CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

ANSWER TO CRITICAL ANALYSIS QUESTION IN THE FEATURE

INSIGHT INTO ETHICS—CRITICAL THINKING—INSIGHT INTO THE ETHICAL ENVIRONMENT (PAGE 27)
Now that the United States Supreme Court is allowing unpublished decisions to form persuasive precedent in federal courts, should state courts follow? Why or why not? Yes, because categorizing some decisions, unpublished or otherwise, as not establishing precedent is arguably unconstitutional. No, because such decisions are often less significant or may set "bad" precedents and have not traditionally been regarded as establishing precedent.

ANSWERS TO QUESTIONS AT THE ENDS OF THE CASES

CASE 2.1—QUESTIONS (PAGE 29)

WHAT IF THE FACTS WERE DIFFERENT?
Suppose that the two parties had engaged in a single business transaction. Would the outcome of this case have been the same? Why or why not? The answer depends most probably on the size of the dispute in question. Had the single transaction been for several million dollars, the trial and appellate courts in North Carolina probably would have decided as they did in the actual case. Had the dispute been for $1,000, the results might have been different.

THE ETHICAL DIMENSION
Was it fair for the North Carolina courts to require a New Jersey company to litigate in North Carolina? Explain. Yes, it was fair to require Independence to litigate in North Carolina.

The court's ruling did not offend "traditional notions of fair play and substantial justice" because Independence purposely availed itself of the privilege of doing business in North Carolina. Independence had engaged in numerous transactions with Southern for a year and had billed Southern for services in amounts totaling more than $21,000. Therefore, Independence should have expected to be hailed into court in North Carolina in the event of a dispute.

CASE 2.2—QUESTIONS (PAGE 32)

WHAT IF THE FACTS WERE DIFFERENT?

Suppose Gucci had not presented evidence that the defendant made one actual sale through his Web site to a resident of the court's district (the private investigator). Would the court still have found that it had personal jurisdiction over Huoqing? Why or why not? The single sale to a resident of the district, Gucci's private investigator, helped the plaintiff establish that the defendant 's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

THE LEGAL ENVIRONMENT DIMENSION

Is it relevant to the analysis of jurisdiction that Gucci America's principal place of business is in New York state rather than California? Explain. The fact that Gucci's headquarters is in New York state was not relevant to the court's analysis here because Gucci was the plaintiff. Courts look only at the defendant's location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff's location is irrelevant to this determination.

CASE 2.3—QUESTIONS (PAGE 41)

THE LEGAL ENVIRONMENT DIMENSION

Why did NCR not want its claims decided by arbitration? A party is typically reluctant to enter into a proceeding that he or she (or it) believes will have an unfavorable result. NCR might have had a less complex claim that could have been resolved more favorably in a court, or its claim might have lent itself to a legal, adversarial argument, which would have held less weight in arbitration As stated elsewhere in this chapter, arbitration's disadvantages include the unpredictability of results, the lack of required written opinions, the difficulty of appeal, and the possible unfairness of the procedural rules. NCR might have wanted to avoid arbitration for any or all of these reasons. Also, arbitration can be nearly as expensive as litigation. NCR may have been simply trying to reduce the duration of the dispute and its cost.

THE ETHICAL DIMENSION

Could NCR have a claim that KAL engaged in unfair competition because KAL had engaged in unethical business practices? (Hint: Unfair competition may occur when one party deceives the public into believing that his or her goods are the goods of another.) Why or why not? Of course, "unethical business practices" is not an element of a claim for unfair competition, and thus NCR could not base a legal action on that allegation alone. Also, the statement of facts in this case does not indicate whether "the public" was "deceived" with the respect to these parties' goods. But NCR could have a claim if it could successfully plead the requirements of the cause as stated in this question—KAL's deceiving the public into believing that its goods are the goods of NCR.

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

1A. Federal jurisdiction

The federal district court exercises jurisdiction because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from different jurisdictions and that the dollar amount of the controversy exceed $75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of boxing matches with George Foreman, the amount in controversy exceeded $75,000.

