

## **CHAPTER 1: INTRODUCTION TO LAW AND LEGAL REASONING**

**LAW IS "MAN MADE"**

**IT CHANGES OVER TIME TO  
ACCOMMODATE SOCIETY'S NEEDS**

**LAW IS MADE BY LEGISLATURE**

**LAW IS INTERPRETED BY COURTS TO DETERMINE**

- 1) WHETHER IT IS "CONSTITUTIONAL"**
- 2) WHO IS RIGHT OR WRONG**

**THERE IS A PROCESS WHICH MUST BE FOLLOWED  
(CALLED "PROCEDURAL LAW")**

**I.** Thomas Jefferson: "The study of the law qualifies a man to be useful to himself, to his neighbors, and to the public."

**II.** Ask Several Students to give their definition of "Law."

- A. Even after years and thousands of dollars, "LAW" still is not easy to define
- B. What does law Consist of? Law consists of enforceable rule governing relationships among individuals and between individuals and their society.

1. Students Need to Understand.

- a. The law is a set of general ideas
- b. When these general ideas are applied, a judge cannot fit a case to suit a rule; he must fit (or find) a rule to suit the unique case at hand.
- c. The judge must also supply legitimate reasons for his decisions.

C. So, How was the Law Created. The law considered in this text are "man made" law. This law can (and will) change over time in response to the changes and needs of society.

D. Example. Grandma, who is 87 years old, walks into a pawn shop. She wants to sell her ring that has been in the family for 200 years. Grandma asks the dealer, "how much will you give me for this ring." The dealer, in good faith, tells Grandma he doesn't know what kind of metal is in the ring, but he will give her \$150.

1. Grandma needs cash to buy medicine and therefore accepts the \$150.
2. The ring turns out to be solid gold and is really worth \$25,000.
3. Question. Can Grandma get the ring back or recover the difference between 25,000 and 150 or is she merely out of luck.
  - a. Ask was there a bargain for exchange
  - b. Was the ring purchased in good faith without knowledge of its value

**THIS IS WHAT WE WILL ENCOUNTER IN THIS COURSE**

### III. Schools of Legal Thought.

- A. Background. When we look at the development of law, there are several things they have had a major influence. Some of the more important element are customs, history, and logic.
- B. The "Problem". The major problem is that philosophers disagree on what are the major factors.
- C. Outcome. This disagree has lead to 2 different schools of thought on what the major factors are:
  - 1. The Traditional Approach. The first school of thought is the "traditional approach." The traditional approach looks to the past to discover what the principles of the current law should be.
    - a. Strict Decisions are followed. Followers of this school look to prior decisions which are on point and will usually follow them to the letter.
    - b. Example. Homer left the neighbor's house and was obviously intoxicated. The neighbor knew Homer was intoxicated but kept serving him drinks and then allowed him to drive. Homer lost control of his car and killed a 6 year old child. Homer has no money or insurance.
      - (1) The child's parents want to sue the "Neighbor" for negligence as a social host.
      - (2) Case Was recently decided stating that social host are not liable for their guest.
      - (3) Under the traditional approach, parents lose. The court will follow prior decisions.
  - 2. The Sociological Approach. The second school of thought is called the "sociological approach." Under this approach, social forces and needs are the primary factors.
    - a. The key to this approach is that historical cases don't drive future law. Under this approach, as society changes, the law should also change.
    - b. Earlier Illustrated Case. Under this approach, the social host issue would probably have a different outcome
      - (1) Why? Because the court would see this as a public safety issue and would put the (1) put the burden on individuals contributing to the occurrence and (2) provide a financial outlet for those who have been injured.

### IV. COMMON LAW.

- A. Background. First, common law is still alive and well in many aspects. This is the law that is common to the entire realm or population.
  - 1. As the text states, common law includes some aspects of statutory and case law dating back prior to the American Revolution.
    - a. What is Case Law. Case law is merely the rules of law announced in court decisions. Case law may consist of interpretations of statutes, regulations and provisions in the

constitution.

- (1) You will hear the terms "precedent" and "stare decisis" when case law is discussed.

(A) Precedent is merely a prior case which is similar in legal principle or fact.

(B) Stare Decisis is the practice of deciding new cases with reference to former cases.

- b. What is Statutory Law. In its simplest terms, statutory law consists laws enacted by state legislatures and at the federal level, by Congress

Example 1: Rape Statutes.

