EIGHTEENTH EDITION

BUSINESS LAW:

The Ethical, Global, and Digital Environment

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Mc Graw Hill

Business Law

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The Authors

Jamie Darin Prenkert, Professor of Business Law and the Charles M. Hewitt Professor, joined the faculty of Indiana University's Kelley School of Business in 2002. He is the Associate Dean of Academics for the Kelley School. He served as chair of the Department of Business Law and Ethics from 2014 to 2016 and from 2019 to 2020, having served as an Associate Vice Provost for Faculty and Academic Affairs for the Indiana University–Bloomington campus from 2016 to 2019. Professor Prenkert is a former editor in chief of the *American Business Law Journal* and is a member of the executive committee of the Academy of Legal Studies in Business. His research focuses on issues of employment discrimination and the human rights obligations of transnational corporations. He has published articles in the *American Business Law Journal*, the *North Carolina Law Review*, the *Berkeley Journal of Employment and Labor Law*, and the *University of Pennsylvania Journal of International Law*, among others. He also coedited a volume titled *Law, Business and Human Rights: Bridging the Gap*. Professor Prenkert has taught undergraduate and graduate courses, both in-residence and online, focusing on the legal environment of business, employment law, law for entrepreneurs, business and human rights, and critical thinking. He is a recipient of the Harry C. Sauvain Undergraduate Teaching Award and the Kelley Innovative Teaching Award.

Professor Prenkert earned a B.A. (*summa cum laude*) from Anderson University and a J.D. (*magna cum laude*) from Harvard Law School. Prior to joining the faculty of the Kelley School, he was a senior trial attorney for the U.S. Equal Employment Opportunity Commission.

A. James Barnes, Professor of Public and Environmental Affairs and Professor of Law at Indiana University–Bloomington (IU), previously served as Dean of IU's School of Public and Environmental Affairs and has taught business law at IU and Georgetown University. His teaching interests include commercial law, environmental law, alternative dispute resolution, law and public policy, and ethics and the public official. He is the co-author of several leading books on business law.

From 1985 to 1988, Professor Barnes served as the deputy administrator of the U.S. Environmental Protection Agency (EPA). From 1983 to 1985, he was the EPA general counsel and in the early 1970s served as chief of staff to the first administrator of EPA. Professor Barnes also served as a trial attorney in the U.S. Department of Justice and as general counsel of the U.S. Department of Agriculture. From 1975 to 1981, he had a commercial and environmental law practice with the firm of Beveridge and Diamond in Washington, D.C.

Professor Barnes is a Fellow of the National Academy of Public Administration, and a Fellow in the American College of Environmental Lawyers. He served as chair of the Environmental Protection Agency's Environmental Finance Advisory Board and as a member of the U.S. Department of Energy's Environmental Management Advisory Board. From 1992 to 1998, he was a member of the Board of Directors of the Long Island Lighting Company (LILCO). Professor Barnes received his B.A. from Michigan State University and a J.D. (*cum laude*) from Harvard Law School.

Joshua E. Perry, Graf Family Professor and Associate Professor of Business Law and Ethics, joined the faculty of Indiana University's Kelley School of Business in 2009. He currently serves as chair of the Department of Business Law and Ethics, an appointment he has held since 2020. He was formerly the Faculty Chair for the Kelley School's Undergraduate Program. A three-time winner of the IU Trustees' Teaching Award and two-time winner of the Kelley Innovative Teaching Award, he teaches graduate and undergraduate courses on business ethics, critical thinking, and the legal environment of business. Professor Perry earned a B.A. (*summa cum laude*) from Lipscomb University, a Masters of Theological Studies from the Vanderbilt University Divinity School, and a J.D. from the Vanderbilt University Law School, where he was Senior Articles Editor on the *Law Review*. Prior to joining Kelley, he was on faculty at the Center for Biomedical Ethics and Society at Vanderbilt University Medical Center. In that role, he taught medical ethics in the School of Medicine and professional responsibility in the Law School, and served as a clinical ethicist in both the adult and children's hospitals at Vanderbilt. Before entering academe, he practiced law in Nashville, Tennessee, at a boutique litigation firm, where he specialized in dispute resolution and risk mitigation for clients in the health care, intellectual property, and entertainment industries.

Professor Perry's award-winning scholarship explores legal, ethical, and public policy issues in the life science, medical device, and health care industries, as well as in the business of medicine. He is the author of over 30 articles and essays that have appeared in a variety of journals, including the *American Business Law Journal*; the *Georgia Law Review*; the *Notre Dame Journal of Law, Ethics, and Public Policy*; the *Journal of Law, Medicine and Ethics*; and the *University of Pennsylvania Journal of Law and Social Change*, among others. His expertise has been featured in *The New York Times, USA Today, Wired, Fast Company, Huffington Post,* and *Salon*. Since 2015, he also has served on the editorial board for the *Journal of Business Ethics* as section editor for law, public policy, and ethics.

Todd Haugh, Associate Professor of Business Law and Ethics and Weimer Faculty Fellow at Indiana University's Kelley School of Business. His scholarship focuses on white-collar and corporate crime, business and behavioral ethics, and federal sentencing policy. His work has appeared in top law and business journals, including the *Northwestern University Law Review, Notre Dame Law Review, Vanderbilt Law Review*, and the *MIT-Sloan Management Review*. Prof. Haugh's expertise relating to the burgeoning field of behavioral compliance has led to frequent speaking and consulting engagements with major U.S.

companies and ethics organizations. He is also regularly quoted in national news publications such as *The New York Times*, *The Wall Street Journal*, *Forbes*, *Bloomberg News*, and *USA Today*.

A graduate of the University of Illinois College of Law and Brown University, Professor Haugh has extensive professional experience as a white-collar criminal defense attorney, a federal law clerk, and a member of the general counsel's office of the U.S. Sentencing Commission. In 2011, he was chosen as one of four Supreme Court Fellows of the Supreme Court of the United States to study the administrative machinery of the federal judiciary.

Prior to joining the Kelley School, where he teaches courses on business ethics, white-collar crime, and critical thinking, Professor Haugh taught at DePaul University College of Law and Chicago-Kent College of Law. He is a recipient of numerous teaching and scholarly awards, including a Trustees Teaching Award and multiple Innovative Teaching Awards, and a Jesse Fine Fellowship from the Poynter Center for the Study of Ethics and American Institutions, to which he now serves as a board member. In 2019 he was awarded the Distinguished Early Career Achievement Award by the Academy of Legal Studies in Business.

Abbey R. Stemler, Assistant Professor of Business Law and Ethics at Indiana University's Kelley School of Business. She is a leading scholar on the sharing economy, and her scholarship and teaching have garnered many university and national awards. She is frequently sought out for her expertise on platform-based technology companies, such as Facebook, Uber, and Google.

Professor Stemler has published multiple articles in leading law journals such as the *Iowa Law Review*, *Emory Law Journal*, *Maryland Law Review*, *Georgia Law Review*, and *Harvard Journal on Legislation*. Her research explores the interesting spaces where law has yet to catch up with technology. In particular, her aim is to expose the evolving realities of Internet-based innovations and platforms and to find ways to effectively regulate them without hindering their beneficial uses. As she sees it, many modern firms inhabit a world that operates under alien physics—where free is often costly and "smart" is not always wise. She employs tools and insights from economics, behavioral science, regulatory theory, and rhetoric to understand how we, as a society, can better protect consumers, privacy, and democracy.

Professor Stemler is also a faculty associate at the Berkman Klein Center for Internet & Society at Harvard University, practicing attorney, entrepreneur, and consultant for governments and multinational organizations such as the World Bank Group.

This is the 18th Edition (and the 24th overall edition) of a business law text that first appeared in 1935. Throughout its more than 80 years of existence, this book has been a leader and an innovator in the fields of business law and the legal environment of business. One reason for the book's success is its clear and comprehensive treatment of the standard topics that form the traditional business law curriculum. Another reason is its responsiveness to changes in these traditional subjects and to new views about that curriculum. In 1976, this textbook was the first to inject regulatory materials into a business law textbook, defining the "legal environment" approach to business law. Over the years, this textbook has also pioneered by introducing materials on business ethics, corporate social responsibility, global legal issues, and the law of an increasingly digital world. The 18th Edition continues to emphasize change by integrating these four areas into its pedagogy.

Appendix B: The Uniform Commercial Code

The Uniform Commercial Code, or UCC, was developed by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) as a body of rules intended to make the application of law to commercial transactions consistent across fifty states. The UCC has been adopted in whole by all but one state legislature, Louisiana, which adopted only certain sections. Such widespread use of the UCC, even with the minor deviations some jurisdictions make from the official code, makes possible more efficient and more confident transactions across state lines. The UCC can be accessed here: www.law.cornell.edu/ucc.

Continuing Strengths

The 18th Edition continues the basic features that have made its predecessors successful. They include:

- *Comprehensive coverage.* We believe that the text continues to excel in both the number of topics it addresses and the depth of coverage within each topic. This is true not only of the basic business law subjects that form the core of the book, but also of the regulatory and other subjects that are said to constitute the "legal environment" curriculum.
  Style and presentation. This text is written in a style that is direct, lucid, and organized, yet also relatively relaxed and conversational. For this reason, the text lends itself to the flipped classroom, allowing coverage of certain topics by assigning them as reading without lecturing on them. As always, key points and terms are emphasized; examples, charts, figures, and concept summaries are used liberally; and elements of a claim and lists of defenses are stated in numbered paragraphs.
  Case selection. We try very hard to find cases that clearly illustrate important points made in the text, that should interest students, and that are fun to teach. Except when older decisions are landmarks or continue to provide the best illustrations of particular concepts, we also try to select recent cases. Our collective in-class teaching experience with recent editions has helped us determine which of those cases best meet these criteria.

Important Changes in This Edition

For this edition, we welcome Todd Haugh and Abbey Stemler, our Indiana University colleagues, to the author team. They bring new teaching, research, and legal practice experiences to our team that have helped shape our approach to the 18th Edition and will allow us to continue to deliver excellent coverage of the ever-changing legal environment of business.

Our longtime co-author Arlen Langvardt decided to retire from authoring the textbook along with retiring from his faculty position at Indiana University. The author team wishes to express our gratitude for his leadership on the textbook for the past couple of editions and to thank him for the profound impact he has made on this text. In his place, Jamie Prenkert has moved into the lead author role. Co-author Jim Barnes remains our connection to the long and vital history of this textbook. With this edition, Jim will have been a co-author of this text for more than 50 years!