2A. Original or appellate jurisdiction

Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that is courts in which lawsuits begin and trials take place. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

3A. Jurisdiction in Illinois

No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were from another state, the court would have to determine if they had sufficient contacts with the state for the Illinois court to exercise jurisdiction based on a long arm statute. Here, the defendants never went to Illinois, and the contract was not formed in Illinois. Thus, it is unlikely that an Illinois state court would find sufficient minimum contacts to exercise jurisdiction.

4A. Jurisdiction in Nevada

Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if defendants had sufficient contacts with the state. Because the parties met Garner and

negotiated the contract in Nevada, a court would likely hold these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

In this age of the Internet with which people communicate via e-mail, instant text messaging, tweeting, Facebook, and MySpace, is the concept of jurisdiction losing its meaning? Explain your answer. Many believe that yes, the idea of determining jurisdiction based on individuals' and companies' physical locations no longer has much meaning. Increasingly, contracts are formed via online communications. Does it matter where one of the parties has a physical presence? Does it matter where the e-mail server or Web page server is located? Probably not.

In contrast, in one sense, jurisdiction still has to be decided when conflicts arise. Slowly, but ever so surely, courts are developing rules to determine where jurisdiction lies when one or both parties used online systems to sell or buy goods or services. In the final analysis, a specific court in a specific physical location has to try each case.

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

2–1A. Standing
(Chapter 2—Page 34)

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this problem, the issue is whether the Turtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Turtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Turtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Thus, the Turtons would have standing to bring their suit.

2-2A. QUESTION WITH SAMPLE ANSWER{ Appellate review

Trial courts, as explained in the text, are responsible for settling "questions of fact." Often, when parties bring a case to court there is a dispute as to what actually happened. Different witnesses have different versions of what they saw or heard, and there may be

only indirect evidence of certain issues in dispute. During the trial, the judge and the jury (if it is a jury trial) listen to the witnesses and view the evidence firsthand. Thus, the trial court is in the best position to assess the credibility (truthfulness) of the witnesses and determine the weight that should be given to various items of evidence. At the end of the trial, the judge and the jury (if it is a jury trial) decide what will be considered facts for the purposes of the case. Trial courts are best suited to this job, as they have the opportunity to observe the witnesses and evidence, and they regularly determine the reliability of certain evidence. Appellate courts, in contrast, see only the written record of the trial court proceedings and cannot evaluate the credibility of witnesses and the persuasiveness of evidence. For these reasons, appellate courts nearly always defer to trial courts' findings of fact. An appellate court can reverse a lower court's findings of fact, however, when so little evidence was presented at trial that no reasonable person could have reached the conclusion that the judge or jury reached.

2-3A. Jurisdiction
(Chapter 2—Page 30)

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

2-4A. Jurisdiction
(Chapter 2— Pages 28–29)

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

its citizens from exploitation by nonresident employers, particularly when its citizens are the targets of recruitment for out-of-state employment."

2–5A. CASE PROBLEM WITH SAMPLE ANSWER: Arbitration clause

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

2–6A. Arbitration
(Chapter 2—Pages 40–41)

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

2–7A. Arbitration
(Chapter 2—Pages 40–41)

In many circumstances, a party that has not signed an arbitration agreement (Kobe in this case) cannot compel arbitration. There are exceptions, however. According to the court, "The first relies on agency and related principles to allow a nonsignatory (Kobe) to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory (Primenergy), a failure to do so would eviscerate [gut] the arbitration agreement." That applies here. Kobe and Primenergy claimed to have entered into a licensing agreement under the terms of the agreement between PRM and Primenergy. The license agreement is central to the resolution of the dispute, so Kobe can compel arbitration. Similarly, all claims PRM has against Primenergy go to arbitration because the arbitration clause covers "all disputes." That would include allegations of fraud and theft. Such matters can be resolved by arbitration. "Arbitration may be compelled under 'a broad arbitration clause … as long as the underlying factual allegations simply "touch matters covered by" the arbitration provision.' It generally does not matter that claims sound in tort, rather than in contract." The reviewing court affirmed the trial court's decision.

