# *Legal Environment Today 9th edition Miller Solutions Manual*

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# CHAPTER 1

# LAW AND LEGAL REASONING

## ANSWERS TO LEARNING OBJECTIVES AT THE BEGINNING OF THE CHAPTER

**1A.** ***What are four primary sources of law in the United States?*** Primary sources of law are sources that establish the law. In the United States, these include the U.S. Constitution and the state constitutions, statutes passed by Congress and the state legislatures, regulations created by administrative agencies, and court decisions, or case law.

**2A.** ***What is the common law?*** Because of our colonial heritage, much of American law is based on the English legal system. After the Norman conquest of England, the king's courts sought to establish a uniform set of rules for the entire country. What evolved in these courts was the common law—a body of general legal principles that applied throughout the entire English realm. Courts developed the common law rules from the principles underlying judges' decisions in actual legal controversies.

**3A.** ***What is the difference between remedies at law and remedies in equity?*** An award of compensation in either money or property, including land, is a remedy at law. Remedies in equity include a decree for *specific performance* (an order to perform what was promised), an *injunction* (an order directing a party to do or refrain from doing a particular act), and *rescission* (cancellation) of a contract (and a return of the parties to the positions that they held before the contract's formation). As a rule, courts will grant an equitable remedy only when the remedy at law (money damages) is inadequate. Remedies in equity on the whole are more flexible than remedies at law.



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**4A.** ***When might a court depart from precedent?*** Judges attempt to be consistent, and when possible, they base their decisions on the principles suggested by earlier cases. They seek to decide similar cases in a similar way and consider new cases with care, because they know that their conflicting decisions make new law. Each interpretation becomes part of the law on the subject and serves as a legal precedent—a decision that furnishes an example or authority for deciding subsequent cases involving similar legal principles or facts.

A court will depart from the rule of a precedent when it decides that the rule should no longer be followed. If a court decides that a precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent.

**5A.** ***What are some important differences between civil law and criminal law?*** Civil law spells out the rights and duties that exist between persons and between persons and their governments, and the relief available when a person's rights are violated. In a civil case, a private party may sue another private party (the government can also sue a party for a civil law violation) to make that other party comply with a duty or pay for damage caused by a failure to comply with a duty.

Criminal law has to do with wrongs committed against society for which society demands redress. Local, state, or federal statutes proscribe criminal acts. Public officials, such as district attorneys, not victims or other private parties, prosecute criminal defendants on behalf of the state.

In a civil case, the object is to obtain remedies (such as damages) to compensate an injured party. In a criminal case, the object is to punish a wrongdoer to deter others from similar actions. Penalties for violations of criminal statutes include fines and imprisonment, and in some cases, death.

## ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

### LINKING BUSINESS LAW TO CORPORATE MANAGEMENT— CRITICAL THINKING

***Why are owner/operators of small businesses at a disadvantage relative to large corporations when they attempt to decipher complex regulations that apply to their businesses?*** The larger the corporation, the larger the staff of attorneys either within the company or available outside the company (so-called outside counsel). Consequently, when a new complex regulation is put into place by an administrative agency, the staff of the large corporation can focus on that new regulation. Whatever the cost of deciphering such a new regulation, that cost will be spread out over a much larger volume of goods or services that the large corporation sells. In contrast, a small business owner/operator rarely can pay significant fees to a specialized

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attorney who might help in deciphering the new regulation. Not only does the small business owner/operator have fewer financial resources, she or he cannot spread the cost of the specialized attorney over a large volume of goods or services sold.

### ETHICS TODAY— CRITICAL THINKING

***When is the Supreme Court justified in* not *following the doctrine of* stare decisis*?*** The doctrine of *stare decisis* requires a court to adhere to precedent to promote predictability and consistency. To overcome the doctrine of *stare decisis* a precedent must be more than just wrongly decided. There has to be a special reason to overrule it. It is more likely that the Supreme Court waves the doctrine of *stare decisis* when issues unrelated to business are the focus of cases at bar. Specifically, issues that involve discrimination, freedom of speech, privacy, and so on are more likely to involve disregarding of the doctrine of *stare decisis* if the political atmosphere has changed since the original decision.

### BEYOND OUR BORDERS— CRITICAL THINKING

***Discuss any advantages the civil law system might offer over the common law system and vice versa.*** The positive and negative aspects of the characteristics of each legal system make up its advantages and disadvantages. For example, on the one hand, a civil law system relies on a code of laws without regard to precedent. When a statute is clear, this can make the application of law more standard. When a statute is ambiguously phrased, it can be subject to different interpretations, however, which can lead to unpredictable applications.

On the other hand, in a common law system, reliance on precedent is required, which can render the application of an unclear statute more predictable, at least in a give jurisdiction. But a statute that is not clearly phrased may not be uniformly interpreted and applied across jurisdictions.

## ANSWERS TO QUESTIONS IN THE CHAPTER SKILL-BUILDING EXERCISE AT THE END OF THE CHAPTER

**1A.** ***Parties***

In this situation, the automobile manufacturers are the plaintiffs, and the state of California is the defendant.

**2A.** ***Remedy***

The plaintiffs are seeking an injunction, which is an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

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**3A.** ***Source of law***

This case involves a law passed by the California legislature and a federal statute, thus the primary source of law is statutory law.

**4A.** ***Finding the law***

Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in both of these sources to find the relevant state and federal statutes.

## ANSWER TO DEBATE THIS QUESTION IN THE CHAPTER SKILL-BUILDING EXERCISE AT THE END OF THE CHAPTER

***Under the doctrine of* stare decisis*, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute?***

Both England and the U.S. legal systems were constructed on the common law system. The doctrine of *stare decisis* has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of *stare decisis* is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was one hundred years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

## ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

**1A.** ***The First Amendment provides protection for the free exercise of religion. A state legislature enacts a law that outlaws all religions that do not derive from the Judeo-Christian tradition. Is this law valid within that state? Why or why***

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***not?*** No. The U.S. Constitution is the supreme law of the land, and applies to all jurisdictions. A law in violation of the Constitution (in this question, the First Amendment to the Constitution) will be declared unconstitutional.

**2A.** ***Under what circumstance might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

## ANSWERS TO BUSINESS SCENARIOS AND CASE PROBLEMS AT THE END OF THE CHAPTER

**1–1A.** ***Binding versus persuasive authority***

A decision of a court is binding on all inferior courts. Because no state's court is inferior to any other state's court, no state's court is obligated to follow the decision of another state's court on an issue. The decision may be persuasive, however, depending on the nature of the case and the particular judge hearing it. A decision of the United States Supreme Court on an issue is binding, like the decision of any court, on all inferior courts. The United States Supreme Court is the nation's highest court, however, and thus, its decisions are binding on all courts, including state courts.

**1–2A.** ***Remedies***

**1.** Specific performance is the remedy that includes an order to a party to perform a contract as promised.

**2.** Rescission is a remedy that includes an order to cancel a contract.

**3.** In both cases, these remedies are remedies in equity.

**1–3A.** ***Sources of law***

**1.** The U.S. Constitution—The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced.

**2.** The federal statute—Under the U.S. Constitution, when there is a conflict between a federal law and a state law, the state law is rendered invalid.

**3.** The state statute—State statutes are enacted by state legislatures. Areas not covered by state statutory law are governed by state case law.

**4.** The U.S. Constitution—State constitutions are supreme within their respective borders unless they conflict with the U.S. Constitution, which is the supreme law of the land.

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**1–4A. *Philosophy of law***

Crimes against humanity constituted, at the time of the Nuremberg trials, a new international crime, consisting of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious ground." In response to the defendants' assertion that they had only been following orders, the Nuremberg judges explained in part that these were familiar crimes within domestic jurisdictions and that thus the accused must have known, when they committed their acts, that they would be considered criminal. In terms of a philosophy of law, it might be said that these criminals violated "natural law." The oldest and one of the most significant schools of jurisprudence is the natural law school. Those who adhere to the natural law school of thought believe that government and the legal system should reflect universal moral and ethical principles that are inherent in human nature. Because natural law is universal, it takes on a higher order than positive, or conventional, law. The natural law tradition presupposes that the legitimacy of conventional, or positive, law derives from natural law. Whenever it conflicts with natural law, conventional law loses its legitimacy. For example, a precept of natural law may be that murder is wrong, which is a value reflected by specific laws prohibiting murder. If a specific, written law *requires* murder, it conflicts with the natural law precept, in which case individuals should disobey the written law and obey the natural law.

**1–5A. SPOTLIGHT ON AOL—*Common law***

The doctrine of *stare decisis* is the process of deciding case with reference to former decisions, or precedents. Under this doctrine, judges are obligated to follow the precedents established within their jurisdiction.

In this problem, the enforceability of a forum-selection clause is at issue. There are two precedents mentioned in the facts that the court can apply: (1) The United States Supreme Court has held that a forum-selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." (2) California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, it will dismiss the suit.

In the actual case on which this problem is based, the court determined that the clause is not enforceable under those precedents.

**1–6A. *Sources of law***

The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced. In this problem, the court determined that a Massachusetts state statute was in conflict with the U.S. Constitution. The Constitution takes priority, so the statute will not be enforced.

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In the actual case on which this problem is based, the trial court held that the statute violated the Constitution, and the U.S. Court of Appeals for the First Circuit affirmed this holding. Under the statute's definitions of large and small wineries, most of the small wineries were in state, and all of the large wineries were out-of-state. The court found that the purpose of the statute was to "ensure that Massachusetts' wineries obtained an advantage over their out-of-state counterparts."

**1–7A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Reading citations***

The court's opinion in this case—*Worldwide TechServices, LLC v. Commissioner of Revenue,* 479 Mass. 20, 91 N.E.3d 650 (2018)—can be found in Volume 479 of the *Massachusetts Reports* on page 20, and in Volume 91 of West's *North Eastern Reporter*, Third Series, on page 650. The Supreme Judicial Court of Massachusetts issued the opinion in 2018.

**1–8A. A QUESTION OF ETHICS—*The doctrine of precedent***

**1.** In this problem, White operated a travel agency. To obtain low fares for her clients, she submitted fake military identification cards to the airlines. She was charged with the crime of identity theft, which requires the "use" of another's identification. In a previous case, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. Miller's conviction for identity theft was overturned on the ground that he had not "used" the investors' identities—he had only *said* that they had done something when they had not. In a second case, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician's signature. White's actions most closely resemble Medlock's forgery. White not only told the airlines that her clients were members of the military—she created false identification cards and sent them to the airlines.