In this edition, the combination of new and longstanding authors has led to a number of innovations, while maintaining the thorough yet accessible approach for which the book is well known. Along with a more explicit focus on compliance in addition to ethics (see Ethics and Compliance in Action features), the 18th Edition includes new cases, tracks recent developments in various substantive areas of law, and offers revisions to various textual material in our ongoing commitment to clarity and completeness. The book continues to include both hypothetical examples and real-life cases so that instructors can elucidate important concepts for students while also maintaining student interest and engagement. Key additions and revisions for the 18th Edition include the following:

Chapter 1

- New problem case dealing with a spectator injured by a foul ball at a professional baseball game. The problem case can be used to enrich class discussion around case law reasoning, as illustrated in the *Coomer* case in the main text.
- Introduction of the new Ethics and Compliance in Action feature, which is present throughout the book.

Chapter 2

- New discussion of the Forced Arbitration Injustice Repeal Act (Fair Act).

Chapter 3

- Incorporation in the text of several recent Supreme Court cases, including *Trump v. Vance* (separation of powers and

Supremacy Clause), *Burwell v. Hobby Lobby Stores* and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (First Amendment religion clause, as well as the federal Religious Freedom Restoration Act).

- Reorganization of the Commerce Clause discussion and the addition of 2018 Supreme Court decision *South Dakota v. Wayfair, Inc.*, which illustrates the standard for excessive burden on interstate commerce.

New figure describing the Food and Drug Administration's tobacco regulations pursuant to the Family Smoking Prevention and Tobacco Control Act and related court challenges, with specific focus on First Amendment speech issues.

New discussion of the claims against Harvard College and the University of North Carolina related to their admissions practices.

Chapter 4

- New discussion of the Business Roundtable's 2019 statement regarding stakeholder theory.

Chapter 5

- New discussion of Fourth Amendment searches and the third-party doctrine.
- New case note that highlights the importance of *New York Central & Hudson River Railroad v. United States*, which established the concept of corporate criminal liability.
- Revision of discussion of criminal racketeering offenses.
- New problem regarding whether a health care company and its senior executives had standing to challenge a warrant in a tax fraud case based on Fourth Amendment grounds.
- New problem case on the Sixth Amendment's reach in the context of corporate criminal fines based on the *Apprendi* line of Supreme Court cases.

Chapter 7

- New case that provides a clear illustration of negligence elements in the context of an easily understood fact pattern.

Chapter 8

- New case, *ZUP, LLC v. Nash Manufacturing, Inc.*, which provides a relatable example of the patent requirement of nonobviousness.

Chapter 9

New case, *Grimes v. Young Life, Inc.*, which deals with a hybrid contract and the application of the predominant factor test.

New case, *PWS Environmental, Inc. v. All Clear Restoration and Remediation, LLC*, which provides a straightforward application of quasi-contract.

New Cyberlaw in Action feature dealing with Twitter and offer terms.

Replacement of the term "insanity" with the more modern concept of "mental incapacity."

General update of examples to ensure that concepts and technology references remain relevant.

Chapter 12

- New case, *Mid-American Salt, LLC v. Morris County Cooperative Pricing Council*, which illustrates that requirements contracts, though recognized under the UCC, must create some obligation in order to avoid being illusory.
- Revision of the discussion of forbearance as a form of consideration for added clarity.

Chapter 16

- Discussion of the 21st Century Integrated Digital Experience Act (IDEA).

Chapter 17

- New Ethics and Compliance in Action feature, which explores the ethics of obligating a donee beneficiary to an arbitration clause.

Chapter 18

- New case, *Macomb Mechanical, Inc. v. Lasalle Group Inc.*, which illustrates the operation of a "pay if paid" clause as a condition precedent.

Chapter 19

- New case, *National Music Museum: America's Shrine to Music v. Johnson*, which deals with a contract for the sale of a guitar once owned by Elvis Presley and illustrates the rules concerning the passage of title.

Chapter 20

- New introduction problem, which explores products liability and ethical issues involving JUUL e-cigarettes.
- New Cyberlaw in Action feature that explores the question of whether Amazon, when it sells a defective product via a third-party seller, can be held liable. The box references and discusses recent litigation including *Allstate New Jersey Insurance Co. v. Amazon.com*; *Eberhart v. Amazon.com*; *Oberdorf v. Amazon.com, Inc.*; and *Papataros v. Amazon.com*.
- Revision of discussion of punitive damages to include recent verdicts against Johnson & Johnson and Monsanto.

Chapter 21

- New case, *Hillerich & Bradsby v. Charles Products*, which addresses whether a buyer timely notified the seller that products delivered to the buyer for sale to children in buyer's Louisville Slugger Museum Store were defective (i.e., contained lead content in excess of limits prescribed under the Consumer Products Safety Improvement Act of 2008).

Chapter 22

- New case, *Beau Townsend Ford Lincoln v. Don Hinds Ford*, which illustrates the principle that a buyer is liable for the purchase price of goods that have been received and accepted and that the buyer is not relieved of that obligation when deceived into making payment to someone other than the seller to whom the buyer is contractually obligated to pay.

Chapter 23

- New problem case.

Chapter 24
- Revision to *Francini v. Goodspeed Airport, LLC* to note that the Connecticut Supreme Court upheld the Connecticut Appellate Court's decision (included in the text) in 2018.

Chapter 25
- Revisions to text to clarify state and local variations in the law that have developed in recent years.
- Revision and update to the discussion of a landlord's duty to mitigate damages.

Chapter 26
Revision to the explanation of the formalities of a will for greater clarity.

- New Cyberlaw in Action feature discussing the burgeoning cyber insurance market.
- Updates to the status of health care insurance under the Affordable Care Act.

Chapter 28
- New case, *Trump Endeavor 12 LLC v. Fernich, Inc. d/b/a The Paint Spot*, involving a contractor who sued to enforce a lien on property on which it had provided materials but had not been paid by the owner of the property.

Chapter 29
- New case, *Hyman v. Capital One Auto Finance*, where the court held that a debtor had stated a case for conversion and breach of the peace in the course of an attempted repossession of her automobile where the "repo man" involved the state police without judicial authorization.

Chapter 30
- Revision of discussion of preferential liens.
- New case, *Rosenberg v. N.Y State Higher Education Services Corp.*, in which a bankruptcy court granted a discharge of student loans on the grounds their repayment would constitute an undue hardship. The court criticized previous bankruptcy court decisions that produced harsh results for students on the grounds that the courts did not properly apply prior case authority.
- New text concerning the Small Business Organization Act of 2019 that provides a modified procedure to facilitate reorganization under Chapter 11 of small businesses in financial difficulty.

Chapter 32
New case, *Triffin v. Sinha*, which illustrates the operation of the shelter rule: The assignee of a check was held to be entitled to holder-in-due-course status because the entity that assigned the check to him was a holder in due course.

Revision of the text for clarity and to reflect recent changes in the law.

New case, *Grodner & Associates v. Regions Bank*, which involves a bookkeeper who defrauded the law firm for which she worked over a period of 15 months by writing checks utilizing facsimile signatures and initiating ACH transactions, which she was not authorized to perform. The bank refused to recredit the account on the grounds the law firm had not notified the bank of the fraud within a year after receiving a statement containing an unauthorized payment and the law firm was unable to show any deviation from the bank's own procedures or local banking standards or from the terms of the parties' deposit agreement.
- Revision of discussion of Check 21, the electronic processing of checks, and Federal Reserve Board Regulations concerning wire transfers.

Chapter 35
- New case, *Krakauer v. Dish Network LLC*, which illustrates the objective standard of manifested assent for agency formation.
- New Cyberlaw in Action feature, which discusses California's judicial and legislative responses to misclassification of gig workers as nonemployee agents in a variety of industries, specifically focusing on sharing-economy platform businesses like Uber and Lyft.

Chapter 36
- New case, *Synergies3 Tec Services, LLC v. Corvo*, in which the court analyzes whether employees' intentional tort was committed in the scope of their employment.

Chapter 37
- Introduction of one of the newest business forms: the benefit corporation.

Chapter 38
- New problem case, which deals with the possible creation of a partnership amid a pandemic.

Chapter 39
- New case, *Gelman v. Buehler*, which demonstrates to students the importance of partnership agreements.

Chapter 40
- New introduction problem, which examines the appropriateness for and tax implications of forming a limited liability company.
- New in-depth discussion of the tax advantages of limited liability companies.
- Removal of discussion of the now-outdated business form: the limited liability limited partnership.

Chapter 41
- New text, which discusses benefit corporations and their growing importance, including a new chart comparing benefit corporations and certified "B corps."
- New case about scholarly critique of benefit corporations suggesting they may actually hurt socially conscious companies that are more traditionally organized.

Chapter 42
- Revision of Ethics and Compliance in Action feature concerning offshore tax havens used by major U.S. companies.

- New problem cases about the policy arguments for holding promoters liable for preincorporation contracts and the equity stakes taken in entrepreneurial ventures on the popular show *Shark Tank*.

Chapter 43

New text related to CEO compensation, including that of Tesla's Elon Musk and Disney's Bob Iger.

New text that highlights the duty-of-care obligations related to the oversight of legal compliance.

New case, *In re Caremark Int'l Inc. Derivative Litig.*, which established the fiduciary obligation of board oversight of compliance and effectively created modern corporate compliance regimes.

- Revised discussion of the foundations of corporate criminal liability and the costs of white-collar crime.
- New problem case about a shareholder suit against Allergan, the company that makes Botox, and the theory of legal liability underlying fiduciary duty claims.

Chapter 44

- New Ethics and Compliance in Action feature about the ethicality of share dissolution at Facebook.
- New problem case regarding dividend distribution under the Model Business Corporation Act.

Chapter 45

- New discussion of the Security and Exchange Commission's powers, including implications of recent Supreme Court opinions *Lucia v. SEC and Kokesh v. SEC.*
- New and revised text about Section 5 of the Securities Act of 1933, including Rules 163A, 135, 169, and the Jumpstart Our Business Startups (JOBS) Act.
- Revision of the Concept Review concerning the communications issuers may provide to the public.
- New text on "gun jumping" violations levied against Google and Salesforce.
- Revisions to text on offering exemptions, including new text concerning Regulation A, Regulation Crowdfunding, and Rule 506, and deletion of text referring to the withdrawn Rule 595.

Revision of Ethics and Compliance in Action feature related to the trade-offs and criticisms of the JOBS Act.

Revision of the Concept Review regarding issuers' exemptions from registration requirements.

New discussion of scienter and the Private Litigation Securities Reform Act.

Revision of text concerning insider trading, including a new discussion of classical and misappropriation theories, as well as tippee liability under *Dirks v. SEC*.

New case, *SEC v. Dorozhko*, which considered computer hacking as insider trading under the misappropriation theory.

