**Alternate Case Problem answers**

Chapter 2

**Courts and Alternative**

**Dispute Resolution**

**2-1A. *Jurisdiction***

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 2000 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.”

**2-2A. *Standing to sue***

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.”

**2-3A. *E-jurisdiction***

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.”

**2-4A. *Arbitration***

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.”

**2-5A. *Jurisdiction***

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.”

**2-6A. *Standing to sue***

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.

**2–7A. *Arbitration***

Based on a recent holding by the Washington state supreme court, the federal ap­peals court held that the arbitration provision was unconscionable and therefore invalid. Because it was invalid, the restriction on class-action suits was also invalid. The state court reasoned that by offering a contract that restricted class actions and required arbitration, the company had improperly stripped consumers of rights they would normally have to attack certain industry practices. Class-action suits are often brought in cases of deceptive or unfair industry practices when the losses suffered by an individual consumer are too small to warrant a consumer suing. In this case, the alleged added cell phone fees are so small that no one consumer would be likely to litigate or arbitrate the matter due to the expenses involved. Because the arbitration agreement eliminates the possibility of class actions, it violates public policy and is void and unenforceable.

**2–8A. *Venue***

The purpose behind most venue statutes is to ensure that a defendant is not “hailed into a remote district, having no real relationship to the dispute.” The events in dispute have no connection to Minnesota. The Court stated: “Looked at through the lens of practicality—which is, after all, what [the venue statute] is all about—Nestlé’s motion can really be distilled to a simple question: does it make sense to compel litigation in Minnesota when this state bears no relationship to the parties or the underlying events?” The court answered no to this simple question. The plaintiff resides in South Carolina, her daughter’s injuries occurred there, and all of her medical treatment was provided (and continues to be provided) in that state. South Carolina is the appropriate venue for this litigation against Nestlé to proceed.

**2-9A. *Arbitration***

Arbitration can be compelled under a contract’s arbitration clause as long as a dispute involves matters covered by the contract provision. In the set of facts in this problem, the terms of the parties’ contract are central to the resolution of their dispute. Under the contract, all claims that PRM has against Primenergy go to arbitration because the arbitration clause covers “all disputes.” That includes allegations of fraud and theft. Such matters can be resolved by arbitration.

In the actual case on which this problem is based, the court ruled that PRM had to take all complaints about Primenergy to arbitration. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed this ruling.

**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.