputes "entails something more than bickering with [opposing counsel]."…. Rather, the statute "requires that there be a serious effort at negotiation and informal resolution."…

This case illustrates once again the truth of *Townsend's* observations, as well as highlighting the lengths to which some counsel and clients will go to avoid providing discovery (in this case by responding to straightforward interrogatories with nitpicking and meritless objections), resulting in delaying proceedings, impeding the self-executing operation of discovery,

and wasting the time of the court, the discovery referee, the opposing party, and his counsel.

Plaintiffs Michael H. Clement and Michael H. Clement Corp. (plaintiffs) appeal from the Contra Costa County Superior Court's imposition of $6,632.50 as discovery sanctions. The sanctions were awarded against plaintiffs for interposing objections to special interrogatories propounded by defendant and respondent Frank C. Alegre, which objections the discovery referee found to be "unreasonable, evasive, lacking in legal merit and without justification." ….

Background

Plaintiffs sued defendant… in connection with a dispute arising out of the sale of real property by plaintiffs to defendant. (The substantive facts of the underlying action are not relevant to the merits of the issues raised on this appeal.)

On November 12, 2007, defendant Alegre served two identical sets of 23 special interrogatories on plaintiffs: one set to plaintiff Clement, the individual, and one set to plaintiff corporation…. The interrogatories requested information on damages, causation, and the existence of a loan commitment. Plaintiffs answered three of the interrogatories and interposed objections to twenty….

The objection to the term "economic damages" as vague and ambiguous was interposed to interrogatory Nos. 1 and 6. The objection that the interrogatories violated section 2030.060 … because each was not "full and complete in itself" was interposed to interrogatory Nos. 2 through 5, 7 through 16, 18, 20, 22 and 23….

On January 29, 2008, defendant moved to compel further responses to the special interrogatories, to strike objections, and for sanctions against plaintiff corporation and [plaintiff's] attorney Goldstein….

The matter was heard by discovery referee Laurence D. Kay on August 14, 2008, nine months after the interrogatories had been propounded. On August 20, 2008, the referee found…that plaintiffs had "deliberately misconstrued the question" insofar as they contended the phrase "economic damages" was too vague. He further found with respect to plaintiffs' claim that an interrogatory that referenced a prior interrogatory was not full and complete in itself, that the case cited by plaintiffs was "inapposite and the objection frivolous." The referee determined "the objections and each of them to be unreasonable, evasive, lacking in legal merit and without justification….

Consequently, the referee recommended that plaintiffs be ordered to provide further answers without any of the objections previously interposed and recommended sanctions be imposed by the court as follows: Plaintiffs were to reimburse defendant $4,950 for legal fees, plus $40 for filing the motions to compel and $1,642.50 for defendant's one-half of the referee fee for referee time spent exclusively on the motion (not including one and one-half hours of hearing time on the motion, as other motions were heard at that same hearing). The court adopted the referee's order on September 5, 2008 and the order was entered on September 10, 2008. This timely appeal followed….

Discussion

A. Monetary Sanctions Authorized

> "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct…. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." …
>
> "'Misuse of the discovery process includes failing to respond or submit to authorized discovery, providing evasive discovery responses, disobeying a court order to provide discovery, unsuccessfully making or opposing discovery motions without substantial justification, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so." …

B. Standard of Review

"We review the trial court's order imposing the sanction for abuse of discretion…. We resolve all evidentiary conflicts most favorably to the trial court's ruling …, and we will reverse only if the trial court's action was `"`arbitrary, capricious, or whimsical …"

C. Vagueness Objection to "Economic Damages" Term

Plaintiffs assert that "economic damages" was not a defined term in defendant's discovery and that the term was, therefore, ambiguous. This contention is preposterous in the circumstances presented…

Ample evidence supports the referee's determination that plaintiffs "deliberately misconstrued the question." Plaintiffs themselves quoted the statute defining the term in their initial response. Yet, they objected, and then deliberately provided an answer using a definition narrower than that provided by statute. Somewhat artfully, plaintiffs urge that Goldstein agreed in his January 23, 2008 letter to respond to any definition of economic damages that plaintiffs

chose to provide. However, even after defendant's counsel advised that the term was being used as defined in the statute plaintiffs had cited, plaintiffs did not answer the question, but demanded that defendant supply the definition in writing and allow them an extra 30 days from the date of receipt in which to respond. Clearly this was "game-playing" and supports the referee's findings and the sanctions award….