Example 2: Divorce Statutes

Example 3: Business Incorporation Statutes

### **III. REASONING**

A. Background. A judge cannot merely render an opinion on an issue and stop there. He must articulate a legitimate reason why he has ruled in such a manner.

B. One form of Reasoning is "Syllogism" (Sine ism). This is deductive reasoning using a major premise, a minor premise and a conclusion.

1. Example. For example, if an individual is charged with the crime of false imprisonment, the judge will:

- a. State that the law requires that the person confined is not free to leave and he must also know of his confinement.
- b. The plaintiff in this case was unaware of his confinement
- c. Therefore, there is no false imprisonment.

C. Justification for the Ruling. A judge has a wide variety of resources to rely on when rendering his opinion. They include:

1. **Previous case law and legal principles**
2. **Statutes**
3. **Society's values**
4. **Customs and Course of dealings**

### **SOURCES OF LAWS**

### **V. LET'S LOOK AT "CONSTITUTIONS"**

A. First Paragraph on Constitutions is "critical". Review

1. The federal and states have separate constitutions
2. The US Constitution is Supreme. Any law in violation of this will be declared unconstitutional and will not be enforceable.
  - a. Therefore, State statutes and regulations which conflict with the US Constitution will not be enforceable.
    1. IF the state constitution does not conflict with the US Constitution, then it is the supreme law within that state's borders.
3. What are some of the things the US Constitution does?
  - a. The Constitution gives the federal government the power to regulate interstate commerce (i.e commerce between or among states)
  - b. The Constitution also details out how the powers are to be divided between the three branches of government (i.e. the judicial, legislative and executive branches).

**B. NOTE, THE CONSTITUTION IS NOT BLACK AND WHITE AS TO ITS POWERS.**

1. Supreme Court Appointments. One of the key duties of the President is to make appointments to the Supreme Court.
  - a. Why is this so Critical. This is critical because the Supreme Court gets to interpret the Constitution.
    - (1) So? Once the Supreme Court interprets a controversial issue, then this becomes the law of the land **UNLESS CONGRESS PASSES SOME LAW THAT WILL ELIMINATE THE GRAY AREAS**

VI. WE ALSO HAVE STATUTORY LAW. This is law passed by Congress and various state legislatures.

VII. ANOTHER BODY OF LAW IS ADMINISTRATIVE AGENCY REGULATIONS. This is law created by an Administrative Agency. Administrative Agencies are created by the executive or legislative branches of government.

VIII. The Uniform Commercial Code.

- A. The UCC will Follow in Most of Your Business Dealings.
- B. What is the UCC? The UCC primarily deals with the sale of goods and was designed to assist in commercial business transactions. **THIS WILL BE DISCUSSED IN GREATER DETAIL IN FUTURE CHAPTERS.**

IX. Brief Look at the Classification of Law.

A. THREE DISTINCTIONS WILL BE MADE

1. Distinguish between Substantive and Procedural Law
2. Distinguish between Public and Private Law
3. Distinguish between Civil and Criminal Law

B. Distinction between Substantive and Procedural

1. Substantive Law governs the behavior of all of us in ordinary life.
  - a. It regulates the creation and exchange of property and contracts.
  - b. It also defines what creates a criminal issue and a tort claim
2. A working definition of procedural law is the rules and principles that govern the behavior of courts and lawyer in dealing with disputes.
  - a. Procedure helps answer the following questions:
    - (1) What does one have to say to get a court to pay attention?
    - (2) From whom a may a person with a grievance seek relief?
    - (3) How can I obtain information from my adversary?

C. Public versus Private Law

1. One Sentence. Public law addresses the relationship between persons and their government, while private law looks at dealings between to persons.

D. Criminal versus Civil Law

1. Civil Law spells out the duties that exist between persons or between citizens and their government.
  - a. One Example would be whether there was a valid contract between two parties.
2. Criminal Law looks at crimes against the public. Criminal law is always public. In such a case, the government is attempting to penalize guilty persons.
  - a. Examples of Criminal Offenses include (1) Burglary, (2)Murder, (3) Rape and (4) Assault and Battery

**IX. REMEDIES AT LAW VERSUS EQUITABLE REMEDIES**

A. Remedies at Law are usually monetary remedies.

1. Their Purpose is to return the parties to an equal footing.

B. Sometimes, remedies at law is inadequate. This is when Remedies in Equity come into play.

C. Equitable Remedies come into play when:

1. Damages cannot make the injured party whole.
2. Damages are speculative and uncertain
3. Insolvency of the person committing the act
4. The harm is so major it can not be fully compensated by money.