New case note comparing *United States v. Newman* and *United States v. Salman*, which address the personal benefit test of tippee liability.

New problem case on whether Elon Musk violated securities laws based on his tweets.

- New problem case about insider trading prosecution of Mathew Martoma and SAC Capital Advisors.

Chapter 46

- New discussion of Regulation Best Interest, including a summary chart of obligations of broker-dealers.
- New case, *United States v. Goyal*, which concerned the evidence used to convict a former CFO for securities fraud violations under Section 10(b) of the 1934 Act.
- New problem case about whether the suit against a seller of high-performance liquid chromatography systems met the pleading standards for scienter and materiality under the securities laws.

Chapter 47

- Revision to discussion of Federal Communications Commission action about network neutrality regulation.

Chapter 48

- Revision to discussion of the recent actions taken by the FTC to regulate deceptive practices.
- Revision to discussion of the Truth in Lending Act.
- New discussion of the Economic Growth, Regulatory Relief, and Consumer Protection Act (Economic Growth Act) and its impact on the Fair Credit Reporting Act.

Chapter 49

- New case box about *United States v. Apple, Inc.*, in which Apple was held responsible for violating the Sherman Act when it conspired among major book publishers to raise the retail prices of ebooks.
- New Ethics and Compliance in Action feature that discusses how antitrust laws may hinder socially responsible business practices.

Chapter 50

- New Ethics and Compliance in Action feature about consolidation among big tech firms such as Facebook and Instagram.

Chapter 51

- New case concerning workers' compensation, *American Greetings Corp. v. Bunch*, in which an employee is injured during a work-related event but not while performing day-to-day work responsibilities.
- Added discussion of emergency medical and family leave provisions of the Families First Coronavirus Response Act.
- Revised discussion of collective bargaining and unionization to reflect recent Supreme Court cases, including *Janus v. AFSCME* and *Epic Systems Corp. v. Lewis*.
- New discussion of the Equal Pay Act that includes consideration of the U.S. Women's National Soccer Team's pay discrimination claim against U.S. Soccer.
- New case, *Bostock v. Clayton County*, in which the U.S. Supreme Court held that Title VII of the 1964 Civil Rights Act prohibition against discrimination in employment because of sex includes discrimination on the basis of sexual orientation and gender identity.

Chapter 52

- Revision of text to incorporate retrenchment by Trump administration of Environmental Protection Agency regulations to control greenhouse gasses associated with global climate change, including the Clean Power Plan and the automobile fuel economy standards adopted during the Obama administration.

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The 18th Edition of ***Business Law*** continues to focus on global, ethical, and digital issues affecting legal aspects of business. The new edition contains a number of new features as well as a revised supplements package. Please take a few moments to page through some of the highlights of this new edition.

OPENING VIGNETTES

Each chapter begins with an opening vignette that presents students with a mix of real-life and hypothetical situations and discussion questions. These stories provide a preview of issues addressed in the chapter and help to stimulate students' interest in the chapter content.

CHAPTER 2

The Resolution of Private Disputes

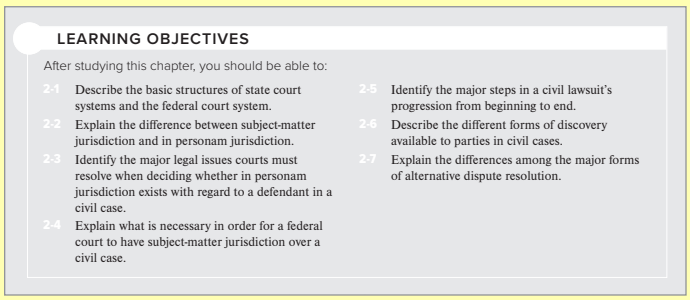
Allnews Publishing Inc., a firm whose principal offices are located in Orlando, Florida, owns and publishes 33 newspapers. These newspapers are published in 21 different states of the United States. Among the Allnews newspapers is the *Snakebite Rattler*, the lone newspaper in the city of Snakebite, New Mexico. The *Rattler* is sold in print form only in New Mexico. However, many of the articles in the newspaper can be viewed by anyone with Internet access, regardless of his or her geographic location, by going to the Allnews website.

In a recent *Rattler* edition, an article appeared beneath this headline: "Local Business Executive Sued for Sexual Harassment." The accompanying article, written by a *Rattler* reporter (an Allnews employee), stated that a person named Phil Anderson was the defendant in the sexual harassment case. Besides being married, Anderson was a well-known businessperson in the Snakebite area. He was active in his church and in community affairs in both Snakebite (his city of primary home) and Petoskey, Michigan (where he and his wife have a summer home). A stock photo of Anderson, which had been used in connection with previous *Rattler* stories mentioning him, appeared alongside the story about the sexual harassment case. Anderson, however, was not the defendant in that case. He was named in the *Rattler* story because of an error by the *Rattler* reporter. The actual defendant in the sexual harassment case was a local business executive with a similar name: Phil Anderer.

Anderson plans to file a defamation lawsuit against Allnews because of the above-described falsehood in the *Rattler* story. He expects to seek $500,000 in damages for harm to his reputation and for other related harms. In Chapter 6, you will learn about the substantive legal issues that will arise in Anderson's defamation case. *For now, however, the focus is on important legal matters of a procedural nature.*

Consider the following questions regarding Anderson's case as you read this chapter:

- Where, in a geographic sense, may Anderson properly file and pursue his lawsuit against Allnews?
- Must Anderson pursue his case in a state court, or does he have the option of litigating it in federal court?
- Assuming that Anderson files his case in a state court, what strategic option may Allnews exercise if it acts promptly?
- In the run-up to a possible trial in the case, what legal mechanisms may Anderson utilize in order to find out, on a pretrial basis, what the *Rattler* reporter and other Allnews employees would say in possible testimony at trial? Is Allnews entitled to do the same with regard to Anderson?
- If Anderson's case goes to trial, what types of trials are possible?
- Through what legal mechanisms might a court decide the case without a trial?
- Today, many legal disputes are decided through arbitration rather than through proceedings in court. Given the prevalence of arbitration these days, why isn't Anderson's case a candidate for arbitration?



LEARNING OBJECTIVES

After studying this chapter, you should be able to:

- 2-1 Describe the basic structures of state court systems and the federal court system.
- 2-2 Explain the difference between subject-matter jurisdiction and in personam jurisdiction.
- 2-3 Identify the major legal issues courts must resolve when deciding whether in personam jurisdiction exists with regard to a defendant in a civil case.
- 2-4 Explain what is necessary in order for a federal court to have subject-matter jurisdiction over a civil case.
- 2-5 Identify the major steps in a civil lawsuit's progression from beginning to end.
- 2-6 Describe the different forms of discovery available to parties in civil cases.
- 2-7 Explain the differences among the major forms of alternative dispute resolution.

LEARNING OBJECTIVES

Active **Learning Objectives** open each chapter. LOs inform you of specific outcomes you should have after finishing the chapter. Icons reference each LO's reference within the chapter.

In recent years, the widespread uses of e-mail and information presented and stored in electronic form have raised questions about whether, in civil litigation, an opposing party's e-mails and electronic information are discoverable to the same extent as conventional written or printed documents. With the Federal Rules of Civil Procedure and comparable discovery rules applicable in state courts having been devised prior to the explosion in e-mail use and online activities, the rules' references to "documents" contemplated traditional on-paper items. Courts, however, frequently interpreted "documents" broadly, so as to include e-mails and certain electronic communications within the scope of discoverable items.

Even so, greater clarity regarding discoverability seemed warranted—especially as to electronic material that might be less readily classifiable than e-mails as "documents." Various states responded by updating their discovery rules to include electronic communications within the list of discoverable items. So did the Federal Judicial Conference. In Federal Rules of Civil Procedure amendments proposed by the Judicial Conference and ratified by Congress in 2006, "electronically stored information" became a separate category of discoverable material. The *electronically stored information (ESI)* category is broad enough to include e-mails and similar communications as well as electronic business records, web pages, dynamic databases, and a host of other material existing in electronic form. So-called e-discovery has become a objection is valid in light of the particular facts and circumstances. For instance, if requested e-mails appear only on backup tapes and searching those tapes would require the expenditures of significant time, money, and effort, are the requested e-mails "not reasonably accessible because of undue burden or costs"? Perhaps, but perhaps not. The court will rule, based on the relevant situation. The court may deny the discovery request, uphold it, or condition the upholding of it on the requesting party's covering part or all of the costs incurred by the other party in retrieving the ESI and making it available. When a party fails or refuses to comply with a legitimate discovery request and the party seeking discovery of ESI has to secure a court order compelling the release of it, the court may order the noncompliant party to pay the attorney fees incurred by the requesting party in seeking the court order. If a recalcitrant party disregards a court order compelling discovery, the court may assess attorney fees against that party and/or impose evidentiary or procedural sanctions such as barring that party from using certain evidence or from raising certain claims or defenses at trial.

The discussion suggests that discovery requests regarding ESI may be extensive and broad-ranging, with logistical issues often attending those requests. In recognition of these realities, the Federal Rules seek to head off disputes by requiring the parties to civil litigation to meet, at least through their attorneys, soon after the case is filed. The meeting's goal is development of a discovery plan that outlines the parties' intentions regarding ESI discovery and sets forth an agreement on such matters as the form in which the

CTION

In keeping with today's technological world, these boxes describe and discuss actual instances of how the Internet is affecting business law today.

HICS AND COMPLIANCE IN ACTION BOXES

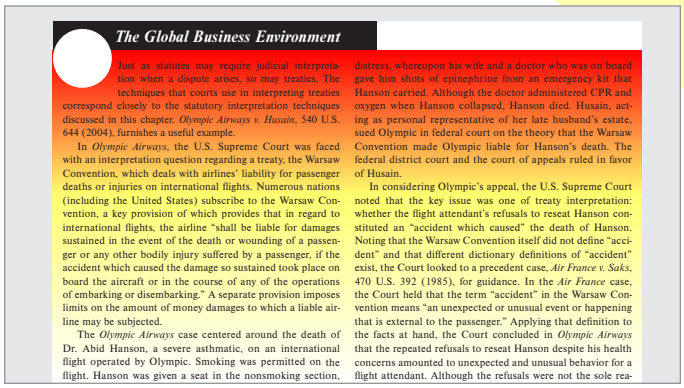
These boxes appear throughout the chapters and offer critical thinking questions and situations that relate to ethical/public policy concerns.

