
LAW AND GOVERNMENT

1.1 INTRODUCTION

In simple terms, law is the rules that a government uses to protect the health and welfare of its citizens and those within its borders. The government of the United States is a federalist system, which means that lawmaking power is shared between the national (U.S.) government and the individual state governments.

Under the division of powers set out in the U.S. Constitution, the national government (also referred to as the *federal government*) is divided into three branches: legislative, executive, and judicial. The *legislative* branch (the U.S. Congress) is responsible for creating the laws, the *executive* branch (the president and federal agencies such as the Environmental Protection Agency) is responsible for implementing the laws, and the *judicial* branch (the federal court system) is responsible for interpreting the laws.

The powers of the state governments are divided similarly. The legislative branch is the state legislature; the executive branch includes the governor and state agencies such as the state department of motor vehicles; the judicial branch is the state court system.

1.1.1 The Powers of Governments

The powers of the federal government are limited to those expressly listed in the U. S. Constitution. Per the 10th Amendment to the Constitution, any power that is not specifically delegated to the federal government, or specifically prohibited to the states, is reserved to the states or to the people. The most significant power reserved to the states is the general police power to protect the health, safety, and welfare of their communities. The state's police power is used as the basis for enacting laws in areas such as land use, gambling, crime, licensing, liquor sales, and motor vehicles. With respect to construction, police power gives state governments the right to adopt and enforce building codes and to require that architects and engineers working within the state be licensed by the state. Although police power does not specifically refer to the right to create a police force, it does include that right.

Any exercise of the police power is subject to constitutional and statutory restrictions, however. One such restriction comes from the U.S. Constitution's prohibition that a government cannot "deprive any person of life, liberty, or property, without due process of law." Another is the Constitution's "Takings" Clause, which prohibits governments from taking private property for public use without the payment of just compensation. A third constitutional standard is equal protection, which prohibits governments from discriminatory actions. An exercise of the police power must also pass a test of reasonableness. Part of the test for reasonableness is whether there is some logical means-ends relationship, that is, whether the regulation bears some rational relationship to its stated objective.

1.1.2 City and County Governments

Cities and counties are political subdivisions of the state and must be delegated power by the state. Most states delegate considerable power, including police power, to the cities and counties. In many states, this is done through *home rule*. Home rule is a broad grant of power whereby cities and counties govern themselves by enacting and administering laws concerning local matters, within the bounds of the state and federal constitutions. Home rule can be granted either by the state's constitution or by an act of the state legislature. In states without home rule, local governments only have the authority expressly granted to them by state legislatures.

1.1.3 The Powers of the Federal Government

Although the federal government does not have police power, it does have quite extensive powers, primarily because of the authority to regulate interstate commerce given to it by Article 1, Section 8, Clause 3 of the U.S. Constitution (the Commerce Clause). In addition, in areas that are not reserved to the states, conflicts between state and federal law are governed by the Supremacy Clause (Article 6 of the Constitution). Under the Supremacy Clause, the federal Constitution, federal laws, and international treaties supersede state and local law. State and local laws that contradict federal laws or treaties are preempted.

A federal statute may explicitly waive preemption of state law, however. In such cases the federal law is applicable in states that have not enacted their own laws. In addition, some federal laws, particularly those related to environmental regulation, only create minimum standards; the states are free to enact stricter regulations. In some cases, primary implementation of a federal regulation may be delegated to the states, provided the states meet certain standards. When a state is delegated federal authority for environmental regulation, for example, the Environmental Protection Agency (EPA) and the state sign a Memorandum of Agreement establishing their respective responsibilities

and necessary procedures. Many federal statutes provide grants, technical assistance, and other support to help the states in furthering national policies or programs.

1.2 THE SOURCES AND HIERARCHY OF LAW

In the United States, law comes from five sources: constitutions, statutes and ordinances, regulations promulgated by administrative agencies, international treaties, and appellate court opinions.

1.2.1 The Constitution

As the supreme law of the land, the Constitution of the United States provides the basis for the U.S. government and guarantees the freedom and rights of all U.S. citizens. No laws may contradict any of the Constitution's principles and no governmental authority in the United States is exempt from complying with the Constitution. The federal courts have the sole authority to interpret the Constitution and to evaluate the federal constitutionality of both federal and state laws. To the extent any statute or agency action is found to be unconstitutional, it is invalid. State constitutions are the supreme law within the state, subject to the U.S. Constitution. The statutes of a state must conform to that state's constitution.

