BUSINESS LAW I SOURCEBOOK (MAC KELLY) - UNDER CONSTRUCTION

LibreTexts™

Business Law I Sourcebook

The LibreTexts libraries are Powered by NICE CXOne and are supported by the Department of Education Open Textbook Pilot Project, the UC Davis Office of the Provost, the UC Davis Library, the California State University Affordable Learning Solutions Program, and Merlot. This material is based upon work supported by the National Science Foundation under Grant No. 1246120, 1525057, and 1413739.

Any opinions, findings, and conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the National Science Foundation nor the US Department of Education.

TABLE OF CONTENTS

16: Appendix B—Media Library

Detailed Licensing

Licensing

*A detailed breakdown of this resource's licensing can be found in **Back Matter/Detailed Licensing**.*

About This Book

About This Book

This book is an interactive open educational resource (OER). Open textbooks are complete textbooks that have been funded, published, and licensed to be freely used, adapted, and distributed. As an open resource, this may be used and reused freely with no direct cost to the user.

Authorship, Adaptations, Supplementary Licensing Notes, and Legal Notice

This includes content (a) created by Matthew L. Mac Kelly and (b) edited, mixed, or otherwise adapted by Matthew L. Mac Kelly from other creators' works in compliance with copyright and licensing laws and appropriate attribution standards and practices. The use of any other content referenced in or integrated into this book complies with copyright and licensing laws and appropriate attribution standards and practices.

Special Thanks

Special thanks to Melissa Randall et al. for *Fundamentals of Business Law* and Mirande Valbrune, Renee De Assis, et al. for *Business Law I Essentials.* Substantial portions of their works have been adapted or otherwise incorporated into this book within the terms of their works' licenses.

Judicial Opinions

Except as otherwise noted, judicial opinions used in this work have been edited by Matthew L. Mac Kelly. Editing and elisions of text are for length and readability purposes. Some elisions of an opinion's original text are identified by bracketed ellipses (e.g., [...]), several of which reveal elided text by clicking on inline annotation indicators (e.g., [...]). Edited judicial opinions in this work are in the public domain, and government documents, judicial opinions and annotations thereto are not subject to copyright protection and are in the public domain. *See Georgia v. Public.Resource.Org, Inc.*, 140 S.Ct. 1498 (2020).

Legal Notice

This book contains legal information intended for educational purposes only and should not be construed as legal advice; please consult a qualified legal professional before making legal decisions.

CHAPTER OVERVIEW

1: Introduction to Law and Types of Legal Systems

Learning Objectives

- Understand the nature and sources of law.
- Know the types of modern legal systems in the world.
- Understand the various functions of a legal system.
- Learn the primary sources of law in the United States.

Chapter Outline

1.1: Why Should I Care About The Law?

Introduction

If you are like a number of undergraduate business students, you might initially see a “law class” as just another course you have to take because it is required for your major. You might be thinking, "I'm going into the business world, not the law," or "We don't really need to know this because we can leave the law to the lawyers." But that mindset presents a couple of practical problems. First, the law is an integral component of most business decisions. Whether planning or executing business decisions—or responding to those of others—some aspect of the law tends to be a factor necessary to sound decision-making. Second, businesses cannot simply "leave the law to the lawyers" because a lawyer cannot be with every decision-maker all the time. (Of course, no one would want that.)

Certainly, this class is not a law school course, and it is not about turning students into lawyers. On the other hand, this class may feel like a mini-law school course because *how lawyers think and how adept business professionals need to think* are more similar than many people might believe. In fact, there is an entire book written about it: *Think Like a Lawyer: Legal Reasoning for Law Students and* ***Business Professionals***.[1]

The significance of legal thinking in business activities and relations cannot be overstated because legal risk plays a substantial role in a business's bottom line.[2] Referring to undergraduate students, Professor Jooho Lee of Pepperdine University’s business school advised that:

> *[L]egal reasoning skills improve their ability to identify and isolate relevant information from irrelevant information, think comprehensively, and communicate their ideas clearly and concisely. These skills are important not only for business but also for good citizenship and a flourishing life.*[3]

Of course, professors typically have some bias of about the importance of their courses, so, let's hear from the professionals. In a risk management study, C-level executives (CEOs, CFOs, etc.) across nine industries and 446 organizations ranked *Legal Risks as their* ***top external pressure***.[4] :

> *In a recent Travelers Business Risk Index survey of more than 1,200 business risk managers, only two categories were among the top ten risks in every industry: legal liability and medical cost inflation. Another category of legal risk, complying with laws, was in the top ten for nine of the ten industries studied.*[5]

The key role that legal considerations play in management is further demonstrated in a survey of over 900 senior managers and executives attending executive programs at the University of Michigan, which showed that they took more sessions on law than any other, aside from Organizational Behavior and Finance.[6] (Presumably, they did not take the legal sessions for amusement but instead for their added value.)

Legal concerns do not just affect senior management and executives; they are also inherent in other decision-making roles. For example:

> *A recent Corporate Executive Board Legal Leadership Council survey concluded that middle managers make 75 percent of legal decisions and that almost 80 percent of corporate employees made a decision or completed an activity with a significant legal implication in the past year. These middle-management decisions involved, for example, signing contracts, developing new products, creating intellectual property, interacting with government officials, entering new markets, creating marketing materials, establishing product safety standards, and executing acquisition agreements. Fewer than one-third of these middle managers consulted the legal department when making their decisions. In other words, they relied on their own knowledge of the law when making everyday business decisions, which are usually intertwined with legal concerns.*[7]

Understanding the rules allows managers to compete in competitive markets and to make judgments about political and business risks.[8] Law can be used in ways to allow managers to compete. A common perspective is a perception that risk management helps prevent losses: “We can do this, but we can’t do that.” However, while understanding the law helps mitigate losses, managers also need to see managing legal risk as a way to create business opportunities and value.

Leaders create opportunity and value by being legally shrewd.

Managers need to "possess legal astuteness and regard the law as a key enabler of value creation.[9] Ultimately, managers who can bridge business strategy and the law give businesses opportunities to create a competitive advantage in the market. This advantage results from being educated about the law and understanding how the law ought to factor in strategic decision-making.

Decision-making is one of a manager’s four major roles.[10] Drilling down, managers play four basic decision-making roles: Entrepreneur, resource allocator, disturbance handler, and negotiator.[11] Legal issues pervade entrepreneurial and resource allocation activities because they deal with issues like developing projects, departmental reorganizations, developing marketing plans, entrusting others with executing strategies and decisions, public relations, mergers and acquisitions, and more.[12]

As negotiators, managers spend substantial time working on contractual relationships and committing resources to them.[13] As disturbance handlers, managers involuntary address circumstances beyond their control, rapidly developing pressures of situations that “are too severe to be ignored,” such as suppliers breaching contracts.[14] Other examples include reports of discriminatory termination, sexual harassment, and injuries caused by employees, and communications with legal counsel and stakeholders.[15]

Moreover, those starting businesses make decisions about:

- the legal form of their business;
- government regulations that govern how they develop and market products and services;
- liability risks in manufacturing and selling their products;
- protection of their intellectual property;
- the nature of their contracts with customers and suppliers;
- legal considerations relating to financing the business; and
- the law that governs hiring employees.[16]

Therefore, Ladwig & Siedel identify *seven management skills that are critical for business success*:

1. The ability to recognize legal issues that arise daily;
2. The ability to decide which legal issues require seeking legal advice;
3. The ability to communicate effectively with legal advisors;
4. The ability to evaluate legal advice;
5. The ability to implement legal decisions;
6. The ability to discuss legal issues with stakeholders; and
7. The ability to lead by highlighting the legal responsibilities of those within the organization.[17]

The goal of this introduction to the law is to help build a foundation on which these seven skills can grow.

Notes

1. (Boldface added.) Fruehwald, E. S. (2020). *Think like a lawyer: Legal reasoning for law students and business professionals* (2nd ed.). Amazon Digital Services LLC. (Note: Readers can access the first edition of this book for free at the Internet Archive.)
2. Siedel, G. J. (2017, March 15). *Law and the business school curriculum*. AACSB International.
3. *Learning business law: 8 things students should know before entering the workforce*. (2023, November 21). Stukent.
4. Accenture. (2013). *Global risk management study: risk management for an era of greater uncertainty*.
5. See note 2.
6. Ladwig, C., & Siedel, G. (2020). *Strategy, Law and Ethics for Business Decisions.* West Academic.
7. See note 2.
8. Hotchkiss, C. (1994). *International Law for Business.* McGraw-Hill.
9. See note 6.
10. Mintzberg, H. (1990). *The manager’s job: Folklore and fact*. Harvard Business Review.

11. See note 11.
12. Ladwig & Seidel, *supra*; Mintzberg, *supra*.
13. See note 11.
14. See note 11.
15. See note 13.
16. See note 6.
17. See note 6.

1.2: What Is Law and What Functions Does It Serve?

Generally, ***a*** **law** is a rule that binds everyone—individuals, institutions, and other entities—in a particular community.[1] By contrast, ***the*** **rule of law** is a principle under which everyone is bound by laws that are (1) established by the government, (2) equally enforced, (3) adjudicatedee adjudicate: make a formal judgment or decision regarding a problem or disputed matter independently, and (4) consistent with one's rights and the principles underlying those rights.[2] Also, under the rule of law, laws are public knowledge and should be clear in meaning to the community members are on notice of their governing authorities, expectations for conduct, penalties for conduct violations, and how to obtain redress for grievances.

Whether a city, a county, a state, a nation, or another type of community, a **legal system** that the community recognizes implements and governs the rule of law. The legal system and its laws can serve to (1) keep the peace, (2) maintain the status quo, (3) preserve individual rights, (4) protect identified marginalized groups, (5) promote social justice, and (6) provide for orderly social change. Some legal systems serve these purposes better than others.

> **Note**
>
> The United States legal system functions under the rule of law, and its authority originates from the US Constitution, which we will discuss further in later chapters.

Although a nation ruled by an authoritarian government may keep the peace and maintain the status quo, it may also oppress minorities or political opponents (e.g., China, Zimbabwe, or Syria). Under colonialism, European nations often imposed peace in nations whose borders were created by those same European nations. With regard to the functions of the law, the empires may have kept the peace—largely with force—but they changed the status quo and seldom promoted the native peoples' rights or social justice.

In nations with various ethnic and tribal groups, it is often difficult for a single united government to rule effectively. In Rwanda, for example, power struggles between Hutus and Tutsis resulted in the genocide of the Tutsi minority. In nations of the former Soviet Union, the withdrawal of a central power created power vacuums that were exploited by local leaders. When Yugoslavia broke up, the different ethnic groups—Croats, Bosniaks, and Serbs—fought bitterly rather than share power. In Iraq and Afghanistan, the blending of different groups of families, tribes, sects, and ethnic groups into an effective national governing body continues to be a challenge. These situations highlight the struggle of a nation to implement and maintain the rule of law.

Notes

1. *Law and the rule of law*. (n.d.). Judicial Learning Center.
2. *Overview - Rule of law*. (n.d.). United States Courts.

› Supplementary Attributions

Source content not listed in the attribution footer below includes:

- *Wex Legal Dictionary and Encyclopedia* by Cornell University's Legal Information Institute is licensed CC BY-NC-SA 2.5. Original source: Legal Systems.

1.3: Modern Legal Systems of the World

Sidebar

Even if a business is not officially "international," it is important to understand the legal systems of the world because consumers come from all over. Consumers, business partners, and competitors are products of their environments, including their societies and legal systems. Therefore, their expectations and how they interact with each other are influenced directly by their legal systems of origin. The most successful businesses take this into account—not only for avoiding legal liability but also for enhanced consumer satisfaction. ~ Arham M., attorney

There are four main legal systems in the modern world:

1. Common law;
2. Civil law;
3. Religious law; and
4. Customary law/monarchy.

Common law and civil law systems are the most common legal systems. Watch the video in the Media Library.

\As the world becomes more interdependent, a fifth category of legal systems has developed — the hybrid legal system, which is a legal system that is a combination of two or more legal systems.

Table 1.3.1 Legal Systems and System Descriptions

Type of Legal System	Description
Common Law	• Written judicial decisions of appellate courts are binding legal authority on lower courts when interpreting and applying the same or similar questions of law • The legal system is adversarial • The outcome of a case is often decided by a jury of the parties' peers
Civil Law	• All legal rules are in comprehensive legislative enactments often called Codes • Written judicial decisions of appellate courts are not binding legal authority • The legal system is inquisitorial
Religious Law	• Religious documents are used as legal sources • All major world religions have a religious legal system • Most nations that have religious legal systems use them to supplement a secular national system
Customary Law	• Legal system used by a monarchy or tribe • Grants specific legal powers to kings, queens, sultans or tribal leaders as heads of state • Monarchs and leaders often seen to be "above the law"
Hybrid Law	• Combination of 2 or more legal systems within a nation

Common Law Systems

The legal system in the United States comes from the English common law tradition and the US Constitution. English common law is a system that gives written judicial decisions the force of law. As a result, the US legal system recognizes an appellate court's ability to interpret and apply the law to future litigants through precedent. **Precedent** is a judicial opinion that is considered legal authority for future cases involving the same or similar questions of law. The benefit of this system is consistency and resolution of disputes without requiring the parties to take legal matters to court.

A famous example of how precedent works is the US Supreme Court case *Brown v. Board of Education of Topeka*. In this landmark 1954 case, the Court unanimously ruled that racial segregation of children in public schools is unconstitutional. *Brown v. Board of Education* is one of the cornerstones of the Civil Rights Movement and helped establish the precedent that "separate-but-equal" education and other services were not, in fact, equal at all. The case required all racially segregated public schools to integrate, not just in Topeka, Kansas. In addition, *Brown* has been cited as legal precedent in thousands of cases nationwide involving racial equality.

The common law legal system is adversarial, which means that the parties are opponents present evidence to a court to resolve the conflict. The judge or jury hears the parties' evidence and arguments before making a final decision. It is the parties' burden to investigate the facts, argue the law, and present their best case. Judges and juries are *not* permitted to do independent investigations, nor are they responsible for helping parties argue their cases. It is a party's responsibility to raise all legal issues.

Another characteristic of common law systems is that cases are often decided by juries of the parties' peers. In both civil and criminal matters, the parties usually have a right to have a jury randomly selected from residents of the local jurisdiction to resolve the dispute. When a jury determines the outcome of a case, the judge acts as a "gatekeeper," who decides what evidence and legal arguments the jury can properly consider. The judge ensures the parties receive a fair trial while the jury decides the outcome of the trial.

The common law tradition is unique to England, the United States, and former British colonies. Although there are differences among common law systems (e.g., whether judiciaries may declare legislative acts unconstitutional and how frequently juries may be used), all of them recognize the use of precedent, and none of them relies solely on the comprehensive, legislative codes that are prevalent in civil law systems.

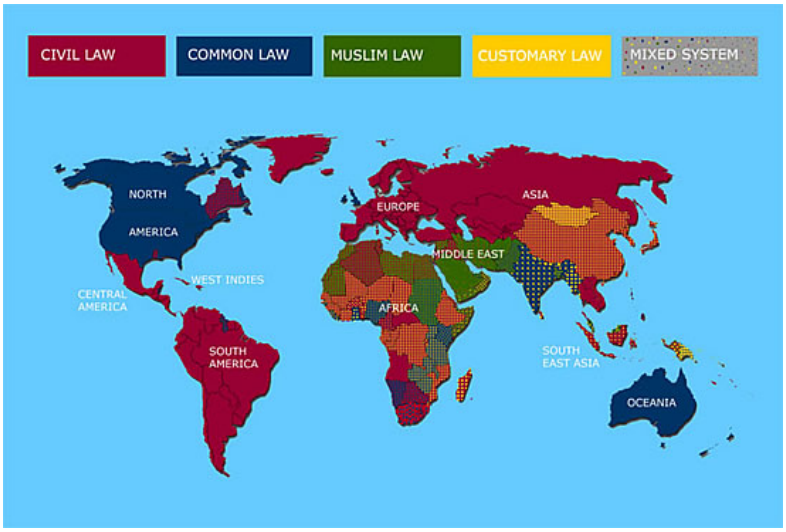


Figure 1.3.1 *Legal systems of the world.* (CC BY 4.0; Source)

Civil Law Systems

Civil law systems were developed in Europe and are based on Roman and Napoleonic law. Civil law systems are also called code systems because all the legal rules are in one or more comprehensive legislative enactments. During Napoleon's reign, a comprehensive book of laws—a code—was developed for all of France. The code covered criminal law and procedure, non-criminal law and procedure, and commercial law. The code is used to resolve only cases brought to the courts, which are usually decided by judges without a jury.

Civil law systems are inquisitorial systems in which judges actively investigate cases. Judges have the authority to request documents and testimony, as well as to shape the parties' legal claims. In addition, judges are not required to follow the decisions of other courts in similar cases. The law is in the code, not in the cases. The legislature, not the courts, is the primary place to enact and modify laws.

Civil law systems are used throughout Europe, Central and South America, Asia and Africa. France, Germany, Holland, Spain, and Portugal had colonies outside of Europe, and many of these colonies adopted the legal practices that were imposed on them by colonial rule.

There are also communist and socialist legal systems that differ significantly from traditional civil law systems. Legal scholars debate whether this is a separate type of legal system or a subset of modern civil law systems. In a communist or socialist legal system, the nation has a code but most property is owned by the government or agricultural cooperatives. In addition, the judiciary is subservient to the Communist party and is not an independent branch of government.

Religious Law Systems

Religious law systems arise from the sacred texts of religious traditions and usually apply to all aspects of life, including social and business relations. In religious legal systems, a religious document is used as a primary legal source. All major world religions–Judaism, Christianity, Islam, Buddhism and Hinduism–have a religious legal system. The Islamic legal system (Sharia) with Islamic jurisprudence (Fiqh) is the most widely used religious legal system in the world. Most nations that have religious legal systems use them to supplement their secular national system. Only Saudi Arabia (Islamic) and the Vatican (Christian) are pure theocracies that have only a religious legal system in their nations.