E. Three Primary forms of Equitable Relief

1. Specific Performance. Specific performance is a remedy by which one party to a contract is ordered to perform according to the contract's terms.
  - a. Example. An example of this would be where you contracted with the executor of Graceland to Purchase Elvis' Cadillac. **IT'S A ONE OF A KIND ITEM**
2. Injunction. This is where a person wants to prevent the occurrence of a certain activity.
  - a. Example. For example, your neighbors have excessively loud parties and you want to stop them.
3. Rescission. Rescission is the remedy whereby the original contract is considered to be voidable and thus may be rescinded.
  - a. In other words, rescission puts an end to the transaction and leaves the parties as though the contract had never been made.

X. HOW TO FIND CASE LAW

- A. State Court Decisions. At a state level, the usually which are usually published are the appellate decisions. The appellate decisions are the decisions of the State's Court of Appeals and the State's Supreme Court.
1. How Do You Find Such a Case. After the decisions are published, they can be found by what is commonly referred to as "citing." **Each state has its own state reports.**
    - a. Additionally, the National Reporter System divide the states into regions and report cases by region. **"NORTH CAROLINA IS IN THE SOUTHEAST REGION."**
      - (1) Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980).
      - (2) Jackson v. Gastonia, 247 N.C. 88, 100 S.E.2d 241 (1957).
        - (A) Note, two cites are given for each of these cases. This is called "**parallel citations.**"
        - (B) Note, the "2d" indicates the case was reported in the second series.

B. Federal Court Decisions.

1. Federal Trial Court Opinions are reported under West's Federal Supplement (F.Supp.)
2. Federal Court of Appeals decisions are reported in West's Federal Reporter (F. or F.2d)
3. Supreme court decisions are reported in:
  - a. The Supreme Court Reporter (S.Ct.)
  - b. The United States Reports (U.S.)
  - c. The Lawyers' Edition of the Supreme Court Reports (L.Ed.)

4. Examples.
  - a. North American Oil Consolidated v. Burnet, 286 US 420 (1932).
  - b. Internal Revenue v. Indianapolis Power and Light Company, 110 S.Ct. (1990).
  - c. City Gas Company of Florida v. Commissioner of Internal Revenue, 689 F.2d 943 (11th Cir. 1982).

\* 11th Circuits denotes that this case was decided in the US Courts of Appeals for the 11th Circuit.

**XI. ANALYZING A CASE.** The author states that each case presented in the text is summarized for ease of reading.

- A. Believe Me, reading a court case is not that simple.
- B. The cases in the text have the following components:
  1. **The Case Name and Cite**
  2. **A brief summary of the background and facts**
  3. **The decision and the rationale behind it.**
- C. Decisions and Opinions. If you ever get a chance to read an original court decisions, you will come across one of four terms in the opinion
  1. Unanimous Opinion is the First. This is when all of the judges agree.
  2. Majority Opinion. When there is not a unanimous opinion, a majority opinion is written. This outlines the views of the majority of the judges on this particular issue.
  3. Concurring Opinion. Concurring opinions are usually written when a judge agrees with the decision for but for a different reason.
  4. Dissenting Opinion. This is sometimes called the "minority opinion." This is written by the judges who disagree with the majority opinion.