1.2.2 Statutes and Ordinances

Laws passed by Congress and state legislatures are typically referred to as *statutes*; laws passed by cities and counties are typically referred to as *ordinances*. City ordinances apply to people, property, and activities within the city's corporate limits (the incorporated area). County ordinances (called *resolutions* in some states) are generally only applicable outside the corporate limits of cities. City and county ordinances are typically preempted by both state and federal law.

The U.S. Congress has exclusive authority to enact federal laws. A proposed law is referred to as a *bill*. Bills may originate in either the House of Representatives or the Senate, except that, per Article 1 of the Constitution, all bills for raising revenue must originate in the House of Representatives. A bill must be passed (approved) by both chambers before it is sent to the president. If the president vetoes a bill, Congress may override the veto by approving the bill again with at least a two-thirds majority vote in both the House and the Senate. The bill then becomes a law, despite the president's veto. The process for enacting laws within the state legislatures is similar, and most governors have veto power over state legislation.

1.2.3 Agency Regulations

The executive branch of the U.S. government is charged with implementing the laws passed by Congress. The administrative bodies (agencies) in the executive branch issue regulations (rules) and make adjudications that apply the regulations. They also provide opinions and guidelines to follow. Federal regulations are issued under statutory authority granted to the agencies by Congress; state agencies issue regulations under authority granted to them by the state legislature. Regulations have the force of law, and federal regulations preempt state laws as well as state regulations.

In addition, the president has the power to issue executive orders. Executive orders are presidential directives governing actions by other federal officials and agencies. Executive orders do not have to be approved by Congress.

1.2.4 International Treaties

Article II, Section 2, Clause 2 of the U.S. Constitution grants the president power to enter into treaties with other countries, with the “advice and consent” of two-thirds of the Senate. Once signed, treaties become part of U.S. federal law. As a result, Congress can modify or repeal treaties by subsequent legislative action, even if this amounts to a violation of the treaty under international law. The changes will be enforced by U.S. courts despite the fact that the international community considers the United States to be bound by the original treaty obligations.

States are forbidden to make treaties with other countries. Furthermore, the Supreme Court has ruled that the power to make treaties is separate from the federal government’s other enumerated powers, and the federal government can use treaties to legislate in areas that would otherwise fall within the exclusive authority of the states.

1.2.5 Appellate Court Opinions

An appellate court is a court that hears appeals from lower-level courts. Usually, when an appellate court makes a decision, it not only decides who wins that specific case but also provides a written opinion that explains the basis for the decision as a guide to lower courts in handling future cases. When a case in a lower court is similar to a dispute that has already been resolved by a higher court in the jurisdiction, the court is bound to follow the reasoning used in the prior decision. Appellate court opinions are also referred to as *common law*, *case law*, or *judicially-created law*.

1.3 THE AMERICAN JUDICIAL SYSTEM

The role of the courts in America is to decide cases and controversies between adversarial parties. The American judicial system comprises two court systems—federal and state—that exist in parallel to one another. Although every state has

its own court system, there are also federal courts in every state. However, federal courts have limited jurisdiction. *Jurisdiction* means the court has authority to hear a case and impose a remedy; the court must have jurisdiction over both the parties and the subject matter of the dispute in order to impose a remedy.

A case can only be brought in federal court if the dispute involves the U.S. Constitution or a federal statute, or is between citizens of different states and involves an aggregate claim of more than \$75,000. A suit involving citizens of different states is referred to as a *diversity suit*; the “citizens” can be legal entities such as partnerships and corporations as well as individuals. Some claims involving the Constitution or a federal statute can be brought in either state court or federal court; this is referred to as *concurrent jurisdiction*. However, certain matters such as bankruptcy, patents and copyrights, actions involving the United States, and violations of federal criminal statutes can only be brought in federal court.

Only federal courts have the power to interpret the U.S. Constitution, federal laws, and federal agency regulations. Federal courts also have the power to review federal agency actions and determine the constitutionality of both federal and state laws. State courts have the power to interpret the state constitution, state laws, and state agency regulations.