In all of these cases, the defendants lied about their actions. Whether or not their conduct fell within the meaning of a word within a statute, or matched the actions of a perpetrator in another case, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful about their actions.

In the actual case on which this problem is based, the court concluded that White's actions were most similar to Medlock's. White was convicted of identity theft. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction.

**2.** No. In the two cases cited by the *White* court—and in the *White* case—there were no ethical differences in the actions of the parties.

Almost any definition of ethics, and any set of ethical standards, includes honesty as a component. In the *White* case, Sandra White lied to the airlines that her clients were members of the military, and created false identification cards to obtain cheaper fares. In the first case cited by the *White* court, David Miller, to obtain a loan,

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represented that certain investors approved of the loan when they did not. In the second case cited by the *White* court, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician's signature.

In all of these cases, the defendants lied. Whether or not their conduct fell within the meaning of a word within a statute, or matched the unlawful actions of each other, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful.

## TIME-LIMITED TEAM ASSIGNMENT

**1–9A.** ***Court opinions***

**1.** A majority opinion is a written opinion outlining the views of the majority of the judges or justices deciding a particular case. A concurring opinion is a written opinion by a judge or justice who agrees with the conclusion reached by the majority of the court but not necessarily with the legal reasoning that led the conclusion.

**2.** A concurring opinion will voice alternative or additional reasons as to why the conclusion is warranted or clarify certain legal points concerning the issue. A dissenting opinion is a written opinion in which a judge or justice, who does not agree with the conclusion reached by the majority of the court, expounds his or her views on the case.

**3.** Obviously, a concurring or dissenting opinion will not affect the case involved—because it has already been decided by majority vote—but such opinions may be used by another court later to support its position on a similar issue.

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*Chapter 1*

# Law and Legal Reasoning

## INTRODUCTION

The first chapters in Unit 1 provide the background for the entire course. Chapter 1 sets the stage. At this point, it is important to establish goals and objectives. For your students to benefit from this course, they must understand that (1) the law is a set of general rules, (2) that, in applying these general rules, a judge cannot always fit a case to suit a rule, so must fit (or find) a rule to suit the case, (3) that, in fitting (or finding) a rule, a judge must also supply reasons for the decision.

Law consists of enforceable rules governing relationships among individuals and between individuals and their society. The tension in the law between the need for stability and the need for change is one of the concepts introduced in this chapter. How common law courts originated, and the rationale for the doctrine of *stare decisis* are also covered in this chapter.

Another major concept in the chapter involves the distinctions among today's sources of law and distinctions in its different classifications. The sources include the federal constitution and federal laws, state constitutions and statutes (including the UCC), local ordinances, administrative agency regulations, and case law. The classifications include substantive and procedural, national and international, public and private, civil and criminal, and law and equity. These sources and categories give students a framework on which to hang the mass of principles known as the law.

## CHAPTER OUTLINE

### I. Business Activities and the Legal Environment

**A. MANY DIFFERENT LAWS MAY AFFECT A SINGLE BUSINESS TRANSACTION**

Various areas of the law can affect a business decision (such as whether to enter into a contract). A businessperson should know enough about the law to know when to ask for advice.

**B. LINKING BUSINESS LAW TO THE SIX FUNCTIONAL FIELDS OF BUSINESS**

The text introduces a feature that appears in selected chapters, which explains how legal concepts can be useful to managers and other businesspersons in any functional field of business—

- Corporate management



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- Production and transportation
- Marketing
- Research and development
- Accounting and finance
- Human resource management

## II. Sources of American Law

### A. CONSTITUTIONAL LAW

The federal constitution is a general document that distributes power among the branches of the government. It is the supreme law of the land. Any law that conflicts with it is invalid. The states also have constitutions, but the federal constitution prevails if their provisions conflict.

### B. STATUTORY LAW

Laws enacted by legislative bodies at any level of government, such as the statutes passed by Congress or by state legislatures, make up the body of law generally referred to as statutory law. When a legislature passes a statute, that statute ultimately is included in the federal code of laws or the relevant state code of laws. Much of the work of courts is interpreting what lawmakers meant when a law was enacted and applying that law to a set of facts (a case).

#### 1. Local Ordinances

Local legislative bodies enact ordinances—regulations passed by municipal or county governing units to deal with matters not covered by federal or state law.

#### 2. Applicability of Statutes

A federal statute applies to all states. A state statute applies only within the state's borders.

#### 3. Uniform Laws

Panels of experts and scholars create uniform laws that any state's legislature can adopt.

#### 4. The Uniform Commercial Code

The Uniform Commercial Code (UCC) provides a uniform flexible set of rules that govern most commercial transactions. The UCC has been adopted by all the states (only in part in Louisiana), the District of Columbia, and the Virgin Islands.

**ADDITIONAL BACKGROUND—**

### National Conference of Commissioners on Uniform State Laws, Co-Sponsor of the Uniform Commercial Code

As explained in the text, the Uniform Commercial Code (UCC) is an ambitious codification of commercial common law principles. The UCC has been the most widely adopted, and thus the most successful, of the many uniform and model acts that have been drafted. **The National Conference of Commissioners on Uniform State Laws** is responsible for many of these acts. The National Conference of Commissioners on Uniform State Laws is an organization of state commissioners appointed by the governor of each state, the District of Columbia, and Puerto Rico. Their goal is to promote uniformity in state law where uniformity is desirable. The purpose is to alleviate problems that arise in an increasingly interdependent society in which a single transaction may cross many states. Financial support comes from state grants. The members meet

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annually to consider drafts of proposed legislation. The American Law Institute works with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws.

## C. ADMINISTRATIVE LAW

Administrative law consists of the rules, orders, and decisions of administrative agencies. The creation of federal administrative agencies, agencies' powers, and the administrative process (rulemaking, investigation, and adjudication) are discussed in the text.

### 1. Federal Agencies

Executive agencies within the cabinet departments of the executive branch are subject to the power of the president to appoint and remove their officers. The officers of independent agencies serve fixed terms and cannot be removed without just cause.

### 2. State and Local Agencies

These agencies are often parallel federal agencies in areas of expertise and subjects of regulation. Federal rules that conflict with state rules take precedence.

### 3. Agency Creation

Congress creates an agency through enabling legislation to perform certain functions with respect to specific subjects. The functions may include legislative powers (rulemaking), executive capabilities (investigation and enforcement), and judicial authority (adjudication).

### 4. Rulemaking

An agency's creation and changing of its rules is subject to the requirements of the Administrative Procedure Act of 1946.

#### a. Legislative Rules

Legislative rules implement federal laws and are legally binding. Creating a legislative rule typically involves—

- Public notice through the publication of a proposed rule in the *Federal Register.*
- Receipt and review of public comments.
- Drafting and publication of the final rule in the *Federal Register*.

#### b. Interpretive Rules

Interpretive rules declare policy—how an agency will interpret and apply its regulations. These informal guidelines are not legally binding.

### 5. Enforcement and Investigation

An agency can request an individual's or a business's records. An agency can conduct an on-site inspection, which may require a search warrant. The purpose is to uncover regulatory violations against which an agency may issue a formal complaint.

### 6. Adjudication

On a formal complaint, an agency's administrative law judge may conduct a trial-like hearing and render a decision, which may compel a fine or prohibit certain behavior. This may be appealed to the board or commission that governs the agency and ultimately to a federal court.

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### D. CASE LAW AND COMMON LAW DOCTRINES

Another basic source of American law consists of the rules of law announced in court decisions. These rules include judicial interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.

**ADDITIONAL BACKGROUND—**

## *Restatement (Second) of Contracts*

The American Law Institute (ALI), a group of American legal scholars, is responsible for the *Restatements.* These scholars also work with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. Members include law educators, judges, and attorneys. Their goal is to promote uniformity in state law to encourage the fair administration of justice.

The ALI publishes summaries of common law rules on selected topics. Intended to clarify the rules, the summaries are published as the *Restatements*. Each *Restatement* is further divided into chapters and sections. Accompanying the sections are explanatory comments, examples illustrating the principles, relevant case citations, and other materials. The following is ***Restatement (Second) of Contracts***, Section 1 (that is, Section 1 of the second edition of the *Restatement of Contracts*) with excerpts from the Introductory Note to Chapter 1 and Comments accompanying the section.

**Chapter 1**
**MEANING OF TERMS**

* * * *

Introductory Note: A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this *Restatement* are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum.

In the *Restatement,* an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as “contract” or “promise.” The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters.

**§ 1. Contract Defined**

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

**Comment:**

* * * *

**c. Set of promises.** A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of

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promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a "set," promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court.

## III. The Common Law

American law is based on the English common law legal system. Knowledge of this tradition is necessary to students' understanding of the nature of our legal system.

### A. EARLY ENGLISH COURTS

The English system unified its local courts after 1066. This unified system, based on the decisions judges make in individual cases, is the common law system. The common law system involves the consistent application of principles applied in earlier cases with similar facts.

### B. *STARE DECISIS*

The use of precedent forms the basis for the doctrine of *stare decisis*.

#### 1. The Importance of Precedents in Judicial Decision Making

A court's application of a specific principle to a certain set of facts is binding on that court and lower courts, which must then apply it in future cases. A controlling precedent is binding authority. Other binding authorities include constitutions, statutes, and rules.

#### 2. *Stare Decisis* and Legal Stability

This doctrine permits a predictable, quick, and fair resolution of cases, which makes the application of law more stable.

ENHANCING YOUR LECTURE—



### "IS AN 1875 CASE PRECEDENT STILL BINDING?"




In a suit against the U.S. government for breach of contract, Boris Korczak sought compensation for services that he had allegedly performed for the Central Intelligence Agency (CIA) from 1973 to 1980. Korczak claimed that the government had failed to pay him an annuity and other compensation required by a secret *oral* agreement he had made with the CIA. The federal trial court dismissed Korczak's claim, and Korczak appealed the decision to the U.S. Court of Appeals for the Federal Circuit.