Customary Law Systems

Customary legal systems are becoming increasingly less common. A customary system is used by a monarchy and grants specific legal powers to the kings, queens, sultans or tribal leaders as heads of state. A challenge of a customary system is that the ruler is seen to be "above the law" because the laws do not apply equally to the ruler and subjects. There are only a handful of monarchies remaining in the world, and most of them have evolved into hybrid legal systems or have adopted a different type of legal system.

Hybrid/Mixed Law Systems

Hybrid legal systems are a combination of two or more legal systems within a nation. India is a classic example of a nation with a hybrid legal system. As a former British colony, India has a common law legal system, which recognizes the power of the Supreme Court and High Courts to make binding judicial decisions as a form of precedent. However, most of its laws are integrated codes found in a Napoleonic code system. In addition, India has separate personal codes that apply to Muslims, Christians, and Hindus. As a result, India has a hybrid system made up of common law, civil law, and religious law systems.

Supplementary Attributions

Source content not listed in the footer below or otherwise referenced in the text includes: *Wex Legal Dictionary and Encyclopedia* by Cornell University's Legal Information Institute is licensed CC BY-NC-SA 2.5. Original source: https://www.law.cornell.edu/wex/legal_systems.

v

1.4: Sources of Law

Basic Classifications of Law

Where does law come from? How do individuals and businesses know right from wrong? Not all actions that are considered "wrong" or inappropriate are violations of the law. They simply may represent social norms. So what is the difference? There are two types of rules in our society—social norms and laws.

Social norms are the informal rules that govern behavior in certain groups, cultures, and societies. Social norms and cultural expectations may be violated with negative social or professional consequences for doing so. However, no legal repercussions follow violating social norms alone.

Violations of law are different. Violating the law carries penalties, such as civil liability, fines, or loss of liberty. While it is optional to conform to social customs, people are compelled to obey the law under threat of penalty.

Laws are generally classified as public law or private law. **Public law** applies to everyone as a group (hence, the public), as opposed to an individual party. It is law that has been created by a legitimate authority with the power to create law, and it applies to the people within its jurisdiction. In the United States, the lawmaking authority itself is also subject to those laws, because no one is "above" the law. If the law is violated, penalties may be levied against violators. Examples of public law include constitutions, criminal laws, and administrative laws. For example, if someone steals items from a store, the thief is violating public law. He committed the crime of theft which affects the community as a whole (not just the store owners), and the crime is defined in public legislation.

Private law is law that is binding on individual parties, their properties, and their relationships. For instance, parties to a contract are involved in a private law agreement. The terms of the contract apply to the parties of the contract but not anyone else. If the parties have a contract dispute, the terms of the contract and the remedy for breach will apply only to the parties of the contract. In addition to contracts, other examples of private law include tort and property laws. For example, if someone installs an industrial smoker on his property and the smoke creates a dense haze in the neighbor's yard, there may be a violation of private law because the smoke is interfering with the neighbor's right to peacefully enjoy one's property.

Laws are also classified as civil or criminal. **Civil law** is usually brought by a private party (referred to as a **plaintiff**) against another private party (referred to as a **defendant**). For example, one company decides to sue another for breach of contract. Or a customer sues a business when injured by the company's product. Most laws affecting businesses are civil.

Criminal law involves a governmental decision to prosecute someone (referred to as a **defendant**) for violating a criminal statute. If someone breaks a criminal law, he or she could lose their freedom (i.e. be sent to prison) or lose their life (i.e. if convicted of a capital offense). In a civil action, no one is sent to prison. Usually, liability results in the loss of property such as money or assets.

Table 1.4.1 *Civil and Criminal Law Comparisons*

	Civil	Criminal
Source of Law	statute or common law	statutes defining crimes
Who files the case?	business or individual suffering harm (referred to as the plaintiff)	the government (e.g., District Attorney/prosecutor)
Burden of Proof	preponderance of the evidence (i.e., the credible evidence presented is convincing enough to determine that the plaintiff's claim is more likely than not to be true)	beyond a reasonable doubt (i.e., the credible evidence presented is so convincing that no doubt about the defendant's guilt is rational)
Remedy	damages, injunction, specific performance	punishment (e.g. fine or imprisonment)
Purpose	provide compensation or private relief	protect society

Additionally, some laws are substantive and some laws are procedural. **Substantive laws** define the rights and obligations of an individual, entity, or government in a particular community, including types of conduct, liability, and remedies. For example, if someone drives 50 miles per hour 40-mile-per-hour-hour zone, they have broken the substantive rule of law governing the speed

limit. If the driver accidentally hits and harms another vehicle or person, the substantive rule of law governing negligence (i.e., harm caused unintentionally) determines what needs to be proven for the injured party to receive a remedy awarded in court in a lawsuit.

Procedural laws, on the other hand, prescribe the legal steps, processes, and rules enforcing the law and managing court proceedings, such as lawsuits, rules of evidence, when someone's constitutional rights are violated, etc. Relating to the examples above, procedural law governs how and what gets decided in court related to the speeding ticket, including whether the driver is entitled to a hearing before a judge, whether they have a right to be represented by legal counsel, whether the hearing takes place within a certain amount of time after the ticket was issued, and what type of evidence can be presented are procedural law issues. Likewise, in a lawsuit for negligence, procedural laws govern the methods and stages of conducting lawsuits.

Sources of Law

In the United States, our laws come primarily from:

- Federal and state constitutions;
- Statutory law from Congress, the state legislatures, and local legislative bodies;
- Common law from federal and state appellate courts;
- Administrative law (rules and regulations) from government agencies;
- Treaties and conventions; and
- Executive orders.

Figure 1.4.1 *Sources of Law in the United States by LawShelf. (See the transcript.)*

Constitutions

Federal/National

The most fundamental law in the United States is the US Constitution, which is the supreme law of the nation. Any law that conflicts with it is void. The Constitution serves three important functions. First, it establishes the structure of our national government and identifies the powers of the legislative, executive, and judicial branches. Second, it defines the boundaries of each branch's authority and creates "checks" on each branch by the other branches. For example, the president is the commander-in-chief of the armed forces, but does not have the power to declare war. That duty falls to Congress. And, third, the Constitution guarantees civil liberties and individual rights.

The power granted to the federal government by the Constitution is limited. Any powers not expressly granted to the federal government by the Constitution are reserved to the states. This means that if the Constitution does not give the federal government power over a particular area, then the states regulate it.

The first ten amendments to the Constitution are known as the **Bill of Rights**. Despite the limited power granted to the federal government by the Constitution, the Bill of Rights protects certain individual civil rights and liberties from governmental interference. These rights include the freedom of speech and religion, the right to bear arms, and the rights of individuals who are suspected and accused of crimes. We will discuss the US Constitution more in Chapter 5.

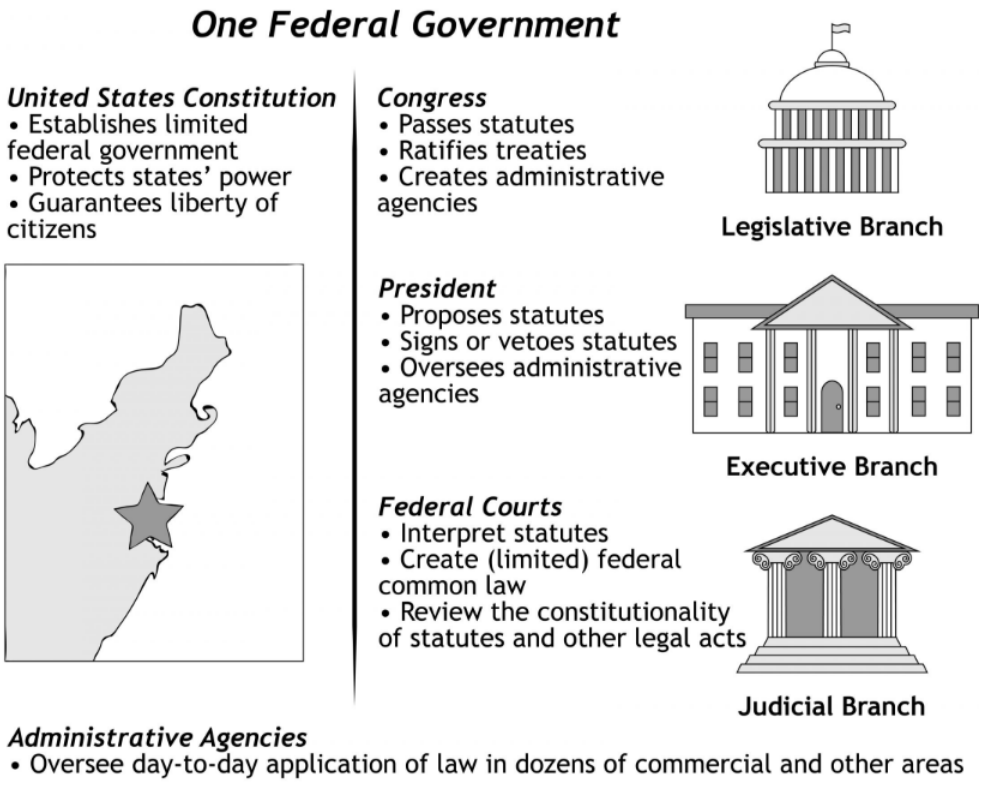


Figure 1.4.2*: Separation of powers of the federal government.* (CC BY 4.0; Source)

State

In the United States, each state also has its own constitution, which serves essentially the same function for the state government as the US Constitution serves for the federal government. Specifically, state constitutions establish limits of state government power, establish the organization and duties of the different branches of government at the state level, and protect fundamental rights of state citizens.

State Constitution Examples

Compare the US Constitution with the Wisconsin Constitution and the Illinois Constitution.

This dual system of government in the United States is called **federalism**, which is a governance structure whereby the federal government and the state governments coexist through a shared power scheme.

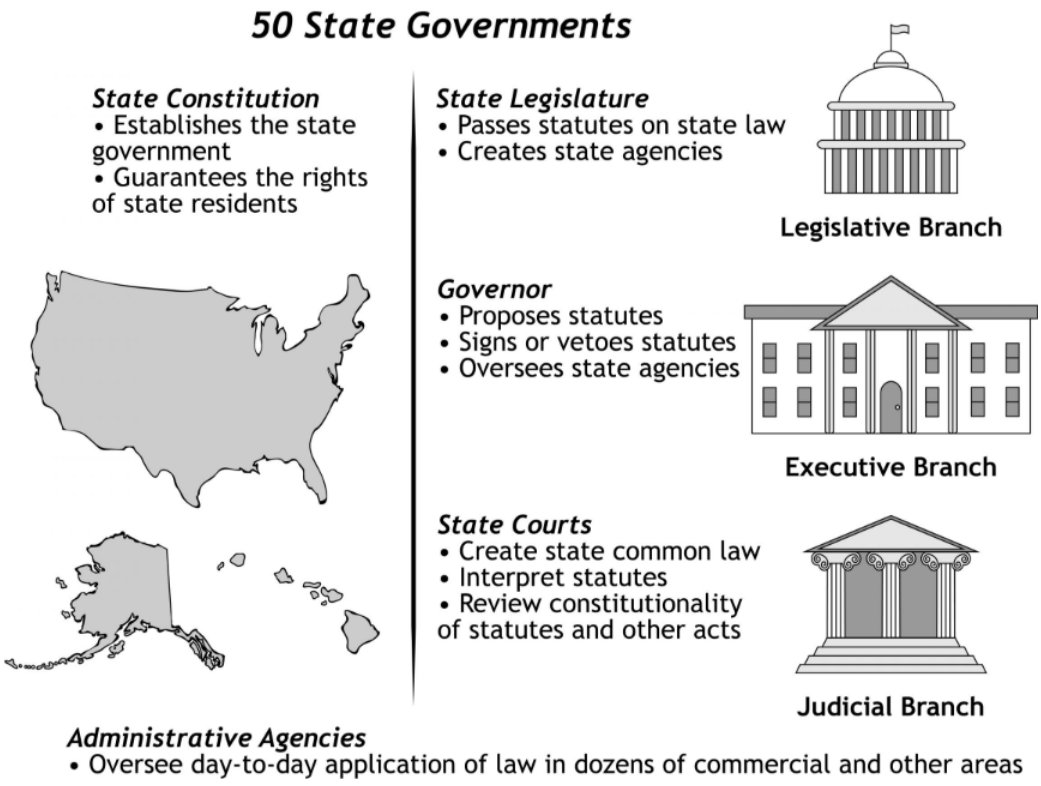


Figure 1.4.3*: Separation of powers of state governments*. (CC BY 4.0; Source)

Statutes

Both federal and state **statutes** are laws created by a legislative body. Congress is the federal legislative body, and each state also has its own legislative body. Almost all statutes are created by the same method. An idea for a new law is proposed in the legislature. This proposal is called a **bill**. The House of Representatives and Senate independently vote on a bill. If the majority of both chambers approves it, the bill is sent to the president or governor for approval. If the president or governor signs the bill, then it becomes a statute.

Federal and State Statutes

- See the United States Code (i.e., the federal statutes).
- See the Wisconsin Statutes.

Ordinances

While statutes are a function of the federal and state governments, **ordinances** are a function of local governments (e.g., counties, cities, and townships). A state constitution typically authorizes various forms of local governments to create or adopt ordinances. Like federal and state legislatures pass statutes, local government lawmaking bodies pass ordinances. Examples of ordinances include building codes, zoning laws, and misdemeanors such as jaywalking.

Sidebar

Mequon, Wisconsin has an ordinance permitting licenses to people who manufacture or sell food only if they are of "good moral character.")

Common Law

Binding legal principles also come from the courts. When appellate courts decide a case, they may interpret and apply legal principles in a way that are binding on lower courts in the future. The process of applying a prior appellate decision to a case is called **precedent**. Simply put, precedent is when judges use past decisions to guide them. The benefit of precedent is that it makes the law predictable and furthers the rule of law by applying legal principles to the greater community, not just the parties to a

lawsuit. Businesses value common law systems because they reduce the cost of business. For example, if a business is unsure of how its contract rights will be applied by the court, it can understand its rights by learning how courts interpreted similar contract provisions in past lawsuits. This allows businesses to assess their risks, determine their liability, and make rational business decisions without the expense of litigation.

Administrative Rules and Regulations

Administrative law is the collection of rules and decisions made by agencies to fill in particular details missing from constitutions and statutes. For example, the Internal Revenue Service (IRS) is the federal agency responsible for collecting national taxes and administering the Internal Revenue Code enacted by Congress. All businesses and individuals must follow the IRS rules and regulations about how to report, file, and pay applicable taxes that Congress levies. Congress passes statute defining "what" taxes need to be paid. The IRS adopts the rules about "how" those taxes are paid.

In the United States, many of the day-to-day regulation of businesses is done by administrative agencies. These agencies are created by the legislature to implement and enforce a particular statute. Agencies often report to the executive branch, but some are run by independent commissions. Legislative bodies give agencies the power to create rules and regulations that individuals and businesses must follow to comply with the statute. For example, the Environmental Protection Agency (EPA) was created to implement and enforce the Clean Air Act and the Clean Water Act.

Treaties and Conventions

A **treaty** is a binding agreement between two nations. A **convention** is a binding agreement among a group of nations. In the US, a treaty or convention is generally negotiated by the executive branch. To be binding, the US Constitution requires the Senate to ratify treaties by a two-thirds vote. Once ratified, a treaty becomes part of federal law with the same weight and effect as a statute passed by the entire Congress. Therefore, treaties and conventions have equal standing as statutes in US law.

Executive Orders

Article II, Section 1 of the US Constitution gives the president the power to "take care that the laws be faithfully executed." Under this power, the president may issue **executive orders** requiring officials in the executive branch to perform their duties in a particular manner. State governors have the same authority under state constitutions. Although they are not laws that apply directly to individuals and businesses, executive orders are important legal documents because they direct the government's enforcement efforts.

Table 1.4.2 *Hierarchy of Sources of Law*

Priority	Source	Comment
1	Constitutions	Exist at both federal and state levels
2 (tie)	Statutes	Laws passed by the federal or state legislatures
2 (tie)	Treaties and Conventions	International agreements that have the same standing as statutes
4	Judicial Opinions	Court interpretation and application of constitutions, statutes, treaties, agency regulations, and executive orders
5	Agency Regulations	Rules and regulations adopted by administrative agencies at the federal, state, or local level
6	Executive Orders	Guidance from the president or governor to executive branch officials about how to perform their duty

1.5: Concluding Thoughts

Understanding business law is essential to successfully running any type of business because a solid understanding of laws and regulations helps avoid liability and minimizes risk. In business, it is not enough to conduct business ethically. Knowledge of business law is essential to successful business practices. Ultimately, business people should be able to recognize legal issues, minimize liability exposure, and know when to consult an attorney.

Legal systems vary widely in their aims and in the way they resolve disputes. Common law systems are adversarial, use juries and adhere to precedent. Civil law systems are inquisatorial, do not use juries and do not recognize precedent. All major world religions have a legal system, although only two nations have a purely national religious system. Many nations have hybrid legal systems that combine two or more legal systems.

The legal system in the United States is composed of multiple jurisdictions at the local, state and federal levels. Local and state laws may not conflict with federal laws. Primary sources of law in the United States include constitutional law, statutory law, common law, administrative law, treaties, and executive orders.

1.6: Check Your Learning

Ch 1 Review Questions

Question 1/20

Which of the following is NOT a primary function of law in a nation?