The broad scope of discovery rights in a civil case will often entitle a party to seek and obtain copies of e-mails, records, memos, and other documents and electronically stored information from the opposing party's files. In many cases, some of the most favorable evidence for the plaintiff will have come from the defendant's files, and vice versa. If your firm is, or is likely to be, a party to civil litigation and you know that the firm's files contain materials that may be damaging to the firm in the litigation, you may be faced with the temptation to alter or destroy the potentially damaging items. This temptation poses serious ethical dilemmas. Is it morally defensible to change the content of records or documents on an after-the-fact basis, in order to lessen the adverse effect on your firm in pending or probable litigation? Is document destruction or e-mail deletion ethically justifiable when you seek to protect your firm's interests in a lawsuit?

If the ethical concerns are not sufficient by themselves to make you leery of involvement in document alteration or destruction, consider the potential legal consequences for yourself and your firm. The much-publicized collapse of the Enron Corporation in 2001 led to considerable scrutiny of the actions of the Arthur Andersen firm, which had provided auditing and consulting services to Enron. An Andersen partner, David Duncan, pleaded guilty to a criminal obstruction of justice charge that accused him of having destroyed, or having instructed Andersen employees to destroy, certain Enron-related records in order to thwart a Securities and Exchange Commission (SEC) investigation of Andersen. The U.S. Justice Department also launched an obstruction of justice prosecution against Andersen on the theory that the firm altered or destroyed records pertaining to Enron in order to impede the SEC investigation. A jury found Andersen guilty of obstruction of justice. Although the Andersen conviction was later overturned by the to impose appropriate sanctions on the document-destroying party. These sanctions may include such remedies as court orders prohibiting the document-destroyer from raising certain claims or defenses in the lawsuit, instructions to the jury regarding the wrongful destruction of the documents, and court orders that the document-destroyer pay certain attorney fees to the opposing party.

What about the temptation to refuse to cooperate regarding an opposing party's lawful request for discovery regarding material in one's possession? Although a refusal to cooperate seems less blameworthy than destruction or alteration of documents, extreme instances of recalcitrance during the discovery process may cause a party to experience adverse consequences similar to those imposed on parties who destroy or alter documents. Litigation involving Ronald Perelman and the Morgan Stanley firm provides an illustration. Perelman had sued Morgan Stanley on the theory that the investment bank participated with Sunbeam Corp. in a fraudulent scheme that supposedly induced him to sell Sunbeam his stake in another firm in return for Sunbeam shares whose value plummeted when Sunbeam collapsed. During the discovery phase of the case, Perelman had sought certain potentially relevant e-mails from Morgan Stanley's files. Morgan Stanley repeatedly failed and refused to provide this discoverable material and, in the process, ignored court orders to provide the e-mails.

Eventually, a fed-up trial judge decided to impose sanctions for Morgan Stanley's wrongful conduct during the discovery process. The judge ordered that Perelman's contentions would be presumed to be correct and that the burden of proof would be shifted to Morgan Stanley so that Morgan Stanley would have to disprove Perelman's allegations. In addition, the trial judge prohibited Morgan Stanley from



The Global Business Environment

Just as statutes may require judicial interpretation when a dispute arises, so may treaties. The techniques that courts use in interpreting treaties correspond closely to the statutory interpretation techniques discussed in this chapter. *Olympic Airways v. Husain*, 540 U.S. 644 (2004), furnishes a useful example.

In *Olympic Airways*, the U.S. Supreme Court was faced with an interpretation question regarding a treaty, the Warsaw Convention, which deals with airlines' liability for passenger deaths or injuries on international flights. Numerous nations (including the United States) subscribe to the Warsaw Convention, a key provision of which provides that in regard to international flights, the airline "shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." A separate provision imposes limits on the amount of money damages to which a liable airline may be subjected.

The *Olympic Airways* case centered around the death of Dr. Abid Hanson, a severe asthmatic, on an international flight operated by Olympic. Smoking was permitted on the flight. Hanson was given a seat in the nonsmoking section, distress, whereupon his wife and a doctor who was on board gave him shots of epinephrine from an emergency kit that Hanson carried. Although the doctor administered CPR and oxygen when Hanson collapsed, Hanson died. Husain, acting as personal representative of her late husband's estate, sued Olympic in federal court on the theory that the Warsaw Convention made Olympic liable for Hanson's death. The federal district court and the court of appeals ruled in favor of Husain.

In considering Olympic's appeal, the U.S. Supreme Court noted that the key issue was one of treaty interpretation: whether the flight attendant's refusals to reseat Hanson constituted an "accident which caused" the death of Hanson. Noting that the Warsaw Convention itself did not define "accident" and that different dictionary definitions of "accident" exist, the Court looked to a precedent case, *Air France v. Saks*, 470 U.S. 392 (1985), for guidance. In the *Air France* case, the Court held that the term "accident" in the Warsaw Convention means "an unexpected or unusual event or happening that is external to the passenger." Applying that definition to the facts at hand, the Court concluded in *Olympic Airways* that the repeated refusals to reseat Hanson despite his health concerns amounted to unexpected and unusual behavior for a flight attendant. Although the refusals were not the sole rea-

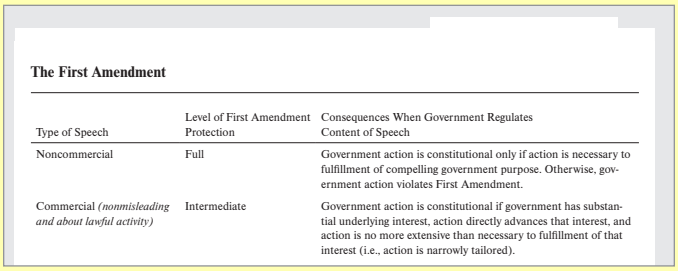
THE GLOBAL BUSINESS ENVIRONMENT BOXES

Because global issues affect people in many different aspects of business, this material appears throughout the text instead of in a separate chapter on international issues. This feature brings to life global issues that are affecting business law.

LOG ON BOXES

These appear throughout the chapters and direct students, where appropriate, to relevant websites that will give them more information about each featured topic. Many of these are key legal sites that may be used repeatedly by business law students and business professionals alike.

For a great deal of information about the U.S. Supreme Court and access to the Court's opinions in recent cases, see the Court's website at **http://www.supremecourtus.gov**.



The First Amendment

Type of Speech	Level of First Amendment Protection	Consequences When Government Regulates Content of Speech
Noncommercial	Full	Government action is constitutional only if action is necessary to fulfillment of compelling government purpose. Otherwise, government action violates First Amendment.
Commercial *(nonmisleading and about lawful activity)*	Intermediate	Government action is constitutional if government has substantial underlying interest, action directly advances that interest, and action is no more extensive than necessary to fulfillment of that interest (i.e., action is narrowly tailored).

CONCEPT REVIEW

These boxes visually represent important concepts presented in the text to help summarize key ideas at a glance and simplify students' conceptualization of complicated issues.

FIGURES

The figures appear occasionally in certain chapters. These features typically furnish further detail on special issues introduced more generally elsewhere in the text.

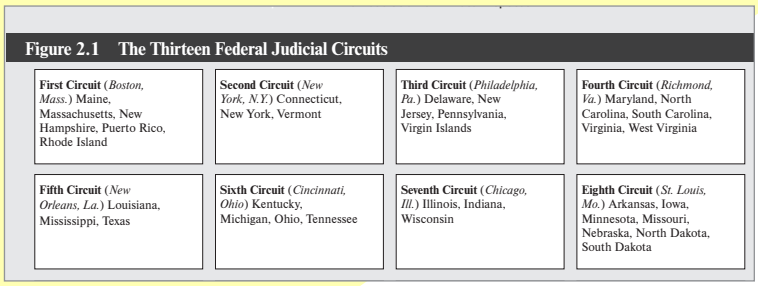
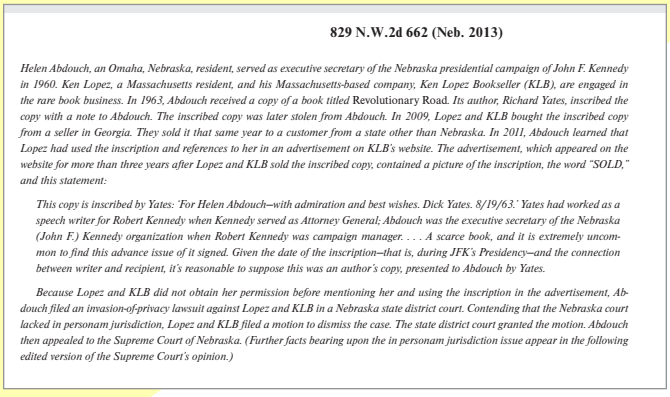


Figure 2.1 The Thirteen Federal Judicial Circuits

First Circuit (*Boston, Mass.*) Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island	**Second Circuit** (*New York, N.Y.*) Connecticut, New York, Vermont	**Third Circuit** (*Philadelphia, Pa.*) Delaware, New Jersey, Pennsylvania, Virgin Islands	**Fourth Circuit** (*Richmond, Va.*) Maryland, North Carolina, South Carolina, Virginia, West Virginia
Fifth Circuit (*New Orleans, La.*) Louisiana, Mississippi, Texas	**Sixth Circuit** (*Cincinnati, Ohio*) Kentucky, Michigan, Ohio, Tennessee	**Seventh Circuit** (*Chicago, Ill.*) Illinois, Indiana, Wisconsin	**Eighth Circuit** (*St. Louis, Mo.*) Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota



829 N.W.2d 662 (Neb. 2013)

Helen Abdouch, an Omaha, Nebraska, resident, served as executive secretary of the Nebraska presidential campaign of John F. Kennedy in 1960. Ken Lopez, a Massachusetts resident, and his Massachusetts-based company, Ken Lopez Bookseller (KLB), are engaged in the rare book business. In 1963, Abdouch received a copy of a book titled Revolutionary Road. *Its author, Richard Yates, inscribed the copy with a note to Abdouch. The inscribed copy was later stolen from Abdouch. In 2009, Lopez and KLB bought the inscribed copy from a seller in Georgia. They sold it that same year to a customer from a state other than Nebraska. In 2011, Abdouch learned that Lopez had used the inscription and references to her in an advertisement on KLB's website. The advertisement, which appeared on the website for more than three years after Lopez and KLB sold the inscribed copy, contained a picture of the inscription, the word "SOLD," and this statement:*

> *This copy is inscribed by Yates: 'For Helen Abdouch—with admiration and best wishes. Dick Yates. 8/19/63.' Yates had worked as a speech writer for Robert Kennedy when Kennedy served as Attorney General; Abdouch was the executive secretary of the Nebraska (John F.) Kennedy organization when Robert Kennedy was campaign manager. . . . A scarce book, and it is extremely uncommon to find this advance issue of it signed. Given the date of the inscription—that is, during JFK's Presidency—and the connection between writer and recipient, it's reasonable to suppose this was an author's copy, presented to Abdouch by Yates.*

Because Lopez and KLB did not obtain her permission before mentioning her and using the inscription in the advertisement, Abdouch filed an invasion-of-privacy lawsuit against Lopez and KLB in a Nebraska state district court. Contending that the Nebraska court lacked in personam jurisdiction, Lopez and KLB filed a motion to dismiss the case. The state district court granted the motion. Abdouch then appealed to the Supreme Court of Nebraska. (Further facts bearing upon the in personam jurisdiction issue appear in the following edited version of the Supreme Court's opinion.)