At issue on appeal was whether a U.S. Supreme Court case decided in 1875, *Totten v. United States*,[a] remained the controlling precedent in this area. In *Totten*, the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate Army during the Civil War. When the plaintiff sued the government for compensation for his services, the Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that "might compromise or embarrass our government" or cause other "serious detriment" to the

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public. In Korczak's case, the federal appellate court held that the *Totten* case precedent was still "good law," and therefore Korczak, like the plaintiff in *Totten,* could not recover compensation for his services. Said the court, "*Totten*, despite its age, is the last pronouncement on this issue by the Supreme Court. . . . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed."[b]

**THE BOTTOM LINE**

Supreme Court precedents, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation.

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a. 92 U.S. 105 (1875).
b. *Korczak v. United States*, 124 F.3d 227 (Fed.Cir. 1997).

**3. Departures from Precedent**
A judge may decide that a precedent is incorrect, however, if there may have been changes in technology, for example, business practices, or society's attitudes.

**4. When There Is No Precedent**
When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical setting; statutes and the policies behind a legislature's passing a specific statute; society's values and custom; and data and principles from other disciplines.

**5. *Stare Decisis* and Legal Reasoning**
Through the use of legal reasoning, judges harmonize their decisions with those that have been made before, as the doctrine of *stare decisis* requires. The IRAC method of legal reasoning is an acronym for *Issue*, *Rule, Application*, and *Conclusion.*

## C. EQUITABLE REMEDIES AND COURTS OF EQUITY

A court of law is limited to awarding payments of money or property as compensation.

**1. Remedies in Equity**
Equity is a branch of unwritten law founded in justice and fair dealing and seeking to supply a fairer and more adequate remedy than a remedy at law. A court of equity can order specific performance, an injunction, or rescission of a contract.

**2. The Merging of Law and Equity**
Today, in most states, a plaintiff may request both legal and equitable remedies in the same action, and the trial court judge may grant either form—or both forms—of relief.

**3. Equitable Maxims**
These guide the application of equitable remedies.

## D. SCHOOLS OF LEGAL THOUGHT

**1. The Natural Law School**
Adherents of the *natural law* school believe that government and the legal system should reflect universal moral and ethical principles that are inherent in the nature of human life.

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**2. Legal Positivism**
Followers of the positivist school believe that there can be no higher law than a nation's positive law (the law created by a particular society at a particular point in time).

**3. The Historical School**
Those of the historical school emphasize legal principles that were applied in the past.

**4. Legal Realism**
Legal realists believe that judges are influenced by their unique individual beliefs and attitudes, that the application of precedent should be tempered by each case's specific circumstances, and that extra-legal sources should be considered in making decisions.

## IV. Classifications of Law

- Substantive law defines, describes, regulates, and creates rights and duties. Procedural law includes rules for enforcing those rights.
- Other classifications include splitting law into federal and state divisions or private and public categories.
- Cyberlaw is an informal term that describes the body of case and statutory law dealing specifically with issues raised by Internet transactions.

### A. Civil Law and Criminal Law

Civil law regulates relationships between persons and between persons and their governments, and the relief available when their rights are violated. Criminal law regulates relationships between individuals and society, and prescribes punishment for proscribed acts.

### B. National and International Law

**1. National Law**
National law is the law of a particular nation. Laws vary from country to country, but generally each nation has either a common law or civil law system. A common law system, like ours, is based on case law. A civil law system is based on codified law (statutes).

**2. International Law**
International law includes written and unwritten laws that independent nations observe. Sources include treaties and international organizations. International law represents attempts to balance each nation's need to be the final authority over its own affairs and to benefit economically from relations with other nations.

## Teaching Suggestions

**1.** Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal principles are presented in this course as "black letter law"—that is, in the form of basic principles generally accepted by the courts or expressed in statutes. In fact, the law is not so concrete and static. One of the purposes of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented

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against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems ("spot the issues") when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision.

**2.** Point out that the law assumes everyone knows it, or, as it's often phrased, "Ignorance of the law is no excuse." Of course, the volume and expanding proliferation of statutes, rules, and court decisions is beyond the ability of anyone to know it all. But pointing out the law's presumption might encourage students to study. Also, knowing the law allows business people to make better business decisions.

**3.** As Oliver Wendell Holmes noted, "The life of the law has not been logic"—that is, the law does not respond to an internal logic. It responds to social change. Emphasize that laws (and legal systems) are manmade, that they can, and do, change over time as society changes. ***To what specific social forces does law respond? Are the changes always improvements?***

**4.** One method of introducing the subject matter of each class is to give students a hypothetical at the beginning of the class. The hypothetical should illustrate the competing interests involved in some part of the law in the assigned reading. Students should be asked to make a decision about the case and to explain the reasons behind their decision. Once the law has been discussed, the same hypothetical can be considered from an ethical perspective.

**5.** You might want to remind your students that the facts in a case should be accepted as given. For example, under some circumstances, an oral contract may be enforceable. If there is a statement in a case about the existence of oral contract, it should be accepted that there was an oral contract. Arguing with the statement ("How could you prove that there was an oral contract?" for instance) will only undercut their learning, Once they have learned the principle for which a case is presented, then they can ask, "What if the facts were different?"

### *Cyberlaw Link*

Ask your students, at this early stage in their study of business law, what they feel are the chief legal issues in developing a Web site or doing business online. ***What are the legal risks involved in transacting business over the Internet?*** As their knowledge of the law increases over the next few weeks, this question can be reconsidered.

## DISCUSSION QUESTIONS

**1.** ***If justice is defined as the fair, impartial consideration of opposing interests, are law and justice the same thing?*** No. There can be law without justice—as happened in Nazi-occupied Europe, for example. There cannot be justice without law.

**2.** ***What is jurisprudence?*** Jurisprudence refers to the study of law and the ethical values used in defining what the law should be. ***Which of the schools of jurisprudence matches the U.S. system?*** None of the approaches mentioned in these sections is an exact model of the American legal system. They represent frameworks that can be used in evaluating the moral and ethical considerations that are an integral part of the law.

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**3.** ***Define and discuss the sources of American law: What is the supreme law of the land?*** The federal constitution. ***What are statutes?*** Laws enacted by Congress or a state legislative body. ***What are ordinances?*** Laws enacted by local legislative bodies. ***What are administrative rules?*** Laws issued by administrative agencies under the authority given to them in statutes.

**4.** ***What is the Uniform Commercial Code?*** The Uniform Commercial Code (UCC) was created through the joint efforts of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. The UCC was first issued in 1952. The UCC facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions (sales of goods, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions). The UCC assures businesspersons, for example, that their contracts, if validly entered into, normally will be enforced. Uniform laws are often adopted in whole or in substantial part by the states. The UCC has been adopted in its entirety by nearly all states (except Louisiana, which has not adopted Article 2).

**5.** ***What is the common law?*** Students may most usefully understand common law to be case law—that is, the body of law derived from judicial decisions. The body of common law originated in England. The term common law is sometimes used to refer to the entire common law system to distinguish it from the civil law system.

**6.** ***Under what circumstance might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

**7.** ***Discuss the differences between remedies at law and in equity.*** Remedies at law were once limited to payments of money or property (including land) as damages. Remedies in equity were available only when there was no adequate remedy at law. Today, in most states, either or both may be granted in the same action. Remedies in equity are still discretionary, guided by equitable principles and maxims. Remedies at law still include payments of money or property as damages. The major practical difference between actions at law and actions in equity is the right to demand a jury trial in an action at law.

**8.** ***Identify and describe remedies available in equity.*** Specific performance is available only when a dispute involves a contract. The court may order a party to perform what was promised. An injunction orders a person to do or refrain from doing a particular act. Rescission undoes an agreement, and the parties are returned to the positions they were in before the agreement.

**9.** ***Discuss the differences within the classification of law as civil law and criminal law.*** Civil law concerns rights and duties of individuals between themselves; criminal law concerns offenses against society as a whole. (Civil law is a term that is also used to refer to a legal system based on a code rather than on case law.)

## ACTIVITY AND RESEARCH ASSIGNMENTS

**1.** Have students research the laws of other common law jurisdictions (England, India, Canada), other legal systems (civil law systems, contemporary China, Moslem nations), and ancient civilizations (the Hebrews, the Babylonians, the Romans), and compare the laws to those of the United States. In looking at other legal systems, have students consider how international law might develop, given the differences in legal systems, laws, traditions, and customs.

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**2.** Assign specific cases and statutes for students to find, either in a library or online, or assign a list of citations, including uniform resource locators (URLs), for students to decipher.

**3.** Ask students to read newspapers and magazines, listen to radio news and podcasts, watch television news, and find online sources for developments in the law—new laws passed by Congress or signed by the president, laws interpreted by the courts, proposals for changes in the law. The omnipresent effect of law on society should be easy to see.

## EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

**Footnote 7:** In ***Brown v. Board of Education of Topeka,*** the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a non-segregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S. Constitution's Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

**Footnote 8:** In ***Plessy v. Ferguson*,** the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution's Thirteenth and Fourteenth Amendments (the Civil War Amendments) "could not have been intended to abolish distinctions based on color, or to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed "the race line from our governmental systems," and the Constitution was thus "color-blind."

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# *Appendix to Chapter 1*

# Finding and Analyzing the Law

## INTRODUCTION

Laws pertaining to business consist of both statutory law and case law. The statutes, agency regulations, and case law referred to in this text establish the rights and duties of businesspersons. The cases in this book provide students with concise, real-life illustrations of the interpretation and application of the law by the courts. The importance of knowing how to find statutory and case law is the reason for this appendix.

## APPENDIX OUTLINE

### I. Finding Statutory and Administrative Law

Publications collecting statutes and administrative regulations are discussed in the text.

### II. Finding Case Law

A brief introduction to case reporting systems and legal citations is also included.

### III. Reading and Understanding Case Law

To assist students in reading and analyzing court opinions, the formats of cases in the text are digested, terms are defined, and a sample case is annotated.

**ADDITIONAL BACKGROUND—**

### The *Federal Reporter*

Federal court decisions are published unofficially in a variety of publications. These reports are organized by court level and issued chronologically. Opinions from the United States Court of Appeals, for example, are reported in the *Federal Reporter*. Thomson Reuters publishes these decisions with headnotes condensing



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important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points to similar points in cases reported in other publications. The following are excerpts from *Ferguson v. Commissioner of Internal Revenue,* as published with headnotes in the *Federal Reporter*.