- To keep the peace
- To maintain the status quo
- To promote individual opinions
- To protect minorities

CHAPTER OVERVIEW

2: Organization and Functions of the American Court System

Learning Objectives

- Understand the US court system and how it affects the conduct of businesses.
- Understand the three branches of government and how they check and balance each other's powers.
- Describe the dual court system and its three tiers.
- Explain how you are protected and governed by different U.S. court systems.
- Know which kinds of cases must be heard in federal courts only.
- Explain diversity of citizenship jurisdiction and be able to decide whether a case is eligible for diversity jurisdiction in the federal courts.
- Distinguish between trial and appellate courts.

Chapter Outline

2.1: Introduction

In the United States, law and government are interdependent. The US Constitution establishes the basic framework of the federal government and imposes certain limitations on the powers of government. In turn, the various branches of government are intimately involved in making, enforcing, and interpreting the law. Most law comes from Congress and the state legislatures. Courts interpret the laws and apply them to cases. We will learn more about the US Constitution's framework in Chapter 6, but we will begin learning about the American court system by introducing Article III of the US Constitution.

Laws are meaningless if they are not enforced. Companies have to make many decisions daily, from product development to marketing to maintaining growth. These decisions are based on financial considerations and legal requirements. If a company violates a law, it is often held accountable through litigation in courts.

Sidebar

Because federal judges are appointed for life, businesses cannot directly influence the actions of the judicial branch. However, they can do so indirectly by lobbying Congress on laws that it considers and lobbying the president concerning enforcement priorities. While all states have a comparable three-branch system, in some states [such as Wisconsin], judges obtain office through partisan elections. In such states, businesses can seek to influence the judicial branch by supporting judges whose philosophy favors business generally or a particular industry. For these reasons, in choosing whether to litigate in state or federal court, businesses should consider that federal judges may be more likely to take politically unpopular actions. ~ John W., Judge

2.2: The Courts and Separation of Powers

The Courts and the Constitution

The US Constitution conceived three branches of government and established a **separation of powers** between the branches, which is discussed in more detail in Chapter 6. Article I of the Constitution allocated the **legislative** power to Congress, which is composed of the House of Representatives and the Senate. Congress makes laws and represents the will of the people. Article II of the Constitution created the **executive** power in the president and makes the president responsible for enforcing the laws passed by Congress. Article III established the **judiciary**, which is in charge of applying and interpreting the meaning of the law. The US Supreme Court is the highest court in the federal judiciary and consists of nine Justices.

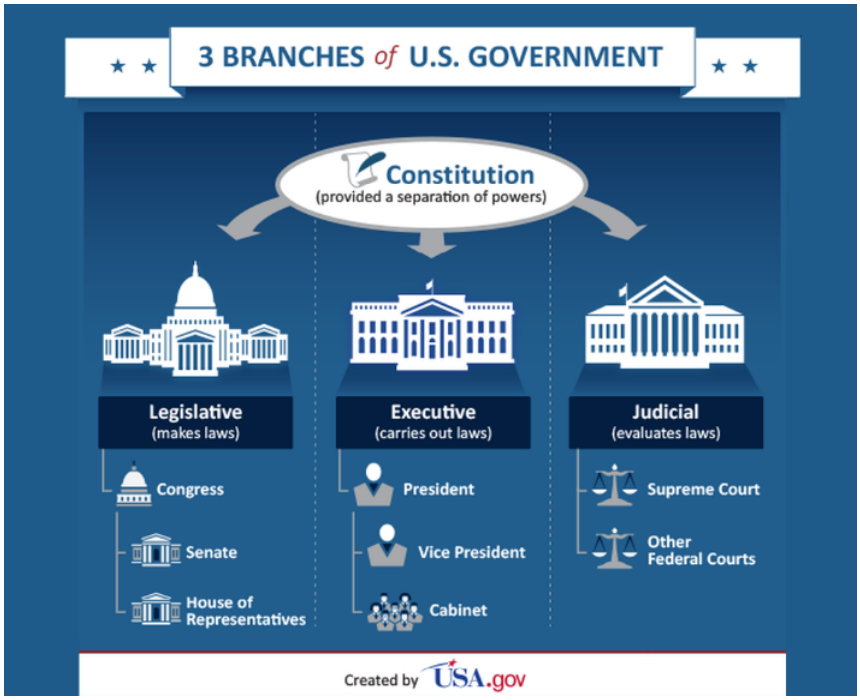


Figure 2.2.1 *The 3 branches of the United States government.*

The Constitution is remarkably short in describing the judicial branch. Under the Constitution, there are only two requirements to becoming a federal judge: nomination by the president and confirmation by the Senate. Article III provides: “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” The Constitution also guarantees that how judges decide cases does not affect their jobs because they have lifetime tenure and a salary that cannot be reduced.

Marbury v. Madison: The Power of Judicial Review

Marbury v. Madison (1803) is the most important case in the area of constitutional law (and, arguably, the most important judicial decision overall). First, *Marbury v. Madison* was the first time the Supreme Court declared an act of Congress to be unconstitutional. Second, and more significantly, it ruled that the Constitution granted the judiciary the power of **judicial review**, meaning that any federal court has the authority to pronounce whether an act of the president or Congress is constitutional. In doing so, the Supreme Court decided a case involving the very same controversial issue that is regularly part of today's political discourse: presidential appointments of Supreme Court Justices along political party and ideological lines. While it may seem like this issue is a more recent controversy, "court packing" has been a political point of contention since as early as 1800.

Figure 2.2.2 *Marbury v. Madison (1803) | Judicial Review Is Established by State Bar of Georgia.*
(Learn how to access the transcript.)

In 1800, the presidential election between John Adams and Thomas Jefferson nearly tore the nation apart. John Adams was the President and his Vice-President, Thomas Jefferson, ran against him. They were both Founding Fathers but were members of different political parties that had opposing visions for the future of the new nation. The election was bitter, partisan, and divisive. Jefferson won but wasn't declared the winner until early in 1801. In the meantime, Adams and other Federalists in Congress attempted to leave their mark on government by creating a slate of new life-tenured judgeships and appointing Federalists to those positions. For the judgeships to become effective, official commissions had to be delivered in person to the new judges. At the time power transitioned from Adams to Jefferson, several commissions had not been delivered, and Jefferson ordered his acting secretary of state to stop delivering them. When Jefferson came to power, there was not a single federal judge from his Democratic-Republican Party, and he refused to expand the Federalist influence any further.

One Federalist judge, William Marbury, sued Secretary of State James Madison to deliver his commission. The case was filed in the Supreme Court, and Chief Justice John Marshall—a Federalist—authored the opinion. At this time, the Supreme Court was composed of six justices (as opposed to today's nine). Chief Justice Marshall was joined by Justices Paterson, Chase, and Washington. Justices Cushing and Moore did not participate. The Court ruled against Marbury, declaring that it was the Supreme Court's role to decide the meaning of the Constitution (i.e., the doctrine of **judicial review**).

2.3: The Dual Court System and Judicial Federalism

Introduction

There are fifty-six separate legal systems in the United States: the fifty states, the federal government, the District of Columbia, the military, and three territorial systems. Within each legal system is a complex interplay among executive, legislative, and judicial branches of government. This division of authority between a federal government and state governments is known as **federalism**, which is discussed in more detail in Chapter 5.

Before the writing of the U.S. Constitution and the establishment of the permanent national judiciary under Article III, the states had courts. Each of the thirteen colonies also had its own courts, based on the British common law model. The judiciary today continues as a dual court system, one system for federal courts and one system for state courts. Generally, both systems have a 3-tier hierarchy of courts,[1] consisting of **trial courts**, **intermediate appellate courts**, and finally, **courts of last resort** (commonly referred to as supreme courts), at the top.

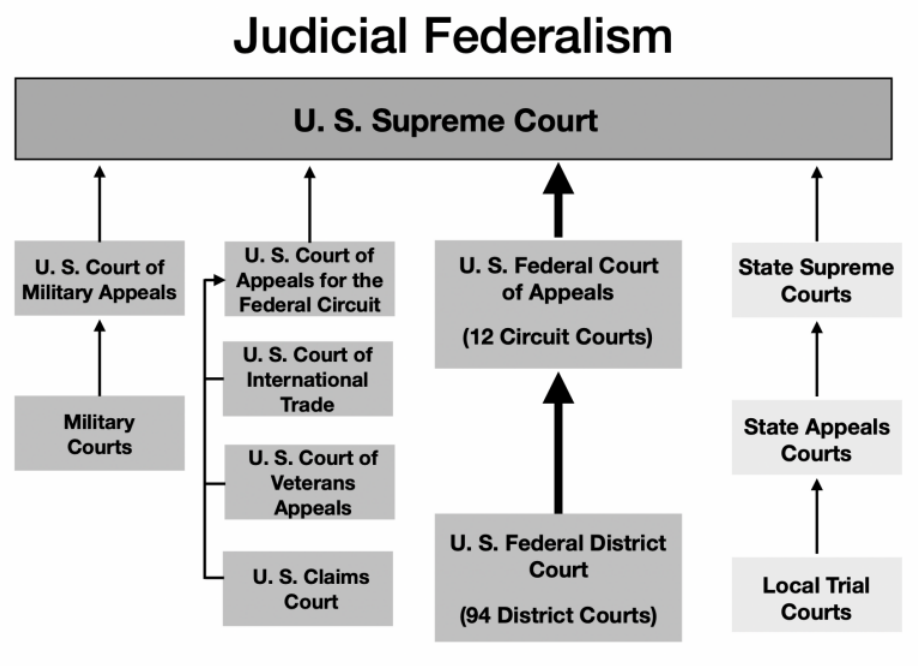


Figure 2.3.1 *Basic structure of the American dual court system. Some states have modified versions of this structure.* (Source)

To complicate matters, the state and federal court systems sometimes intersect and overlap with one another, *and* no two states organize their court system exactly alike. Although many states generally parallel the federal system's basic 3-tiered structure, state court systems are created by the states, so each state system can be structured differently from one state to another, including the number of courts and their basic hierarchy and jurisdiction. (Section 2.4 provides some examples.)

Compare and Contrast

Wisconsin generally parallels the federal system's structure. See this side-by-side comparison. By contrast, see the New York court system structure.

Regardless of differences among the states, we can summarize the overall three-tiered structure of the dual court model and consider the relationship that the national and state sides share in relation to the U.S. Supreme Court, as illustrated in Figure 2.3.1.

Let's flesh out *three important* things about Figure 2.3.1. First, note that the three boxes on the right represent the state court system where most cases in the U.S. occur—e.g., people on trial for murder, rape, robbery, burglary, embezzlement, fraud, civil lawsuits, and so on. Although cases can go straight through the state court system and on to the US Supreme Court, that is not a common path. The diagram may be a little deceptive in this sense: The lightly shaded boxes on the right represent a large amount of work overall, but fewer Supreme Court cases originate from the states than the federal system.

Second, note the diagram's two boxes in the middle with thick arrows. Most Supreme Court cases come up through the federal district courts and then through one of the 12 regional federal circuit courts of appeals (i.e., 13 circuits in all). See Figure 2.4.2, which is a map that illustrates these regions. Eleven of the 12 regions are numbered, and the remaining region is dedicated to the District of Columbia. The Federal Circuit of Appeals—identified in Figure 2.4.2 as "FED"—is a specialized court of appeals that handles certain monetary claims against the U.S., international trade disputes, matters involving military veterans being denied military veteran benefits. Cases involving the military have their own path and are not part of the circuit court system. In all, the main route to the Supreme Court is depicted with the thick arrows in Figure 2.3.1.

Third, cases handled in state courts can sometimes raise questions that need to be adjudicated in federal courts. If a state defendant has exhausted their state options, they may seek a **writ of *habeas corpus*** from a federal court. (*Habeas corpus* is Latin for "you have the body," and refers to the court ordering state or federal authorities to bring a detained person to the court and show cause for the detention or incarceration.) The person is hoping the court will release them because of some violation of their federal rights. For example, the defendant may argue that their Fourth Amendment protections against unreasonable search and seizure were violated, or perhaps their Fifth and Fourteenth Amendment due process protections were violated.

? Learning Exercise

This site provides an interesting challenge: Look at the different cases presented and decide whether each would be heard in the state or federal courts. You can check your results at the end.

Although the Supreme Court tends to draw the most public attention, it typically hears fewer than one hundred cases yearly, which amounts to less than *one percent* of all appeals made to it.[2] Typically, the Supreme Court only hears cases when (a) other federal courts around the nation disagree about how to interpret or apply a constitutional principle[3] or when the question involves a state court's interpretation or application of federal law (as we will see in the discussion below of *Miranda v. Arizona*[4]). The Supreme Court can also hear legal disputes between states.

Ultimately, state courts really are the core of the US judicial system. The several hundred thousand cases handled every year in federal courts pale in comparison to the several million handled by their state counterparts.

Jurisdiction

In simple terms, jurisdiction refers to the legal authority of a court to adjudicate a case, which means that the court with jurisdiction has the power to issue decisions, judgments, and orders that are legally binding on others regarding certain legal issues and disputes. There are classes of jurisdiction, but we will focus on two: subject matter jurisdiction and personal jurisdiction. We will start with subject matter jurisdiction and address personal jurisdiction in the next chapter.

Subject Matter Jurisdiction

State and federal courts hear different types of cases, involving different laws, different law enforcement agencies, and different judicial systems. The rules of subject matter jurisdiction dictate whether a case is heard in federal or state court.

Table 2.3.1 *Jurisdictions of the Courts: State vs. Federal*

State Courts	Federal Courts
Hear most day-to-day cases, covering 90 percent of all cases (i.e., both state and federal cases, combined)	Hear cases that involve a "federal question," involving the Constitution, federal laws or treaties, or a "federal party" in which the U.S. government is a party to the case
Hear both civil and criminal matters	Hear both civil and criminal matters

State Courts	Federal Courts
Help the states retain their own sovereignty in judicial matters over their state laws, distinct from the national government	Hear cases with a damage claim that exceeds the sum or value of $75,000 and is between (1) citizens of different states (i.e., "diversity of citizenship"); (2) citizens of a state and citizens of a foreign state; (3) citizens of different states and in other parties are citizens of a foreign state; and (4) a foreign state (as a plaintiff) and citizens of a state.*

The vast majority of civil lawsuits are filed in state courts, including lawsuits involving state laws such as property, contracts, probate law, and torts. State laws also involve most criminal cases, and domestic issues such as divorce and child custody. A tort is a civil wrong other than a breach of contract and include a variety of situations in which people and businesses suffer legal injury. Some states are friendlier toward torts than others, and the resulting patchwork of tort laws means that companies that do business across the nation need to know the different standards they are held to based on the state their customers live in. Given the wide array of subject areas regulated by state law, most businesses deal with state courts.

Federal Subject Matter Jurisdiction: Federal Question and Diversity of Citizenship

Federal court subject matter jurisdiction is generally limited to **federal questions**. In other words, federal courts hear cases involving the U.S. Constitution or a federal law. Cases involving the interpretation of treaties to which the United States is a party are also subject to federal court jurisdiction. Finally, lawsuits between states can be filed directly in the U.S. Supreme Court.

Exclusive Federal Subject Matter Jurisdiction

1. *Suits between states*. Cases in which two or more states are a party.
2. *Cases involving ambassadors and other high-ranking public figures*. Cases arising between foreign ambassadors and other high-ranking public officials.
3. *Federal crimes*. Crimes defined by or mentioned in the US Constitution or those defined or punished by federal statute. Such crimes include treason against the United States, piracy, counterfeiting, crimes against the law of nations, and crimes relating to the federal government's authority to regulate interstate commerce. However, most crimes are state matters.
4. *Bankruptcy*. The statutory procedure, usually triggered by insolvency, by which a person is relieved of most debts and undergoes a judicially supervised reorganization or liquidation for the benefit of the person's creditors.
5. *Patent, copyright, and trademark cases*
    1. *Patent*. The exclusive right to make, use, or sell an invention for a specified period (usually seventeen years), granted by the federal government to the inventor if the device or process is novel, useful, and nonobvious.
    2. *Copyright*. The body of law relating to a property right in an original work of authorship (such as a literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.

3. *Trademark*. A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.
6. *Admiralty*. The system of laws that has grown out of the practice of admiralty courts: courts that exercise jurisdiction over all maritime contracts, torts, injuries, and offenses.
7. *Antitrust*. Federal laws designed to protect trade and commerce from restraining monopolies, price fixing, and price discrimination.
8. *Securities and banking regulation*. The body of law protecting the public by regulating the registration, offering, and trading of securities and the regulation of banking practices.
9. *Other cases specified by federal statute*. Any other cases specified by a federal statute where Congress declares that federal courts will have exclusive jurisdiction.

Sometimes a federal court may hear a case involving state law. These cases are called **diversity jurisdiction** cases, and they arise if (1) none of the plaintiffs in a civil case reside in the same state as any of the defendants *and* (2) the amount claimed by the plaintiffs *exceeds* seventy-five thousand dollars. For example, a citizen of New Jersey may sue a citizen of New York over a contract dispute in federal court. But if both were citizens of New York, the plaintiff would be limited to the state court of New York. Diversity jurisdiction cases allow one party who feels it may not receive a fair trial where its opponent has a "home court advantage" to seek a neutral forum to try the case. (Other diversity jurisdiction circumstances are referenced in Table 2.3.1.)

Concurrent Jurisdiction

When a plaintiff takes a case to state court, it will be because state courts typically hear that kind of case (i.e., there is subject matter jurisdiction). If the plaintiff's main cause of action comes from a certain state's constitution, statutes, or court decisions, the state courts have subject matter jurisdiction over the case. If the plaintiff's main cause of action is based on federal law (e.g., Title VII of the Civil Rights Act of 1964), the federal courts have subject matter jurisdiction over the case. But federal courts will also have subject matter jurisdiction over certain cases that have only a state-based cause of action, such as diversity jurisdiction cases. And state courts can have subject matter jurisdiction over certain cases that have only a federal-based cause of action. The Supreme Court has now made clear that state courts have **concurrent jurisdiction** of any federal cause of action unless Congress has given exclusive jurisdiction to federal courts.