The cases in each chapter help to provide concrete examples of the rules stated in the text. A list of cases appears at the front of the text.

Problem cases appear at the end of each chapter for student review and discussion.

1. Victoria Wilson, a resident of Illinois, wishes to bring an invasion of privacy lawsuit against XYZ Co. because XYZ used a photograph of her, without her consent, in an advertisement for one of the company's products. Wilson will seek money damages of $150,000 from XYZ, whose principal offices are located in New Jersey. A New Jersey newspaper was the only print media outlet in which the advertisement was published. However, XYZ also placed the advertisement on the firm's website. This website may be viewed by anyone with Internet access, regardless of the viewer's geographic location. Where, in a geographic sense, may Wilson properly file and pursue her lawsuit against XYZ? Must Wilson pursue her case in a state court, or does she have the option of litigating in federal court? Assuming that Wilson files her case in state court, what strategic option may XYZ exercise if it acts promptly?
2. Alex Ferrer, a former judge who appeared as "Judge Alex" on a television program, entered into a contract with Arnold Preston, a California attorney who rendered services to persons in the entertainment industry. Seeking fees allegedly due under the contract, Preston invoked the clause setting forth the parties' agreement to arbitrate "any dispute . . . relating to the terms of [the contract] or the breach, validity, or legality thereof . . . in accordance with the rules [of the American Arbitration Association]." Ferrer countered Preston's demand for arbitration by filing, with the California Labor Commissioner, a petition in which he contended that the contract was unenforceable under residents Anne and Jim Cornelsen. When Anne Cornelson telephoned the Bomblisses and said she was ready to sell two litters of Tibetan mastiff puppies, Ron Bombliss expressed interest in purchasing two females of breeding quality. The Cornelsens had a website that allowed communications regarding dogs available for purchase but did not permit actual sales via the website. The Bomblisses traveled to Oklahoma to see the Cornelsens' puppies and ended up purchasing two of them. The Cornelsens provided a guarantee that the puppies were suitable for breeding purposes. Following the sale, the Cornelsens mailed, to the Bomblisses' home in Illinois, American Kennel Club registration papers for the puppies. Around this same time, Anne Cornelsen posted comments in an Internet chat room frequented by persons interested in Tibetan mastiffs. These comments suggested that the mother of certain Tibetan mastiff puppies (including one the Bomblisses had purchased) may have had a genetic disorder. The comments were made in the context of an apparent dispute between the Cornelsens and Richard Eichhorn, who owned the mother mastiff and had made it available to the Cornelsens for breeding purposes. The Bomblisses believed that the comments would have been seen by other persons in Illinois and elsewhere and would have impaired the Bomblisses' ability to sell their puppies even though, when tested, their puppies were healthy. The Bomblisses therefore sued the Cornelsens in an Illinois court on various legal theories. The Cornelsens asked the Illinois court to dismiss the case on the ground that the court lacked in personam jurisdiction over them. Did the Illinois court lack in personam jurisdiction?

KEY TERMS

Key terms are in color and bolded throughout the text and defined in the Glossary at the end of the text for better comprehension of important terminology.

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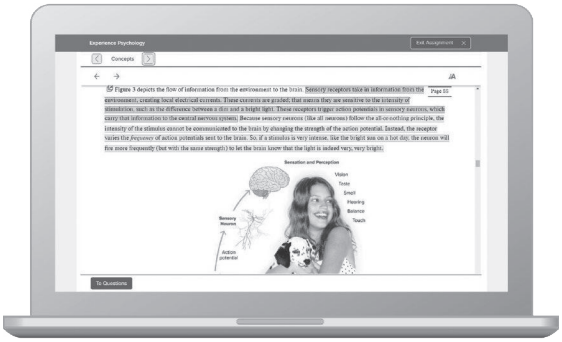

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Brief Contents

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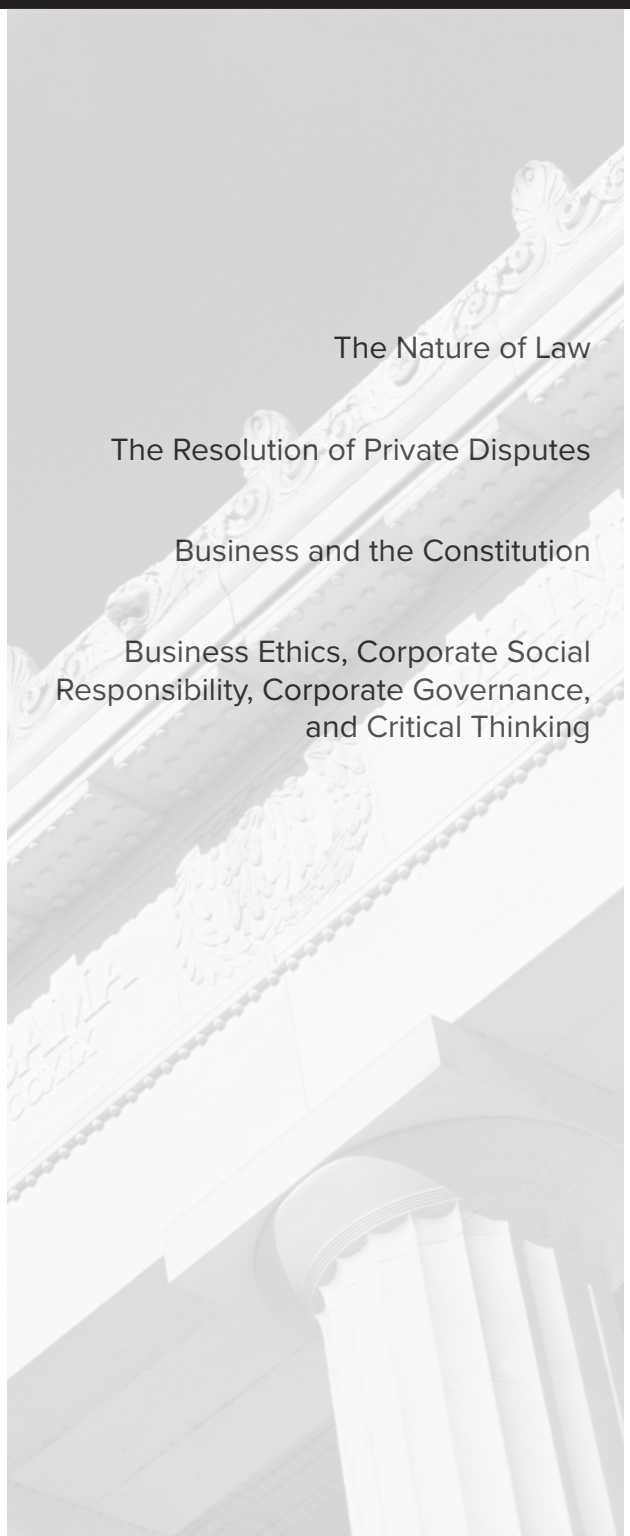

The Nature of Law

The Resolution of Private Disputes

Business and the Constitution

Business Ethics, Corporate Social Responsibility, Corporate Governance, and Critical Thinking

Pixtal/AGE Fotostock

CHAPTER 1

Assume that you have taken on a management position at MKT Corp. If MKT is to make sound business decisions, you and your management colleagues must be aware of a broad array of legal considerations. These may range, to use a nonexhaustive list, from issues in contract, agency, and employment law to considerations suggested by tort, intellectual property, securities, and constitutional law. Sometimes, legal principles may constrain MKT's business decisions; at other times, the law may prove a valuable ally of MKT in the successful operation of the firm's business.

Of course, you and other members of the MKT management group will rely on the advice of in-house counsel (an attorney who is an MKT employee) or of outside attorneys who are in private practice. The approach of simply "leaving the law to the lawyers," however, is likely to be counterproductive. It will often be up to nonlawyers such as you to identify a potential legal issue or pitfall about which MKT needs professional guidance. If you fail to spot the issue in a timely manner and legal problems are allowed to develop and fester, even the most skilled attorneys may have difficulty rescuing you and the firm from the resulting predicament. If, on the other hand, your failure to identify a legal consideration means that you do not seek advice in time to obtain an advantage that applicable law would have provided MKT, the corporation may lose out on a beneficial opportunity. Either way—that is, whether the relevant legal issue operates as a constraint or offers a potential advantage—you and the firm cannot afford to be unfamiliar with the legal environment in which MKT operates.

This may sound intimidating, but it need not be. The process of acquiring a working understanding of the legal environment of business begins simply enough with these basic questions:

- What major types of law apply to the business activities and help shape the business decisions of firms such as MKT?
- What ways of examining and evaluating law may serve as useful perspectives from which to view the legal environment in which MKT and other businesses operate?
- What role do courts play in making or interpreting law that applies to businesses such as MKT and to employees of those firms, and what methods of legal reasoning do courts utilize?
- What is the relationship between legal standards of behavior and notions of *ethical* conduct?

LEARNING OBJECTIVES

After studying this chapter, you should be able to:

Identify the respective makers of the different types of law (constitutions, statutes, common law, and administrative regulations and decisions).

Identify the type of law that takes precedence when two types of law conflict.

Explain the basic differences between the *criminal law* and *civil law* classifications.

Describe key ways in which the major schools of jurisprudence differ from each other.

Describe the respective roles of adhering to precedent (*stare decisis*) and distinguishing precedent in case law reasoning.

Identify what courts focus on when applying the major statutory interpretation techniques (plain meaning, legislative purpose, legislative history, and general public purpose).

Types and Classifications of Law

Identify the respective makers of the different types of law (constitutions, statutes, common law, and administrative regulations and decisions).

Constitutions, which exist at the state and federal levels, have two general functions.[1] First, they set up the structure of government for the political unit they control (a state or the federal government). This involves creating the branches and subdivisions of the government and stating the powers given and denied to each. Through its , the U.S. Constitution establishes the Congress and gives it power to *make* law in certain areas, provides for a chief executive (the president) whose function is to execute or *enforce* the laws, and helps create a federal judiciary to *interpret* the laws. The U.S. Constitution also structures the relationship between the federal government and the states. In the process, it respects the principle of by recognizing the states' power to make law in certain areas.