**Betty Ann FERGUSON, Petitioner-Appellant,**
**v.**
**COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.**

**No. 90-4430**

Summary Calendar.
United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1991.

Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm.

Reversed and remanded.

**1. Constitutional Law 92K84(2)**

Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. U.S.C.A. Const. Amend. 1. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

**2. Witnesses 410K227**

Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

Betty Ann Ferguson, Metairie, La., pro se.

Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee.

Appeal from a Decision of the United States Tax Court.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

***PER CURIAM:***

Betty Ann Ferguson appeals the Tax Court's dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court's failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse.

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I.

This First Amendment case ironically arose out of a hearing in Tax Court. Although the government's brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson's refusal to "swear" or "affirm" before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. * * *

Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in *Staton v. Fought,* 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation:

> I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.

Judge Korner abruptly denied her request, commenting that "[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had" and that he did not think affirming "violates any recognizable religious scruple." Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court.

II.

**[1]** The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *Accord Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard,* 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness "declare that [she] will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990).

The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States,* 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (*per curiam*), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word "solemnly" in their affirmations for religious reasons.

* * * *

**[2]** The government offers only two justifications for Judge Korner's refusal to consider the *Staton* statement. First, the government contends that the Tax Court was not bound by a Louisiana decision. This argument misses the point entirely; Ms. Ferguson offered *Staton* as an alternative to an oath or affirmation and not as a precedent.

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The government also claims that the *Staton* statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of "an oath" an element of the crime of perjury. *Accord Smith v. United States*, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the Staton statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson's proposal would not suffice as "an oath" for purposes of § 1621. See *Gordon*, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)).

The parties' briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows:

> MS. FERGUSON: I have religious objections to taking an oath.
> THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm.
> MS. FERGUSON: Sir, may I present this to you? I do not—
> THE COURT: Just a minute. The Clerk will ask you.
> THE CLERK: You are going to have to stand up and raise your right hand.
> MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court.
> THE COURT: I don't care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge.
> MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus—
> THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify.
> MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify.

Ms. Ferguson contends that Judge Korner insisted that she use either the word "swear" or the word "affirm"; the government suggests instead that Judge Korner only required an affirmation which the government defines as "an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603]." Even Ms. Ferguson's proposed alternative would be an "affirmation" under the government's definition.

If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson's religious belief, and concluding that it did not violate any "recognizable religious scruple," but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing.

We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion.

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**ADDITIONAL BACKGROUND—**

## State Codes:

## Pennsylvania Consolidated Statutes

State codes may have any of several names—Codes, General Statutes, Revisions, and so on—depending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the **Pennsylvania Consolidated Statutes** (13 Pa. C.S. § 1101).

**PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED**
**TITLE 13. COMMERCIAL CODE**
**DIVISION 1. GENERAL PROVISIONS**
**CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE**

**§ 1101. Short title of title**

This title shall be known and may be cited as the "Uniform Commercial Code."

1984 Main Volume Credit(s)

1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980.

## California Commercial Code

The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the **California Commercial Code** (Cal. Com. Code § 1101).

**WEST'S ANNOTATED CALIFORNIA CODES**
**COMMERCIAL CODE**
**DIVISION 1. GENERAL PROVISIONS**
**CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE**

**§ 1101. Short Title**

This code shall be known and may be cited as Uniform Commercial Code.

1964 Main Volume Credit(s)

(Stats.1963, c. 819, § 1101.)

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## ADDITIONAL BACKGROUND—

## *Corpus Juris Secundum*

Because the body of American case law is huge, finding relevant precedents would be nearly impracticable were it not for case digests, legal encyclopedias, and similar publications that classify decisions by subject. Like case digests, legal encyclopedias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia **Corpus Juris Secundum** (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category "*Theaters & Shows*" (86 C.J.S. *Theaters & Shows* § 47).

**f. Assumption of Risk**

**A patron assumes the ordinary and natural risks of the character of the premises, devices, and form of amusement of which he has actual or imputed knowledge; but he does not assume the risk of injury from the negligence of the proprietor or third persons.**

While it has been said that, strictly speaking, the doctrine of assumed risk is applicable only to the relationship of master and servant,[3] patrons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,[4] or to the devices located therein,[5] or to the form of amusement,[6] which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compulsion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks

**3.** Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.
**4.** Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285.
62 C.J. p 877 note 62.

**Darkened motion picture theater**
Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.
N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.
Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.
**5.** Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.
Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.
Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.
Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.
Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.
Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.
62 C.J. p 877 note 63

**Particular amusement devices**
(1) "Dodge Em" cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b].
(2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93.
(3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].
**6.** Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.
N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.
N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802.
Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.
62 C.J. p 877 note 63.

**Other statements of rule**
(1) A spectator at game assumes risk of such dangers incident to playing of game as are known to him or should be obvious to reasonable and prudent person in exercise of due care under circumstances.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22.
(2) One participating in a race assumes the risk of injury from natural hazards necessarily incident to, or which inhere in, such a race, under maxim "volenti non fit injuria," which means that to which a person assents is not esteemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
(3) Patrons of a place of amusement assume the risk of ordinary dangers normally attendant thereon and also the risks ensuing from conditions of which they now or of which, in the particular circumstances, they are charged with knowledge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

**Liability of proprietor of sports arena**
Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are conducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.

**Risks of particular sports/entertainment**
(1) Baseball.
Cal.—Quinn v. Recreation Park Ass'n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.
Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.
La.—Jones v. Alexandria Baseball Ass'n, App., 50 So.2d 93.
Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American League Baseball Co., App., 78 S.W.2d
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.
N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.
Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.
Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.
Tex.—Williams v. Houston Baseball Ass'n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.
Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.
62 C.J. p 877 note 63 [a].

(2) Basketball.—Paine v. Young Men's Christian Ass'n, 13 A.2d 820, 91 N.H. 78.
(3) Golf.
Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.
N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.
(4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.
(5) Hockey.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311.
(6) Horse racing.
Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
N.Y.—Futterer v. Saratoga Ass'n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.
(7) Ice skating.
Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.
N.D.—Filler v. Stenvick, 56 N.W.2d 798.
Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.
(8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374.

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**ADDITIONAL BACKGROUND—**

## *United States Code*

Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the ***United States Code***. In the *United States Code,* all federal laws of a public and permanent nature are compiled by subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the *United States Code* (15 U.S.C. § 1).

**TITLE 15. COMMERCE AND TRADE**
**CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE**

**§ 1. Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

**ADDITIONAL BACKGROUND—**

## *Code of Federal Regulations*

Created by Congress in 1937, the ***Code of Federal Regulations*** is a set of soft cover volumes that contain the regulations of federal agencies currently in effect. Items are selected from those published in the *Federal Register* and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the *United States Code* (discussed above). Each title is divided into chapters, parts, and sections. The *Code of Federal Regulations* is completely revised every year. The following is the text of Section 230.504 of Title 17 of the *Code of Federal Regulations* (17 C.F.R. § 230.504).

**TITLE 17—COMMODITY AND SECURITIES EXCHANGE**
**Chapter II—Securities and Exchange Commission**
**Part 230—General Rules and Regulations, Securities Act of 1933**
**REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS**
**Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933**

**§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.**

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**(a) Exemption.**

Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

**(b) Conditions to be met—**

**(b)(1) General Conditions.** To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made:

(b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or

(b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities.

**(b)(2) Specific condition—**

(b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state's securities laws.

Note 1.—The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504.

Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

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Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the integration principles set forth in § 230.502(a).

(b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502.

[53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989]

AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37.

Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted.

Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

**ADDITIONAL BACKGROUND—**

## *United States Code Annotated*

The ***United States Code Annotated*** contains the complete text of laws enacted by Congress that are included in the *United States Code* (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the *United States Code Annotated* (15 U.S.C.A. § 1), including the historical notes and selected references.

**TITLE 15. COMMERCE AND TRADE**
**CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE**

**§ 1. Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

**HISTORICAL AND STATUTORY NOTES**

Effective Date of 1975 Amendment. Section 4 of Pub. L. 94-145 provided that: "The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975]."

Short Title of 1984 Amendment. Pub. L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: "That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the 'Local Government Antitrust Act of 1984'."

Short Title of 1982 Amendment. Pub. L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that "This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the 'Foreign Trade Antitrust Improvements Act of 1982'."

Short Title of 1980 Amendment. Pub. L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: "That this Act [enacting section 26a of this title] may be cited as the 'Gasohol Competition Act of 1980'."

Short Title of 1975 Amendment. Section 1 of Pub. L. 94-145 provided: "That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the 'Consumer Goods Pricing Act of 1975'."

Short Title of 1974 Amendment. Section 1 of Pub. L. 93-528 provided: "That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the 'Antitrust Procedures and Penalties Act'."

Short Title. Pub. L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: "That this Act [sections 1 to 7 of this title] may be cited as the 'Sherman Act'."

Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S.Code Cong. and Adm.News, p. 2322.

For legislative history and purpose of Pub. L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub. L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569.

**REFERENCES**

**CROSS REFERENCES**

Antitrust laws inapplicable to labor organizations, see § 17 of this title.

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Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation.

Combinations in restraint of import trade, see § 8 of this title.

Conspiracy to commit offense or to defraud United States, see § 371 of Title 18, Crimes and Criminal Procedure.

Discrimination in price, services or facilities, see § 13 of this title.

Fishing industry, restraints of trade in, see § 522 of this title.

Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure.

Monopolies prohibited, see § 2 of this title.

Trusts in territories or District of Columbia prohibited, see § 3 of this title.

**FEDERAL PRACTICE AND PROCEDURE**

1990 Pocket Part Federal Practice and Procedure

Adding new parties, see Wright & Miller: Civil § 1504.

Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765.

Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167.

Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730.

Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain intrastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031.

Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942.

Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564.

Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668.

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

Joiner of claims, see Wright & Miller: Civil § 1587.

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***CODE OF FEDERAL REGULATIONS***

1973 Main Volume *Code of Federal Regulations*

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Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 *et seq*.

Common sales agency, see 16 CFR 15.46.

Compliance with state milk marketing orders, see 16 CFR 15.154.

Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254.