In short, a case with a federal question can be often be heard in either state or federal court, and a case that meets the diversity jurisdiction requirements can be heard in state courts or in federal courts.

Whether a case will be heard in a state court or moved to a federal court will depend on the parties. If a plaintiff files a case in state trial court where concurrent jurisdiction applies, a defendant may (or may not) ask that the case be removed to federal district court.

Summary of Rules: Subject Matter Jurisdiction

Miranda v. Arizona: An Illustration of Subject Matter Jurisdiction Overlap

While we may certainly distinguish between the two sides of a jurisdiction, looking on a case-by-case basis will sometimes complicate the seemingly clear-cut division between the state and federal sides. It is always possible that issues of federal law may start in the state courts before they make their way over to the federal side. And any case that starts out at the state and/or local level on state matters can make it into the federal system on appeal—but only on points that involve a federal law or question, and usually, only after all avenues of appeal in the state courts have been exhausted.

For example, consider the case *Miranda v. Arizona*.[5] Ernesto Miranda, arrested for kidnapping and rape (state subject matter legal violations), was convicted in an Arizona state trial court and sentenced to prison after a key piece of evidence—his own signed confession while being interrogated—was presented at trial. Miranda lost his appeal to the Arizona Supreme Court on the ground that he failed to expressly request an attorney to be present during his interrogation, despite not being informed of his constitutional rights to remain silent and to an attorney during interrogation. Because these rights are issues of federal constitutional law, Miranda appealed to the US Supreme Court to exclude the confession on the grounds that its admission was a violation of his constitutional rights. By a slim 5–4 margin, the Court ruled in Miranda's favor, holding that the confession had to be excluded from evidence because the police obtained the confession without informing him of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to an attorney. In the opinion of the Court, because of the coercive nature of police interrogation, no confession can be admissible unless a suspect is made aware of his rights and then in turn waives those rights. For this reason, Miranda's original conviction was overturned.

Yet the Supreme Court considered only the violation of Miranda's constitutional rights, but not whether he was guilty of the crimes with which he was charged. So there were still crimes committed for which Miranda had to face charges. He was therefore retried in state court in 1967, the second time without the confession as evidence, but was still found guilty based on witness testimony and other evidence.

Miranda's story is a good example of the tandem operation of the state and federal court systems. Whether he was guilty of the crimes was a matter for the state courts, whereas the constitutional questions raised by his trial were a matter for the federal courts.[6]

The Implications of a Dual Court System

From an individual's perspective, the dual court system has both benefits and drawbacks. On the plus side, each person has more than just one court system ready to protect his or her rights. The dual court system provides alternate forums in which to appeal for assistance, as Ernesto Miranda's case illustrates. The U.S. Supreme Court found for Miranda an extension of his Fifth Amendment protections—a constitutional right to remain silent when faced with police questioning. It was a right he could not get solely from the state courts in Arizona, but one those courts had to honor nonetheless.

The fact that a minority voice like Miranda's can be heard in court, and that his or her grievance can be resolved in his or her favor if warranted, says much about the role of the judiciary in a democratic republic. In Miranda's case, a resolution came from the federal courts, but it can also come from the state side. In fact, the many differences among the state courts themselves may enhance an individual's potential to be heard.

But the existence of the dual court system and variations across the states and nation also mean that there are different courts in which a person could face charges for a crime or for a violation of another person's rights. Except for the fact that the U.S. Constitution binds judges and justices in all the courts, it is state law that governs the authority of state courts, so judicial rulings about what is legal or illegal may differ from state to state. These differences are particularly pronounced when the laws across the states and the nation are not the same, as we see with marijuana laws today.

Marijuana Laws By State

See this interactive map, which identifies the legal status of marijuana and marijuana byproducts in each state.

There are so many differences in marijuana laws from state to state, and between states and the national government, that a uniform application of these laws in courts across the nation is impracticable. What is legal in one state may be illegal in another, and state laws do not cross state borders—but people do. So, someone might legally be in possession in one state and illegally in possession at the moment they cross state lines. What's more, a person residing in any of the states is still subject to federal law, regardless of the state law.

Under federal law, marijuana is still classified as a Schedule I drug,[7] and federal authorities often find themselves pitted against states that have legalized it. Such differences can lead, somewhat ironically, to arrests and federal criminal charges for people who have marijuana in states where it is legal, or to federal raids on growers and dispensaries that would otherwise be operating legally under their state's law.

Further, just as the laws vary across the states, so do judicial rulings and interpretations. Any given judge may interpret the same state or federal law differently than another. Accordingly, the creation and application of law is not necessarily uniform across the country. Also, we are somewhat bound by geography and do not always have the luxury of picking and choosing the **venue** for a particular case. Thus, ultimately, our varied set of judicial operations affects (a) the kinds of cases that a given court will hear, (b) the location where a case is heard, and (c) potential disparities in the way cases are treated once they get there.

Notes

1. Bureau of International Information Programs, United States Department of State (2004). *Outline of the U.S. legal system*; United States Courts. (n.d.). *Court role and structure*.
2. Offices of the United States Attorneys. (n.d.). *Introduction to the federal court system*. U.S. Department of Justice.
3. Offices of the United States Attorneys. (n.d.). *Introduction to the federal court system*. U.S. Department of Justice.
4. 384 U.S. 436 (1966).
5. 384 U.S. 436 (1966).
6. Although Miranda won his case before the US Supreme Court, which established a significant precedent that criminal suspects must be read their so-called "*Miranda* warnings" before police questioning while in custody, the victory did not do much for Miranda himself. After serving prison time, he was stabbed to death in a bar fight in 1976 while out on parole, and due to a lack of evidence, no one was ever convicted for his death.
7. The federal government treats Schedule I drugs as having the "high[est] potential for abuse ... to create severe psychological and/or physical dependence." United States Drug Enforcement Administration. (n.d.). *Drug scheduling*.

Supplementary Attributions

Source content not listed in the attribution footer below includes:

- **13.3: The Dual Court System** by Glen Krutz and Sylvie, Waskiewicz is licensed by CC BY 4.0. Original source: American Government 3e.
- **5.2: Chapter 32- Paths to the Supreme Court** by David Hubert is licensed by CC BY-NC-SA. Original source: Attenuated Democracy:A Critical Introduction to U.S. Government and Politics.

2.4: Trial and Appellate Court Functions

As demonstrated earlier in Figure 2.3.1, the federal and state court systems include a hierarchy of courts. Now, we will explore their functions within those structures.

Trial Courts

The principal purpose of a **trial court** is to hear evidence and decide what happened in a case when the parties disagree on particular facts. In other words, a trial court makes **findings of fact** (e.g., determining whether someone committed a crime or violated the terms of a contract). At trial, witnesses are called, and their testimonies are recorded in a trial record for future reference. Although there are some exceptions, juries typically are responsible for making findings of fact, while judges decide **questions of law**. Also, the parties can agree to have a judge serve as the finder of fact instead of a jury. A losing party is entitled to appeal the case to an **appellate court**, discussed below.

In the federal court system, cases are filed in the US District Court, which is a federal trial court. There are 94 judicial districts in the nation (i.e., 94 federal trial courts) named for their geographic locations. Some states with smaller populations have only one judicial district (e.g., North Dakota and Montana), while more populated states have multiple judicial districts (e.g., Wisconsin and Texas). See Figure 2.4.1. The US Department of Justice represents the federal government in federal court in both civil and criminal cases, dividing its US Attorneys among the 94 judicial districts.

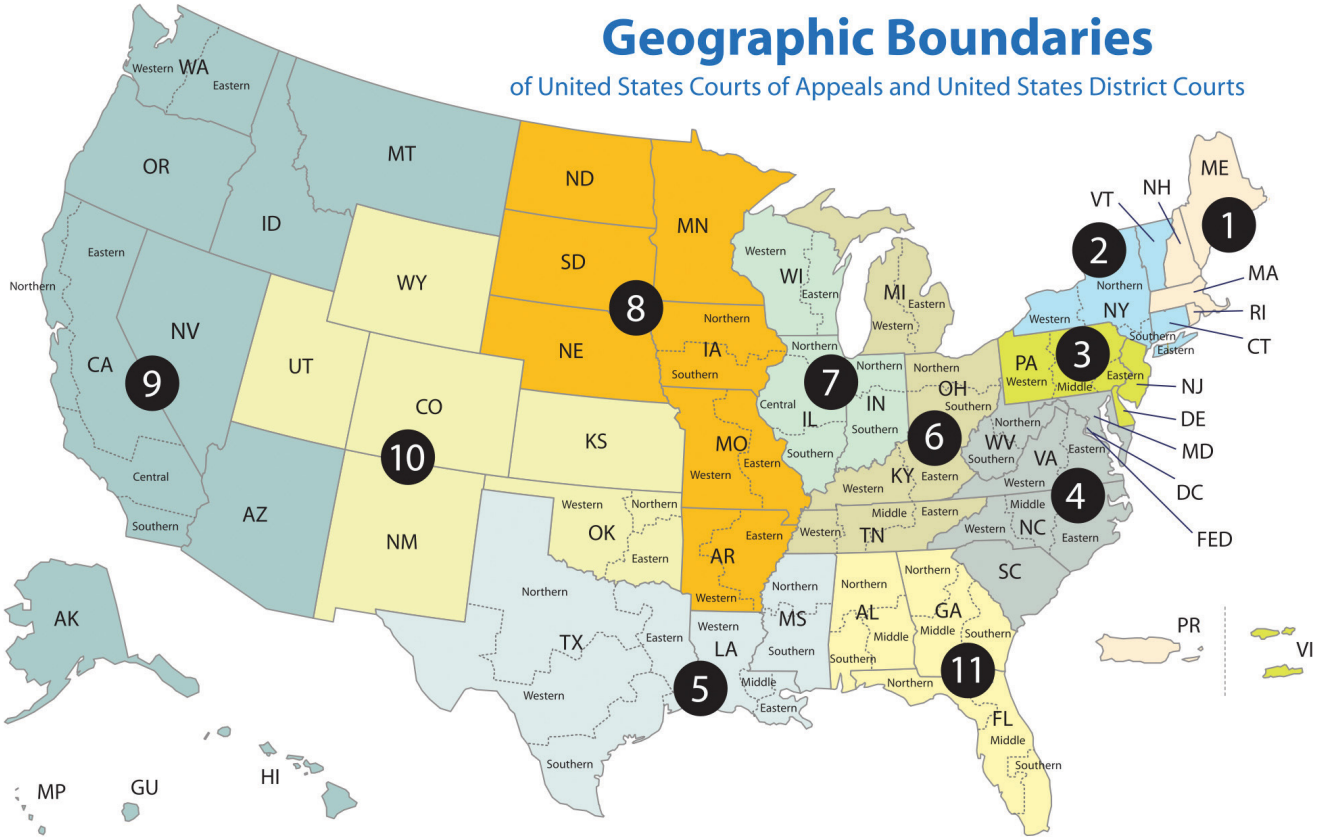


Figure 2.4.1 *Geographic boundaries of the United States Courts of Appeals and United States District (Trial) Courts.* (Source)

Depending on the state court system, trial courts are known most commonly by names such as circuit court, superior court, or district court, but so can intermediate appellate courts. Wisconsin refers to its trial courts as circuit courts. Wisconsin has 72 counties with circuit courts, which is analogous to the 94 judicial districts in the federal system.

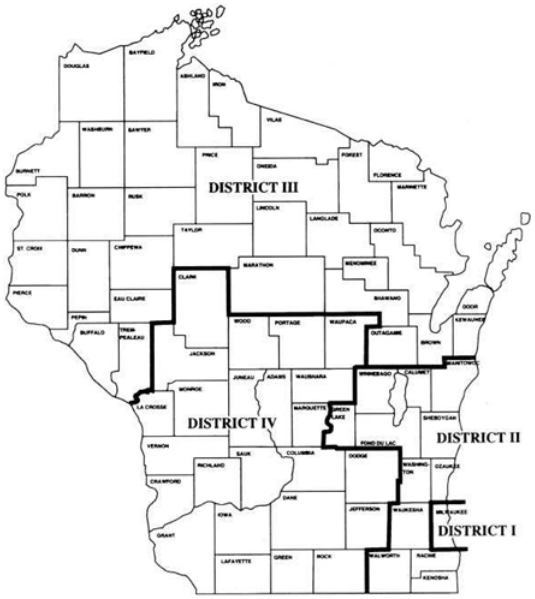


Figure 2.4.2 *Geographic boundaries of the Wisconsin Courts of Appeals and Wisconsin Circuit (Trial) Courts.* (Source)

Intermediate Appellate Courts

Intermediate appellate courts—typically referred to simply as **appellate courts**—review the decisions of trial courts, normally to determine whether the parties received a fair trial or whether the trial judge (1) applied the appropriate law or (2) interpreted the law appropriately. Thus, these courts address **questions of law**. Because the job of appellate courts is to interpret the law and determine whether the court below applied the law properly, juries do not play a role in appellate court proceedings.

Legal Lingo

A common problem with learning languages is that, frequently, different words mean or describe the same thing. For example, "bathroom," "restroom," washroom," and "lavatory" all refer to the same thing. Depending on the area of the United States, someone might refer to a carbonated beverage as "soda," "pop," or "Coke." "Water fountain" commons refers to a "drinking fountain," and Wisconsin residents have a history of referring to drinking fountains as a Bubblers.)

The same nuances exist in the legal world. In the context of courts, "court of appeals" and "appellate court" both refer to an **intermediate court of appeals**. But despite the fact that the US Supreme Court and state **courts of last resort** actually are appellate courts, people do not refer to them as "appellate courts."

By contrast, it is reasonable to infer that a *supreme* court is at the top of the hierarchy, thus a court of last resort. Yet, New York refers to its court of last resort as its "court of appeals."

A federal trial court is called a "district court," but a trial court in Wisconsin is called a "circuit court." A federal appellate court is called a "circuit court," but an appellate court in Wisconsin is called a "district court."

While we are on the topic of trial courts, what do you think a trial court in New York is called?

Answer

That's right: a s*upreme court*. (If you already knew this, maybe you have watched *Law and Order*.) Now, you can amaze your friends and family with a "did you know . . .?" fun fact. (It is also possible that you will receive *this reaction*.)

Figures 2.4.1 (federal) and 2.4.2 (Wisconsin) demonstrate which appellate courts hear cases from which trial courts. Whether in the federal or state court system, each appellate court is responsible for hearing cases from a particular region. For example, if a party appealed the outcome of a federal case in the Western District of Wisconsin (the federal trial court located in Madison, Wisconsin), the US Court of Appeals for the Seventh Circuit (located in Chicago, Illinois) would hear the appeal. In a Wisconsin state case, an

appeal from the Ozaukee County Circuit Court (a state trial court located in Port Washington, Wisconsin) would be heard by the Wisconsin Court of Appeals for the Second District (located in Waukesha, Wisconsin).

A final note about intermediate appellate courts is that they must hear any appeal made to them. Appeals to these courts are called **appeals as of right**, which is different than appeals to courts of last resort.

Courts of Last Resort

As discussed in Section 2.3, a party losing an appeal at the federal appellate court level may ask the US Supreme Court to hear its case, and this is true at the state level. However, appeals to courts of last resort are **discretionary appeals**, so they can select which cases to hear, which usually includes cases in which the multiple federal circuit courts arrive at different conclusions about the same legal issue, cases that the Court believes have substantial national importance, and cases that present federal legal issues it has never before addressed.

The US Supreme Court agrees to hear very few cases. Each Supreme Court term, the Court receives 7,000-8,000 petitions for review, and it hears only about 80 cases (approximately one percent). State supreme courts tend to agree to hear a greater proportion. For instance, the Wisconsin Supreme Court hears approximately 10% of the appeals made.

2.5: Concluding Thoughts

The US Constitution establishes the three branches of the federal government and gives them the ability to check each other's authority. The Judicial branch oversees the actions of the Executive and Legislative branches through judicial review to ensure that they do not violate the Constitution. While not perfect, the US federalist system was designed to restrain governmental power and to prevent the rise of an authoritarian regime.

The Judicial Branch is the only unelected branch of government. *Marbury v. Madison* established the doctrine of judicial review, which allows courts to determine the final validity of laws as well as the meaning of the Constitution. The president can check the judiciary through appointments and the pardon power. Congress can check the judiciary through confirming judges, administrative control of court calendars and funds, and legislation about the types of cases a court can hear.

There are fifty-six separate legal systems in the United States. Subject matter jurisdiction is the authority of a court to hear a case based on the type of dispute. State law claims are generally heard in state courts, while federal question cases are generally heard in federal court. Federal courts may hear state law claims under diversity jurisdiction. Federal cases are filed in a US District Court and appealed to a US Circuit Court of Appeals. State cases are typically filed in a trial court and appealed to an intermediate court of appeals.

CHAPTER OVERVIEW

3: Litigation

Learning Objectives

- Identify the parties involved in litigation.
- Explain the requirement of standing.
- Explain the concept of personal jurisdiction and distinguish it from subject matter jurisdiction.
- Explain how courts can obtain personal jurisdiction over a defendant.
- Understand the roles and types of juries.
- Follow a trial from opening statements to closing arguments.

Chapter Outline

3.1: Introduction

Litigation provides an opportunity for each side in a dispute to tell their story to an impartial jury or judge to decide who wins. Business professionals have a responsibility to their company and stakeholders to avoid legal liability. Acting ethically helps achieve this goal. Agreeing to mediation or arbitration may help businesses avoid court. However, litigation may be the only dispute-resolution mechanism available or the one that is best for the situation.

Sidebar

Litigation is like any other business effort: you are trying to get someone to see things your way. The best way to do that is to be likable and persuasive to the judge, other lawyers, and the jury. Construct your theory of the case early on. Meet your deadlines. Maintain a strict ethical standard in your professional life. Work hard to explore both sides of the case, and develop a short and compelling statement about why your side should prevail. If you do all that, you will make it easy for others to want to find in your favor. Why does this work? Because as humans, we want good to prevail. Be good. ~Valerie M., magistrate

Let's get started by identifying the individuals involved in litigation.