Sanctions were warranted here, as plaintiffs' objection to the term "economic damages" was without "substantial justification" and their responses to those interrogatories were evasive….

D. Objection That Question Was Not "Full and Complete in and of Itself"

Plaintiffs' objections to most of the interrogatories propounded by defendant were based on the assertion that an interrogatory failed to comply with the statutory requirement that each be "full and complete in and of itself," where it referred to a previous interrogatory….

Plaintiffs do not contend that any of the interrogatories to which they objected on this basis were unclear, or that the interrogatories, considered either singly or collectively, in any way undermined or violated the presumptive numerical limit of 35 interrogatories of section 2030.030. Yet plaintiffs seized on what might have been at most an arguable technical violation of the rule, to object to interrogatories that were clear and concise where the interrogatories did not even arguably violate the presumptive numerical limitation set by statute. In so doing, plaintiffs themselves engaged in the type of gamesmanship and delay decried by the drafters of the Act….

It is a central precept to the Civil Discovery Act of 1986… that civil discovery be essentially self-executing…. A self-executing discovery system is "one that operates without judicial involvement." … Conduct frustrates the goal of a self-executing discovery system when it requires the trial court to become involved in discovery because a dispute leads a party to move for an order compelling a response…. On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery….

We have no difficulty in affirming the trial court's determination that in this case plaintiffs forced to court a dispute that was not "genuine." Indeed, the record here strongly indicates that the purpose of plaintiffs' objections was to delay discovery, to require defendants to incur potentially significant costs in redrafting interrogatories that were clear and that did not exceed numerical limits, and to generally obstruct the self-executing process of discovery. That plaintiffs seized upon an arguable deficiency in the interrogatories based on slim authority, does not provide "substantial justification" for their objections. The trial court could look at the whole picture of the discovery dispute and was well within its discretion in rejecting plaintiffs' claim of substantial justification….

…[R]esort to the courts easily could have been avoided here had both parties actually taken to heart Justice Stone's admonitions in Townsend that "the statute requires that there be a serious effort at negotiation and informal resolution." … Perhaps after 11 years it is necessary to remind trial counsel and the bar once again that "[a]rgument is not the same as informal negotiation"… that attempting informal resolution means more than the mere attempt by the discovery proponent "to persuade the objector of the error of his ways" …; and that "a reasonable and good faith attempt at informal resolution entails something more than bickering with [opposing] counsel…. Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate." …

Disposition

Discovery Order No. 1, granting defendant's motions… to compel and awarding sanctions, is affirmed. Defendant shall recover his costs on this appeal…

Case Questions

1. What should a party do when an opponent fails to follow the rules of civil procedure with respect to discovery?
2. The media often depict courtroom lawyers using surprise witnesses and evidence. In reality, thorough discovery usually destroys any possibility of surprise. Is this good or bad?
3. Exhaustive discovery is very expensive. One party will frequently be able to afford more discovery than his or her opponent. Does that change your mind about the value of discovery?

How do the discovery rules seek to encourage ethical conduct in the context of the adversarial process of litigation?

CIVIL TRIALS

A trial is a legal procedure that is available to parties who have been otherwise unwilling or unable to resolve their differences through negotiations, settlement offers, and even mediation attempts. Trials involve the staging of a confrontation between the plaintiff and the defendant as contradicting witnesses, and arguments collide in a courtroom in accordance with procedural and evidentiary rules. The trial process may, as a result of appeals and/or new trials, take many years, but it will ultimately result either in a dismissal of the complaint or in a judgment.

In some cases, parties waive a jury trial, preferring to try their case before a judge. (This is called a **bench trial**.) Bench trials can be scheduled more quickly, and they take less time to conclude because the procedures associated with the jury are eliminated. Bench trials also cost the parties and taxpayers less money than jury trials.

The right to a federal jury trial is provided by the Seventh Amendment to the U.S. Constitution to parties involved in a common law civil action. The right to a jury trial in the state judicial system is determined by state law and may not exist for some types of actions, such as equitable claims and small claims cases. Federal rules permit parties to stipulate to less than twelve jurors, and local court rules often provide for six.

The judge is responsible for making sure that (1) the jury is properly selected in a jury trial, (2) due process requirements for a fair trial are satisfied, (3) proper rulings are made with respect to the admissibility of evidence, (4) the rules of procedure are followed by the parties, and (5) the judgment is awarded in accordance with law.