2–8A. Arbitration
(Chapter 2—Page 39)

An arbitrator's award generally is the final word on the matter. A court's review of an arbitrator's decision is extremely limited in scope, unlike an appellate court's review of a lower court's decision. A court may set aside an arbitrator's award if it violates an established public policy or if the arbitrator exceeded her or his powers. In this case, the NFLPA argued that the arbitration award was contrary to public policy because it required Matthews to forfeit the right to seek workers' compensation under California law. The court rejected this argument, however, because under the arbitrator's award Matthews could still seek workers' compensation under Tennessee law. Thus, the arbitration award was not clearly contrary to public policy.

2–9A. A QUESTION OF ETHICS: Agreement to arbitrate

(a) This is very common, as many hospitals and other health-care provides have arbitration agreements in their contracts for services. There was a valid contract here. It is presumed in valid contracts that arbitration clauses will be upheld unless there is a violation of public policy. The provision of medical care is much like the provision of other services in this regard. There was not evidence of fraud or pressure in the inclusion of the arbitration agreement. Of course there is concern about mistreatment of patients, but there is no reason to believe that arbitration will not provide a professional review of the evidence of what transpired in this situation. Arbitration is a less of a lottery that litigation can be, as there are very few gigantic arbitration awards, but there is no evidence of systematic discrimination against plaintiffs in arbitration compared to litigation, so there may not be a major ethical issue.

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

IHI ANSWER TO VIDEO QUESTION NO. 2–10 IHI

Jurisdiction in Cyberspace

(a) What standard would a court apply to determine whether it has jurisdiction over the out-of-state computer firm in the video? A court would apply a "sliding-scale" standard to determine if the defendants (Wizard Internet) had sufficient minimum contacts with the state for the court to assert jurisdiction. Generally, the courts have found that jurisdiction is proper when there is substantial business conducted over the Internet (with contracts, sales, and so on). When there is some interactivity through a Web site, courts have also sometimes held that jurisdiction is proper. Jurisdiction is not proper, however, when there is merely passive advertising.

(b) What factors is a court likely to consider in assessing whether sufficient contacts existed when the only connection to the jurisdiction is through a Web site? The facts in the video indicate that there might be some interactivity through Wizard Internet's Web site. The court will likely focus on Wizard's Web site and determine what kinds of business it conducts over the Web site. The court will consider whether a person could order Wizard's products or services via the Web site, whether the defendant entered into contracts over the Web, and if the defendant did business with other Montana residents.

(c) How do you think the court would resolve the issue in this case? Wizard

Internet could argue that the site is not "interactive" because software cannot be downloaded from the site (according to Caleb). That would be the defendant's strongest argument against jurisdiction. The court, however, would also consider any other interactivity. The facts state that Wizard has done projects in other states and might have clients in Montana (although Anna and Caleb cannot remember). If Wizard does have clients in Montana who purchased software via the Web site, the court will likely find jurisdiction is proper because the defendant purposefully availed itself of the privilege of acting in the forum state. Also, if Wizard Internet regularly enters contracts to sell its software or consulting services over the Web—which seems likely, given the type of business in which Wizard engages—the court may hold jurisdiction is proper. If, however, Wizard simply advertises its services over the Internet and persons cannot place orders via the Web, the court will likely hold that this PASSIVE advertising does not justify asserting jurisdiction.

ALTERNATE CASE PROBLEM ANSWERS

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

2-1A. Jurisdiction

(Chapter 2— Pages 28–29)

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

2-2A. Arbitration

(Chapter 2—Pages 40–41)

The public policy that the court weighed in making its decision included the policy of "not tolerating the knowing misappropriation of state funds by state officials or employees," as well as "[t]he public policy of discouraging fraud," which is "firmly rooted in our common law." The defendant asserted the public policy of discouraging discrimination against the mentally ill. The court considered this policy, but "did not find that Beaudry's discharge was motivated by an intent to discriminate against the mentally ill." In this case, "the policy of minimizing discrimination against the mentally ill did not outweigh the damaging consequences to the concomitant policy goal of refusing to countenance the knowing misappropriation of state moneys." The court vacated the award, the union appealed, and a state appellate court affirmed the trial court's decision.