3.2: The Parties, Attorneys, and Jury

3.2.1 The Parties

The litigation system relies on parties to bring forth and defend their respective claims. The party that begins a civil lawsuit is called the **plaintiff**. The plaintiff sues the **defendant** to recover damages for, or to stop, a legal wrong. In a criminal trial, the party that initiates litigation is the prosecution, representing the people within a state or federal government. In a criminal trial the accused wrongdoer is also called the defendant.

Cases may involve multiple plaintiffs and multiple defendants. Civil procedure encourages parties to bring their complaints against each other at once. All parties, and every possible **claim** (each claim is a separate violation of law) arising out of a single incident or series of related incidents, should be identified and raised in a lawsuit.

Except in some small claims courts, parties may hire attorneys to represent them. Individuals who represent themselves are called **pro se litigants**. The complexities of litigation require knowledge and objectivity to succeed. Courts hold pro se litigants to the same standards as they do attorneys. Therefore, a pro se litigant is expected to understand and follow all the rules of the court and applicable laws.

3.2.2 Attorneys

In the United States, law school is a graduate-level program that usually takes three years to complete. Law school graduates earn a Juris Doctorate degree, or JD. Graduates then take the bar exam in the state where they wish to practice. If they pass the exam and background check, they can apply to be licensed in that state. Because the practice of law in the United States varies widely by jurisdiction, attorneys are only permitted to practice in jurisdictions where they are licensed.

Attorneys are bound by a professional code of ethics that is overseen by the supreme court of the state where they are licensed. One of the most important rules of professional responsibility is the obligation to keep a client's secrets. The communications between a client and his or her attorney are absolutely confidential under the attorney-client privilege doctrine. The privilege belongs to the client, and the attorney is not permitted to reveal any of these communications without the client's consent. A narrow exception exists for clients who tell their attorneys they intend to harm others or themselves. Attorneys must avoid violating the privilege because it exists for the client's benefit. Someone who cannot communicate with his or her attorney freely is unable to help the attorney prepare the best possible case.

In spite of an attorney's professional obligations to his or her client, it's important to remember that ultimately an attorney's first duty is to the administration of justice. The requirements for attorneys to be civil, honest, and fair are written to ensure that attorneys represent the very best aspects of the judicial system. For example, a client admits to his attorney that he is guilty of a crime. The client then wants to testify under oath that he is innocent. Although an attorney cannot reveal what her client has told her, the attorney is prohibited from knowingly suborning perjury. The attorney must either convince the client to not testify or withdraw from the case.

An attorney owes her client zealous advocacy, but her zeal must be constrained within the bounds placed on her as an officer of the Court and under the Court's rules. Attorneys cannot assert legal claims or arguments that are not well-founded under existing law or through the modification or expansion of law. Attorneys are also prohibited from using the courts for a purpose unrelated to the resolution of a legitimate legal cause of action.

3.2.3 The Jury

In the US legal system, the jury has a very special role of citizen participation in the administration of justice. As the trier of fact, the jury has the duty of determining the truth in any given situation: who said and did what, why, and when. The litigation system is a process in which each side gets to present its case to a group of unbiased citizens, and then ask them to decide who wins the case.

There are two types of juries. A **grand jury** is a group of citizens convened by the prosecution in serious criminal cases to determine (1) whether probable cause exists to believe that a crime has occurred, and (2) whether it's more likely than not that the defendant committed the crime. If the grand jury decides probable cause exists, then the government may bring criminal charges against the defendant. The grand jury prevents prosecutors from abusing their powers of arrest and indictment. The grand jury requirement exists at the federal level and in most states. A grand jury typically meets for an extended period of time and hears several different cases.

The grand jury does not determine guilt or innocence. A **petit jury** does that. This jury is impaneled for a specific trial. During the trial, members of the jury listen to the evidence presented and then deliberate as a group on the facts of the case. They then apply the law, as instructed by the judge, to the facts. There are typically twelve members in a petit jury in criminal trials and from six to twelve members in civil trials. In a criminal trial, a jury must arrive at a unanimous verdict to convict a defendant of the crimes charged.

The jury system is incredibly important because ordinary citizens adjudicate all sorts of disputes. There are problems with administering this system, however.

Both grand and petit juries are drawn from citizen voter and driver license rolls. In high-profile cases, it may be difficult to find citizens who have not heard about the case or who can be impartial. Another problem arises from the burdens placed on jurors' personal lives through their service. While most states have laws that prevent an employer from firing a worker or taking any negative action against workers on jury duty, there is no legal requirement that an employer continue to pay a worker on jury duty. Some citizens, such as those who are self-employed, risk losing personal income by serving on juries.

Another potential problem arises in the composition of the jury. To provide a fair jury, courts attempt to draw from a cross-section of society to reflect the diversity of the surrounding community. Local court rules typically allow judges to excuse potential jurors for hardship or extreme inconvenience. The only professions that are automatically exempt are active-duty military members, police officers, firefighters, and public officers. In spite of these administrative problems, the jury system remains a cornerstone of the US legal system.

3.3: Standing

3.3.1 Introduction

Article III of the US Constitution grants the judiciary the power to hear "cases" and "controversies," meaning that a dispute must be appropriate for judicial determination. This requirement means that a plaintiff must have **standing** as a prerequisite for a court to hear the case. This is a procedural legal issue, and it requires the case to be brought at the right time, or the court will dismiss the case. In other words, the dispute must be **ripe** for adjudication (i.e., the facts of the dispute are not hypothetical, and the factual circumstances have advanced sufficiently beyond mere possibilities of legally recognized harm.) On the other end of the spectrum, if the case is brought too late, the case is **moot**, which also deprives a plaintiff of standing.

Example 3.3.1

Ripeness. Assume that a state is debating whether to pass a law that would require thirty hours of financial management classes before anyone is allowed to form a company. Sally wishes to form a company and hears about the debate. Sally doesn't want to take thirty hours of classes and decides to sue the state, claiming that the law is unconstitutional. The lawsuit would be dismissed because the law hasn't yet been passed and thus is not ripe for adjudication.

Example 3.3.2

Mootness. Referring to Example 3.3.1, assume that the state passed the law, and then Sally filed her lawsuit. However, while her lawsuit was pending, the state repealed the law. The court would dismiss the lawsuit because any decision about whether the law was constitutional would be pointless, which makes the case moot.

Plaintiffs must establish that they have standing when they file their lawsuit. Generally, the plaintiff must *allege* that they have a genuine stake in the case's outcome because:

1. they have personally suffered a harm that is actual, concrete and particularized;
2. the harm is fairly traceable to the defendant's unlawful actions; and
3. if the plaintiff receives a favorable decision, the court has the ability to provide redress (i.e., the court has the ability to do something about it, such as ordering compensation).[1]

3.3.1.1 Actual and Concrete Harm

Actual and concrete harm is a harm that is not hypothetical or abstract.[2]

Example 3.3.3

Mary regularly plays VR games. A company releases a new virtual reality (VR) game. During the game, players are exposed to various flashing and flickers lights and rapidly alternating colors that can cause people with photosensitive epilepsy to experience adverse effects, such as seizures. The game included a warning: "Discretion is advised: This content contains sequences of flashing lights that may trigger discomfort or seizures in individuals with certain sensitivities."

Mary has photosensitive epilepsy but purchased and played the game anyway. During the gameplay, Mary experienced severe epileptic seizures. She provides medical documentation from her neurologist, showing that her condition has worsened since playing the game, including increased frequency and severity of seizures. Since playing the game, Mary also has not been able to work regularly and has had to seek psychological care and additional neurological treatment.

In this example, Mary can meet the harm requirement for standing. She can allege that she suffered actual and concrete injuries in the form of physical and psychological harm, lost wages, and increased healthcare expenses.

Case in Point

In the *1982 U.S. Supreme Court case* of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the federal government had transferred ownership of a former military hospital, appraised at $577,500, to a church-related college at no cost.

The respondent organization and some of its employees brought suit, alleging this appropriation of taxpayer dollars violated the Establishment Clause of the First Amendment by contravening the principle of the "separation of church and State." However, the Court did not determine whether the property transfer violated the First Amendment because mere grievances and the "psychological consequence presumably produced by observation of conduct with which one disagrees" is not an actual harm and concrete harm.

3.3.1.2 Particularized Harm

A particularized harm is a harm that specifically has affected the plaintiff individually and personally, not some other party or an entire population.[3]

Example 3.3.4

A consumer files a lawsuit against a car manufacturer, claiming that a recalled vehicle model is defective and dangerous. However, the consumer never owned, leased, or even drove that model. Because they have not *personally* suffered any harm or financial loss, the court will dismiss the case for failing to have a particularized harm.

Case in Point

In *Gill v. Whitford*, after the Wisconsin Legislature passed a statewide redistricting law, and a group of 12 Democrat voters filed suit, claiming that the law's partisan gerrymandering was unconstitutional. The petitioners claimed that the law harmed Wisconsin Democrats by diluting votes of Democratic constituents, thus impeding the ability to elect Democrats to the legislature. However, the 12 petitioners could not demonstrate that the "dilution of votes" statewide harmed their individual voting interests in their particular voting district. Consequently, the U.S. Supreme Court held that the petitioners did not meet the particularized harm requirement.

3.3.1.3 Causation

The plaintiff must articulate that the alleged harm is fairly traceable to the defendant's wrongful conduct. The causal connection between the defendant's conduct and the harm must be demonstrable, not speculation or conjecture.

Example 3.3.5

John lives on a beachfront property in a town on the southeastern coast of the U.S., and nearby is a beachfront hotel. There is a lot of construction going on up and down the coastline. Over the last few years, John has noticed the beach on his property eroding. John sues the hotel, claiming that the hotel's construction and other activities are causing his property to erode. Although John has evidence of harm (his eroding land), it is too speculative to trace his harm to the hotel's conduct because so many other factors may be directly related to his harm, such as natural movement of the waves, rising sea levels, and construction projects unrelated to the hotel.

Case in Point

Murthy v. Missouri involved the states of Missouri and Louisiana, and five social media users, suing several federal Executive Branch officials and agencies, claiming that the officials and agencies violated the First Amendment by pressuring social media platforms to suppress protected speech. During the 2020 election season and the COVID-19 pandemic, social media platforms announced that they would enforce their pre-existing content moderation policies against users who posted false and misleading content. For example, various platforms deleted posts that is considered false, including posts related to purported treatments, cures, and the utility of social distancing and masks.

Also during this time, government officials interacted with social media platforms about their efforts to suppress vaccine misinformation out of concern for public health. Also, agencies—including the FBI—communicated with platforms about concerns about election-related misinformed posted by social media users. The plaintiffs contended that the government's involvement unconstitutionally interfered with their free speech rights and wanted a court injunction to cease the government's alleged interference.

The Supreme Court ruled that the plaintiffs failed to demonstrate that if their speech had been suppressed, they could not establish whether it was fairly traceable to the government officials and agencies that they sued, as opposed to the social media platforms, which were already moderating content.

3.3.1.4 Redressability

In addition to the requirements discussed above, the plaintiff's must show that if the court would find in favor of the plaintiff, the plaintiff's requested remedy would redress the alleged harm. For example, if the plaintiff requests that the court issue an injunction against the defendant's conduct, an injunction would remedy or prevent future harm.

Example 3.3.6

Sally lives in an area of the U.S. that has increasingly suffered from severe droughts and wildfires related to global climate change. Sally sues the U.S. government, alleging that the U.S.'s foreign aid policies to other countries have worsened climate change, leading to the droughts and wildfires. Even if the court issues an injunction to cease the foreign aid, the injunction

would have little to no impact on climate change in Sally's region because of the complex, global factors affecting the climate that are beyond the government's control.

Cases in Point

Newdow v. Roberts

Michael Newdow (and other individuals, collectively referred to as "Newdow") intended to attend or otherwise view the January 20, 2009 presidential inauguration ceremony of Barack Obama. Meanwhile, leading up the inauguration, various entities were preparing for the inaugural ceremony and related activities (e.g., military services, equipment, security, etc.). Federal statues authorize this organization and planning, however, none of these laws require it. In fact, no law requires an inaugural ceremony to take place at all; it is a matter of tradition. The President-elect has the discretion to proceed with a ceremony and to choose what to include in the ceremony.

Here, the preparations included arranging for two ministers to lead prayers and for the Chief Justice of the United States, John Roberts, to administer the oath of office, which customarily ends with the phrase, "So help me God." However, Newdow filed suit against Chief Justice Roberts and a multitude of individuals and entities involved in organizing and administering the ceremony, requesting the court to issue an injunction to prohibit ceremonial prayers and the reference to God during the oath office, both for this and future inaugurations. Newdow claimed that the religious aspects of the ceremony violated the Establishment Clause of the First Amendment.

Among the legal issues the D.C. Circuit Court of Appeals decided was that Newdow did not standing because an injunction would not have redressed the purported constitutional injury. If a President-elect wishes to proceed with these ceremonial rituals, then the law permits them; the law neither requires them nor prohibits them, including whether the Chief Justice is the individual to administers the oath of office. An injunction against the defendants would only prevent *those* individuals carrying out ceremonial plans and rituals; it would not prevent anyone else, for example, from issuing the oath of office or saying prayers. Therefore, the requested injunction would not redress any alleged harm. Consequently, Newdow did not have standing.

Allen v. Wright

The issue in this case was whether parents of Black students had standing to challenge the IRS's tax-exempt status for discriminatory private schools. At the time, the the Internal Revenue Code included guidelines and procedures for determining when a school's practices were deemed "racially nondiscriminatory," and if a school failed to meet these standards and procedures, the IRS would deny tax-exempt status to the school.

The parents of Black children who were attending public schools in seven States in school districts undergoing desegregation brought a nationwide class action in Federal District Court against government officials, alleging that the IRS standards and procedures were insufficient, allowing various private schools continuing to receive tax-exempt statute despite engaging in discriminatory practices. The parents' argued that this encouraged White children to leave the public schools and instead attend discriminatory private schools, harming Black children's opportunity to receive an education in desegregated public schools.

Notably, the parents did not allege that their children had ever applied or would ever apply for admission to any private school. Thus, it was merely speculative that the alleged harm—education in a desegregated school—would be fairly traceable to the IRS unlawfully granting tax-exempt status to discriminatory private schools (see Causation, above).

The Court also held that the parents could not establish that a favorable decision would redress the alleged harm. If the IRS did revoke tax exemptions to the discriminatory schools, there was no guarantee that private schools would stop discriminating or that racial integration in the public schools would improve (particularly with respect to the schools in the parents' respective school districts).

Remember

It is important to remember that whether standing exists does *not* depend on whether the plaintiff ultimately will produce sufficient evidence to prove their case. The court determines standing based on whether the allegations in the complaint, *if* proven, would make the case sufficient for adjudication.

Notes

1. Library of Congress. (n.d.). *Overview of standing*. Constitution Annotated. ↩
2. Library of Congress. (n.d.). *Concrete injury*. Constitution Annotated. ↩
3. Library of Congress. (n.d.). *Particularized injury*. Constitution Annotated. ↩

3.4: Jurisdiction and Venue

Jurisdiction

As noted in Chapter 2, for a court to adjudicate a case, in addition to the plaintiff having standing, the court must have jurisdiction: **both** subject matter jurisdiction and personal jurisdiction. The court must dismiss a case if it lacks either form of jurisdiction. Review Chapter 2 for a refresher on subject matter jurisdiction. **Personal jurisdiction**, relates to the authority of a court *over a particular defendant*.

Specifically, personal jurisdiction relates to the power of the court to compel a defendant to appear before that court and be subject to its judgment. *First*, states—and thus their courts—inherently have personal jurisdiction over its residents, regardless of whether the resident is a natural person, business entity (for profit or not-for-profit), or political body.

Second, personal jurisdiction is an additional concern for those to travel out of state and/or engage in interstate or international commerce. For example, a state may also exercise personal jurisdiction over *nonresident* defendants under various circumstances. The implication for individuals and businesses is that—depending on the circumstances—a court in one state may compel a defendant from a different state to appear before it and subject the nonresident defendant to its judgment.

A court can have personal jurisdiction over a defendant in multiple ways. First, a court has personal jurisdiction over the residents of that state. Second, a defendant can consent to personal jurisdiction. In a business context, this frequently occurs when a contract contains a clause in which the parties agree to a particular court having jurisdiction. For example, a contract might include language such as this:

> *Any dispute arising under or related to this Agreement shall be resolved exclusively in the state courts of Wisconsin, and each party hereby consents to the personal jurisdiction in Wisconsin, thus waiving any objection to personal jurisdiction or any claim that such venue is inconvenient.*

Third, a court obtains personal jurisdiction over a defendant if they are served with process while the defendant is physically in the state (i.e., the summons and complaint) or otherwise waives the right to service of process. **Service of process** is the procedure by which a defendant is notified that it is being sued. Service of process typically requires a copy of the notice to appear before a court to be personally delivered to the defendant or the defendant's agent. In the case of businesses, service of process is usually delivering a copy of the notice to appear to their registered agent. Service can be more challenging with individuals.

Fourth, most states have a **long-arm statute** that establishes a procedure by which out-of-state defendants can be required to appear before a court. These statute provide for how service of process occurs.

Long-Arm Statute

See Wisconsin's long-arm statute here: Wis. Stat. § 801.05

Because a court is a government entity, it has constitutional limitations on its authority, which includes prohibiting courts from arbitrarily (a) subjecting others to its state's laws and (b) compelling a nonresident to travel from one state to another to defendant themselves. In short, compelling someone to appear before a court and be subject to its judgment must be reasonable such that it would "not offend traditional notions of fair play and substantial justice."[1] Based on this principle, procedural laws exist to establish when a party may be subjected to another state's jurisdiction.