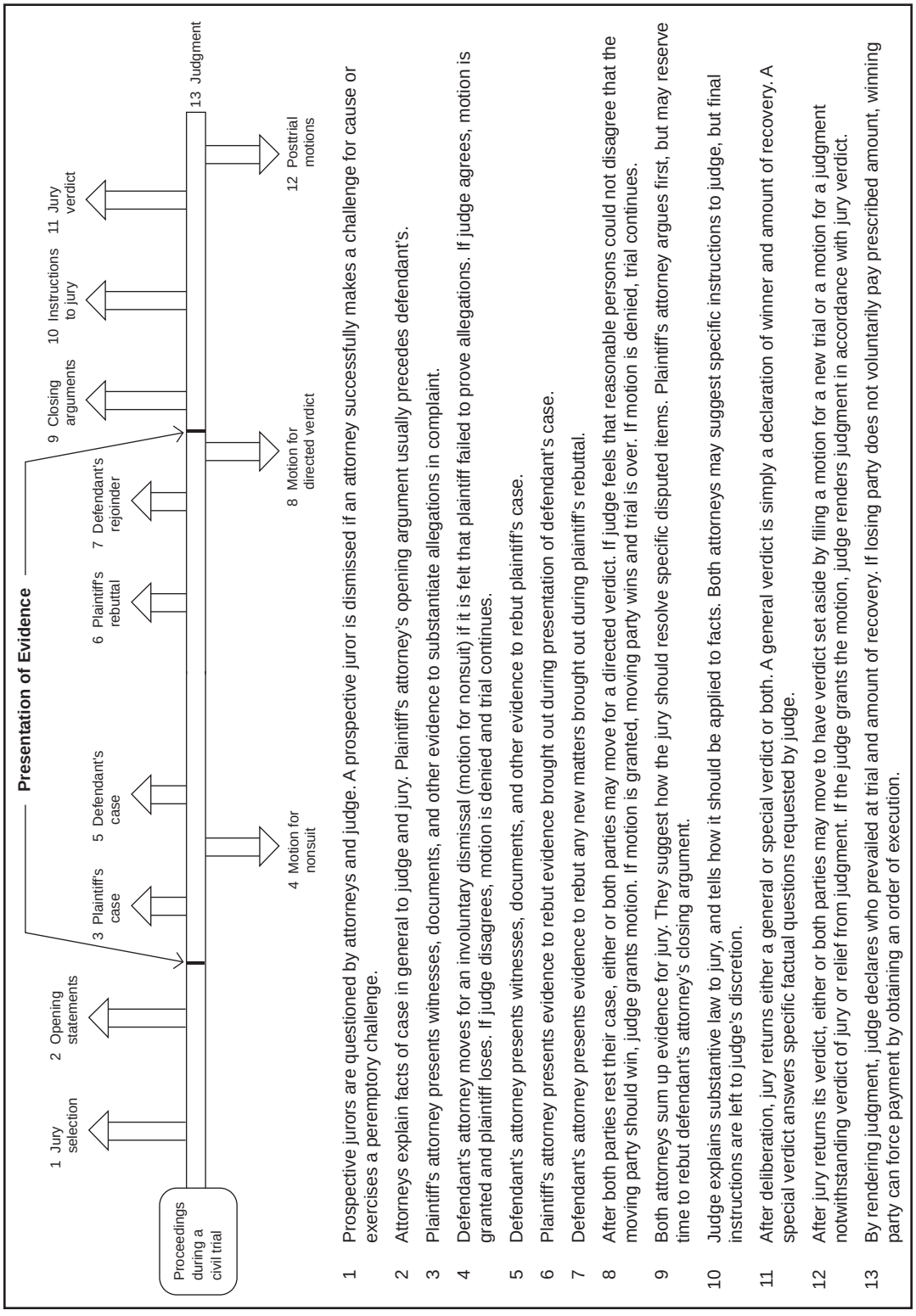
Selection of the Jury

The procedure discussed here applies only to jury trials (see Figure 5.4). Jurors are selected at random from a fair cross section of the community and summoned to the courthouse for jury duty.[5] After a case has been assigned to a courtroom, the judge calls in a group of prospective jurors, who take their seats in the jury box. A **voir dire** (literally, "to speak the truth") examination is conducted to determine each juror's qualifications for jury duty under the appropriate statute, and any grounds for a challenge for cause, or information on which to base a peremptory challenge. A challenge for cause may be based on prejudice or bias. A juror's relationship, business involvement, or other close connection with one of the parties or attorneys may also be considered cause for replacing a juror. Attorneys for both sides may make as many challenges for cause as they wish, and it is within the judge's sound discretion to replace a juror for cause. In addition to the challenges for cause, each party is given a limited number of peremptory challenges that may be exercised for any reason other than race (*Baton v. Kentucky*, 476 U.S. 79 [1986]) or gender (*J. E. B. v. Alabama* ex rel. T.B., 511 U.S. 127 [1994]).