**LAW REVIEW COMMENTARIES**

Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986).

Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24

* * * *

**ANNOTATIONS**

1. Common law

Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad mandate by drawing on common-law tradition. *National Society of Professional Engineers v. U.S.,* U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637.

This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. *U.S. v. Socony-Vacuum Oil Co.,* Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421.

Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. *Denison Mattress Factory v. Spring-Air Co.,* C.A.Tex.1962, 308 F.2d 403.

Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. *Rogers v. Douglas Tobacco Bd. of Trade, Inc.,* C.A.Ga.1957, 244 F.2d 471.

Federal statutory law on monopolies did not supplant common law but incorporated it. *Mans v. Sunray DX Oil Co.,* D.C.Okl.1971, 352 F.Supp. 1095.

Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. *U.S. v. Arnold, Schwinn & Co.,* D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567.

This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. *U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass'n,* D.C.Mo.1949, 82 F.Supp. 147.

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**CASE SYNOPSIS—**

## A Sample Court Case: *Yeasin v. Durham*

Navid Yeasin and A.W. were students at the University of Kansas (KU). They dated for about nine months. When A.W. tried to end the relationship, Yeasin restrained her in his car, took her phone, and threatened to make the "campus environment so hostile that she would not attend any university in the state of Kansas." He repeatedly tweeted disparaging comments about her. Tammara Durham, the university's vice provost for student affairs, found that Yeasin's conduct and tweets violated the school's student code of conduct and sexual-harassment policy. She expelled him.

Yeasin filed a suit in a Kansas state court against Durham, and the university reinstated him. He then filed a suit in a federal district court against Durham, claiming that she had violated his First Amendment rights by expelling him for the content of his off-campus speech. The court dismissed the claim. Yeasin appealed to the U.S. Court of Appeals for the Tenth Circuit.

The U.S. Court of Appeals for the Tenth Circuit affirmed the lower court's dismissal of Yeasin's suit. Yeasin argued that three cases decided by the United States Supreme Court clearly established his right to tweet about A.W. without the university being able to place restrictions on, or discipline him for, his tweets. In response, the court here pointed out that those cases did not involve circumstances similar to Yeasin's situation. In those cases, no student had been charged with a crime against another student and then made sexually harassing comments affecting her ability to feel safe while attending classes. And, the court concluded, in this case Dr. Durham could reasonably believe, based on Yeasin's conduct and his tweets, that his presence at the university would disrupt A.W.'s education and interfere with her rights.

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# BUSINESS ACTIVITIES AND THE LEGAL ENVIRONMENT

- **Law:** A body of enforceable rules governing relationships among individuals and between individuals and their society.
  - All rules have one feature in common: they establish rights, duties, and privileges that are consistent with the values and beliefs of a society or its ruling group.
- **Liability:** The state of being legally responsible (liable) for something, such as a debt or obligation.
- Business law is linked to six functional fields of business:

(1) corporate management
(2) production and transportation
(3) marketing
(4) research and development
(5) accounting and finance
(6) human resource management


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# SOURCES OF AMERICAN LAW

- **Primary Source of Law:** A document that establishes the law on a particular issue. In the U.S., primary sources of law include:

  (1) *constitutions* setting forth the fundamental rights of the people living within the United States or a given state, describing and empowering the various branches of government, and prescribing limitations on that power;

  (2) legislatively-enacted *statutes* and local *ordinances*;

  - A given state statute may be based on a *uniform law* (*e.g.*, the Uniform Commercial Code) or on a *model act* (*e.g.*, the Model Business Corporations Act). However, each state is free to depart from the uniform law or model act as it sees fit.

  (3) *administrative rules and regulations* promulgated by federal, state, and local regulatory agencies; and

  (4) *case law*, which is the body of judicial decisions that interpret and enforce any of the foregoing.

- **Secondary Source of Law:** A publication that summarizes or interprets the law, such as a legal encyclopedia, a legal treatise, or an article in a law review.


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# CONSTITUTIONAL LAW

- **Constitutional Law:** The body of law derived from the U.S. Constitution (for example, the Tenth Amendment) and the constitutions of the various states.


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# STATUTORY LAW

- **Statutory Law:** The body of law enacted by legislative bodies, as opposed to constitutional law, administrative law, or case law.
  - **Citation:** A reference to a publication in which a legal authority—such as a statute or a court decision—can be found.
- **Ordinance:** A regulation enacted by a city or county legislative body that becomes part of that state's statutory law.
- A federal statute applies to all states; a state statute applies only within the state's borders. No state statute or local ordinance may violate the U.S. Constitution or the relevant state constitution.
- To counteract problems arising from differences among state laws, the National Conference of Commissioners on Uniform State Laws draft **uniform laws** ("model statutes") that states can choose to adopt or reject.
  - The Uniform Commercial Code (UCC), one of the most important uniform acts, facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions.


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# ADMINISTRATIVE LAW

- **Administrative Law:** The body of rules, orders, and decisions issued by administrative agencies, such as the federal Securities and Exchange Commission or a state's public utilities commission.

- **Administrative Agencies:** Agencies authorized by federal or state legislation to make and enforce rules to administer and enforce legislative acts (*e.g.*, the Social Security Administration).

  - *Federal Agencies:* Agencies formed at the executive branch of government (known as **Executive Agencies**) or, at the state level, the Governor, to carry out executive functions (*e.g.*, the Federal Bureau of Investigation).

  - **Independent Regulatory Agencies:** Agencies neither designed to aid nor directly accountable to the legislative or executive branches (*e.g.*, the Federal Reserve System).

  - *State and Local Agencies:* State or local agencies often created as a parallel to a federal agency.


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# CASE LAW AND COMMON LAW DOCTRINES

- **Case Law:** The rules of law announced in court decisions. Case law interprets statutes, regulations, and constitutional provisions, and governs all areas not covered by statutory or administrative law.


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# THE COMMON LAW

- Due to colonial heritage, much American law is based on the English court system, which began under William the Conqueror in the 11th century.

- **Precedent:** The authority afforded to a prior judicial decision by judges deciding subsequent disputes involving the same or similar facts and the same jurisdiction's substantive law.

- **Common Law:** The body of law developed from custom or judicial decisions in English and U.S. courts, not attributable to a legislature.


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# COURTS OF LAW AND COURTS OF EQUITY

- From their origin in the late 11th century, common law courts were typically classified as either "courts of law" or "courts of equity."
  - **Courts of Law** were empowered only to award wronged parties money or other valuable compensation for their injuries or other losses.
  - **Courts of Equity**, by contrast, were empowered to award any manner of non-monetary relief, such as ordering a person to do something or to cease doing something.
- Today, these courts have merged, and a party can seek both legal and equitable remedies in the same action**.**
  - **Remedy:** The relief given to an innocent party to enforce a right or compensate for the violation of a right.
  - **Remedy at Law:** A remedy available in a court of law. Money **damages** are awarded as compensation for a loss or injury.
  - **Remedy in Equity:** A remedy allowed by courts in situations where remedies at law are not appropriate. Equitable remedies include injunction, specific performance, and rescission.
  - **Breach:** The failure to perform a legal obligation.
  - **Equitable Maxims:** General propositions or principles of law that have to do with fairness (equity).


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# *STARE DECISIS*

- ***Stare Decisis*:** The common law doctrine that obliges judges to follow established precedent within a particular jurisdiction.

  - **Binding Authority:** Any primary source of law a court must follow when deciding a dispute. This includes all constitutional provisions, statutes, treaties, regulations, or ordinances that govern the issue being decided, as well as prior court decisions that constitute controlling precedent in the court's jurisdiction.

  - **Persuasive Authority:** Any primary or secondary source of law which a court may, but which the court is not bound to, rely upon for guidance in resolving a dispute.

  - A prior judicial decision acts as *binding* precedent only when the subsequent court is applying the same law as the prior court; otherwise, the prior decision is only *persuasive* authority.


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# *STARE DECISIS* AND LEGAL REASONING

- **Legal Reasoning:** The process of reasoning by which a judge harmonizes his or her opinion with the judicial decisions in previous cases, achieved by asking the following IRAC questions:
  - *Issue*: What are the key facts and issues?
  - *Rule*: What rule of law applies to the case?
  - *Application*: How does the rule of law apply to the particular facts and circumstances of this case?
  - *Conclusion*: What conclusion should be drawn?
- Some key terms associated with legal reasoning include:
  - **Plaintiff:** The party who filed a court action.
  - **Defendant:** The party against whom the plaintiff filed its action.
  - **Allege:** To state, recite, assert, or charge.
  - **Case on Point:** A previous case involving factual circumstances and issues that are similar to those in the case before the court.
- Personal factors shape the legal reasoning process, and there is often not "one right answer" to a legal question.


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# SCHOOLS OF LEGAL THOUGHT

- **Jurisprudence:** The science or philosophy of law, typically influenced by one of several schools of legal thought:
  - **Natural Law:** The oldest school of legal thought, based on the belief that the legal system should reflect universal ("higher") moral and ethical principles that are inherent in human nature.
  - **Legal Positivism:** A school of thought centered on the assumption that there is no law higher than the laws created by a national government.
  - **Historical School:** A school of legal thought that looks to the past to determine what the principles of contemporary law should be.
  - **Legal Realism:** A school of legal thought that holds that the law is only one factor to be considered when deciding cases, and that social and economic circumstances should also be taken into account.


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# CLASSIFICATIONS OF LAW

- **Substantive vs. Procedural Law**
  - **Substantive law** consists of all laws that define, describe, regulate, and create legal rights and obligations.
  - **Procedural law** consists of all laws that establish and regulate the manner of enforcing or vindicating the rights established by substantive law.


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# CIVIL LAW AND CRIMINAL LAW

- **Civil law** defines and enforces the duties or obligations of persons to one another.
  - **Civil law systems**, such as those in Mexico and France, are based primarily on statutory, or "codified," law. Prior judicial decisions have no *binding* authority except as between the parties to the decision.
- **Criminal law**, by contrast, defines and enforces the obligations of persons to society as a whole.


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# NATIONAL AND INTERNATIONAL LAW

- **National Law:** Laws governing rights and obligations within a particular country.

- **International Law:** Laws governing the relations between and among nations and between nations and the citizens of one or more other sovereign nations (*e.g.*, the Geneva Convention on the Treatment of Prisoners of War, the Warsaw Convention on International Air Travel, the General Agreement on Tariffs and Trade).