Personal jurisdiction requires litigants to have some form of "minimum contacts" with the state where the case is filed. Personal jurisdiction seeks to avoid litigation in a particular court , even if the case has merit.

Obtaining personal jurisdiction over the defendant requires some connection between the defendant and the state where the court is located. Businesses that incorporate, have a physical location, or do business in a state create personal jurisdiction through their actions within the state. Owning property in a state also creates personal jurisdiction.

Case in Point

In *World-Wide Volkswagen v. Woodsen*,[2] Kay and Harry Robinson had purchased a new Audi in New York from Seaway Volkswagen, a local car dealer, and they left New York for their new home in Arizona. But as they passed through Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay and her two children. They had not yet reached Arizona, so since the accident occurred in Oklahoma, the Robinsons filed a products liability lawsuit in an Oklahoma state court; the defendants were Seaway Volkswagen, the dealer's regional distributor, World-Wide Volkswagen, and two other defendants.

Seaway was incorporated and had its principal place of business in New York, and World-Wide was incorporated and had its business office in New York. World-Wide had distributor contracts with car dealers in New York, New Jersey, and Connecticut. Other than this car accident, there was no evidence of Seaway or Wold-Wide having engaged in any activity in Oklahoma. There was no evidence that they regularly sold cars to Oklahoma residents, or that they indirectly, through others, served or sought to serve the Oklahoma market. They did not close sales or perform services there, and they did not solicit business there, either through salespersons or through advertising reasonably calculated to reach Oklahoma.

Given the evidence, it would not have been reasonably foreseeable that cars sold by Seaway or World-Wide would travel to and might cause injury in Oklahoma. As opposed to mere foreseeability, to determine whether allowing Oklahoma to exercise personal jurisdiction would satisfy constitutional due process, the foreseeability is based on **whether the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there**. In this case, Seaway's and World-Wide's lack of activity or connections with Oklahoma was such that they could not reasonably anticipate being haled into court in Oklahoma. Thus, allowing Oklahoma to have personal jurisdiction would violate due process (i.e., Oklahoma did not have personal jurisdiction over Seaway or World-Wide).

Basis of Personal Jurisdiction	Description
Consent	• A business or individual agrees to the jurisdiction of the court
Residence	• A business or individual resides in the state
Service of Process	• The defendant is served a summons and complaint within the state
Long-arm Jurisdiction (via a long-arm statute)	• A resident business or individual was involved in an incident in another state; or • A non-resident business or individual was involved in an incident within the state

Venue

Venue is the proper geographic location of the court to hear a case because the place has some connection with the events that give rise to the lawsuit. While multiple courts may have subject matter and personal jurisdiction over a dispute, only a few may be the proper venue. For example, by doing business in Colorado a company is subject to the jurisdiction of Colorado courts. However, the court in the county where the plaintiff was injured or where the business maintains an office would be the proper court to hear the dispute.

5. Jurisdiction and Choice of Law Combined
"This Agreement shall be governed by and construed in accordance with the laws of the State of [State], without regard to its conflict of laws principles. ."

Notes

1. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). ↩

2. 444 U.S. 286 (1980). This case is also sometimes referred to as *Robinson v. Audi*. ↩

› Supplementary Attributions

Source content not listed in the attribution footer below includes:

- **PageSourceNameLink** by Author is licensed by CC BY 4.0. Original source: https://www.

CHAPTER OVERVIEW

4: Alternative Dispute Resolution

Learning Objectives

- Understand alternative dispute resolution (ADR) methods.
- Learn the benefits and drawbacks of different methods of dispute resolution.

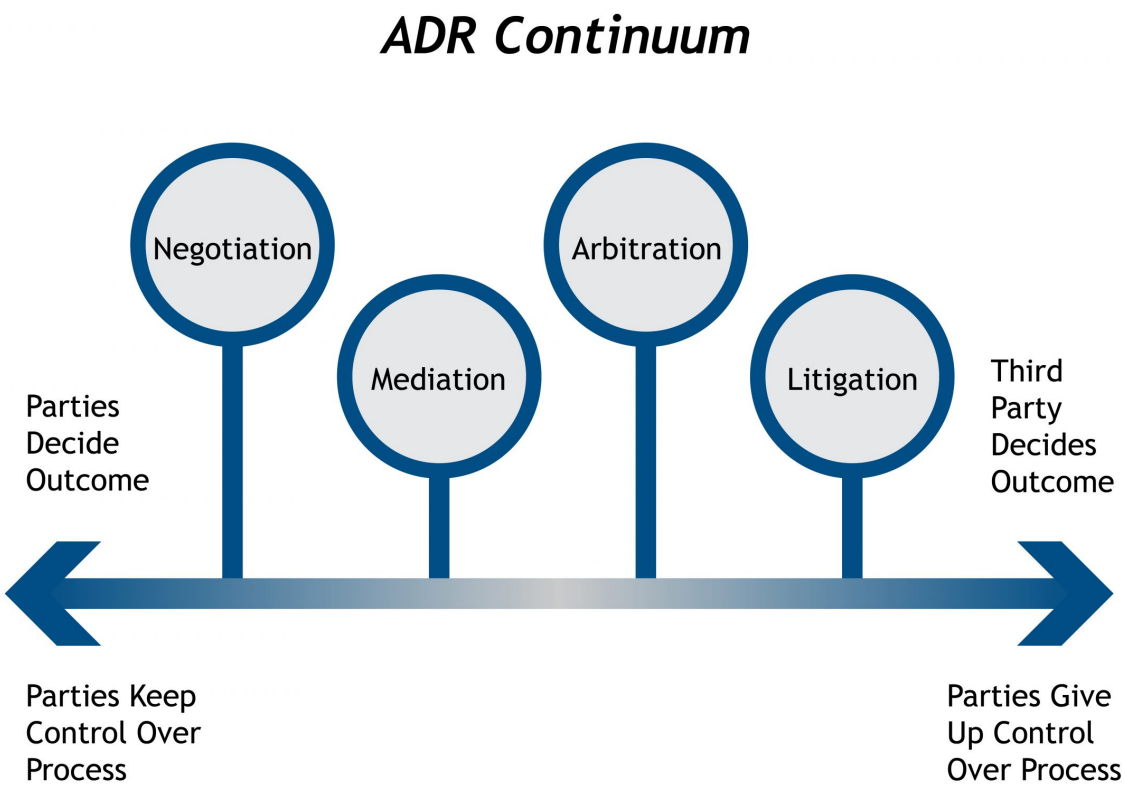
Chapter Outline

4.1: Introduction

Imagine that someone has a legal claim against a supplier, employer, or a business where he or she is a customer. What will happen? They probably don't want to immediately initiate litigation because litigation is very expensive and time consuming. Besides, they may want to continue doing business with the supplier, employer, or business. Perhaps the matter is of a private nature, and they do not want to engage in a public process to determine the outcome. They would like the dispute to be resolved, but do not want to engage in a public, time-consuming, expensive process like litigation to do it.

A common method of dispute resolution that avoids many of the challenges associated with litigation is alternative dispute resolution. **Alternative dispute resolution (ADR)** encompasses many different methods of resolving disputes outside of the judicial process. Some ADR methods vest power to resolve the dispute in a neutral third party, while other strategies vest that power in the parties themselves.

Figure 4.1 Alternative Dispute Resolution Continuum



The most common methods of ADR are negotiation, mediation, and arbitration. ADR is often used to resolve disputes among businesses, employers and employees, and businesses and consumers.

ADR methods are used outside of the courtroom, but participation in ADR has important legal consequences. For instance, parties that have agreed by contract to be subject to binding arbitration give up their constitutional right to go to court. The **Federal Arbitration Act (FAA)** is a federal statute that requires parties to participate in arbitration when they have agreed by contract to do so, even in state court matters. The FAA preempts state power to create a judicial forum for disputes arising under contracts with mandatory arbitration clauses. The FAA encompasses transactions within the broadest permissible exercise of congressional power under the Commerce Clause in the US Constitution. This means that the FAA requires mandatory arbitration clauses to be

enforceable for virtually any transaction involving interstate commerce, which is very broadly construed. This is an example of federal preemption exercised through the Supremacy Clause in the US Constitution.

Counselor's Corner "Alternative dispute resolution." The term suggests that litigation is the primary means of dispute resolution and that mediation, arbitration, and other means are "alternatives." But, actually, negotiation is the primary means of dispute resolution and the others are the alternative means—with litigation being the last (legal) alternative. In negotiation and mediation, the participants make decisions based on their values and predispositions, needs, criteria for satisfying those needs, pertinent information they are aware of, and available ways to satisfy their needs. Negotiation is the most used means of resolving disputes. It is an invaluable life skill. Don't wing it—learn how to do it well. ~Russell C., judge

---

4.2: Negotiation

Imagine that Han is a tent manufacturer. Han's supplier of tent fabric routinely supplies him with appropriate water-resistant fabric to construct tents, so that he can make and sell them. After many years of a good working relationship, Han's fabric supplier delivered nonconforming goods. Specifically, the fabric delivered was not water-resistant, despite the need for water-resistant fabric to make tents. However, when Han notified the supplier of the problem, the supplier denied that the fabric was nonconforming to his order. Han refused to pay for the goods. The fabric supplier insisted on payment before future delivery of any additional fabric. Without water-resistant fabric, Han cannot continue to make tents.

This is an example of a **business to business dispute**. Despite the problem, Han wants to continue working with this supplier, since they have a good, long-standing relationship. This problem seems to be a "hiccup" in the regular business relationship so they want to resolve this dispute quickly and without hard feelings. It is very unlikely that Han will immediately hire an attorney to file a formal complaint against his supplier. However, that does not change the fact that there is a dispute that needs to be resolved.

One of the first strategies that Han and his supplier are likely to use is negotiation. **Negotiation** is a method of alternative dispute resolution in which the parties retain power to resolve their dispute. No outside party is vested with decision-making power. Negotiation requires the parties to define the conflict and agree to an outcome. Often, this can take the form of a compromise. Note that a compromise does not mean that anyone "loses." If both parties are satisfied with the result of the negotiation and the business relationship can continue moving forward, then both parties will likely consider the settlement a "win."

Benefits to negotiation as a method of ADR include its potential for a speedy resolution, the inexpensive nature of participation, and the fact that parties participate voluntarily. Drawbacks include the fact that there are no set rules, and either party may bargain badly or even unethically. In a negotiation, there is no neutral third party to ensure that rules are followed, that the negotiation strategy is fair, or that the overall outcome is sound. Moreover, any party can walk away whenever it wishes. There is no guarantee of resolution through this method. The result may not be "win-win" or "win-lose," but no resolution at all.

In addition, the parties may not have equal bargaining power. If Han's business and the supplier are both dependent on each other for roughly equal portions of their businesses, then they are most likely relatively equal with respect to bargaining power. However, if Han has a small business but his supplier has a large business, then negotiation is potentially unbalanced, since one party has a much more powerful bargaining position than the other. For example, if Han needs that particular type of fabric, which is only available from one supplier. But the supplier does not need Han's business because he do not provide a significant amount of its profit. This would be an example of **unequal bargaining power**.

4.3: Mediation

Mediation is a method of ADR in which parties work to form a mutually acceptable agreement to resolve their dispute with the help of a neutral third party. Like negotiation, parties in mediation do not vest authority in a third party to decide the dispute. Instead, this authority remains with the parties themselves, who are free to end mediation if it is not working. Often, when parties end mediation, they pursue another form of ADR, such as arbitration, or they choose to litigate their claims in court. Like negotiation, mediation seeks a "win-win" outcome for the parties involved. Additionally, mediation is confidential, which may be attractive to people who wish to avoid the public nature of litigation. Discussions during a mediation are not admissible as evidence if the parties proceed to litigation. This encourages parties to be open with each other when trying to resolve their dispute. Finally, the mediation process is usually much faster than litigation, and the associated costs can be substantially less.

Unlike negotiation, a third party is involved in mediation. Indeed, a neutral **mediator** is crucial to the mediation process. Mediators act as a go-between for the parties, seeking to facilitate the agreement. Mediators do not provide advice on the subject matter of the dispute. Mediators might not possess any subject-matter expertise concerning the nature of the dispute. The value of mediators, however, is their training and experience in conflict resolution, which they use to facilitate an agreement between the parties.

Advantages of Mediation	Drawbacks of Mediation
• Quick resolution • Less expensive than litigation & arbitration • Non-adversarial process that can preserve the relationship between the parties • Allows parties to work together to solve shared problem • Confidentiality • Set ground rules by a third party • Possibility of a "win-win" outcome	• Requires genuine participation by parties • Results may depend on skill of mediator • No uniform rules or procedures that apply to all mediations • No guarantee of a mutually agreeable outcome

Parties often enter into a legally binding contract that embodies the terms of the resolution immediately after a successful mediation. Therefore, the terms of the mediation can become binding if they are reduced to a contract.

Mediation is often required by courts as part of the litigation process. In an effort to reduce the court's docket and encourage the parties to settle their own disputes, parties to lawsuits often must mediate their disputes after discovery and before trial. If the parties cannot settle their dispute with the help of a mediator, the case will proceed to trial before a judge or jury who will determine the outcome of the case.

4.4: Arbitration

Arbitration is a method of ADR in which parties vest authority in a neutral third-party decision maker to hear their case and issue a decision, which is called an **arbitration award**.

An arbitrator presides over arbitration proceedings. **Arbitrators** are neutral decision makers who are often experts in the law and subject matter at issue in the dispute. Arbitrators act like judges during trials. For instance, they determine which evidence can be introduced, hear the parties' cases, and issue decisions. They may be certified by the state in which they arbitrate, and they may arbitrate only certain types of claims. For instance, the Better Business Bureau trains its own arbitrators to hear common complaints between businesses and consumers (B2C). However, their decisions do not form binding precedent like appellate court decisions.

Participation in the arbitration proceeding is sometimes mandatory. Parties must arbitrate if they signed a contract requiring mandatory arbitration for that type of dispute. Arbitration is also mandatory when state law requires it.

Voluntary arbitration is frequently used in business disputes. Sometimes parties simply agree that they do not want to litigate a dispute because they believe that the benefits of arbitration outweigh the costs of litigation, so they choose arbitration in hopes of a speedy and relatively inexpensive outcome.

In binding arbitration, the arbitration award is final. Therefore, appealing the merits of a binding arbitration award to court is not available. An arbitration award may be converted to a judgment by the court, thereby creating the legal mechanism through which the judgment can be collected. This process is called **confirmation**.

Although courts review arbitration awards, their review is very limited and all doubts are resolved in favor of the validity of the award. Courts review whether (1) the arbitration award covered matters beyond the issues submitted; (2) the arbitrator failed to apply the law correctly; and (3) fraud occurred. Courts do not review the merits of the award.

Like any other form of dispute resolution, arbitration has certain benefits and drawbacks. Arbitration is an adversarial process like a trial, and it will produce a "winner" and a "loser." Arbitration is more formal than negotiation and mediation and, in many ways, it resembles a trial. Parties present their cases to the arbitrator by introducing evidence. After both sides have presented their cases, the arbitrator issues an arbitration award.

The rules of procedure during arbitration are often less formal or less restrictive on the presentation of evidence than in litigation. Arbitrators decide which evidence to allow, and they are not required to follow precedents or to provide their reasoning in the final award. In short, arbitration adheres to rules, but those rules are not the same as the rules for litigation.

Arbitration can be more expensive than negotiation or mediation, but it is often less expensive than litigation. Parties must pay the costs of the arbitrator, and they often hire attorneys to represent them. Additionally, in mandatory arbitration clause cases, the arbitration may be required to take place far from one of the parties. This means that a party may have to pay travel costs during the arbitration proceeding. Arbitration is also faster than litigation.

A common issue is whether mandatory arbitration is fair in certain circumstances. It's easy to imagine that arbitration is fair when both parties are equally situated. For example, **business to business (B2B)** arbitration is often perceived as fair, especially if businesses are roughly the same size or have roughly equal bargaining power. This is because they will be able to devote approximately the same amount of resources to resolve the dispute, and they both understand the issues involved.

However, issues of fairness often arise in **business to employee (B2E)** and **business to consumer (B2C) disputes**, particularly where parties with unequal bargaining power have entered into a contract that contains a mandatory arbitration clause. In such cases, the weaker party has no real negotiating power to modify or to delete the mandatory arbitration clause, so that party is required to agree to such a clause if it wants to engage in certain types of transactions. In B2E contexts, unequal bargaining power alone is insufficient to hold arbitration agreements unenforceable.

In B2C cases, different issues of fairness exist. As noted previously, when the parties possess unequal power, these issues can be magnified. Consumers tend to fare better in litigation than in arbitration. Incentives exist to favor businesses over consumers in the arbitration process, including the lack of appeal rights to the courts, the limits on consumers' remedies, prohibitions against class-action suits, limitations on access to jury trials, limitations on abilities to collect evidence, and greater out-of-pocket expenses.

Not all binding arbitration clauses have been upheld by courts in B2C cases. The FAA does not prevent the courts from applying state law, including the unconscionability of contract terms. In other words, if the terms of the contract make it unreasonable to enforce the arbitration provision, then a party may still bring claims to court for resolution.

Similarly, arbitration agreements may be rescinded on the same grounds as other contracts. Fraud, mutual mistake, and lack of capacity are grounds for voiding arbitration contracts. Revocation is also possible in the event of death or bankruptcy of one of the parties, as well as destruction of the subject matter of the underlying contract.

4.5: Concluding Thoughts

ADR is the body of dispute-resolution methods outside of the litigation process. ADR is often faster, less expensive, and more private than litigation. For this reason, ADR may be the preferred dispute resolution method, particularly when an ongoing relationship between parties is desired. Common methods of dispute resolution are negotiation, mediation, and arbitration. Mandatory arbitration clauses are common in contracts, and such clauses are usually enforceable against the parties even if they wish to litigate their claims.