Opening Statements and Examination of Witnesses

After a jury has been selected and sworn, the trial begins with an opening statement by the plaintiff's attorney. The opening statement explains the case in general, including the attorney's legal theories and what he or she intends to prove. The defendant's lawyer may also present an opening statement introducing legal theories of the case and the facts the defense intends to prove.

In order to win the case, the plaintiff must prove the disputed allegations of the complaint by presenting evidence. Witnesses and exhibits are produced by both parties to the suit. If witnesses do not voluntarily appear to testify, they may be ordered by means of a **subpoena** (see Figure 5.5)



1 Prospective jurors are questioned by attorneys and judge. A prospective juror is dismissed if an attorney successfully makes a challenge for cause or exercises a peremptory challenge.

2 Attorneys explain facts of case in general to judge and jury. Plaintiff's attorney's opening argument usually precedes defendant's.

3 Plaintiff's attorney presents witnesses, documents, and other evidence to substantiate allegations in complaint.

4 Defendant's attorney moves for an involuntary dismissal (motion for nonsuit) if it is felt that plaintiff failed to prove allegations. If judge agrees, motion is granted and plaintiff loses. If judge disagrees, motion is denied and trial continues.

5 Defendant's attorney presents witnesses, documents, and other evidence to rebut plaintiff's case.

6 Plaintiff's attorney presents evidence to rebut evidence brought out during presentation of defendant's case.

7 Defendant's attorney presents evidence to rebut any new matters brought out during plaintiff's rebuttal.

8 After both parties rest their case, either or both parties may move for a directed verdict. If judge feels that reasonable persons could not disagree that the moving party should win, judge grants motion. If motion is granted, moving party wins and trial is over. If motion is denied, trial continues.

9 Both attorneys sum up evidence for jury. They suggest how the jury should resolve specific disputed items. Plaintiff's attorney argues first, but may reserve time to rebut defendant's attorney's closing argument.

10 Judge explains substantive law to jury, and tells how it should be applied to facts. Both attorneys may suggest specific instructions to judge, but final instructions are left to judge's discretion.

11 After deliberation, jury returns either a general or special verdict or both. A general verdict is simply a declaration of winner and amount of recovery. A special verdict answers specific factual questions requested by judge.

12 After jury returns its verdict, either or both parties may move to have verdict set aside by filing a motion for a new trial or a motion for a judgment notwithstanding verdict of jury or relief from judgment. If the judge grants the motion, judge renders judgment in accordance with jury verdict.

13 By rendering judgment, judge declares who prevailed at trial and amount of recovery. If losing party does not voluntarily pay prescribed amount, winning party can force payment by obtaining an order of execution.

FIGURE 5.4 Proceedings During a Civil Trial

UNITED STATES DISTRICT COURT
FOR THE . . . . . DISTRICT OF . . . . .
. . . . . DIVISION

. . . . . .
Plaintiff,

v. Civil Action No. . . . . .

. . . . . .
Defendant.

To: . . . . . ***[name and address of witness]***
You are commanded to appear in the United States District Court for the . . . . . District of . . . . . , at . . . . . in the City of . . . . . , State of . . . . . on the . . . . . day of . . . . . , 20 . . . . . at . . . . . o'clock . . . . ..M. to testify on behalf of . . . . . in the above pending action.
Dated . . . . . , 20 . . . . . .
[Name and address of attorney]

[Signature and title of clerk]

[Seal]

FIGURE 5.5 Subpoena—For Attendance of Witness [FRCP 45(a)]

to appear in court. A **subpoena duces tecum** issued by the court commands a witness to produce a document that is in his or her possession. If witnesses refuse to appear, to testify, or to produce required documents, or if they perform any act that disrupts the judicial proceedings, they may be punished for contempt of court.

Judges have much discretion with respect to the order of production of evidence. Normally, a plaintiff's attorney presents the plaintiff's case first. The attorney presents witnesses, documents, and other evidence, and rests the case when he or she decides that enough evidence has been produced to substantiate the allegations. Defendant's lawyer then presents the defendant's case in the same manner. When the defense is finished, the plaintiff's attorney may introduce additional witnesses and exhibits in rebuttal of the defense's case. If new matters are brought out by the rebuttal, the defendant may introduce evidence in rejoinder, limited to answering the new matters.