1.3.1 Structure of the Court Systems

Both the state and federal court systems are multi-tiered. Cases are initially brought in a trial court; the trial can be either a jury or a bench (nonjury) trial. In a bench trial, the presiding judge delivers the verdict; in a jury trial, the jury delivers the verdict. Either party can appeal any part of the verdict to a first-level appeals court. In the federal system and the majority of the states, the ruling in the first-level appeals court can be appealed to a second-level appeals court. Courts of appeals do not use juries or witnesses, and no new evidence is submitted; appellate courts base their decisions on a review of lower-court records.

1.3.2 Federal Trial and Appeals Courts

In the federal system, most of the trial courts are district courts. Each state has at least one federal district case; more populous states can have three or four. In addition to the district courts, there is the Court of Federal Claims, a trial court that hears claims against the U.S. government. The district courts have concurrent jurisdiction with the Court of Federal Claims for claims under \$10,000. When the claim involves a contract with a government agency, the Court of Federal Claims has concurrent jurisdiction with the applicable Board of Contract Appeals. Federal district courts are bound by legal precedents established by the decisions of the Supreme Court and the court of appeals for their respective circuit.

There are 13 federal courts of appeals. The U.S. Court of Appeals for the Federal Circuit hears appeals of decisions in cases involving patents, contract claims against the federal government, federal employment claims, and international trade. The Court of Appeals for the District of Columbia hears appeals

from the DC District Court; the other 11 courts are circuit courts and hear appeals from the district courts in several states, called a *circuit*. For example, the Court of Appeals for the Eleventh Circuit hears appeals from the district courts in Florida, Alabama, and Georgia.

Although decisions from the federal courts of appeals can be appealed to the Supreme Court, the Supreme Court is not required to hear the appeal. In general, the Supreme Court will not accept a petition to review a lower-court ruling unless the case presents an important legal issue or there is a conflict in the rulings of the circuit courts with respect to the issue. In certain circumstances, the ruling of a state supreme court can be appealed to the U.S. Supreme Court; this usually occurs when the case involves a constitutional right that has been denied in the state courts.

1.3.3 State Trial and Appeals Courts

Although the states vary in the way they have structured their court systems, many states have a court of general jurisdiction that hears all types of cases. The court of general jurisdiction may also review challenges to rulings by administrative agencies such as those involving zoning and licensing. Some states have courts with specialized jurisdictions—for example, family courts that have jurisdiction over divorce and child custody disputes. In addition to these specialized trial courts, there may be less formal trial courts, such as magistrate courts, municipal courts, and justice of the peace courts that handle minor cases such as traffic offenses. Generally, the rulings in these courts can be appealed to a court of general jurisdiction.

Although some states have only one appeals court, most states have both an intermediate (first-level) appeals court and a second-level appeals court. In most states the second-level appeals court is called the *supreme court* of that state. While there is always the right of an appeal from a trial court decision, the state supreme courts are generally not required to hear an appeal of an intermediate appeals court decision.

1.4 COMMON LAW

There are two basic types of legal systems in the United States: common law and civil law. Louisiana has a civil law system that is derived from the French civil law system. Every other state has a common-law system; the federal legal system is also a common-law system. Common-law courts give great weight to previous court decisions, on the principle that it is unfair to treat similar facts differently on different occasions. The body of previous decisions (precedent) is referred to as *common law*.

Judges establish common law through written opinions that are binding on subsequent decisions of lower courts in the same jurisdiction. A federal district

court is thus bound by the decisions of both its circuit court and the Supreme Court. A state trial court is bound by the appellate courts of that state. The reasoning and holdings of the courts in one state are not binding on the courts of any other states, but a decision in one state may influence or persuade the court of another state to reach a similar decision on an issue.

Common law is mostly state law. Broad areas of the law, including contracts, property, and torts, have traditionally been governed by the common law but these areas of the law are primarily within the jurisdiction of the states. Federal common law is relatively narrow in scope and is primarily limited to issues that are clearly federal and that have not been addressed by a statute.

1.4.1 Stare Decisis

The policy of adhering to principles established by decisions in earlier cases is known as *stare decisis*, which is Latin for “let the decision stand.” Under stare decisis, once a court has addressed a legal question, the question must be addressed the same way in other cases that come before that court or lower courts in that jurisdiction. Decisions can be overturned by a higher court, however. For example, the decision of a federal district court can be overturned by the court of appeals for that circuit. A court of appeals decision can be overturned by the Supreme Court.