CHAPTER OVERVIEW

5: Torts

Learning Objectives

- Define torts.
- Understand intentional torts, and how to defend against an accusation of one.
- Explore negligence.
- Explain strict liability and how product liability affects manufacturers.

Chapter Outline

5.1: Introduction

LEARNING OBJECTIVES

1. Define torts.
2. Understand intentional torts, and how to defend against an accusation of one.
3. Explore negligence.
4. Explain strict liability and how product liability affects manufacturers.

A tort can be understood as a civil wrong to a person or property other than breach of contract. A **tort** is any legally recognizable injury arising from the conduct (or sometimes failure to act) of persons or corporations. There are several key differences between torts and contracts, which are also different than crimes:

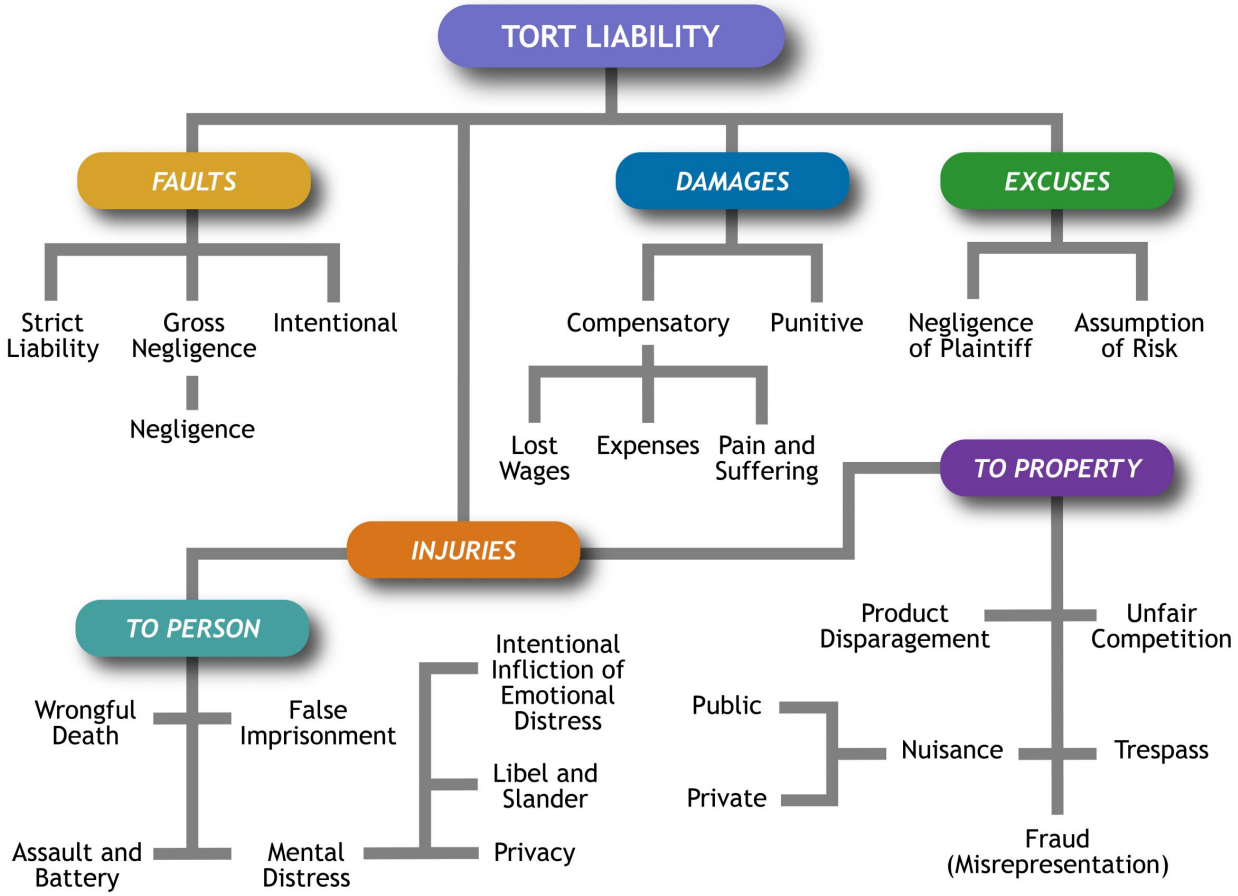
	Contract	**Tort**	**Crime**
Obligation	The parties agree to a contract; which imposes duties on them	Civil law imposes duties	Legislatures pass laws prohibiting certain conduct
Enforcement	Party to contract or beneficiary sues for breach of contract	Injured party sues for tort claims	Government prosecutes
Consequences	Monetary damages	Monetary damages; injunction	Criminal conviction may include fine, imprisonment, & restitution

Some conduct can be both a crime and a tort. If Allie punches Bentley without provocation, then Allie has committed both the tort of battery and the crime of battery. In the tort case, Bentley could sue Allie in civil court for money damages (typically for his medical bills). That case would be tried based on the civil burden of proof—preponderance of the evidence. That same action, however, could result in Allie being charged with criminal battery. If convicted beyond a reasonable doubt, Allie may have to pay a fine or go to jail.

The standard of proof in a criminal case (beyond a reasonable doubt) is far higher than the standard of proof in a civil case (a preponderance of evidence). Therefore, victims of crimes often wait to bring related tort claims against a defendant until after the criminal trial is over. If the defendant is convicted of a crime, it is easier and less expensive to prove liability at a civil trial.

Torts can be broadly categorized into three categories, depending on the level of intent demonstrated by the **tortfeasor** (the person committing the tort). If the tortfeasor acted with intent to cause the damage or harm, then an **intentional tort** has occurred. If the tortfeasor didn't act intentionally but failed to act as a reasonable person, then **negligence** occurs. Finally, **strict liability** occurs where the tortfeasor is held responsible regardless of intent.

Figure 9.1 Tort Liability Diagram



Counselor's Corner Not every injury or harm gives rise to a legal claim. You can't sue someone just because your feelings are hurt or something bad happened. Even though you may have been through something harmful, if the law doesn't recognize the injury as something you can recover for, you don't have a legal claim. Lawsuits are meant to address really bad injuries or really bad behavior. Many things that drive us crazy when dealing with other people are things that we just have to learn to deal with. Or resolve in another forum. ~Heather C., attorney

---

5.2: Intentional Torts

In an intentional tort, the tortfeasor intends the consequences of his or her act, or knew with substantial certainty that certain consequences would result. This intent can be transferred. For example, if someone swings a baseball bat at someone else but the person ducks and the bat hits a third person, the person hit is the victim of a tort even if the person swinging the bat had no intention of hitting the person actually injured.

It is useful to think of torts based on the type of rights being protected.

Theory of Liability	**Description**
Interference with Personal Freedom	
Assault	Causing the apprehension or fear of immediate harmful or offensive contact
Battery	Application of force that results in harmful or offensive contact with a person's body
False Imprisonment	Intentional confinement or restrain of a person's movements without justification or consent
Intentional Infliction of Emotional Distress	Intentionally or recklessly causing another person severe emotional distress through extreme or outrageous acts
Interference with Property Rights	
Trespass to Land	Unauthorized entry onto land that is visibly enclosed & owned by another
Trespass to Personal Property	Taking or harming another's personal property without permission
Conversion	Wrongful possession or disposition of property as if it were one's own with the intent to do so permanently
Nuisance	Condition or situation that interferes with the use or enjoyment of property
Interference with Economic Relations	
Disparagement	False & injurious statement that discredits or detracts from the reputation of another's property, product or business
Interference with Contractual Relations	Intentional inducement of a party to break an existing contract
Interference with Prospective Advantage	Intentional interference with a potential business relationship
Misappropriation	Using another's property dishonestly for one's own use
Wrongful Communications	
Defamation	Harming the reputation of another by making a false statement
Slander	Spoken defamation
Libel	Written defamation
Invasion of Privacy	Violating someone's right to be left alone or to restrict public access to confidential information through: • appropriating the person's name or likeness; • invasion of physical solitude; • publicly disclosing private facts; or • false light

Fraud	Intentional misstatement of a material fact that is relied upon by a third party

Interference with Personal Freedom

Assault is the threat of force on another that causes that person to have a reasonable apprehension or fear of immediate harmful or offensive contact. Actual fear or physical injuries are not required for assault. It is also not necessary for the tortfeasor to intend to cause apprehension or fear. If someone points a realistic-looking toy pistol at a stranger and says "give me all your money" as a joke, it is still assault if a reasonable person would have had apprehension or fear in that situation. The intentional element of assault exists here, because the tortfeasor intended to point the realistic-looking toy at the stranger.

Battery is the application of force to another that results in harmful or offensive conduct. It includes any non-consensual touching, even if physical injuries are not present. In battery, the contact or touching does not have to be to the person. Grabbing someone's clothing or possessions they are holding is battery. Notice that assault and battery are not always present together. Assault can occur without physically touching the victim. Similarly, a surgeon who performs unwanted surgery or inappropriately touches a patient who is sedated has committed battery but not assault because the patient did not feel fear or apprehension.

When someone is sued for assault or battery, several defenses are available. The first is consent. Boxers have consented to being battered when competing. Self-defense and defense of others also may be available defenses, as long as the self-defense is proportionate to the initial force.

False imprisonment occurs when someone intentionally confines or restrains another person's movement or activities without justification. The protected interest is the right to travel and move freely without impediment. This tort requires actual and present confinement. False imprisonment is challenging for retailers and other businesses that interact regularly with the public, such as hotels and restaurants. The **shopkeeper's privilege** allows businesses to detain suspected thieves until law enforcement arrives. The detention must be reasonable, however. Store employees must not use excessive force in detaining the suspect, and the justification, manner, and time of the detention must be reasonable.

Intentional infliction of emotional distress occurs when a tortfeasor intentionally or recklessly causes another person severe emotional distress through extreme and outrageous acts. A plaintiff has to prove the defendant's actions would be outrageous to a reasonable member of the community. The standard is objective. It is not enough for the plaintiff to believe the defendant acted outrageously.

Although the standard for outrageous conduct is objective, the measurement is made against the particular sensitivities of the plaintiff. Exploiting a known sensitivity in a child, the elderly, or pregnant women can constitute intentional infliction of emotional distress. Businesses must be careful when handling sensitive employment situations to avoid potential liability. This is especially true when firing or laying off employees. Such actions must be taken with care and civility. Similarly, bill collectors and foreclosure agencies must be careful not to harass, intimidate, or threaten people.

Interference with Property Rights

Intentional torts can also be committed against property. **Trespass to land** occurs when someone enters onto, above, or below the surface of land that is visibly enclosed without the owner's permission. The trespass can be momentary or fleeting. Soot, smoke, noise, odor, or even a flying arrow or bullet can all become the basis for trespass. These can also be the basis for nuisance claims. **Nuisance** is a condition or situation that interferes with the use or enjoyment of property. Nuisance claims can be public (applying to community areas such as parks or the environment) or private (applying to privately owned property such as houses).

Trespass can be innocent or willful. An innocent trespass occurs when someone enters another's property by mistake or when they believe they have permission but do not. Willful trespass occurs when someone intentionally enters another's property knowing they do not have permission to be there.

There are times when trespass is justified. Someone may have a license to trespass, such as a meter reader or utility repair technician. There may also be times when it may be necessary to trespass—for example, to rescue someone during an emergency.

Some states do not require the land to be visibly enclosed to be protected from trespass. Therefore, residential homes in urban and suburban areas do not always need a fence around the property to be protected from trespass.

Trespass to personal property is the unlawful taking or harming of another's personal property without the owner's permission. The tort of **conversion** is the wrongful possession or disposition of property as if it were one's own with the intent to do so

permanently. It is the civil equivalent to the crime of theft. An employer who refuses to pay an employee for work commits conversion. Similarly, conversion occurs when a business returns personal property to the wrong customer.

Interference with Economic Relations

Torts can also take place against goods or products instead of people. **Disparagement** is a false and injurious statement that discredits or detracts from the reputation of another's property, product, or business. To recover, the injured party must prove that the statement caused a third party to take some action resulting in economic loss to the plaintiff. In other words, the victim of the statement must prove that it lost customers or goodwill as a result of the false statement made about its business or products. These types of false statements are considered unfair competition and, therefore, are unlawful.

Similarly, unfair competition can also be in the form of interfering with a competitor's contracts. **Tortious interference with contractual relations** prohibits the intentional interference with an existing valid and enforceable contract by intentionally inducing one of the parties to break the contract, causing damage to the relationship between the contracting parties. This occurs when a business tries to break up a competitor's contract with vendors, suppliers, or customers in an effort to harm them.

There are four elements to prove intentional interference with contractual relations:

1. A contract exists between the plaintiff and a third party;
2. Defendant knew of the contract;
3. Defendant improperly induced the third party to breach the contract or made performance of the contract impossible; and
4. Plaintiff was injured.

Similarly, **tortious interference with prospective advantage** is an intentional, damaging intrusion on another's potential business relationship, such as the opportunity to obtain customers or employment. Fair competition does not give rise to this tort. However, if a business engages in fraud, intimidation, or threats to drive away potential customers from its competitors, then it is liable. Tortious interference with prospective advantage applies to conduct before a contract exists.

Misappropriation occurs when a person or business uses someone else's property dishonestly for one's own use. Misappropriation is a very broad tort because it covers any likeness or identifying characteristic, as well as property such as patents, copyrights, and trademarks. It also applies to a business's name and goodwill.

Wrongful Communications

Another intentional tort is **defamation**, which is the act of harming the reputation of another by making a false statement to a third party. Spoken defamation is considered **slander**, while written defamation is **libel**. To be liable for defamation, the words must be made to a third party, which may include emails, text messages, and social media. The First Amendment provides strong protection for news organizations, and courts have held that public figures must show actual malice before they can win a defamation lawsuit. This means celebrities and famous individuals must prove the media knew that it was publishing false information, or that it published the information with reckless disregard for the truth. Truth is a complete defense to defamation.

The **invasion of the right of privacy** is essentially the violation of a person's right to be left alone and to restrict public access to personal information, such as tax returns and medical records. There are four forms of this tort:

Form of Invasion of Privacy	Description
1. Appropriating a person's name or likeness	Using someone's name, photograph, or other identifying characteristic for commercial purposes without permission
2. Invasion of physical solitude	Window peeping, eavesdropping, using drones to video private areas, going through garage to find confidential information, etc.
3. Public disclosure of private facts	Disclosure of a private citizen's finances, medical conditions, or personal relationships through a public medium such as social media
4. False light	Using publicity to place a person in false light in the public eye, such as objectionable hobbies or attributing beliefs and opinions to the person that he or she does not hold

Fraud is the intentional misstatement of a material fact that is relied upon by a third party to the detriment of the targeted party. It requires the tortfeasor to misrepresent facts (not opinions) with knowledge that they are false or with reckless disregard for the truth. An "innocent" misrepresentation is not enough—the defendant must know he or she is lying. Fraud can arise in any number of business situations, such as lying on a résumé to gain employment, lying on a credit application to obtain credit, or in product marketing. Here, there is a fine line between **puffery**, or seller's talk, and an actual lie. If an advertisement claims that a particular car gets a certain gas mileage or meets emissions standards, then fraud occurs if those statements are untrue. Conversely, an advertisement that promises "unparalleled luxury" is only puffery since it is opinion.

5.3: Negligence

Everyone has the duty to act reasonably and to exercise a reasonable amount of care in their dealings and interactions with others. Breach of that duty, which causes injury, is negligence. Negligence is distinguished from intentional torts because there is a lack of intent to cause harm.

The definition of negligence is purposefully broad. **Negligence** is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. This legal standard is to protect people against unreasonable risk of harm.

To succeed on a negligence claim, a plaintiff must prove five elements:

1. The defendant owed a duty of care to the plaintiff;
2. The defendant breached that duty;
3. The defendant's conduct was the actual cause of the plaintiff's injuries;
4. The defendant's conduct was the proximate cause of the plaintiff's injuries; and
5. The plaintiff was damaged.

Duty of Care

First, the plaintiff has to demonstrate that the defendant owed it a duty of care. The general rule is that people are free to act any way they want, as long as they do not harm others. This means strangers are generally not responsible for caring for each other unless a special relationship exists. For example, parents owe their children a duty of care and doctors owe their patients a duty of care because of their underlying relationship. In a business context, businesses owe a duty of care to their customers and managers owe a duty of care to their employees. Some business relationships involve a **fiduciary duty**, which is a duty to act with the utmost faith, trust, and candor towards another. Doctors, lawyers, accountants, and corporate officers all have fiduciary duties towards their patients, clients, and shareholders.

It is important to understand that businesses and individuals owe a general duty to the community as a whole. Drivers owe other drivers and pedestrians a duty of care not to cause accidents. However, drivers are not required to report accidents or to stop and help others when they are not involved because they do not owe a duty of care to strangers.

Businesses have a duty to warn and protect customers from crimes committed by other customers. When a business knows about, or should know about, a high likelihood of crime occurring, then the business must warn or take steps to protect its customers. These businesses include bars frequented by biker gangs, hotels where frequent sexual assaults occur, and any business with escalating violence on their premises.

Businesses also owe a duty to exercise a reasonable degree of care to protect the public from foreseeable risks that the owner knew or should have known about. There are many foreseeable ways for customers to be injured in retail stores, including objects falling from shelves, spilled liquids, and icy entryways. If a store knows about a hazardous condition, or should have known about it, then the store must quickly warn customers and remedy the situation.

Breach of Duty of Care

Once a duty has been established, plaintiffs have to prove that the defendant breached that duty. A breach is demonstrated by showing the defendant failed to act reasonably. It is important to keep in mind that the reasonable person is an objective standard. The reasonable person is never sleep-deprived, angry, or intoxicated. He or she is reasonably careful and considers consequences carefully before acting. A jury does not put themselves in the shoes of the defendant to determine what they would have done in that situation. Nor do they take into account the defendant's subjective situation, such as being intoxicated or sleep-deprived at the time.