Both attorneys introduce their own witnesses and question them. This is called **direct examination**. The opposing attorney **cross-examines** the witnesses after the direct examination is completed. Attorneys may conduct **redirect examinations** of their own witnesses following the cross-examinations. Attorneys generally may not ask their own witnesses leading questions (except for preliminary questions to introduce a witness or questions to a hostile witness). A **leading question** is one that suggests the answer to the witness. For instance, if an attorney asks, "You've never seen this gun before, have you?" the witness is almost told to answer no. Leading questions are permissible on cross-examination because they promote the purpose of cross-examination: testing the credibility of witnesses.

Upon cross-examination, for example, an attorney could ask a witness the following question: "Isn't it true, Mr. Smith, that you are a firearms expert?"

RULES OF EVIDENCE

Since 1975, federal trials have been conducted pursuant to the Federal Rules of Evidence (FIRE). Although each state is entitled to promulgate its own rules, most states have chosen to adopt the federal rules as their "state rules." Rules of evidence apply to jury and nonjury trials, although they are applied less strictly in the latter. Many of the so-called "rules" are actually more like policy statements because many provide judges with considerable discretion in their application. Trial judges use the rules to control the admissibility of evidence, and their decisions are generally upheld on appeal unless there has been a clear abuse of discretion. Judges will instruct jurors to disregard evidence that has been improperly presented to them, but it is difficult to evaluate the effect that this excluded evidence has on the jurors' decision-making process. Once jurors have heard testimony, they may not be able to simply forget what they have seen and heard. In some situations, the judge may conclude that significant prejudice has occurred and that instructing the jury is an inadequate remedy. When this occurs, a mistrial will be declared.

Relevance and Materiality

Evidence, whether it be testimony, demonstrative evidence (such as photographs, charts, and graphs), or physical evidence, is admissible only if it is **relevant**. That is, it must logically tend to prove or disprove some issue of consequence that is in dispute at the trial. Irrelevant evidence confuses the jury, wastes court time, and is often prejudicial. Relevancy is sometimes confused with materiality, which has to do with the probative value of evidence. *Probative evidence* tends to prove something of importance to the case. Relevant evidence that has "significant" probative value is "**material**." Evidence that is either immaterial or irrelevant should be excluded.

Competency

Evidence must be **competent** (legally adequate) to be admissible. Competency is a broad concept. To be competent, witnesses have to take an oath or affirm that they will testify truthfully. A nonexpert witness is limited to testimony about what he or she has heard or seen firsthand; the opinions and conclusions of such a witness are "incompetent."

As fact-finder, the jury must draw its own conclusions from the evidence. However, where special expertise is required to evaluate a fact situation, a jury may not be competent to form an opinion. In that case, a person with special training, knowledge, or expertise may be called to testify as an expert witness. Doctors, for example, are frequently called as expert witnesses in personal injury cases. The qualifications and expertise of such witnesses must be established to the court's satisfaction before an expert witness's opinion is admissible.

The Best Evidence Rule

The **best evidence rule** requires that, unless they are unobtainable, original documents rather than copies be introduced into evidence. Even when the original writing is unobtainable, secondary evidence of the contents is admissible only if the unavailability is not the fault of the party seeking to introduce the evidence. In this situation, the best available alternative proof must be presented. For example, a photocopy of a writing is preferred over oral testimony as to its contents.

The Hearsay Rule

The **hearsay evidence rule** excludes witness testimony that does not proceed from the personal knowledge of the witness but instead from the repetition of what was said or written outside court by another person, and is offered for the purpose of establishing the truth of what was written or said. The person who made the out-of-court statement may have been lying, joking, or speaking carelessly. The witness reporting the statement in court may have a poor memory. This exclusionary rule guarantees the opportunity to cross-examine the person

who made the out-of-court statement and prevents highly unreliable evidence from being considered.

The hearsay rule contains many exceptions. The **spontaneous declarations exception** (in legalese called *res gestae*) permits courts to admit in court spontaneous declarations uttered simultaneously with the occurrence of an act. The basis for the admission is the belief that a statement made instinctively at the time of an event, without the opportunity for formulation of a statement favorable to one's own cause, is likely to be truthful.