Courts sometimes overrule their own precedents by issuing an opinion that contradicts a previous ruling, but they generally only do so for a good reason. A ruling that does not follow precedent will almost certainly be appealed and may be overturned by the appeals court. The U.S. Supreme Court rarely overrules one of its precedents, but when it does, the new ruling usually signifies a radically different way of looking at an important legal issue.

Civil law systems, such as Louisiana’s, do not follow stare decisis. In a civil law system, the primary source of law is the law code, which is a systematic collection of interrelated articles that explain the principles of law, rights, and entitlements. Civil law judges do not interpret the law but instead follow predetermined legal rules to arrive at their decisions. Civil law is the dominant legal tradition in most of Europe, all of Central and South America, and parts of Asia and Africa.

1.4.2 Restatements of the Law

Appellate court decisions are considered primary (binding) authority on lower courts. There are also a number of sources of secondary (nonbinding) authority. The secondary authorities that are cited most often in legal decisions are the Restatements of the Law, a series of treatises published by the American Law Institute (ALI). The ALI, a private organization composed of judges, lawyers, legal scholars, and law professors, was founded in 1923 with the objective of improving the law by gathering, studying, and synthesizing the common law of the states.

The Restatements attempt to organize the case law on a topic and present the rules or principles distilled from the cases. They are divided into sections, with each section containing a rule of law, comments and illustrations that clarify the rule, and major exceptions to the rule. Most of the original Restatements have been reissued in an updated Restatement 2nd series, and some have been reissued in a Restatement 3rd series. The Restatements cited most often in construction industry cases are the Restatement (2nd) of Contracts and the Restatement (2nd) of Torts.

Although the Restatements are not binding precedent in any jurisdiction, they reflect the consensus of the American legal community on what the law is and, in some cases, what it should be. As a result, they are typically granted considerable deference by judges. If a trial court finds that a dispute is fundamentally different from all previous cases heard in that state (“a matter of first impression”), the judge will often look to the relevant Restatement section to understand how other states have addressed the issue. In some cases, judges have explicitly adopted a section of the Restatement as the common law of the state.

1.5 LEGAL CODES

A *code* is a compilation of related statutes. The compilation of permanent federal laws is referred to as the *United States Code* (U.S.C.). The U.S.C. is divided into 50 titles by subject matter; Title 41, for example, encompasses statutes related to federal government contracts. A new edition of the U.S.C. is published every six years, and annual supplements are published between editions. Each annual supplement includes all new laws and all changes to existing laws since the previous edition. Various subsets of the U.S.C. are also identified as codes. Some codes collect and organize statutes that have been adopted over the years on a particular subject matter. Other codes, such as the federal Bankruptcy Code, consist of a group of statutes that were drafted and adopted by a legislature as a unified whole.

1.5.1 Uniform Codes

State laws are often based on uniform codes. Uniform codes are not in themselves statutes but are a set of model statutes related to a particular subject that can be adopted by the states. Once adopted by a state, the uniform code becomes the law in that state. A state may adopt all or part of a uniform code; it may also add its own amendments to the code to reflect local concerns or local approaches to particular issues.

The International Building Code (IBC) is an example of a uniform code. The IBC is published by the International Code Council (ICC) and does not become the law in any state until it is explicitly adopted by that state. The IBC has now

been adopted by all of the states, but virtually every state has adopted amendments that add to, vary, or delete particular sections of the IBC.

1.5.2 The Uniform Commercial Code

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has published a number of uniform codes. These include the Uniform Partnership Act (UPA), the Uniform Arbitration Act of 1956 (UAA), and its successor, the Revised Uniform Arbitration Act of 2000 (RUAA). The uniform code that is most applicable to the construction industry is the Uniform Commercial Code (UCC). The UCC is a collection of laws aimed at furthering uniformity and fair dealing in business and commercial transactions. It has been adopted, at least in part, by all of the states. As with building codes, the law of any particular state is not the UCC but whatever parts of the UCC that the state has adopted, along with any amendments it has adopted.