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United States Court of Appeals,
Ninth Circuit.
DOE 1, Doe 2, and Kasadore Ramkissoon, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,
v.
AOL LLC, Defendant-Appellee.

No. 07-15323.
Argued and Submitted Dec. 6, 2007.
Filed Jan. 16, 2009.

**Background:** Members of internet company brought an action, on behalf of themselves and a putative nationwide class of members, alleging violations of federal electronic privacy law and California law. The United States District Court for the Northern District of California, Saundra B. Armstrong, J., internet company's motion to dismiss for improper venue. Members appealed.

**Holdings:** The Court of Appeals held that:
(1) designation of "the courts of Virginia" in forum selection clause of internet company's member agreement meant the state courts of Virginia, and
(2) forum selection clause was unenforceable.

Reversed and remanded.

D.W. Nelson, Senior Circuit Judge, and Reinhardt, Circuit Judge, filed a concurring opinion.

Bea, Circuit Judge, filed a concurring opinion.

West Headnotes

**[1] Federal Courts 170B 818**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk818 k. Dismissal. Most Cited Cases

An appellate court reviews a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion.

**[2] Federal Courts 170B 776**

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of

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extrinsic evidence but on an application of the principles of contract interpretation, an appellate court reviews a district court's interpretation de novo.

**[3] Federal Courts 170B 95**

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk95 k. Objections, Waiver and Consent. Most Cited Cases

**Federal Courts 170B 96**

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases

A motion to enforce a forum selection clause is treated as a motion to dismiss for improper venue; pleadings need not be accepted as true, and facts outside the pleadings may be considered. Fed.Rules Civ.Proc.Rule 12(b)(3), 28 U.S.C.A.

**[4] Contracts 95 206**

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Designation of "the courts of Virginia" in forum selection clause of internet company's member agreement meant the state courts of Virginia, and did not include federal courts located in Virginia; courts "of" Virginia referred to courts proceeding from, with their origin in, Virginia.

**[5] Federal Courts 170B 412.1**

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases

A federal court applies federal law to the interpretation of a forum selection clause.

**[6] Contracts 95 147(2)**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

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**Contracts 95 152**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself; whenever possible, the plain language of the contract should be considered first.

**[7] Contracts 95 143.5**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole. Most Cited Cases

Under federal law, a court reads a written contract as a whole, and interprets each part with reference to the whole.

**[8] Contracts 95 143(2)**

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation.

**[9] Contracts 95 127(4)**

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Forum selection clause in internet company's member agreement designating Virginia state courts was unenforceable as to California resident plaintiffs bringing class action claims under California consumer law; class action relief for consumer claims was unavailable in Virginia state court, and California state court had previously found a California public policy against consumer class action waivers and waivers of consumer rights under California consumer law.

**[10] Federal Courts 170B 412.1**

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170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases

A federal court applies federal law to determine the enforceability of a forum selection clause.

**[11] Contracts 95 141(1)**

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k141 Evidence
95k141(1) k. Presumptions and Burden of Proof. Most Cited Cases

A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a heavy burden to establish a ground upon which a court will conclude the clause is unenforceable.

**[12] Contracts 95 127(4)**

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

A forum selection clause is unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Joseph J. Tabacco, Jr., Christopher T. Heffelfinger, Berman DeValerio Pease Tabacco Burt & Pucillo, San Francisco, CA; C. Oliver Burt, III, Berman DeValerio Pease Tabacco Burt & Pucillo, West Palm Beach, FL; Richard R. Wiebe, Law Office of Richard R. Wiebe, San Francisco, CA; and James K. Green, James K. Green, P.A., West Palm Beach, FL, for the plaintiffs-appellants.

Patrick J. Carome, Samir C. Jain, D. Hien Tran, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV-06-05866-SBA.

Before: D.W. NELSON, STEPHEN REINHARDT, and CARLOS T. BEA, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge D.W. NELSON; Concurrence by Judge BEA.

PER CURIAM:

On July 31, 2006, AOL LLC (formerly America Online, Inc.) made publicly available the internet search records of more than 650,000 of its members. The records contained personal and sometimes embarrassing information

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about the members. Plaintiffs, members of AOL, brought an action in federal district court in California on behalf of themselves and a putative nationwide class of AOL members, alleging violations of federal electronic privacy law, 18 U.S.C. § 2702(a). A subclass of AOL members who are California residents also alleged various violations of California law, including the California Consumers Legal Remedies Act, California Civil Code § 1770.

Under the AOL Member Agreement, all plaintiffs agreed to a forum selection clause that designates the "courts of Virginia" as the fora for disputes between AOL and its members. The Member Agreement also contains a choice of law clause designating Virginia law to govern disputes.

AOL moved to dismiss the action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), on the basis of the parties' forum selection clause. AOL contends the clause permits plaintiffs to refile their consumer class action in state *or* federal court in Virginia. Plaintiffs contend the forum selection clause limits them to Virginia state court, where a class action remedy would be unavailable to them; this, they contend, violates California public policy favoring consumer class actions and renders the forum selection clause unenforceable.

The district court granted AOL's motion and dismissed the action without prejudice to plaintiffs refiling it in a state or federal court in Virginia. We hold the district court erred when it interpreted the forum selection clause to permit actions in either state or federal court in Virginia; the plain language of the clause-courts "of" Virginia-demonstrates the parties chose Virginia state courts as the only fora for any disputes. We reverse and remand for further proceedings.

## I.

### A. The Complaint

Plaintiffs Kasadore Ramkissoon and Doe 1 and Doe 2,[FN1] members of AOL, filed a class action complaint in the District Court for the Northern District of California against AOL on behalf of themselves and a nationwide putative class of AOL members. The complaint alleges Ramkissoon currently is a resident of New York, while Doe 1 and Doe 2 currently are residents of California. The complaint does not state when Doe 1 and Doe 2 became residents of California, where they resided when they entered into the Member Agreement with AOL, or where they resided when they used AOL's services.

> FN1. Plaintiffs and AOL filed a joint stipulation and proposed order to allow Doe 1 and Doe 2 to proceed anonymously, because of the sensitive nature of the personal information Doe 1 and Doe 2 claim AOL publicly disclosed about them. The district court granted the motion, which ruling is not at issue on appeal.

AOL provides its members with access to the Internet and a variety of related features, including search tools and security features. The complaint alleges that on July 31, 2006, "roughly twenty million AOL Internet search records were packaged into a database" and made publicly available for download for a period of approximately ten days. The data consisted of the records of which internet sites were visited by nearly 658,000 AOL members who conducted such visits from approximately March 2006 through May 2006. AOL does not contest this occurrence.

The complaint alleges the data contained the addresses, phone numbers, credit card numbers, social security numbers, passwords and other personal information of AOL members. Plaintiffs also allege the searches reveal members' "personal struggles with various highly personal issues, including sexuality, mental illness, recovery from alcoholism, and victimization from incest, physical abuse, domestic violence, adultery, and rape," by revealing their Internet searches for information on these issues. Although AOL admitted it made a "mistake" and took down the data, "mirror" websites appeared on the internet that reproduced the data. Some of these websites present the data in a searchable form and others "invite the public to openly criticize and pass judgment on AOL members based on their searches."

Plaintiffs' complaint alleges seven causes of action. Two of the causes of action-violation of the federal Elec-

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tronic Communications Privacy Act, 18 U.S.C. § 2702(a),[FN2] and unjust enrichment under federal common law-are brought on behalf of all plaintiffs and the putative nationwide class.

> FN2. 18 U.S.C. § 2702(a) prohibits an entity that provides an electronic communications service or remote computing service from knowingly divulging, except in certain circumstances, the contents of an electronic communication or a record or other information about a subscriber.

The other five causes of action are brought under California statutory and common law. Doe 1 and Doe 2 bring these claims on behalf of the putative sub-class of AOL members who are California residents. They allege AOL violated the following California statutes: (1) the California Consumers Legal Remedies Act (CLRA),[FN3] which prohibits unfair methods of competition and unfair or deceptive acts or practices resulting in the sale of goods or services; (2) the California Customer Records Act,[FN4] which requires businesses to destroy customers' records that are no longer to be maintained, and requires businesses to maintain security procedures to protect customers' personal information; (3) California False Advertising law; [FN5] and (4) California Unfair Competition law,[FN6] which prohibits unfair, unlawful, and fraudulent business practices. These California plaintiffs also allege AOL committed the tort of public disclosure of private facts under California common law.

> FN3. Cal. Civ.Code § 1770.
>
> FN4. Cal. Civ.Code § 1798.81.
>
> FN5. Cal. Bus. & Prof.Code § 17500 *et seq.*
>
> FN6. Cal. Bus. & Prof.Code § 17200 *et seq.*

**B. The Forum Selection and Choice of Law Clause**

AOL's headquarters are located in Dulles, Virginia. All members of AOL's online service, including all plaintiffs and putative class members, must agree to the AOL Member Agreement as a prerequisite to register for AOL service. Each member must click on a box that states the member has agreed to the terms of the Member Agreement before he can complete his registration.

The Member Agreement contains a choice of law clause that designates Virginia law, excluding its conflict-of-law rules. It also contains a forum selection clause that designates the "courts of Virginia" as the fora for disputes between AOL and its members. The choice of law and forum selection clause of the Member Agreement in effect during the time period relevant to the complaint-January 1, 2004 through September 22, 2006-states in its entirety:

> The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Member Agreement and your membership. You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or AOL Services. The foregoing provision may not apply to you depending on the laws of your jurisdiction. This Agreement shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods.

**C. District Court Order**

Based on the forum selection clause, AOL moved to dismiss the action for improper venue under Federal Rule of Civil Procedure 12(b)(3) ("Rule 12(b)(3)"), or, alternatively, to transfer venue to the District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1406(a).[FN7] The district court granted AOL's Rule 12(b)(3) motion to dismiss and adopted AOL's proposed order in its entirety. The district court held the forum selection clause "expressly requires that this controversy be adjudicated in a court in Virginia" and that "[p]laintiffs agreed the courts of

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Virginia have 'exclusive jurisdiction' over any claims or disputes with AOL, and venue in the Northern District of California is improper." The order dismissed plaintiffs' complaint "without prejudice to the refiling of their claims in a state or federal court in Virginia."