INTERNET TIP

Readers wishing to read an interesting case involving the admissibility of hearsay evidence will want to read *Barbara Harris v. Toys R Us* on the textbook's website. In this case, a children's motorized vehicle weighing ten pounds was alleged to have fallen from the middle shelf of a three-tiered commercial shelving unit in a Toys R Us store. The falling vehicle allegedly struck customer Barbara Harris on her head while she was shopping, knocking her to the floor and causing her injury.

Communicative Privileges

The general rule is that all persons who can provide relevant, competent, and material information that would help the fact finder search for the truth are required to testify at trial. But the law also provides some exceptions where certain communications, for reasons of public policy, are recognized by constitutional provision, statute, judicial decision, or rule of evidence as being privileged. Privileges exist for reasons of public policy. Where a **privilege** exists, a person benefitted by the privilege (called the **holder**) is entitled to refuse to testify or to block some other person from testifying as a witness. Because privileges permit the withholding of important evidence at trial, they are disfavored by courts. This means that privileges are narrowly construed and only recognized when the facts clearly demonstrate that interest being protected by the privilege would be threatened if the testimony were to be given.

Probably the best-known privilege is the privilege against self-incrimination, which is written in the Fifth and Fourteenth Amendments to the U.S. Constitution. This privilege permits individuals to refuse to disclose information (in most circumstances) that might expose them to a criminal prosecution. (This is the privilege against self-incrimination that is protected by the *Miranda* warnings.)

Traditionally the law has recognized two types of privileges that are intended to protect spousal relationships and the institution of marriage: the marital testimonial privilege and the confidential marital communications privilege. The marital testimonial privilege permits one spouse to refuse to testify in a criminal case in which the other spouse is the defendant. The non-accused spouse is the holder of this privilege and decides whether to testify or claim this privilege. The marital communications privilege permits a spouse from being involuntarily forced to testify in any proceeding against the other spouse about the content of a private marital communication between the two. The marital privileges usually can be waived and do not apply to cases in which the spouses clearly have adverse interests (such as in spousal battery, divorce, or child neglect, abuse, or support cases). In cases like these, permitting the spouse's testimony is essential to the action, and there is no intact intimate marital relationship interest to protect. Many states no longer recognize the testimonial privilege, and states differ as to the exact requirements for the confidential marital communications privilege.

The wife of the appellant in the next case claimed the marital testimonial privilege and refused to testify against her criminally accused husband. The prosecution used statements the wife had voluntarily given to the police and a nurse as evidence at the preliminary hearing. The use of these statements in this manner to convict the husband was appealed to the Utah Supreme Court.

State of Utah v. Travis Dee Timmermann
2009 UT 58
Supreme Court of Utah
September 4, 2009

Durham, Chief Justice:

Introduction
Travis Timmerman was charged with attempted rape, forcible sexual abuse, and assault. At the preliminary hearing, the victim, Mrs. Timmerman, invoked her spousal privilege not to testify against her husband. The State then introduced into evidence Mrs. Timmerman's previous statements to the police and to a sexual assault nurse. With those statements, the magistrate bound Mr. Timmerman over for trial. Mr. Timmerman subsequently filed a motion to quash the bindover. The district court denied the motion and held that the admission of Mrs. Timmerman's statements did not violate Mr. Timmerman's constitutional rights or Mrs. Timmerman's spousal testimonial privilege. Mr. Timmerman now appeals the district court's denial of his motion. We are asked to consider whether the Confrontation Clauses of the United States Constitution and Utah Constitution apply to preliminary hearings and whether the spousal testimonial privilege embodied in the Utah Constitution applies to a spouse's voluntary, out-of-court statements. We affirm the trial court.

Background
During the early morning hours of June 30, 2007, the Timmermans' neighbor heard a woman screaming "Stop it!" and "Help me!" The neighbor thought the screams came from the Timmermans' house. Around 7:00 a.m., the neighbor notified the police. Officer McLelland responded and spoke with Mrs. Timmerman. During their conversation, Officer McLelland observed bruises on her arms and face. He asked Mrs. Timmerman to fill out a witness statement. In her three-page statement, Mrs. Timmerman wrote that Mr. Timmerman repeatedly hit her and tried to force her to have … intercourse.

Another police officer, Detective Harding, interviewed Mrs. Timmerman and asked her to submit to a sexual assault examination at the hospital. When Mrs. Timmerman arrived at the hospital, a sexual assault nurse examined her and filled out a Sexual Assault Nurse Examination (SANE) report. In the report, the nurse cataloged Mrs. Timmerman's bruises and her statements that Mr. Timmerman hit her and tried to have forced sex with her.