Although the UCC consists of 13 sections (referred to as Articles), the only sections that are significant to construction are Article 1, General Provisions, and Article 2, Sales. Article 2 applies to transactions in goods, where “goods” are things that are tangible and movable. Thus, Article 2 does not apply to real estate; it also does not apply to services like design or construction. However, it does apply to the contracts to purchase the materials used in construction.

It should be noted that the UCC generally supplies default terms; it does not override any terms in a contract. For example, Article 2 provides a remedy for breach of a sales contract where the parties have not specifically agreed to a remedy in their contract. This is different from the IBC, which sets building code requirements.

As judicial decisions in each state have interpreted and applied sections of that state’s UCC, they have established a common-law commercial code that supplements the explicit language of the code. Moreover, even if a dispute is not covered by the UCC (for example, a dispute involving an employment contract), a court may apply a section of the UCC by analogy if it believes the rule expressed by the code section is appropriate to adopt as a more general common-law rule.

1.6 LEGAL DOCTRINES

A legal doctrine is a framework or set of rules established by precedent in the common law, through which judgments can be determined on a particular issue. A doctrine comes about when a judge makes a ruling and outlines a process in a way that allows the process to be applied in subsequent cases. When enough judges make use of the process, it becomes established as the de facto method of deciding that issue and is considered a doctrine.

Many of the legal doctrines used in the construction industry have evolved from cases involving federal government contracts. While the holding in the case is only applicable to cases brought in federal court, state courts often adopt the doctrine as the law of the state. The doctrine cited most often in both state and federal courts is the Spearin doctrine, from the case *United States v. Spearin*.¹ Under the Spearin doctrine, the owner is liable for any delays or cost increases due to defects in the plans and specifications. Doctrines may also evolve over time from a series of cases in both federal and state courts. An example of such a doctrine is the economic loss doctrine, which imposes limits on a party's ability to recover damages for a tort claim such as negligence.

Doctrines are not necessarily interpreted the same way in every state, however. A state may create exceptions such that the doctrine does not apply in specific circumstances. Likewise, a state may extend the doctrine to cover circumstances not included in the original holdings. The economic loss doctrine, for example, is interpreted very differently by different states.

1.7 CHOICE-OF-LAW CLAUSES

Construction contracts and design agreements typically include a “choice-of-law” clause that indicates which state's law will govern any disputes. For example, §13.1 of AIA A201 states:

The Contract shall be governed by the law of the place where the Project is located, except, that if the parties have selected arbitration as the method of binding dispute resolution, the Federal Arbitration Act shall govern Section 15.4. [Section 15.4 specifies the procedure to be used for arbitration.]

The choice of law can be significant, as the law that applies to construction projects is primarily state law, and the law on a particular issue can be very different in the different states.

The state chosen must have some connection with the parties or the project. Generally, it must be either the state in which the project is located (the project's *situs state*), the state in which at least one of the parties has its principal place of business, or the state in which at least one of the parties is incorporated. When these are all the same state, that state is the only choice for governing law. When these are different states, the parties may prefer one state over another. For example, an Illinois architect working on a project in Wisconsin would probably want Illinois law to apply to the design agreement, because Illinois strictly applies the economic loss doctrine to prevent negligence claims for defective architectural design services. The owner would probably prefer that Wisconsin law apply, because Wisconsin does allow such claims.

¹*United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918).

If the parties want to make their choice of law apply to tort claims as well as contract claims the contract would state that the chosen state's law:

... governs all matters arising from, related to, or connected with, the contract or the work, regardless of how remotely and regardless of whether sounding in contract, tort, arising under a statute, or some other body of law.

Some states have mandatory choice-of-law statutes. Under these statutes, the law of that state governs all projects within the state, regardless of the contract language. When federal courts have to decide a matter involving state law in a diversity case, they will use the law of the state in which the court is located, unless the parties have specified that the law of another state applies.

1.8 CRIMINAL LAW VERSUS CIVIL LAW

There are two broad categories of law: civil law and criminal law. Civil law deals with disputes between individuals, organizations, or government agencies, in which compensation or some other remedy may be awarded to the injured party. In a civil lawsuit, the party that brings the case (the plaintiff) is typically awarded money damages if it prevails on its claim against the other party (the defendant).