2-3A. Arbitration

(Chapter 2—Pages 40–41)

The U.S. Court of Appeals for the Third Circuit held that the arbitration award, requiring Exxon to reinstate Fris, should be vacated as contrary to public policy. The court reasoned that the award "violates a public policy that is both well defined and dominant," that is "that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty." The court explained, "An intoxicated crew member on such a vessel can cause loss of life and catastrophic environmental and economic injury. Some of this injury may not be reparable by money damages." The court offered, as an example, harm caused by oil spills. "Moreover," added the court, "it is entirely possible that much of the cost resulting from a major oil spill may fall on taxpayers and those who are injured by the accident."

2-4A. Jurisdiction

(Chapter 2— Pages 28–29)

The North Carolina state court held that it had personal jurisdiction over the Florida defendants. On appeal, the North Carolina Court of Appeals agreed. The appellate court initially pointed out that a court can assert "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. When a corporation purposefully avails itself of the privilege of conducting activities in this State, it is not unreasonable to subject it to suit here." The court pointed out that Health Care advertised Cal-Ban in North Carolina. "Health Care sold the Cal-Ban 3000 capsules to its distributor, defendant CKI Industries, who in turn advertised and sold the drug to defendant Prescott's Pharmacies." The court concluded, "[a]ccordingly," that the defendants "injected Cal-Ban 3000 into the stream of commerce of this State with the expectation that the drug would be purchased by consumers here. The trial court properly exercised personal jurisdiction over defendants."

2-5A. Standing to sue

(Chapter 2—Page 34)

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

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

2-6A. E-Jurisdiction (Chapter 2—Pages 30–31)

The court denied Boyer's motion to dismiss the complaint for lack of personal jurisdiction. "[T]he likelihood that personal jurisdiction can be constitutionally exercised [in the context of Internet activities] is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Boyer "posted Internet messages on the Yahoo bulletin board, which included negative information regarding ABFI." He "also sent an e-mail to ABFI's independent auditors, accusing ABFI of 'fraudulent accounting practices' and 'borderline criminal conduct' . . . with the understanding that the independent auditors were situated in Pennsylvania." Also, the court held that the e-mail fell under the state's long-arm statute, which, like other states' long-arm statutes, permits the exercise of jurisdiction "where an act or omission outside the Commonwealth [Pennsylvania] causes harm or tortious injury inside the Commonwealth." Finally, the court reasoned that "its exercise of jurisdiction over Defendant Boyer would not necessarily violate traditional notions of fair play and substantial justice. It is true that as a non-resident individual, Boyer will be burdened in being forced to defend himself in Pennsylvania. However, his conduct appears to be directed towards Pennsylvania where Plaintiff is located and where Plaintiff's auditors are located. Plaintiff's interest in

adjudicating its dispute and vindicating its reputation in Pennsylvania appears to be self-evident. . . . In addition, it does seem reasonable and fair to require Boyer to conduct his defense in Pennsylvania since that is where he sent the negative e-mail."

2-7A. Arbitration
(Chapter 2—Pages 40–41)

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

2-8A. Jurisdiction
(Chapter 2— Pages 28–29)

The court denied Sharman's motion to dismiss. The court explained that "fairness consists principally of ensuring that jurisdiction over a person is not exercised absent fair warning that a particular activity may subject that person to the jurisdiction of a foreign sovereign." Thus, "the touchstone constitutional inquiry is whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In this case, "Sharman provides its KMD software to millions of users every week . . . . Sharman has not denied and cannot deny that a substantial number of its users are California residents, and thus that it is, at a minimum, constructively aware of continuous and substantial commercial interaction with residents of this forum. Further, Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described . . . is likely to be felt here. It is hard to imagine on

these bases alone that Sharman would not reasonably anticipate being haled into court in California. However, jurisdiction is reasonable for an important added reason: Sharman's effective predecessor, Kazaa BV, was engaged in this very litigation when Sharman was formed. . . . Because Sharman has succeeded Kazaa BV in virtually every aspect of its business, Sharman reasonably should have anticipated being required to succeed Kazaa BV in this litigation as well. If Sharman wished to structure its primary conduct with some minimum assurance that it would not be haled into court in this forum, it simply could have avoided taking over the business of a company already enmeshed in litigation here."