## **CHAPTER 3: COURTS AND ALTERNATIVE DISPUTE RESOLUTION**

- I. **QUESTION:** How many of you have ever been in a court room either as part of the case or as a witness.
- II. **PURPOSE.** The purpose of this chapter is to give you an understanding of when a court and which courts have power to decide a dispute.
- III. **LET'S START WITH JURISDICTION.**
  - A. **Background.** Once the decision to sue has been made, a lawyer must make some procedural decisions. The first major procedural decision is the selection of a proper court
  - B. **Jurisdiction.** Before any court can hear a case, it must have the power to hear the case. **This is called "jurisdiction."** **PARAGRAPH ONE IS "VERY IMPORTANT"**
    1. A court of proper jurisdiction is one that can render a **judgment that is binding on the parties and is enforceable in other courts.** Without jurisdiction, a court cannot exercise any authority in the case
      - a. In order for a court to exercise valid authority, one of two things must occur:
        - (1) The court must have jurisdiction over the person against whom the suit is brought and subject matter of the case OR
        - (2) The court must have jurisdiction over the property involved and the subject matter of the case.
  - C. **Personal Jurisdiction.** The first key point that we must remember is that "in order to consider a case, a court must have power over the person or the property involved in the action. Do example."
    1. **Three Types of Personal Jurisdiction.** There are three types of personal jurisdiction
      - a. **In Personam Jurisdiction.** The first is "in personam jurisdiction." This is merely power over the person
        - (1) **Example.** Larry sues Mo in a North Carolina Court. Larry and Mo live in NC. Under this situation, the court has "in personam" jurisdiction over Mo because Mo lives in NC.
      - b. **In Rem.** Compare this with "in rem" jurisdiction. In this case, the action is taken directly against the property
        - (1) **Example.** If Larry lived in NC and Mo lived in Florida, then NC can't get "in personam" jurisdiction, but if the property was in NC, then the NC court would have jurisdiction over the property.
  - D. **Subject Matter Jurisdiction.** Subject matter jurisdiction is defined as the power or authority of a court to "decide a particular type of legal dispute."
    1. **Usually Defined by Statute or the Constitution.** The subject matter jurisdiction is usually defined

in the statute or constitution that created the court.

- a. Example 1: Probate Court - Court that handles only wills and estates.
- b. Example 2: Family Court - Court that handles disputes involving members of the family (such as divorce and child custody).

**E. General vs. Limited Jurisdictions.** You must also know generally the difference between a court of general jurisdiction and a court of limited jurisdiction.

1. General Jurisdiction. A court of general jurisdiction can decide almost any type of case. Some examples of such courts are district courts, circuit courts and county courts.
2. Limited Jurisdiction. A court of limited jurisdiction hears only specialized or limited subject matter cases. Again, the family court is one example.

**F. Original vs. Appellate Jurisdiction.** The text clarifies this distinction. Courts having original jurisdiction are those who first hear the case, while appellate jurisdiction deals with a court who reviews the decision of a lower court.

1. Example. NC Court of Appeals may review cases of district courts of North Carolina. NC Court of Appeals are never the court of original jurisdiction.

**IV. VENUE.** Venue simply means the "place of trial." Venue rules attempt to allocate cases within a judicial system in a manner that is convenient for the parties, witnesses and the court.

1. General Rule. The general rule is that venue is proper where the incident occurred or where the parties involved in the suit reside.
  - a. Example 1: Barney Fife ran into Gomer's car. Barney and Gomer live in NC and the accident occurred in NC. What state has proper venue?
    - (1) Answer. NC because Barney and Gomer lived in NC and the incident occurred in NC.
  - b. Example 2: Barney ran into Floyd's car. Barney lives in NC and Floyd lives in Texas. The accident occurred in Florida. Where is venue proper?
    - (1) Answer: NC, Texas, or Florida.  
NC because Barney lives there  
Texas because Floyd lives there  
Florida because the accident occurred there.

**V. STANDING TO SUE.** This is a "WHO" question. When we say a person must have standing to assert a claim, we mean a party must have a legally protectible and tangible interest at stake in the litigation.

- A. Standing focuses on the party asserting the claim.
- B. The party must have been injured or be threatened with injury by the action complained of.
- C. EXAMPLE. Barney Fife was a member Mayberry's police force. He was also a member of the local police lodge. You had to be a police officer to be a member of the lodge. After Barney opening opposed Major Pike's re-election, the police lodge voted to expel Barney out of the lodge. Barney resigned from the police force the next day. After Barney's resignation, he file an action in the federal district court seeking to be re-instated into the lodge. WHAT'S THE OUTCOME?  
(A) BARNEY LOSSES. Since Barney resigned from the Mayberry police force, he lacks standing

to challenge his expulsion because you had to be a police officer to be a member of the police lodge.

## VI. COURT SYSTEMS. Let's take a look at the court systems.

### A. State Court System.

1. Background. I want to try to keep this concept pretty simple because there are variations based on the circumstance. In general, there are three levels to a court system: the trial court, Appellate Court and the State Supreme Court.
  - a. General Rule. The general rule is that a trial court decision is automatically appealable to the Appellate Court. BUT, the Supreme court must accept it before it will hear the case.
    - (1) NC Supreme Court. There are two types of cases that are automatically appealable to the State Supreme Court. They are Utility Rate Case Hearing and hearings where the person has been sentenced to "death."
2. Become familiar with Exhibit 2-1 on page 23; You will probably see it again.
3. General v. Limited Jurisdiction Trial Courts. We briefly touched on this topic earlier. Just to make sure we got it, general jurisdiction trial courts can hear practically any case, while limited jurisdiction trial courts can only hear certain types of cases.
4. Hierarchy of Courts. Some additional points about state court decisions.
  - a. In most states, the state supreme court is the highest court in the state.
  - b. Appeal court's responsibility is to review lower courts decisions. They try to determine whether the lower court committed an error.
    - (1) NOTE, the Appeals court looks for errors in "law and procedure" not in fact.
  - c. US Supreme Court may override. The general rule is that the State's Supreme Court Decision is final. The only exception is when it is a question of federal law. In this case it may be overruled by the US Supreme Court.