> FN7. 28 U.S.C. § 1406(a) states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

**II.**

[1][2] We review a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 323 (9th Cir.1996). Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of extrinsic evidence but on an application of the principles of contract interpretation, we review the district court's interpretation *de novo*. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir.1987).

[3] A motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to Rule 12(b)(3); pleadings need not be accepted as true, and facts outside the pleadings may be considered. *Argueta*, 87 F.3d at 324.

**III.**

[4] As a threshold matter, the parties dispute the meaning of the forum selection clause, specifically the phrase "exclusive jurisdiction ... resides *in the courts of Virginia.*" AOL claims the phrase "courts of Virginia" refers to state and federal courts in Virginia, while plaintiffs claim it refers to Virginia state courts only. We agree with plaintiffs' interpretation.

[5] We apply federal law to the interpretation of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir.1988). When we interpret a contract under federal law, we look for guidance "to general principles for interpreting contracts." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir.1999).

[6][7][8] "Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first." *Id.* (internal citation omitted). We apply the "primary rule of interpretation ... that the common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." *Hunt Wesson Foods, Inc.*, 817 F.2d at 77 (internal quotation marks and alteration omitted). We read a written contract as a whole, and interpret each part with reference to the whole. *Klamath Water Users Protective Ass'n*, 204 F.3d at 1210. That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous "if reasonable people could find its terms susceptible to more than one interpretation." *Id.*

The district court, without discussion, interpreted the forum selection clause to refer to state *and* federal courts of Virginia. We determine the meaning of the phrase "courts of Virginia" *de novo*, *Hunt Wesson Foods, Inc.*, 817 F.2d at 77, and look first to its plain meaning. We have not previously addressed the meaning of a forum selection clause designating the courts "of," rather than "in," a state. We hold that the forum selection clause at issue here-designating the courts of Virginia-means the state courts of Virginia only; it does not also refer to federal courts in Virginia.

The clause's use of the preposition "of"-rather than "in"-is determinative. Black's Law Dictionary defines "of" as a term "denoting that from which anything proceeds; indicating origin, source, descent, and the like...." FN8 *Black's Law Dictionary* 1080 (6th ed.1990). Thus, courts "of" Virginia refers to courts proceeding from, with their origin in, Virginia-i.e., the state courts of Virginia. Federal district courts, in contrast, proceed from, and find their

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origin in, the federal government.[FN9]

FN8. In contrast, the proposition "in" "express[es] relation of presence, existence, situation, inclusion, action, etc.; inclosed or surrounded by limits, as in a room; also meaning for, in and about, on, within etc. ...." *Black's Law Dictionary* 758 (6th ed.1990).

FN9. Reading the forum selection and choice of law clause as a whole further supports this reasonable interpretation. *See Klamath Water Users Protective Ass'n,* 204 F.3d at 1210. The clause contains both a forum selection provision by which the parties agreed to the "courts of Virginia" as the fora for their disputes, *and* a choice of law provision by which the parties agreed to apply the "laws of the Commonwealth of Virginia." The *state* courts of Virginia are the ultimate determiners of the "laws of the Commonwealth of Virginia"; a federal court in Virginia merely follows Virginia law.

Our interpretation finds support among opinions by our sister circuits who have addressed the meaning of forum selection clauses designating the "courts of" a state-all of whom have interpreted such clauses to refer to the state courts of the designated state, and not also to the federal courts in the designated state. *See Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.,* 428 F.3d 921, 926 (10th Cir.2005) (interpreting "Courts of the State of Colorado" to mean Colorado state courts; the clause "refers to sovereignty rather than geography"); *Dixon v. TSE Int'l Inc.,* 330 F.3d 396, 398 (5th Cir.2003) (interpreting "Courts of Texas, U.S.A." to mean Texas state courts; "[f]ederal district courts may be *in* Texas, but they are not *of* Texas"); *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.,* 739 F.2d 4, 7 (1st Cir.1984) (interpreting forum selection and choice of law clause stating the contract shall be interpreted according to "the law, and in the courts, of the Commonwealth of Massachusetts" to designate the state courts of Massachusetts; "the word 'of' as it appears in the phrase in question must have been intended to restrict the meaning of both 'law' and 'courts' to those that trace their origin to the state.").

Accordingly, we hold the plain meaning of the forum selection clause's designation of the "courts of Virginia" is the state courts of Virginia; it does not include federal district courts located in Virginia.[FN10]

FN10. We find no ambiguity in the forum selection clause. Even if we did find the phrase ambiguous, we would interpret it in plaintiffs' favor. The parties produced no other evidence of their expressed intent. Accordingly, we would construe the contract against AOL as the drafter and adopt plaintiffs' reasonable interpretation of the phrase to mean the state courts of Virginia. *See InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.,* 719 F.2d 992, 998 (9th Cir.1984).

**IV.**

[9] Having interpreted the AOL forum selection clause to designate Virginia state courts, we turn to the enforceability of the clause.

Plaintiffs contend the forum selection clause so construed is unenforceable as a matter of federal law, because it violates California public policy against waivers of class action remedies and rights under the California Consumers Legal Remedies Act. AOL, however, steadfastly has asserted the forum selection clause permits plaintiffs to maintain an action in federal court in Virginia, where plaintiffs could pursue their consumer class action remedies. AOL has raised no contention that the forum selection clause, construed to mean only Virginia state courts, nevertheless is enforceable and does not violate California public policy.

[10][11][12] We apply federal law to determine the enforceability of the forum selection clause. *Manetti-Farrow,* 858 F.2d at 513. A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a "heavy burden" to establish a ground upon which we will conclude the clause is unenforceable. *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Under the directives of the Supreme Court in *Bremen,* we will determine a forum selection clause is unenforceable "if enforcement would

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contravene a strong public policy of the forum in which suit is brought, whether declared by statute *or by judicial decision*." *Id.* at 15, 92 S.Ct. 1907 (emphasis added).

California has declared "by judicial decision" the same AOL forum selection clause at issue here contravenes a strong public policy of California-as applied to California residents who brought claims under California statutory consumer law in California state court. In *America Online, Inc. v. Superior Court of Alameda County (Mendoza)*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (2001), Mendoza, a California resident and member of AOL, brought a putative class action on behalf of AOL members in California state court, alleging violations of California state law, to wit: the California Consumers Legal Remedies Act, the California Unfair Business Practices Act, and common law conversion and fraud. *Mendoza*, 108 Cal.Rptr.2d at 702.

AOL moved to dismiss Mendoza's action based on its forum selection clause designating the "courts of Virginia." *Id.* at 701-02. The state trial court denied AOL's motion, holding the forum selection clause was unenforceable because it "diminished" the rights of California consumers, and remedies available in Virginia were not "comparable" to those in California.[FN11] *Id.* at 703.

> FN11. The trial court also denied AOL's motion on the basis the forum selection clause was unconscionable under California law because the clause was not negotiated, was contained in a standard form contract, and "was in a format that was not readily identifiable by Mendoza." *Id.* at 703. The Court of Appeal did not reach the trial court's unconscionability ruling, because it affirmed on other grounds. *Id.* at 713 n. 17.

AOL filed a petition for writ of mandamus. The California Court of Appeal denied the writ, thereby leaving in place the trial court's denial of AOL's motion to dismiss. Relevant to the instant appeal, the California Court of Appeal held the AOL forum selection clause was unenforceable, because the clause violated California public policy on two grounds: (1) enforcement of the forum selection clause violated California public policy that strongly favors consumer class actions, because consumer class actions are not available in Virginia state courts, *id.* at 712; [FN12] and (2) enforcement of the forum selection clause violates the anti-waiver provision of the Consumer Legal Remedies Act (CLRA), *id.* at 710, which states "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ.Code § 1751. The state Court of Appeal held the forum selection clause, together with the choice of law provision, effect a waiver of statutory remedies provided by the CLRA in violation of the anti-waiver provision, as well as California's "strong public policy" to "protect consumers against unfair and deceptive business practices." [FN13] *Mendoza*, 108 Cal.Rptr.2d at 710.

> FN12. The California Court of Appeal expressed "the importance class action consumer litigation has come to play" in California and noted California courts have "extolled" "the right to seek class action relief in consumer cases." *Mendoza*, 108 Cal.Rptr.2d at 712. In Virginia state court, in contrast, class action relief for consumer claims is unavailable. *Id.*; Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.11 (4th ed. 2003) (Virginia "does *not* have a statute or rule authorizing a 'class action' comparable to such proceedings under Rule 23 of the Federal Rules of Civil Procedure or the statutes and rules of most sister states.") (emphasis in original).

> FN13. The California Court of Appeal noted its conclusion on this point was "reinforced by a statutory comparison of California and Virginia consumer protection laws, which reveals Virginia's law provides significantly less consumer protection to its citizens than California law provides for our own." *Id.* at 710. Specifically, the court noted Virginia consumer protection law has a shorter statute of limitations, has a lower required minimum recovery amount, and does not provide the enhanced remedies for disabled and senior citizens which the CLRA provides. *Id.*

We agree with plaintiffs that *Mendoza* is the kind of declaration "by judicial decision" contemplated by *Bremen*. *Mendoza* found a California public policy against consumer class action waivers and waivers of consumer

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rights under the CLRA that California public policy applies to California residents bringing class action claims under California consumer law. As to such California resident plaintiffs, *Mendoza* holds California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.

Accordingly, the forum selection clause in the instant member agreement is unenforceable as to California resident plaintiffs bringing class action claims under California consumer law.[FN14]

FN14. The members of this panel, however, disagree as to whether the plaintiffs in the instant case have established the AOL forum selection clause is unenforceable as to them, or whether further development of the record is necessary on remand.

**REVERSED and REMANDED.**[FN15]

FN15. Plaintiffs' requests for judicial notice of an AOL memorandum of law in an unrelated litigation and an AOL press release stating AOL will move its headquarters to New York are denied as moot.