2-9A. Standing to sue
(Chapter 2— Page 34)

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this case, the issue is whether the Covingtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Covingtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Covingtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Indeed, this was the conclusion reached by the appellate court in this case. While the trial court found that the Covingtons lacked standing to sue, when the plaintiffs appealed to U.S. Court of Appeals for the Ninth Circuit, that court found that the Covingtons did have standing to assert their claims. The appellate court remanded (sent back) the case to the lower court for a trial.

2–10A. A Question of Ethics

1. A court can generally exercise personal jurisdiction over a defendant that has had minimum contacts with the forum "necessary to have reasonably anticipated being haled into court there." After minimum contacts have been established, a court can consider whether the exercise of personal jurisdiction comports with "traditional conceptions of fair play."

In this case, the court held that "Rosedale's representations—which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property—constitute sufficient contacts" to support the exercise of personal jurisdiction. The court compared these efforts to an advertising campaign that, for example, urges viewers to call a toll-free phone number to place orders. "This inducement destroys any semblance of . . . passive advertising," which might consist of generalized product promotion that would not support an assertion of jurisdiction.

It was the interactive nature of the marketing scheme, not the Web site, on which the court based its holding. "Rosedale's personal role was to bait the hook for potential customers to make more interactive contact with Linden by visiting Second Life's website.

Rosedale's activity was designed to generate additional traffic inside Second Life. He was the hawker sitting outside Second Life's circus tent, singing the marvels of what was contained inside to entice customers to enter. Once inside Second Life, participants could view virtual property, read additional materials about purchasing virtual property, interact with other avatars who owned virtual property, and, ultimately, purchase virtual property themselves. Significantly, participants could even interact with Rosedale's avatar on Second Life during town hall meetings that he held on the topic of virtual property."

As for fairness, the court focused chiefly on the burden that would be imposed on Rosedale to make an appearance. Rosedale did not claim that he could not afford to appear "or that he would otherwise be irreparably prejudiced by litigating" in Pennsylvania. Rosedale had lawyers "on both coasts." Weighed against Rosedale's burden was Pennsylvania's interest in protecting its residents from "allegedly misleading representations that induce them to purchase virtual property" and in vindicating their rights.

2. Under the Federal Arbitration Act (FAA), a court must compel the arbitration of a dispute if there is a valid agreement to arbitrate that covers the dispute. In this case, the court focused primarily on the validity of the agreement.

A critical factor was the manner in which Linden presented the "Terms of Service" (TOS). A participant was effectively told to "take it or leave it"—one who declined could not gain access to Second Life. There was no opportunity for negotiation so that even a participant like Bragg, who was an experienced attorney, could not use his or her skills to negotiate different terms. And there was no reasonable market alternative—Second Life was the only virtual world to recognize its participants' rights in virtual property.

As for the specific TOS, including the arbitration provision, the court emphasized that Linden allowed itself a range of remedies to resolve disputes while limiting Bragg and other participants to the sole remedy of arbitration. In the circumstances of this case, Linden froze Bragg's account, kept the funds that Linden determined were subject to dispute, and told Bragg that he could resolve the dispute only by arbitration, subject to whatever "asymmetrical" amendment Linden might choose to impose. Also, limiting venue to "Linden's backyard appears to be yet one more means by which the arbitration clause serves to shield Linden from liability instead of providing a neutral forum in which to [resolve] disputes." Altogether, these terms were one-sided and thus unfair.