Mr. Timmerman was charged with attempted rape, a first-degree felony; forcible sexual abuse, a second-degree felony; and assault, a class B misdemeanor.... At the preliminary hearing, the State called Mrs. Timmerman as a witness, but she invoked her spousal privilege not to testify against her husband. Instead, Officer McLelland and Detective Harding testified for the State, and the State introduced Mrs. Timmerman's witness statement and SANE report. Mr. Timmerman objected to the admission of the statement and the report on the grounds that they violated Mrs. Timmerman's spousal privilege and Mr. Timmerman's confrontation rights under the federal and state constitutions. The magistrate admitted both documents and bound Mr. Timmerman over for trial.

In his motion to quash the bindover before the district court, Mr. Timmerman argued that his confrontation rights under the federal and state constitutions were violated because he could not cross-examine Mrs. Timmerman at the preliminary hearing regarding her out-of-court statements. He also argued that the magistrate had ignored Mrs. Timmerman's spousal privilege when he admitted her out-of-court statements into evidence. Without Mrs. Timmerman's statements, there was insufficient evidence to bind Mr. Timmerman over for trial on the attempted rape charge. The district court held that confrontation rights under the federal and state constitutions do not apply to preliminary hearings and that out-of-court statements made by spouses to third parties are not excluded under the spousal testimonial privilege.

Mr. Timmerman subsequently filed this interlocutory appeal.....

Analysis
Mr. Timmerman argues that the right to confrontation in preliminary hearings is guaranteed by the Sixth Amendment of the United States Constitution and by article 1, section 12 of the Utah Constitution. He also argues that the spousal testimonial privilege found in the Utah Constitution prevents the use of out-of-court, voluntary statements.

[Note: Part I of this opinion which contains the Court's discussion of the right to confrontation has been omitted to focus readers on the spousal privilege discussion]

II. The Trial Court Properly Denied the Motion to Quash Because the Constitutional Spousal Testimonial Privilege Applies only to Compelled, In-Court Testimony

Mr. Timmerman argues that the trial court erred when it allowed Mrs. Timmerman's out-of-court statements into evidence even though Mrs. Timmerman invoked her spousal privilege not to testify against her husband. Utah recognizes two different spousal privileges: the spousal testimonial privilege and the spousal communications privilege. The spousal testimonial privilege is defined in article I, section 12 of the Utah Constitution: "[A] wife shall not be compelled to testify against her husband, nor a husband against his wife." The Utah Rules of Evidence codifies the privilege in rule 502(a). In contrast, the spousal communications privilege, as codified in Utah Code section 78B-1-137 and Rule 502(b) of the Utah Rules of Evidence, protects confidential communications between spouses during their marriage. However, the accused spouse cannot invoke the spousal communications privilege if the accused spouse is charged with a crime.... Mr. Timmerman argues that the privileges were violated, but since Mr. Timmerman is accused of a crime against his spouse, he cannot invoke the spousal communications privilege.... Hence, only the spousal testimonial privilege is at issue here.

Mr. Timmerman argues that Mrs. Timmerman's out-of-court statements were improperly admitted after she invoked her spousal testimonial privilege. ....

Article I, section 12 of the Utah Constitution provides, "[A] wife shall not be compelled to testify against her husband." In examining the language of the privilege, we recognize that a privilege should be "strictly construed in accordance with its object,"... because of its "undesirable effect of excluding relevant evidence." .... Because a privilege withholds "relevant information from the factfinder, it applies only where necessary to achieve its purpose."....

The purpose of the spousal testimonial privilege is to foster "the harmony and sanctity of the marriage relationship."..... If spouses were forced to testify against each other, then "the testifying spouse would be placed in the unenviable position of either committing perjury or testifying to matters that are detrimental to his or her spouse, which could clearly lead to marital strife." ...

Construing the privilege strictly, according to its plain language and in light of its purpose, we interpret the spousal testimonial privilege to apply only to compelled testimony, or in other words, involuntary, in-court testimony. We believe this narrow interpretation of the privilege will not serve to exclude relevant testimony or extend the privilege beyond its narrow purpose. Further, admitting an out-of-court statement into evidence does not force one spouse to testify against the other or tempt the testifying spouse to commit perjury.