The second function of constitutions is to prevent the government from taking certain actions or passing certain laws, sometimes even if those actions or laws would otherwise appear to fall within the authority granted to the government under the first function. Constitutions do so mainly by prohibiting government action that restricts certain individual rights. The Bill of Rights to the U.S. Constitution is an example. You could see the interaction of those two functions, for instance, where Congress is empowered to regulate interstate commerce but cannot do so in a way that would abridge the First Amendment's free speech guarantee.

Statutes are laws created by elected representatives in Congress or a state legislature. They are stated in an authoritative form in statute books or codes. As you will see, however, their interpretation and application are often difficult.

[1]Chapter 3 discusses constitutional law as it applies to government regulation of business.

Throughout this text, you will encounter state statutes that were originally drafted as . Uniform acts are model statutes drafted by private bodies of lawyers and scholars. They do not become law until a legislature enacts them. Their aim is to produce state-by-state uniformity on the subjects they address. Examples include the Uniform Commercial Code (which deals with a wide range of commercial law subjects), the Revised Uniform Partnership Act, and the Revised Model Business Corporation Act.

The (also called judge-made law or case law) is law made and applied by judges as they decide cases not governed by statutes or other types of law. Although, as a general matter, common law exists only at the state level, both state courts and federal courts become involved in applying it. The common law originated in medieval England and developed from the decisions of judges in settling disputes. Over time, judges began to follow the decisions of other judges in similar cases, called . This practice became formalized in the doctrine of *stare decisis* (let the decision stand). As you will see later in the chapter, *stare decisis* is not completely rigid in its requirement of adherence to precedent. It is flexible enough to allow the common law to evolve to meet changing social conditions. The common law rules in force today, therefore, often differ considerably from the common law rules of earlier times.

The common law came to America with the first English settlers, was applied by courts during the colonial period, and continued to be applied after the Revolution and the adoption of the Constitution. It still governs many cases today. For example, the rules of tort, contract, and agency discussed in this text are mainly common law rules. In some instances, states have codified (enacted into statute) some parts of the common law. States and the federal government have also passed statutes superseding the common law in certain situations. As discussed in Chapter 9, for example, the states have established special rules for contract cases involving the sale of goods by enacting Article 2 of the Uniform Commercial Code.

This text's torts, contracts, and agency chapters often refer to the *Restatement*—or *Restatement (Second)* or (*Third*)—rule on a particular subject. The *Restatements* are collections of common law (and occasionally statutory) rules covering various areas of the law. Because they are written by the American Law Institute rather than by courts, the *Restatements* are not law and do not bind courts. However, state courts often find *Restatement* rules persuasive and adopt them as common law rules within their states. The *Restatement* rules usually are the rules followed by a majority of the states. Occasionally, however, the *Restatements* stimulate changes in the common law by suggesting new rules that the courts later decide to follow.

Because the judge-made rules of common law apply only when there is no applicable statute or other type of law, common law fills in gaps left by other legal rules if sound social and public policy reasons call for those gaps to be filled. As a result, with regard to the common law, judges sometimes serve in the unexpected role of crafting legal rules in addition to interpreting the law.

In *Price v. High Pointe Oil Company, Inc.*, which follows shortly, the court surveys the relevant legal landscape and concludes that a longstanding common law rule should remain in effect. A later section in the chapter will focus on the process of , in which courts engage when they make and apply common law rules. That process is exemplified by the first half of the *Price* opinion.

828 N.W.2d 660 (Mich. 2013)

In 2006, Beckie Price replaced the oil furnace in her house with a propane furnace. The oil furnace was removed, but the pipe that had been used to fill the furnace with oil remained in place.

At the time the furnace was replaced, Price canceled her contract for oil refills with the predecessor of High Pointe Oil Company, the defendant. Somehow, though, in November 2007, High Pointe mistakenly placed Price's address back on its "keep full list." Subsequently, a High Pointe truck driver pumped around 400 gallons of fuel oil into Price's basement through the oil-fill pipe before realizing the mistake. Price's house and her belongings were destroyed. The house was eventually torn down, the site was remediated, and a new house was built on a different part of Price's property. Price's personal property was all cleaned or replaced. All of her costs related to her temporary homelessness were reimbursed to her, as well. Thus, she was fully compensated for all of her economic losses resulting from High Pointe's error.

Nevertheless, Price sued High Pointe alleging a number of claims. The only of her claims to survive to trial was one focused on her noneconomic losses—for example, pain and suffering, humiliation, embarrassment, and emotional distress. A jury found in Price's favor and awarded her $100,000 in damages.

High Pointe filed an appeal to the intermediate appellate court but lost. High Pointe then appealed to the Michigan Supreme Court, excerpts of whose opinion is below.

Markman, J.

III. Analysis

The question in this case is whether noneconomic damages are recoverable for the negligent destruction of real property. Absent any relevant statute, the answer to that question is a matter of common law.

A. Common Law

As this Court explained in [a prior case], the common law "is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes[.]" The common law, however, is not static. By its nature, it adapts to changing circumstances. . . . The common law is always a work in progress and typically develops incrementally, i.e., gradually evolving as individual disputes are decided and existing common-law rules are considered and sometimes adapted to current needs in light of changing times and circumstances.

The common-law rule with respect to the damages recoverable in an action alleging the negligent destruction of property was set forth in [a 1933 case]:

> If injury to property caused by negligence is permanent or irreparable, the measure of damages is the difference in its market value before and after said injury, but if the injury is reparable, and the expense of making repairs is less than the value of the property, the measure of damages is the cost of making repairs.

Michigan common law has continually followed [that] rule. . . . Accordingly, the long-held common-law rule in Michigan is that the measure of damages for the negligent destruction of property is the cost of replacement or repair. Because replacement and repair costs reflect *economic* damages, the logical implication of this rule is that the measure of damages excludes *noneconomic* damages.

Lending additional support to this conclusion is the simple fact that, before the Court of Appeals' opinion below, *no* case ever in the history of the Michigan common law has approvingly discussed the recovery of noneconomic damages for the negligent

destruction of property. Indeed, no case has even broached this issue except through the negative implication arising from limiting damages for the negligent destruction or damage of property to replacement and repair costs. . . .

Moreover, the Court of Appeals has decided two relatively recent cases concerning injury to *personal* property in which noneconomic damages were disallowed. In *Koester v. VCA Animal Hospital*, the plaintiff dog owner sought noneconomic damages . . . against his veterinarian following the death of his dog . . . . The trial court [ruled in favor of the veterinarian], holding that "emotional damages for the loss of a dog do not exist." On appeal, the Court of Appeals affirmed, noting that pets are personal property under Michigan law and explaining that there "is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage."

Later, in *Bernhardt v. Ingham Regional Medical Center*, the plaintiff [accidentally left] her grandmother's 1897 wedding ring (which was also her wedding ring) and a watch purchased in 1980 around the time of her brother's murder . . . in the [hospital's] washbasin and left the hospital. Upon realizing her mistake, the plaintiff contacted the defendant and was advised that she could retrieve the jewelry from hospital security. However, when she tried to retrieve the jewelry, it could not be located. The plaintiff sued, and the defendant . . . argu[ed] that the plaintiff's damages did not exceed the $25,000 [minimum amount for a valid case in the] trial court. The plaintiff countered that her damages exceeded that limit because the jewelry possessed great sentimental value. The trial court granted the defendant's motion. On appeal, the Court of Appeals affirmed, citing *Koester* for the proposition that there "is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage". . . . In support of its conclusion, *Bernhardt* quoted the following language from the Restatement Second of Torts:

> If the subject matter cannot be replaced, however, as in the case of a destroyed or lost family portrait, the owner will be compensated for its special value to him, as evidenced by the original cost, and the quality and condition at the time of the loss. . . . In these cases, however, damages cannot be based on sentimental value. Compensatory damages are not given for emotional distress caused merely by the loss of the things, except that in unusual circumstances damages may be awarded for humiliation caused by deprivation, as when one is deprived of essential elements of clothing.

While *Koester* and *Bernhardt* both involved negligent injury to *personal* property, they speak of property generally. Although the Court of Appeals in the instant case seeks to draw distinctions between personal and real property, neither that Court nor plaintiff has explained how any of those distinctions, even if they had some pertinent foundation in the law, are relevant with regard to the propriety of awarding noneconomic damages. In short, while it is doubtlessly true that many people are highly emotionally attached to their houses, many people are also highly emotionally attached to their pets, their heirlooms, their collections, and any number of other things. But there is no legally relevant basis that would logically justify prohibiting the recovery of noneconomic damages for the negligent killing of a pet or the negligent loss of a family heirloom but allow such a recovery for the negligent destruction of a house. Accordingly, *Koester* and *Bernhardt* underscore [the long-standing] exclusion of noneconomic damages for negligent injury to real and personal property.

Finally, we would be remiss if we did not address *Sutter v. Biggs*, which the Court of Appeals cited as providing the "general rule" for the recovery of damages in tort actions. *Sutter* stated:

> The general rule, expressed in terms of damages, and long followed in this State, is that in a tort action, the [party that committed the tort] is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, provided the damages are the legal and natural consequences of the wrongful act, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated. Remote contingent, or speculative damages are not considered in conformity to the general rule.

Although *Sutter* articulates a "general rule," it is a "general rule" that has never been applied to allow the recovery of noneconomic damages in a case involving only property damage, and it is a "general rule" that must be read in light of the more narrow and specific "general rule" [that Michigan has always followed with regard to the noneconomic damages exclusion in cases involving property damage].

The development of the common law frequently yields "general rules" from which branch more specific "general rules" that apply in limited circumstances. Where tension exists between those rules, the more specific rule controls. . . . With respect to this case, although *Sutter* articulated a general rule, [the rule excluding noneconomic damages for property damages is] a more specific "general rule". . . . Accordingly, because this case involves only property damage, the [latter] rule . . . controls.

B. Altering the Common Law

Because the Court of Appeals determined that the "general rule" is that "in a tort action, the [party who committed the tort] is liable for *all* injuries," the Court of Appeals contended that it was not altering the common law but, rather, "declin[ing] to extend" to real property the personal property "exception" set forth in *Koester* and *Bernhardt*. However, as previously mentioned, the Court of Appeals' opinion constitutes the first and only Michigan case to support the recovery of noneconomic damages for the negligent destruction of property. Accordingly, contrary to the Court of Appeals' own characterization and for the reasons

discussed [above], the Court of Appeals' holding represents an alteration of the common law. With that understanding, we address whether the common law *should* be altered.

