

PREVIEW OF FIRST THREE PAGES  
OF CHAPTER TEN

---

THE RULE OF LAW [10.00.0]:

A. LAW OF THE CASE DOCTRINE [10.10.0]: Generally, legal issues previously decided in an appeal in the same case are not open to relitigation in subsequent proceedings in that case, and the prior decision becomes “law of the case” as to those issues. The law of the case is binding upon the district court on remand, as well as upon any subsequent court of appeals panel that has occasion to hear a new appeal in the matter. *Maag v. Wessler*, 993 F.2d 718, 720 n.2 (9th Cir. 1993); *Milgard Tempering Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990); *accord Cone v. Bell*, 492 F.3d 743, 758 (6th Cir. 2007). In order for the doctrine to apply, “the issue in question must have been ‘decided explicitly or by necessary implication in [the] previous disposition.’” *Milgard Tempering* 902 F.2d at 715 (quoting *Liberty Mutual Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir. 1982)). “The law of the case doctrine is a discretionary one created to maintain consistency and avoid reconsideration, during the course of a single continuing lawsuit, of those decisions that are intended to put a matter to rest.” *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994).

However, the law of the case doctrine is not an absolute bar to reconsideration of matters previously decided. The doctrine “merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.” *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). “Thus, the court may reconsider previously decided questions in cases in which there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice.” *Leslie Salt Co. v. United States*, 55 F.3d. 1388, 1393 (9th Cir. 1995); *accord Arizona v. California*, 460 U.S. 605, 618 n.8 (1983) (not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice); *Davis v. United*

*States*, 417 U.S. 333, 342 (1974) (court of appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent). Also, when the Supreme Court remands a case to the court of appeals, “whatever was before [the Supreme Court], and disposed of by its decree, is considered as finally settled” and not in the court of appeals’ power to rehear. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)); accord *Cone v. Bell*, 492 F.3d 743, 758 (6th Cir. 2007).

## B. STARE DECISIS [10.20.0]:

### 1. Supreme Court Decisions [10.21.0]:

- a. Binding Effect - Generally [10.21.1]: Generally, all lower state and federal courts are bound by United States Supreme Court decisions. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). Lower federal courts are “bound not only to the holdings of [Supreme Court] decisions but also by their ‘mode of analysis.’” *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). In other words, federal courts must adhere not only to the holdings of Supreme Court cases, “but also to their explications of the governing rules of law.” *Id.* (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part)).

✕ Cross-refer: See, *infra*, Court Of Appeals Decisions, Published page 640.

- b. Binding Effect - Dicta [10.21.2]: “When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66-67 (1996) (contrasting dictum with holdings, which include the final disposition of a case as well as the preceding determinations “necessary to that result”). But “[i]t is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was

not presented or even envisioned.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992); *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 n.5 (1993) (declaring statement in earlier cases dicta because they were “uninvited, unargued, and unnecessary to the Court’s holding”); see *Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir. 1995) (seemingly dispositive language from a Supreme Court opinion is not controlling where the Court expressly declined to consider the question at issue).

Nevertheless, Supreme Court dicta “have a weight that is greater than ordinary judicial dicta” because it may signal the direction of future Supreme Court decisions. Accordingly, such dicta “is not to be lightly disregarded” and is treated with “due deference.” *Laub v. United States Dep’t of Interior*, 342 F.3d 1080, 1090 n.8 (9th Cir. 2003); see also *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (“dicta from the Supreme Court is not something to be lightly case aside”); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003) (en banc) (“Although the Committee is doubtless correct that the Supreme Court’s dicta are not binding on us, we do not view it lightly”); *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997) (“Where there is no clear precedent to the contrary, we will not simply ignore the [Supreme] Court’s dicta”); *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996) (“It may be dicta, but Supreme Court dicta tends to have somewhat greater force – particularly when expressed so unequivocally”); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (“This Court should respect considered Supreme Court dicta”).

Indeed, some courts have held that “carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n 3 (4th Cir. 2004); see also *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (“We think that federal appellate courts are bound by the Supreme Court’s considered dicta almost as firmly as by the Court’s outright holdings, particularly when . . . a