Criticism of the spousal testimonial privilege further bolsters this narrow interpretation. The privilege enables "abusers to silence their victims" and makes the testifying spouse "vulnerable to coercion from the defendant-spouse and his lawyer." Amanda H. Frost, Updating the Marital Privileges: A Witness-Centered Rationale, 14 Wis. Women's L.J. 1, 34 (1999). Similarly, the Advisory Committee of the Utah Rules of Evidence is convinced that the justifications for the spousal testimonial privilege are insufficient: "[The privilege] does not promote marital felicity, is based on the outmoded concept that the husband and wife are one, and causes suppression of relevant evidence." ... The Advisory Committee recommends that only the spousal communications privilege be preserved and the spousal testimonial privilege be repealed. However, such a change is dependent on a constitutional amendment to article I, section 12 that would remove the spousal testimonial privilege.

In this case, the introduction of Mrs. Timmerman's statements into evidence at the preliminary hearing did not violate her spousal testimonial privilege, which protects a spouse from giving involuntary, in-court statements. Mrs. Timmerman was not forced to testify at the preliminary hearing. She invoked her privilege and was dismissed from the witness stand. In lieu of her in-court testimony, the State introduced Mrs. Timmerman's witness statement and her statements in the SANE report. Mrs. Timmerman made those statements voluntarily. She was not forced to attend a sexual assault examination or write a witness statement. Because the statements were neither compelled nor in-court, the spousal testimonial privilege does not apply.

We also note that barring the statements would not comport with the justifications for the privilege. Whatever degree of marital harmony that previously existed between the Timmermans was most likely absent when Mrs. Timmerman voluntarily gave her statements to the police and to the sexual assault nurse. Blocking her statements from admission into evidence at the preliminary hearing would promote excluding relevant evidence more than it would promote marital harmony. Furthermore, Mrs. Timmerman was not placed in a position where she had to choose either to perjure herself or harm her husband because she was not forced to testify in court...

Because the spousal testimonial privilege does not apply to the voluntary, out-of-court statements given to the police and to the sexual assault nurse, the trial court properly held that the spousal testimonial privilege was not violated and denied the motion to quash the bindover… We therefore affirm.

Associate Chief Justice Durrant, Justice Wilkins, Justice Parrish, and Justice Nehring concur in Chief Justice Durham's opinion.

Case Questions

1. This case illustrates how recognition of a spousal immunity can result in the exclusion of evidence. In this case, the prosecution was able to introduce the victim/wife's statement in lieu of having her testify at trial. Given that the public policy in Utah is to recognize spousal immunity, should the wife/victim have been "advised of her rights" by the police or hospital personnel prior to giving a statement to the SANE nurse?
2. Chief Justice Durham's opinion points out that one of the spousal immunities has been heavily criticized as bad public policy. Do you believe that there is any continuing need for the recognition of either spousal privilege? Explain and defend your position.

INTERNET TIP

Due to the complexity of the marital privilege, interested readers are invited to read the Florida case of *Dennis and Mary Hill v. State of Florida*. This is a criminal case involving confidential communications between husband and wife as well as the psychotherapist-patient privilege, both of which are also recognized under Florida law. You can read this case on the textbook's website.

Also on the website are the Wisconsin statute containing that state's attorney-client privilege rule, and *Raymond Binkley v. Georgette Allen* , a case in which the appellant claimed that the physician-patient privilege permitted her to refuse to disclose during discovery information relating to her use of prescribed medications….

Other privileges involving confidential communications include the doctor-patient privilege and the attorney-client privilege. The doctor-patient privilege applies to confidential information provided by a patient to a doctor for the purpose of treatment. The attorney-client privilege, the oldest common law privilege, protects confidential communications between lawyers and their clients and thereby encourages clients to speak frankly with their lawyers. The privilege applies to all communications between a client and his/her lawyer relating to professional representation. In addition, the attorney's work product, including all matters considered to be part of the preparation of a case, is privileged. These privileges may be waived by the client for whose protection they are intended.

The communications to clergy privilege protects a parishioner who has divulged confidential information to a member of the clergy while seeking spiritual guidance. If the parishioner reveals confidential information to a member of the clergy who is acting in his or her professional religious capacity, this communication can be excluded from evidence at trial as privileged. The modern version of this privilege has very imprecise boundaries, which will become more clear with the evolution of the case law.

Trial Motions

If, after the plaintiff's attorney presents plaintiff's case, the defendant's attorney believes that the plaintiff was unable to substantiate the essential allegations adequately, the defendant may make a **motion for nonsuit**. The judge grants the motion only if a reasonable person could not find in favor of the plaintiff after considering the evidence most favorable to the plaintiff. If the motion is granted, the case is over and the plaintiff loses.