"This Court is the principal steward of Michigan's common law," . . . and it is "axiomatic that our courts have the constitutional authority to change the common law in the proper case. . . ." However, this Court has also explained that alteration of the common law should be approached cautiously with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules. . . . Among them has been our attempt to "avoid capricious departures from bedrock legal rules as such tectonic shifts might produce unforeseen and undesirable consequences." . . . As this emphasis on incrementalism suggests, when it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change. This approach ensures continuity and stability in the law.

With the foregoing principles in mind, we respectfully decline to alter the common-law rule that the appropriate measure of damages for negligently damaged property is the cost of replacement or repair. We are not oblivious to the reality that destruction of property or property damage will often engender considerable mental distress, and we are quite prepared to believe that the particular circumstances of the instant case were sufficient to have caused exactly such distress. However, we are persuaded that the present rule is a rational one and justifiable as a matter of reasonable public policy. We recognize that might also be true of alternative rules that could be constructed by this Court. In the final analysis, however, the venerability of the present rule and the lack of any compelling argument that would suggest its objectionableness in light of changing social and economic circumstances weigh, in our judgment, in favor of its retention. Because we believe the rule to be sound, if change is going to come, it must come by legislative alteration. A number of factors persuade us that the longstanding character of the present rule is not simply a function of serendipity or of judicial inertia, but is reflective of the fact that the rule serves legitimate purposes and values within our legal system.

First, one of the most fundamental principles of our economic system is that the market sets the price of property. This is so even though every individual values property differently as a function of his or her own particular preferences. . . . Second, economic damages, unlike noneconomic damages, are easily verifiable, quantifiable, and measurable. Thus, when measured only in terms of economic damages, the value of property is easily ascertainable. . . . Third, limiting damages to the economic value of the damaged or destroyed property limits disparities in damage awards from case to case. Disparities in recovery are inherent in legal matters in which the value of what is in dispute is neither tangible nor objectively determined, but rather intangible and subjectively determined. . . . Fourth, the present rule affords some reasonable level of certainty to businesses regarding the potential scope of their liability for accidents caused to property resulting from their negligent conduct. [U]nder the Court of Appeals' rule, those businesses that come into regular contact with real property—contractors, repairmen, and fuel suppliers, for example—would be exposed to the uncertainty of not knowing whether their exposure to tort liability will be defined by a plaintiff who has an unusual emotional attachment to the property or by a jury that has an unusually sympathetic opinion toward those emotional attachments.

Once again, it is not our view that the common-law rule in Michigan cannot be improved, or that it represents the best of all possible rules, only that the rule is a reasonable one and has survived for as long as it has because there is some reasonable basis for the rule and that no compelling reasons for replacing it have been set forth by either the Court of Appeals or plaintiff. We therefore leave it to the Legislature, if it chooses to do so at some future time, to more carefully balance the benefits of the current rule with what that body might come to view as its shortcomings.

IV. Conclusion

The issue in this case is whether noneconomic damages are recoverable for the negligent destruction of real property. No Michigan case has ever allowed a plaintiff to recover noneconomic damages resulting solely from the negligent destruction of property, either real or personal. Rather, the common law of this state has long provided that the appropriate measure of damages in cases involving the negligent destruction of property is simply the cost of replacement or repair of the negligently destroyed property. We continue today to adhere to this rule and decline to alter it. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the trial court for entry of summary disposition in defendant's favor.

The body of law called historically concerned itself with accomplishing "rough justice" when common law rules would produce unfair results. In medieval England, common law rules were technical and rigid and the remedies available in common law courts were too few. This meant that some deserving parties could not obtain adequate relief. As a result, separate equity courts began hearing cases that the common law courts could not resolve fairly. In these equity courts, procedures were flexible, and rigid rules of law were deemphasized in favor of general moral maxims.

Equity courts also provided several remedies not available in the common law courts (which generally awarded

only money damages or the recovery of property). The most important of these *equitable remedies* was—and continues to be—the , a court order forbidding a party to do some act or commanding him to perform some act. Others include the contract remedies of (whereby a party is ordered to perform according to the terms of her contract), (in which the court rewrites the contract's terms to reflect the parties' real intentions), and (a cancellation of a contract and a return of the parties to their precontractual position).

As was the common law, equity principles were brought to the American colonies and continued to be used after the Revolution and the adoption of the Constitution. Over time, however, the once-sharp line between law and equity has become blurred. Nearly all states have abolished separate equity courts and have enabled courts to grant whatever relief is appropriate, whether it be the legal remedy of money damages or one of the equitable remedies discussed earlier. Equitable principles have been blended together with common law rules, and some traditional equity doctrines have been restated as common law or statutory rules. An example is the doctrine of unconscionability discussed in Chapter 15.

As Chapter 47 reveals, the administrative agencies established by Congress and the state legislatures have acquired considerable power, importance, and influence over business. A major reason for the rise of administrative agencies was the collection of social and economic problems created by the industrialization of the United States that began late in the 19th century. Because legislatures generally lacked the time and expertise to deal with these problems on a continuing basis, the creation of specialized, expert agencies was almost inevitable.

Administrative agencies obtain the ability to make law through a *delegation* (or grant) of power from the legislature. Agencies normally are created by a statute that specifies the areas in which the agency can make law and the scope of its power in each area. Often, these statutory delegations are worded so broadly that the legislature has, in effect, merely pointed to a problem and given the agency wide-ranging powers to deal with it.

The two types of law made by administrative agencies are *administrative regulations* and *agency decisions*. As do statutes, administrative regulations appear in a precise form in one authoritative source. They differ from statutes, however, because the body enacting regulations is not an elected body. Many agencies have an internal courtlike structure that enables them to hear cases arising under the statutes and regulations they enforce. The resulting agency decisions are legally binding, though appeals to the judicial system are sometimes allowed.

According to the U.S. Constitution, made by the president with foreign governments and approved by two-thirds of the U.S. Senate become "the supreme Law of the Land." As will be seen, treaties invalidate inconsistent state (and sometimes federal) laws.

State governments have subordinate units that exercise certain functions. Some of these units, such as school districts, have limited powers. Others, such as counties, municipalities, and townships, exercise various governmental functions. The enactments of counties and municipalities are called ; zoning ordinances are an example. Ordinances resemble statutes, and the techniques of statutory interpretation described later in this chapter typically are used to interpret ambiguous language in ordinances.

In theory, the president or a state's governor is a chief executive who enforces the laws but has no law-making powers. However, these officials sometimes have limited power to issue laws called . This power normally results from a legislative delegation.

Identify the type of law that takes precedence when two types of law conflict.

Because the different types of law may, from time to time, conflict, rules for determining which type takes priority are necessary. Here, we briefly describe the most important such rules.

1. According to the principle of , the U.S. Constitution, federal laws enacted pursuant to it, and treaties are the supreme law of the land. This means that federal law defeats conflicting state law.
2. Constitutions defeat other types of law within their domain. Thus, a state constitution defeats all other state laws inconsistent with it. The U.S. Constitution, however, defeats inconsistent laws of whatever type.
3. When a treaty conflicts with a federal statute over a purely domestic matter, the measure that is later in time usually prevails.
4. Within either the state or the federal domain, statutes defeat conflicting laws that depend on a legislative

delegation for their validity. For example, a state statute defeats an inconsistent state administrative regulation.

5. Statutes and any laws derived from them by delegation defeat inconsistent common law rules. Accordingly, either a statute or an administrative regulation defeats a conflicting common law rule.

Courts are careful to avoid finding a conflict between the different types of law unless the conflict is clear. In fact, one maxim of statutory interpretation (described later in this chapter) instructs courts to choose an interpretation that avoids unnecessary conflicts with other types of law, particularly constitutions that would preempt the statute. Statutes will sometimes explicitly state the enacting legislature's intent to displace a common law rule. In the absence of that, though, courts will look for significant overlap and inconsistency between a statute and a common law rule to determine that there is a conflict for which the statute must take priority. The following *Advance Dental Care, Inc. v. SunTrust Bank* case illustrates this. Notice how the court first looks to the statutory language for explicit instruction regarding displacement of the common law rule. Then it considers whether the statute and common law rule overlap, particularly whether the statute offers a sufficient remedy to replace the common law rule. Finally, the court notes an important inconsistency between the statute and the common law rule.

816 F. Supp. 2d 268 (D. Md. 2011)

Michelle Rampersad was an employee of Advance Dental at its dental office in Prince George's County, Maryland. During a period of more than three years ending in fall 2007, Rampersad took approximately 185 insurance reimbursement checks that were written to Advance Dental and endorsed them to herself. She then took the checks to SunTrust Bank and deposited them into her personal accounts. The checks totaled $400,954.04.

Advance Dental filed a lawsuit against SunTrust after it discovered Rampersad's unauthorized endorsement and deposit of the checks. The lawsuit claimed SunTrust violated two provisions of the Maryland version of the Uniform Commercial Code (UCC) dealing with negligence and conversion. It also stated a claim of negligence pursuant to the common law of Maryland. The court had previously dismissed the UCC negligence claim for reasons not relevant here. In the opinion that follows, the court considers whether Advance Dental's common-law negligence claim has been displaced by the statutory UCC conversion claim.

Alexander Williams, Jr., U.S. District Court Judge

III. Legal Analysis

In this case of first impression, the Court must determine whether section 3-420 of the Maryland U.C.C. [(the U.C.C. conversion provision)] displaces common-law negligence when a payee seeks to recover from a depositary bank that accepted unauthorized and fraudulently endorsed checks.

A. Availability of an Adequate U.C.C. Remedy

[C]ourts have held that common-law negligence claims can proceed only in the absence of an adequate U.C.C. remedy.

In the present case, it is indisputable that Advance Dental has an adequate U.C.C. remedy—conversion—for which Advance Dental has already filed a claim. Therefore, in light of the overwhelming case law, . . . [the U.C.C. conversion provision] displaces common-law negligence because Advance Dental has an adequate U.C.C. remedy.

B. Indistinct Causes of Action with Conflicting Defenses

Statutory authority also emphasizes the necessity of displacing common-law negligence in this case. Section 1-103(b) of the Maryland U.C.C. establishes the U.C.C.'s position regarding the survival of common-law actions alongside the U.C.C.: "[u]nless displaced by the particular provisions of Titles 1-10 of this article, the principles of law and equity . . . shall supplement its provisions. . . ." Since the U.C.C. has no express "displacement" provision, the Court must determine whether [the U.C.C. conversion provision] is a "particular provision" that displaces the common law.