In practical terms, the presence of injury or harm is usually enough to satisfy the "breach of duty" requirement. Often the harm is the evidence of the breach because it would not have occurred if the defendant had acted as they should.

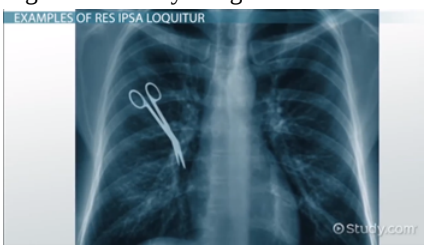
Breach of the duty of care can be both an action (such as causing a car accident) or it can be a failure to act (such as not clearing ice from the sidewalk). These are fact-specific determinations because what a reasonable person would do in a given situation varies.

There are two special doctrines that establish breach of duty of care in limited circumstances. The first, **res ipsa loquitur**, means "the thing speaks for itself" in Latin and holds that a breach of a party's duty of care may be inferred from the events that occurred. It is used in cases where:

1. The injury would not have occurred unless someone was negligent;
2. The defendant had exclusive control over the property causing injury; and
3. The plaintiff had no role in causing the harm.

For example, if a patient discovers surgical equipment inside his or her body after surgery, the patient does not have to prove which person in the operating room negligently left the equipment. Instead, the plaintiff can sue the surgeon under the res ipsa loquitur doctrine because the surgeon is in charge of the surgery room. When res ipsa loquitur is raised, the burden shifts to the defendant to prove that he or she did not cause the harm.

Figure 9.2 X-Ray Image of Scissors Left Inside a Patient



The second doctrine is **negligence per se**. Legislatures sometimes pass laws defining negligence under certain circumstances. If a defendant violates the statute or ordinance, then the defendant is legally negligent. To recover under this theory, a plaintiff has to prove:

1. The defendant broke the law;
2. The plaintiff is in the class of people intended to be protected by the law; and
3. The violation of the law caused plaintiff's injuries.

Negligence per se is often argued in car accidents where the defendant is ticketed for reckless driving by the police, as well as dog bite cases where the victim has physical injuries. When defending against negligence per se claims, defendants may argue:

1. They were unable to comply with the law through reasonable care;
2. It was an emergency situation not caused by them; or
3. Complying with the law would have presented a greater risk of harm.

Actual Cause

The third element of negligence is actual causation, which is also known as but-for causation. This form of causation is fairly easy to prove. But for the defendant's actions, would the plaintiff have been injured? If yes, then but-for causation is proven. For example, if a customer slips on ice on a store's property, would the plaintiff been injured but for the store's failure to remove the ice? This is the form of causation that most people describe in their daily interactions. Because the store did not remove the ice, the customer slipped and was injured.

Proximate Cause

The second form of causation asks whether the defendant's actions were the proximate cause of the plaintiff's injury. Sometimes the chain of events results in the injury being too remote from the defendant's conduct to be legally recoverable. In other words, proximate cause means that the act or omission must be related closely enough to the injury to justify imposing legal liability. Proximate cause places a limit on a defendant's responsibility to immediate (or foreseeable) harm. This ensures that no intervening causes of the plaintiff's injuries exist.

A customer slips on ice on a store's property and breaks a leg. On the way to the hospital in an ambulance, there is a car accident and the customer is killed. Although the customer would not have been in the ambulance if she had not fallen on the store's property, the store would not be responsible in a wrongful death claim. The car accident is an intervening event that breaks the causal chain. Put another way, the car accident was not a foreseeable consequence of the store's failure to remove ice on its premises.

Proximate cause prevents actual causation to be taken to a logical but extreme conclusion. At some point, the law has to break the chain of causation to hold parties to a reasonable amount of liability for their actions.

Damages

The final element in negligence is legally recognizable injuries, or damages. If someone walks on a discarded banana peel and does not slip, then no tort occurs. Only when someone has been injured are damages awarded.

There are two types of damages awarded in tort law. The first, **compensatory damages**, seek to compensate the plaintiff for his or her injuries. Compensatory damages can be awarded for medical injuries, economic injuries (such as loss of property or income), and pain and suffering. They can also be awarded for past, present, and future losses. While medical and economic damages can be calculated using available standards, it is far more difficult to assign a monetary value to pain and suffering. Juries often use the severity and duration of the injury and its impact on the plaintiff's life to calculate damages.

The second type of damages is **punitive damages**, which are intended to deter the defendant from engaging in similar conduct in the future. The idea behind punitive damages is that compensatory damages may be inadequate to deter future bad conduct, so additional damages are necessary to ensure the defendant corrects its ways. Punitive damages are available in cases where the defendant acted with willful and wanton negligence, a higher level of negligence than ordinary negligence. There are constitutional limits to the award of punitive damages.

Defenses to Negligence Claims

A defendant being sued for negligence has two main defenses: (1) assumption of risk by the plaintiff; and (2) comparative negligence.

Assumption of Risk

The first defense is assumption of risk. If the plaintiff knowingly and voluntarily assumes the risk of participating in a dangerous activity, then the defendant is not liable for injuries incurred. However, a plaintiff can only assume known risks. A skier assumes the known risks of downhill skiing, including falling, avalanches, and skiing in poor conditions. However, a skier who is injured from a defective chair lift does not assume the risk of injury as a result of a manufacturing defect.

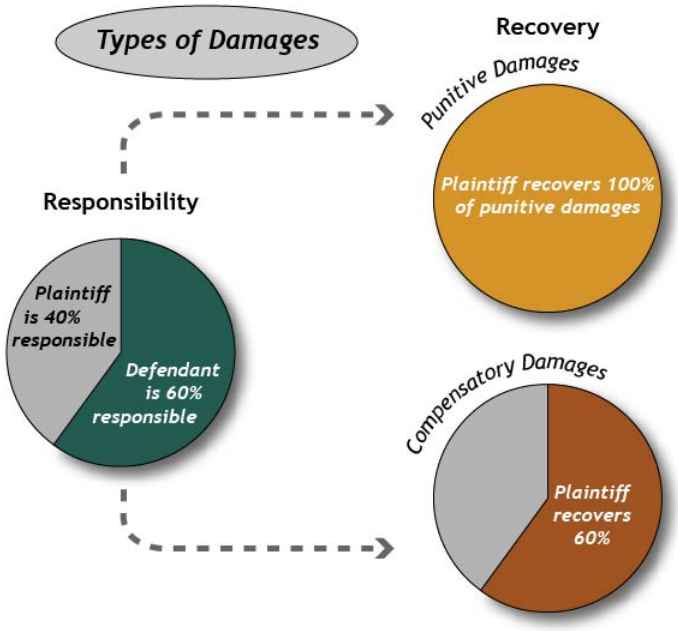
A related doctrine, the **open and obvious doctrine**, is used to defend against lawsuits by persons injured while on someone else's property. For example, if there is a spill on a store's floor and the store owner has put up a sign that says "Caution—Slippery Floor," yet someone decides to run through the spill anyway, then that person would lose a negligence lawsuit because the spill was open and obvious.

Both the assumption of risk and open and obvious defenses are not available to the defendant who caused a dangerous situation in the first place.

Comparative Negligence

The second defense to negligence is when the plaintiff's own negligence contributed to his or her injuries. Most jurisdictions, including Colorado, follow the comparative negligence rule. Under this rule, the jury determines the percentage of fault of all the parties for the plaintiff's injuries. If the jury finds the plaintiff responsible for some of his or her own injuries, then any compensatory damages are reduced by that percentage. For example, if a customer is 40 percent at fault for his injuries, then the compensatory damage award will be reduced by 40 percent. The reasoning for this rule is to hold people and businesses accountable for their own negligence.

Figure 9.3 Recovery of Damages under Comparative Negligence



This rule applies only to compensatory damages, and not punitive damages. Because punitive damages are meant to deter the defendant from committing future bad acts, the purpose would be undercut if the amount of punitive damages was reduced, too.

5.4: Strict Liability

Intentional torts require some level of intent to be committed, such as the intent to batter someone. Negligence torts require carelessness or neglect. Some torts require neither intent nor carelessness. In strict liability, it is irrelevant how carefully the defendant acted. If someone is harmed in a situation where strict liability applies, then the defendant is liable regardless of lack of intent.

Strict liability applies when restaurants and bars serve alcohol to minors or visibly intoxicated persons. This is dangerous because there is a high risk that drunk patrons will injure others if they drive. Sale of tobacco and firearms to minors are also strict liability crimes, as well as possession of child pornography.

Ultrahazardous Activity

An **ultrahazardous activity** is an undertaking that cannot be performed safely even if reasonable care is used while performing it, and it does not ordinarily happen in the community. Ultrahazardous activities include using dynamite, transporting dangerous chemicals, keeping wild animals, and using nuclear and radioactive materials. Some states have passed laws defining offshore drilling for oil and gas as an ultrahazardous activity as well.

Defendants engaged in ultrahazardous activities are almost always liable for resulting harm. Plaintiffs do not have to prove duty of care or breach of duty of care. The “reasonable person” test is also irrelevant, as well as the issue of whether the harm was foreseeable.

Product Liability

Product liability cases address situations in which products, not people, cause injury. Plaintiffs can raise either negligence or strict liability claims for injuries caused by products. There are three main product liability theories: design defect, manufacturing defects, and failure to warn.

Design defects occur when the foreseeable risk of harm can be reduced or avoided by the adoption of a reasonable alternative design. In other words, the manufacturer poorly designed a product that caused injuries which could have been avoided. The law does not require products to be perfect. Litigation in these cases centers on what is a foreseeable risk and whether there was a reasonable alternative. As a result, plaintiffs must show that an alternative design was reasonable.

For example, Takata manufactured airbags that were installed by most major car manufacturers. After many airbags failed to deploy in car accidents, leading to severe injury and death, Takata recalled its airbags. Takata is strictly liable for injuries caused by its defective design.

Manufacturing defects occur when a product fails to conform to the manufacturer’s design for the product. In other words, the product may have been designed adequately but the manufacturer allowed a dangerous product to leave the plant. These claims often involve allegations of failure to adequately inspect products before distribution.

For example, a light bulb factory is strictly liable for manufacturing a batch of faulty bulbs that explode when turned on due to some glitch in the production process.

Failure to warn occurs when the defect is not in the product itself but in the instructions (or lack of them). The plaintiff argues that the manufacturer failed to warn users about the dangers of normal use or a foreseeable misuse. However, there is no duty to warn about obvious dangers.

Defenses to Product Liability

There are several defenses to product liability claims.

First, strict liability applies only to commercial sellers. If an individual sells her car to another person, she would not be strictly liable for selling an unreasonably dangerous product if it had Takata airbags.

Second, plaintiff’s assumption of risk can be a defense. The user must know of the risk of harm and voluntarily assume that risk. Someone cutting carrots with a sharp knife voluntarily assumes the risk of being cut by the knife. However, if the knife blade unexpectedly detaches from the knife handle because of a design or production defect, no assumption of risk occurs.

Third, product misuse is another defense to strict product liability. If the consumer misuses the product in a way that is unforeseeable by the manufacturer, then strict liability does not apply. Modifying a lawn mower to operate as a go-kart, for instance, is product misuse.

A final related defense is known as the commonly known danger doctrine. If a manufacturer can convince a jury that the plaintiff's injury resulted from a commonly known danger, then the defendant may escape liability.

5.5: Concluding Thoughts

Tort law significantly impacts businesses, regardless of industry. Businesses must not engage in activities with the intention to harm employees, customers, and the public. They also must act reasonably to avoid injuries caused by their negligence. Similarly, manufacturers can be strictly liable for design defects, manufacturing defects, and failure to warn consumers. Because many businesses are seen to have “deep pockets,” they are often targeted by plaintiffs when injured by their products and services.

Intentional torts occur when the tortfeasor intends the consequences of his or her act or knew with substantial certainty what the consequences would be. Businesses are affected by intentional torts and need to be careful not to commit them against their employees, customers, and members of the public. It is useful to categorize intentional torts based on the types of rights being protected, such as preventing injuries to persons, property or privacy.

Negligence imposes a duty on all persons to act reasonably and to exercise due care in dealing and interacting with others. Negligence has five elements. First, the plaintiff must demonstrate the defendant owed the plaintiff a duty of care. Second, there must be a breach of that duty. A breach occurs when the defendant fails to act like a reasonable person. The plaintiff must also demonstrate that the defendant caused the plaintiff’s injuries. Both causation-in-fact and proximate causation must be proven. Finally, the plaintiff must demonstrate legally recognizable injuries, which include past, present, and future economic, medical, and pain and suffering damages. Defendants can raise several affirmative defenses to negligence, including assumption of risk and comparative negligence.

In areas where strict liability applies, the defendant is liable no matter how carefully it tried to prevent harm. Carrying out ultrahazardous activities results in strict liability for defendants. Another area where strict liability applies is in the serving of alcohol to minors or visibly intoxicated persons. A large area of strict liability applies to the manufacture, distribution, and sale of unreasonably dangerous products. Products can be unreasonably dangerous because of a production defect, design defect, or both. A product’s warnings and documentation are a part of a product’s design, and therefore inadequate warnings can be a basis for strict product liability. Assumption of risk, product misuse, and commonly known dangers are all defenses to strict product liability.

CHAPTER OVERVIEW

15: Appendix A—Rule Summaries

15.2: Subject Matter Jurisdiction

15.2: Subject Matter Jurisdiction

Summary of Rules: Subject Matter Jurisdiction

1. A court must always have subject matter jurisdiction, and personal jurisdiction over at least one defendant, to hear and decide a case.
2. A state court will have subject matter jurisdiction over any case that is not required to be brought in a federal court.
   - Remember: Some cases can *only* be brought in federal court, such as bankruptcy cases, cases involving federal crimes, patent cases, and Internal Revenue Service tax court claims. The list of cases for exclusive federal jurisdiction is fairly short. That means that almost any state court will have subject matter jurisdiction over almost any kind of case. If it's a case based on state law, a state court will always have subject matter jurisdiction.
3. A federal court will have subject matter jurisdiction over any case that is based on:
   - Federal law (statute, case, or US Constitution); **or**
   - State law where (1) the parties have diverse residency **and** (2) the amount in controversy is over $75,000. (This is called "diversity subject matter jurisdiction."
     - **Diverse residency** means that no plaintiff can have permanent residence in a state where any defendant has permanent residence—there must be complete diversity of citizenship as between all plaintiffs and defendants.
       - A **corporation** is considered a resident where it is incorporated AND where it has a **principal place of business**.
     - The **amount in controversy requirement** means that a good-faith estimate of the amount the plaintiff may recover more than $75,000.
     - Here, the federal court will interpret and apply state law governing the dispute.

CHAPTER OVERVIEW

16: Appendix B—Media Library

16.1: Chapter 1

Introduction to Law and Types of Legal Systems

Civil vs. Common Law

The Legal Systems We Live In Today by *Sprouts*, *courtesy of YouTube.* *(Learn how to access the transcript.)*

16.2: Chapter 2

16.3: Chapter 3

16.4: Chapter 5

16.5: Chapter 6

Index

Glossary

adjudicate | issue decisions, judgments, and orders that are legally binding on others regarding related to legal issues and disputes*

appellant | the party who appeals a lower court's judgment or order to a higher court to overturn or modify a decision made by the lower court (some courts refer to this party as the petitioner)*

breach of contract | when a party to a contract fails to perform their promised obligations*

complaint | the initial pleading filed that starts a lawsuit*

injunction | a type of court order requiring someone to do or cease doing a specific action.*

moot | when an issue or case has been resolved in some way, and a court's judgment favorable to any side would no longer have an effect*

nonresident defendant | in the context of personal jurisdiction—a defendant who/that does not have permanent residence in the state where a plaintiff filed a complaint

personal jurisdiction | the power of a court to subject a defendant to a legally binding judgment, decision, or order*

petition | a formal application in writing made to a court or other official body requesting some judicial action*

petitioner | the party who presents a petition to the court; in the context of an appeal, the petitioner is usually the party who lost in the lower court (also referred to as the appellant)*

respondent | the party against whom a petition is filed (i.e., the party opposing the petitioner/appellant), especially one for the purposes of appeal*

ripe | a particular case is ripe—i.e., ripe for adjudication—when (a) the facts surrounding the dispute make it ready for a judicial decision and (b) waiting for further facts to develop would not change the nature of the legal issues and would not pose a hardship on the parties*

rule of law | the principle under which everyone is bound by laws that are (1) established by the government, (2) equally enforced, (3) adjudicated independently, and (4) consistent with one's rights and the principles underlying those rights (see law)

standing | the legal capacity of a plaintiff bring a lawsuit that a court can adjudicate (a sufficient connection to and from a law or defendant's actions)*

subject matter jurisdiction | the power of a court to adjudicate a particular type of matter and provide the remedy demanded.*

tort | an act or omission that gives rise to injury or harm and amounts to a civil wrong for which a court may impose liability*

Detailed Licensing

Overview

Title: Business Law I Sourcebook (Mac Kelly) - UNDER CONSTRUCTION

Webpages: 141

Applicable Restrictions: Noncommercial

All licenses found:

- CC BY 4.0: 49.6% (70 pages)
- Undeclared: 31.2% (44 pages)
- CC BY-NC-SA 4.0: 17.7% (25 pages)
- CC BY-NC-SA 3.0: 1.4% (2 pages)

By Page

Detailed Licensing

Overview

Title: Business Law I Sourcebook (Mac Kelly) - UNDER CONSTRUCTION

Webpages: 141

Applicable Restrictions: Noncommercial

All licenses found:

- CC BY 4.0: 49.6% (70 pages)
- Undeclared: 31.2% (44 pages)
- CC BY-NC-SA 4.0: 17.7% (25 pages)
- CC BY-NC-SA 3.0: 1.4% (2 pages)

By Page