In contrast, criminal law comprises rules prohibiting conduct that threatens, harms, or otherwise endangers the safety and welfare of the public, and sets out the punishment to be imposed on those who break these rules. Criminal lawsuits are filed by the government against individuals or organizations that have violated criminal statutes. If the defendants in a criminal case are found guilty, they may be punished by incarceration or a fine paid to the government. Victims of crimes must usually bring a civil case in order to be compensated for the injuries they suffered as a result of the crimes.

The vast majority of the legal issues arising in construction are civil. For instance, if an owner felt its roof was leaking because of defective construction, it could bring a breach-of-contract case against the contractor and, if successful, would probably be awarded the cost of repair. Criminal cases do occur, however. The federal government has brought criminal complaints on construction projects because of serious violations of environmental statutes, particularly when the violations were intentional or grossly negligent.

1.9 CAUSE OF ACTION

The legal theory upon which a plaintiff brings a lawsuit is referred to as the *cause of action*. The most common cause of action in the construction industry is breach of contract, but other causes of action include professional negligence, negligent misrepresentation, unjust enrichment, and *quantum meruit*.

The plaintiff initiates a lawsuit by filing a complaint with the appropriate court. The complaint must state both the cause of action for the injury that the plaintiff claims to have suffered and the legal remedy it is seeking (the relief that the court is asked to grant). Often, the facts or events that entitle a person to seek judicial relief may create more than one cause of action; in the interest of judicial efficiency, all causes of action arising out of a set of facts or events must typically be brought in the same lawsuit.

The defendant must file an answer to the complaint within a certain number of days. In the answer, the plaintiff's allegations can be admitted, denied, or neither admitted nor denied, on the basis that the defendant has insufficient information to form a response. The answer may also include counterclaims whereby the defendant states its own causes of action against the plaintiff. Finally, the answer may contain affirmative defenses. An affirmative defense does not consider whether the facts alleged are true; instead, it presents facts that attempt to justify or excuse the behavior on which the lawsuit is based. For example, self-defense might be raised as a defense to an assault claim.

A cause of action can arise from either a failure to perform a legal obligation or a violation of a right. The importance of the failure or violation lies in its legal effect, in other words, how the facts and circumstances, considered as a whole, relate to applicable law. An act might give rise to a cause of action in one set of circumstances but not in another. For example, an individual may be privileged to trespass on the property of another if the individual was in danger. In such a case, the property owner would not have a cause of action for trespass. However, the trespasser would need to compensate the property owner for any property damage.

The points that a plaintiff must prove for a given cause of action are called the *elements* of that cause of action. For example, the elements of a negligence claim are the existence of a duty, breach of that duty, a connection between the breach and the plaintiff's injury, and damages as result of the breach. If a complaint does not allege facts sufficient to support every element of a claim, the court may dismiss the complaint.

1.10 SUMMARY JUDGMENT

Summary judgment is a procedural device used to dispose of a case without a trial. It is applicable when there is no dispute about the material facts of the case, and one of the parties is entitled to judgment as a matter of law. Either party may move for summary judgment, and it is not uncommon for both parties to seek it. A judge may also determine *sua sponte* (on its own initiative) that summary judgment is appropriate. A partial summary judgment can be used to dispose of certain issues or claims. For example, a court might grant partial summary judgment and find that the defendant is liable for the plaintiff's injuries, but a trial would still be necessary to determine the amount of damages.

A motion for summary judgment is usually based on information obtained during discovery. Any evidence that would be admissible at trial can be used to support a motion for summary judgment. Summary judgment does not mean that the judge has decided which side would prevail at trial. Rather, it means there are no factual questions for a judge or jury to decide.

Summary judgment is properly granted only when two conditions are met: (1) There is no genuine issues of material fact, and (2) the moving party is entitled to judgment as a matter of law. A genuine issue of material fact requires there to be a legitimate dispute over facts that are central to the case; minor factual disputes will not defeat a motion for summary judgment. In addition, the law as applied to the undisputed facts of the case must require judgment for the moving party.

The moving party has the burden of proving that summary judgment is proper; the court examines the evidence presented with the motion in the light most favorable to the nonmoving party. The nonmoving party must generally cite to evidence that contradicts the moving party's version of the facts. When the nonmoving party will bear the burden of proof at trial, the moving party may obtain summary judgment by showing that the nonmoving party has no evidence or that its evidence is insufficient to meet its burden at trial.