The Court finds significant overlap between [the U.C.C. conversion provision] and common-law negligence. [The U.C.C. conversion provision] defines conversion as "payment with respect to [an] instrument for a person not entitled to enforce the instrument or receive payment." Here, Advance Dental alleges that SunTrust is liable in negligence for allowing Rampersad to fraudulently endorse and deposit checks made payable to Advance Dental into her personal account. Therefore, . . . both negligence and conversion require a consideration of whether there was payment over a wrongful endorsement.

The duplicative nature of these two theories suggests the U.C.C.'s intention to create a comprehensive regulation of payment over unauthorized or fraudulent endorsements. . . . In the presence

of such intent, courts have preempted common-law claims. To do otherwise would destroy the U.C.C.'s attempt to establish reliability, uniformity, and certainty in commercial transactions.

Here, Advance Dental's common-law negligence action has no independent significance apart from [the U.C.C. conversion provision]. In fact, when discussing common-law negligence, Advance Dental simply refers to the same conduct alleged in Count I (conversion) to argue that SunTrust has breached its duty of reasonable and ordinary care. . . . In other words, [the U.C.C. conversion provision] has effectively subsumed common-law negligence claims.

Not only is common-law negligence insufficiently distinct from [the U.C.C. conversion provision], but the conflicting defenses available for each cause of action are also problematic. The U.C.C. is based on the principle of comparative negligence. In contrast, contributory negligence remains a defense for common-law negligence.[2] Displacement is thus required since Maryland courts "hesitate to adopt or perpetuate a common law rule that would be plainly inconsistent with the legislature's intent. . . ."

IV. Conclusion

For the foregoing reasons [and reasons not included in this edited version of the opinion], the Court **GRANTS** Defendant's Renewed Motion to Dismiss Count III of Plaintiff's Complaint.

Three common classifications of law cut across the different types of law. These classifications involve distinctions between (1) criminal law and civil law; (2) substantive law and procedural law; and (3) public law and private law. One type of law might be classified in each of these ways. For example, a burglary statute would be criminal, substantive, and public; a rule of contract law would be civil, substantive, and private.

Explain the basic differences between the *criminal law* and *civil law* classifications.

is the law under which the government prosecutes someone for committing a crime. It creates duties that are owed to the public as a whole. mainly concerns obligations that private parties owe to each other. It is the law applied when one private party sues another. The government, however, may also be a party to a civil case. For example, a city may sue, or be sued by, a construction contractor. Criminal penalties (e.g., imprisonment or fines) differ from civil remedies (e.g., money damages or equitable relief). Although most of the legal rules in this text are civil law rules, Chapter 5 deals specifically with the criminal law.

Even though the civil law and the criminal law are distinct bodies of law, the same behavior will sometimes violate both. For instance, if A commits an intentional act of physical violence on B, A may face both a criminal prosecution by the state and B's civil suit for damages.

sets the rights and duties of people as they act in society. controls the behavior of government bodies (mainly courts) as they establish and enforce rules of substantive law. A statute making murder a crime, for example, is a rule of substantive law. The rules describing the proper conduct of a trial, however, are procedural. This text focuses on substantive law, although Chapters 2 and 5 examine some of the procedural rules governing civil and criminal cases.

Public law concerns the powers of government and the relations between government and private parties. Examples include constitutional law, administrative law, and criminal law. *Private law* establishes a framework of legal rules that enables parties to set the rights and duties they owe each other. Examples include the rules of contract, property, and agency.

Jurisprudence

Describe key ways in which the major schools of jurisprudence differ from each other.

The various types of law sometimes are called *positive law*. Positive law comprises the rules that have been laid down by a recognized political authority. Knowing the types of positive law is essential to an understanding of the American legal system and the topics discussed in this text.

[2]The comparative and contributory negligence defenses are discussed in detail in Chapter 7. They address in different manners whether and to what extent a plaintiff's own negligence in the actions upon which a claim is based ought to excuse the defendant from liability. Here the defenses would be relevant in that SunTrust might argue that Advance Dental was at fault for failing to discover and to prevent Rampersad's fraudulent activities on its own.

Yet defining *law* by listing these different kinds of positive law is no more complete or accurate than defining "automobile" by describing all the vehicles going by that name. To define law properly, some say, we need a general description that captures its essence.

The field known as seeks to provide such a description. Over time, different schools of jurisprudence have emerged, each with its own distinctive view of the essence of the law.

One feature common to all types of law is their enactment by a governmental authority such as a legislature or an administrative agency. This feature underlies the definition of law that characterizes the school of jurisprudence known as . Legal positivists define law as the *command of a recognized political authority*. As the British political philosopher Thomas Hobbes observed, "Law properly, is the word of him, that by right hath command over others."

The commands of recognized political authorities may be good, bad, or indifferent in moral terms. To legal positivists, such commands are valid law regardless of their "good" or "bad" content. In other words, positivists see legal validity and moral validity as entirely separate questions. Some (but not all) positivists say that every properly enacted positive law should be enforced and obeyed, whether just or unjust. Similarly, a judge who views the law through a positivist lens would typically try to enforce the law as written, excluding her own moral views from the process. Note, however, that this does not mean that a positivist is bound to accept the law as static or unchangeable. Rather, a positivist who was unhappy with the law as written would point to established political processes as the appropriate mechanism for the law to evolve (e.g., by lobbying a legislature to amend or repeal a statute).

At first glance, legal positivism's "law is law, just or not" approach may seem to be perfect common sense. It presents a problem, however, for it could mean that *any* positive law—no matter how unjust—is valid law and should be enforced and obeyed so long as some recognized political authority enacted it. The school of jurisprudence known as rejects the positivist separation of law and morality.

Natural law adherents usually contend that some higher law or set of universal moral rules binds all human beings in all times and places. The Roman statesman Marcus Cicero described natural law as "the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite." Because this higher law determines what is ultimately good and ultimately bad, it serves as a criterion for evaluating positive law. To Saint Thomas Aquinas, for example, "every human law has just so much of the nature of law, as it is derived from the law of nature." To be genuine law, in other words, positive law must resemble the law of nature by being "good"—or at least by not being "bad."

Unjust positive laws, then, are not valid law under the natural law view. As Cicero put it: "What of the many deadly, the many pestilential statutes which are imposed on peoples? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly."

An "unjust" law's supposed invalidity does not translate into a natural law defense that is recognized in court, however. Nonetheless, judges may sometimes take natural law-oriented views into account when interpreting the law. As compared with positivist judges, judges influenced by natural law ideas may be more likely to read constitutional provisions broadly in order to strike down positive laws they regard as unjust. They also may be more likely to let morality influence their interpretation of the law. Of course, neither judges nor natural law thinkers always agree about what is moral and immoral—a major difficulty for the natural law position. This difficulty allows legal positivists to claim that only by keeping legal and moral questions separate can we obtain stability and predictability in the law.

To some, the debate between natural law and legal positivism may seem disconnected from reality. Not only is natural law unworkable, such people might say, but sometimes positive law does not mean much either. For example, juries sometimes pay little attention to the legal rules that are supposed to guide their decisions, and prosecutors have discretion concerning whether to enforce criminal statutes. In some legal proceedings, moreover, the background, biases, and values of the judge—and not the positive law—drive the result. An old joke reminds us that justice sometimes is what the judge ate for breakfast.

Remarks such as these typify the school of jurisprudence known as . Legal realists regard the law in the books as less important than the *law in action*—the conduct of those who enforce and interpret the positive law. American legal realism defines law as the *behavior of public officials (mainly judges) as they deal with matters before the legal system*. Because the actions of such decision makers—and not the rules in the books—really affect people's lives, the realists say, this behavior is what deserves to be called law.

It is doubtful whether the legal realists have ever developed a common position on the relation between law and morality or on the duty to obey positive law. They have been quick, however, to tell judges how to behave. Many realists feel that the modern judge should be a social engineer who weighs all relevant values and considers social science findings when deciding a case. Such a judge would make the positive law only one factor in her decision. Because judges inevitably base their decisions on personal considerations, the realists assert, they should at least do this honestly and intelligently. To promote this kind of decision making, the realists have sometimes favored fuzzy, discretionary standards that allow judges to decide each case according to its unique facts.

is a general label uniting several different approaches that examine law within its social context. The following quotation from Justice Oliver Wendell Holmes is consistent with such approaches:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[3]

Despite these approaches' common outlook, there is no distinctive sociological definition of law. If one were attempted, it might go as follows: *Law is a process of social ordering reflecting society's dominant interests and values*.

By examining examples of sociological legal thinking, we can add substance to the definition just offered. The "dominant interests" portion of the definition is exemplified by the writings of Roscoe Pound, an influential 20th-century American legal philosopher. Pound developed a detailed and changing catalog of the social interests that press on government and the legal system and thus shape positive law. An example of the definition's "dominant values" component is the *historical school* of jurisprudence identified with the 19th-century German legal philosopher Friedrich Karl von Savigny. Savigny saw law as an unplanned, almost unconscious, reflection of the collective spirit of a particular society. In his view, legal change could only be explained historically, as a slow response to social change.

By emphasizing the influence of dominant social interests and values, Pound and Savigny undermine the legal positivist view that law is nothing more than the command of some political authority. The early 20th-century Austrian legal philosopher Eugen Ehrlich went even further in rejecting positivism. He did so by identifying two different "processes of social ordering" contained within our definition of sociological jurisprudence. The first of these is positive law. The second is the "living law," informal social controls such as customs, family ties, and business practices. By regarding both as law, Ehrlich sought to demonstrate that positive law is only one element within a spectrum of social controls.

Because its definition of law includes social values, sociological jurisprudence seems to resemble natural law. Most sociological thinkers, however, are concerned only with the *fact* that moral values influence the law, and not with the goodness or badness of those values. Thus, it might seem that sociological jurisprudence gives no practical advice to those who must enforce and obey positive law.

Sociological jurisprudence has at least one practical implication, however: a tendency to urge that the law must change to meet changing social conditions and values. In other words, the law should keep up with the times. Some might stick to this view even when society's values are changing for the worse. To Holmes, for example, "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."

During the past half century, legal scholars have fashioned additional ways of viewing law, explaining why legal rules are as they are and exploring supposed needs for changes in legal doctrines. For example, the *law and economics* movement examines legal rules through the lens provided by economic theory and analysis. This movement's influence has extended beyond academic literature, with law and economics-oriented considerations, factors, and tests sometimes appearing in judicial opinions dealing with such matters as contract, tort, or antitrust law.

The *critical legal studies (CLS)* movement regards law as inevitably the product of political calculation (mostly of the right-wing variety) and longstanding class biases on the part of lawmakers, including judges. Articles published by CLS adherents provide controversial assessments and critiques of legal rules. Given the thrust of CLS and the view it takes of

[3]Oliver Wendell Holmes, *The Common Law* (1881).