D.W. NELSON, Senior Circuit Judge, and REINHARDT, Circuit Judge, concurring:

Plaintiffs Doe 1 and 2 have alleged sufficient facts to invoke California's public policy. California courts have made clear that they will "refuse to defer to the selected forum if to do so would substantially diminish the rights of California *residents* in a way that violates our state's public policy." *Mendoza,* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 707 (2001) (emphasis added). In this case, plaintiffs, who allege that they were California *residents* at the time of the filing of the complaint, are bringing claims under California's consumer protection statutes, while the defendant seeks to enforce the same AOL contract by relying on the exact contract provisions that *Mendoza* refused to apply. Nothing in California law suggests that a plaintiff must have been a resident for any period of time before invoking California's public policy. To the contrary, being a resident at the time the complaint is filed is sufficient. *See id.* at 708, 709 (evaluating the effect of the forum selection clause on the rights of "California residents").

As the per curiam opinion recognizes, California's Consumer Legal Remedies Act states that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ.Code § 1751. California public policy is offended by *any* clause that would require the plaintiffs, being California *residents,* to pursue their claims in a forum that does not permit class actions. This is true regardless of whether plaintiffs' rights are waived directly by a forum selection clause or indirectly, as our colleague proposes, through conflicts of law analysis. As *Mendoza* made clear, "Enforcement of the contractual forum selection *and choice of law clauses* would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law." *Mendoza,* 108 Cal.Rptr.2d at 702 (emphasis added). As a result, no further pleadings are necessary. Any purported waiver of the rights of a California consumer is unenforceable.

Our colleague has created a pleading requirement premised on a supposed distinction between California "consumers" and California "residents." However, *Mendoza* treats California consumers and California residents as interchangeable, making it clear that, at least for the purposes of the California Consumers Legal Remedies Act, no such distinction exists under California law. This is not surprising given that it is difficult, if not impossible, to reside somewhere without also consuming there. Every California resident is a California consumer. Moreover, the California courts have never applied a pleading requirement such as that proposed by our colleague. If California wishes to adopt such a requirement, its courts are free to do so. However, as a federal court sitting in diversity jurisdiction, we apply, but do not create, state law. *See Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Thus, we may not do so here.

We would add that we do not share our colleague's fear that there will be a rush by out-of-staters to establish California residency in order to file consumer class actions-that we face a new "Gold Rush." No such rush has oc-

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curred in the past despite the state's policy designed to protect California consumers' right to file class actions in cases of fraud or "unfair and deceptive business practices." *Mendoza,* 108 Cal.Rptr.2d at 710.[FN1] The chain of horrors tactic is not a credible one as urged in this case. There are far better reasons to move to the Golden State than are conjured up here by our imaginative and creative colleague.

> FN1. Judge Bea's reliance on the example of Seymour Lazar is entirely out of place. Mr. Lazar was a Californian from childhood. *See* Rhonda L. Rundle, "Legal Setback: A Career in Courts Leads to Trouble For Seymour Lazar," Wall St. J., Jan. 19, 2006, at A1.

BEA, Circuit Judge, concurring:

I concur in the court's judgment reversing the district court's dismissal order and remanding for further proceedings. However, I would remand to allow the plaintiffs an opportunity to plead and prove facts to establish California law and public policy apply to their action and that, therefore, California public policy is violated by enforcement of the AOL contractual forum selection clause.

California has a public policy against the waiver of the class action procedural mechanism by California consumers, as well as the waiver of consumer rights under the California Consumer Legal Remedies Act (CLRA). But that public policy applies to *California consumers* bringing class action claims under *California consumer law.* It is not a foregone conclusion that the AOL forum selection clause (or, for that matter, the choice of law clause) is unenforceable as to plaintiffs. For the forum selection and the choice of law clauses to be unenforceable, plaintiffs must establish they are protected by California law and public policy.

As the California Supreme Court has explained, a consumer class action waiver violates California public policy if it is unconscionable because it operates as an exculpatory clause, exempting a defendant from liability-to the extent the obligation at issue is governed by California law. *See Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1109 (2005) ( "Such one-sided, exculpatory contracts in a contract of adhesion, *at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law,* are generally unconscionable." (emphasis added)). Where, however, liability is not controlled by California law-for example because a valid choice of law provision or conflict of laws principles dictate the application of the laws of another state or country-California's public policy against consumer class action waivers is not implicated. *See id.*

Moreover, enforcement of the AOL forum selection and choice of law clause violates the CLRA statutory anti-waiver provision, California Civil Code § 1751, only if plaintiffs are California consumers who otherwise would be protected by California law. *See* Cal. Civ.Code § 1751 ("Any waiver by a *consumer* of the provisions of this title is contrary to public policy and shall be unenforceable and void."). If plaintiffs have no contacts with California and are not covered by the CLRA, they have no protection under the California law "which would otherwise govern"; hence, they have nothing to waive. *See Am. Online Inc. v. Mendoza,* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 706, 708-09 (1st Dist.2001).

Based on the allegations in plaintiffs' complaint, however, it is not clear whether they are California consumers protected by California law.[FN1] Plaintiffs' complaint, as it currently stands, is devoid of factual allegations that would support a conclusion that California law would apply, notwithstanding the Virginia choice of law provision. Plaintiffs' complaint alleges Doe 1 and Doe 2 "currently"-as of the time they filed their complaint-are residents of California. It further alleges the "California subclass" of plaintiffs is comprised of "AOL members in the State of California." The complaint is silent as to the place of the contracting, the place where the contract was negotiated, the place where the contract was performed, the location of the subject matter of the contract, or the residency of the AOL members at the time of their injuries. *Cf. Klussman v. Cross Country Bank,* 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728, 740-41 (1st. Dist.2005) (noting that California had a materially greater interest than Delaware in the application of its own law where the consumer contracts were formed in California, the allegedly illegal conduct took place at the plaintiffs' homes in California, and the plaintiffs were residents of California at the time of injury).

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The sole relevant allegation is that, as of the time of filing the complaint, Doe 1 and Doe 2 were residents of California. That alone is simply insufficient to establish California law would govern plaintiffs' action. Even in the absence of a choice of law or forum selection clause, residency is but one factor to be considered in determining whether California law applies. "California, despite its interest in securing recovery for its residents, will not apply its law to conduct in other jurisdictions resulting in injury in those jurisdictions." *McGhee v. Arabian Am. Oil Co.,* 871 F.2d 1412, 1425 (9th Cir.1989).

> FN1. To determine whether California or Virginia law would apply, we would apply federal conflict of law rules, as set forth in the Restatement (Second) of Conflicts of Laws. *See Huynh v. Chase Manhattan Bank,* 465 F.3d 992, 997 (9th Cir.2006). Under the Restatement, the parties' chosen law of Virginia will apply unless either (a) Virginia has no substantial relationship to the parties or transaction and there is no other reasonable basis for the parties' choice of law, or (b) application of Virginia law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of [Restatement (Second) of Conflict of Laws] § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187 (1971). Plaintiffs do not claim Virginia has no substantial relation to the transaction; after all, Virginia is where AOL has its principal place of business. *See Discover Bank v. Superior Court,* 134 Cal.App.4th 886, 36 Cal.Rptr.3d 456, 458-59 (2005) (holding Delaware had a substantial relation to transaction where defendant Discover Bank was domiciled in that state).
>
> To determine whether California "has a materially greater interest" than Virginia and would be the state of the applicable law in the absence of an effective choice of law by the parties, § 188 directs us to take into account the following contacts to determine the applicable law: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement (Second) of Conflict of Laws § 188 (1971). Here, plaintiffs' voluminous complaint is curiously silent as to any and all of the determinative contacts mentioned in the Restatement.

There is no "declar[ation] by statute or by judicial decision," *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), that California public policy against consumer rights waivers could possibly be offended by enforcing a contractual class action waiver against a party whose sole connection to California is residency at the time he filed a consumer class action in a California court.[FN2] My colleagues' suggestion otherwise would permit a citizen of another state to move to California for the sole purpose of serving as a class representative and clothing himself with the protections of consumer-friendly California public policy. This would magnetize California courts to pull in out-of-state contracts, actions or omissions. I see nothing in California consumer-protection statutes or cases that would invite such a new Gold Rush.

> FN2. The majority cites *Mendoza* for the proposition that mere residency at the time of filing a complaint is sufficient to invoke California public policy. *Mendoza* neither said nor held any such thing. In *Mendoza,* there was no dispute whether the plaintiffs were California *consumers entitled to invoke the protection of California consumer law,* not merely California residents. *See Mendoza,* 108 Cal.Rptr.2d at 706, 707, 708 (discussing "California consumers" and "this state's consumers"). What *Mendoza* did was use the phrase "California residents" twice. *See id.* at 708, 709. And in each case, the court explained California courts would not enforce contract provisions that would diminish the rights of California residents in a way that would violate California public policy. *Id.* at 708, 709. These statements assume, but do not put, analyze, nor determine, the ultimate question: whether the forum selection and choice of law clauses violate California public policy.
>
> The majority's logical syllogism-all California residents are California consumers-says nothing about whether the plaintiffs are California consumers of AOL products entitled to invoke the protection of California public policy in the instant litigation.

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I am admittedly not as sanguine as my colleagues as to the non-litigation attractions which bring class action plaintiffs to the Golden State. They mention, but do not describe, "far better reasons" for class action representative plaintiffs moving to California than simply to become class action plaintiffs. I am reminded of Mr. Lazar, of Palm Springs, California, recipient of Mel Weiss's kickbacks to become a class action representative plaintiff in several cases.[FN3] With thanks to my colleagues for their encomium, it doesn't really require one to be "imaginative and creative" to suspect the class representatives may not have become California residents for reasons other than class action litigation status and are not really California consumers entitled to California consumer protection.

FN3. *See* The Wall Street Journal Law Blog, http:// blogs. wsj. com/ law/? s= seymour+ lazar (last visited August 20, 2008).

My concurrence merely requires the plaintiff class representatives plead and prove they really are California *consumers* by stating facts which make California substantive law applicable to them, pursuant to the well-known rules of federal choice of law, set forth in the Restatement. This point seems to be brushed away by the majority as an unnecessary technicality by a misreading of *Mendoza.*

Accordingly, I would remand for plaintiffs to be permitted to file an amended complaint to allege facts-if they can so allege-that would demonstrate contacts with California sufficient to establish their causes of action are controlled by California law.

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552 F.3d 1077, 09 Cal. Daily Op. Serv. 636, 2009 Daily Journal D.A.R. 756

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