### B. Federal Court Systems.

1. Organization.
  - a. District Courts. These courts are very similar to state trial courts in that federal cases usually arise in this type of court. The key points are:
    - (1) Each state has at least one district court.
    - (2) District judges are appointed by the president with the advice and consent of Congress.
    - (3) US District courts have original jurisdiction in federal matters.
  - b. US Courts of Appeal. The Courts of Appeal hears cases from the district court. Key points are:

- (1) Usually, the decisions of the Courts of Appeal are final, but in rare situations they may be appealed to the US Supreme Court.
- c. Supreme Court of the United States. This is the highest court in the land.
  - (1) This court consists of nine justices. These justices are nominated by the President and confirmed by the Senate.
  - (2) Once they get there, they are in the job for life (i.e. a lifetime appointment)
  - (3) The Supreme Court can review any case decided by a lower federal court and it may review some state court decisions.
- 2. Judicial Review. Judicial review means that the courts have the authority and power to determine if a particular law is in violation of the Constitution.
  - a. Marbury v. Madison. This was established in the famous case of Marbury v. Madison.
  - b. Why is this so Important? It is important because any statute or law passed by government is subject to the courts' review. You see, the government may pass a law, but if the court rules that it is unconstitutional, then the law is void.
  - c. Roe v. Wade was a classic example. In this case, the Texas legislature mandated an out right ban on abortion.
    - (1) The US Supreme Court held that such a ban violated an individual's right to privacy and therefore struck down the Texas Statute as being unconstitutional.
- 2. Jurisdiction and Standing to Sue.
  - a. The General Problem is " to what extent may Congress curtail the jurisdiction of the Supreme Court or the lower federal courts.
    - (1) Answer. Congress has the power to control the number and kind of inferior courts in the federal system. This is critical because it helps spread the balance of power between the different branches of government.
  - b. Federal Question. Whenever a cause of action is based on the US Constitution or any federal law, then it is a federal question. If it is a federal question, then the case comes under the jurisdiction of the federal courts. Some examples include:
    - (1) Claims based on rights granted by an act of Congress
    - (2) Claims based on violation of Constitutional rights.
    - (3) Diversity of Citizenship. Diversity of citizenship cases are those arising between (1) citizens of different states, (2) a foreign country and citizens of a state and (3) citizens of a state and citizens or subject of a foreign country. The amount in controversy must also exceed \$50,000.
      - (a) Look at the "Big Picture." The primary reason for diversity of

citizenship is that it was feared that State courts would be biased against individuals from other States.

- (b) Heavy Dee, who is from (let's say NY) hits Aunt Bees car. Aunt Bee is from Texas. The accident also happens in Texas. Aunt Bees car is totally destroyed and she has substantial medical bill (i.e. exceeding \$50,000). Do you think Heavy Dee is going to get a fair trial in a Texas Court?

- (A) Answer. Probably not. That's why Heavy Dee may take the case to federal district court.

d. Which Case Reach the Supreme Court.

- (1) General Rule. The general rule is that there is no absolute right of appeal to the US Supreme Court.
- (2) Writ of Certiorari. To bring a case before the Supreme Court, a party requests the Court to issue a "writ of certiorari." This is an order issued by the Supreme Court to the lower court requiring the lower court to send the case to them for review.
- (A) NOTE, such a writ is not automatic. It is in the discretion of the Supreme Court.
- (B) Page 29 lists some situations in which the Supreme Court may issue a writ of certiorari.

## **CHAPTER 4: COURT PROCEDURES**

- I. **PROCEDURAL RULES.** Understanding and meeting procedural rules are essential in the litigation process.
- II. **Consulting an Attorney.** This is key because the attorney will represent your interest. Legal fees and all settlement issues should be thoroughly discussed with the attorney.

### **III. JUDICIAL PROCEDURE: FOLLOWING A CASE THROUGH THE COURTS.**

- A. **Background.** In this section of the chapter, we are asked to follow a case through the court system. Formats or procedures have been established so that a case may progress smoothly through the court system.
- B. **Stage One: The Pleading.**
  1. The complaint and the answer make up the pleadings.
  2. **The suit starts** when Kirby files the complaint. The complaint will contain 3 things (see exhibit 4-3, page 67):
    - a. A short statement of the grounds for jurisdiction. **Items 1 and 2**
    - b. A short and plain statement of the facts necessary to show that the plaintiff is entitled to relief. **Items 3 and 4**
    - c. A statement of the remedy the plaintiff is seeking. **Last paragraph.**
  3. **Service of Summons.** After the complaint is filed, the Sheriff serves a summons and a copy of the complaint on the defendant (in this case, Jones). See Exhibit 2-6 on page 32. The summons:
    - a. notifies Jones that he is prepare an answer to the complaint.
    - b. The summons informs Jones that failure to answer will result in a judgment by default for the plaintiff.
  4. **Answer and Counterclaim is the Next Step.** The answer either admits the statements or allegations set out in the complaint or denies them and sets out any defenses that the defendant may have.
    - a. If Carvello admits to all of the allegations in Kirby=s complaint, a judgment will be entered for Adams.
    - b. If Carvello denies Kirby=s allegations, the matter will go to court.
  5. **Answer and Affirmative Defenses.** Carvello could admit the truth of Kirby complaint but raise new facts.
- D. **The Next Stage is Possible Dismissible and Judgment before Trial.**
  1. **Motion for Judgment on the Pleadings.** This motion is made after the pleadings are closed (i.e. after the complaint, answer and any counterclaims).
    - a. This motion may be used when no facts are disputed, and only questions of law are at issue.

2. Motion for Summary Judgment. This is similar to a "motion for judgment on the pleadings."
    - a. The only difference is that a motion for summary judgment may be supported by evidence outside of the pleading.
      - (1) For Motion on the pleadings, you can only look at the pleading.
- E. Discovery. Before a trial begins, the parties will want to gather information about the case. This is called "discovery." There are many devices which may be used to obtain information about a case including:
1. Depositions. A deposition is a device by which one party may require another party or witness to appear before a court reporter and answer oral questions put to him by the opposing lawyer.
    - a. The questions and answers are taken down, sworn to and signed.
  2. Interrogatories. Interrogatories are written questions to a party. AFTER the answers are prepared, they are signed under oath.
    - a. Interrogatories are directed only to the parties; not the witnesses.
  3. Physical and Mental Examinations. When the physical or mental condition of one party is in question, the opposing party can ask the court to order a physical or mental examination. The party must also show;
    - a. good cause for the examination
    - b. notice is given to the person to be examined.
    - c. the court order specifies the time, place, manner and scope of the examination.

#### **IV. PRETRIAL HEARINGS.** Either party may request a pretrial hearing.

- A. Purpose. The purpose of the pretrial hearing is to identify the matters that are in dispute and to plan the course of the trial.
- B. This is not a mechanism for the parties to settle their disputes.

#### **V. JURY TRIAL.**

- A. Purpose. The purpose of any trial is to persuade the judge or jury that your facts are more truthful and accurate than the opposing lawyer.
- C. 7th Amendment. The 7th amendment to the Constitution establishes the right to a jury trial.
- B. A trial can be held with or without a jury.
  1. If there is no jury, the judge determines the truth of the facts alleged in the case.
  2. The right to a jury trial does not have to be exercised and many cases are tried without juries.

#### **VI. JURY SELECTION.**

- A. General Rule. The general rule is that all persons are qualified to serve as jurors and to be included on the jury list.

- B. First stage - Assembling a pool of jurors for the particular case. Normally a pool of jurors is selected from voting lists or city directories.
  - 1. Exempt individuals are eliminated. Exempt individuals include lawyers, doctors, teachers, etc.
- C. Second Stage - Assembling a jury panel for the particular case. From the list of nonexempt jurors, a panel of jurors is selected to try the case
  - 1. The selection process is called voir dire examination.
    - a. The jurors are called into the courtroom and examined by the lawyers and in some cases by the judge.
    - b. Each side has an unlimited number of challenges for cause (e.g. a juror is employed by one of the parties).
    - c. Each side has a "limited" number what is called "peremptory challenges. Under this method, a party can disqualify a juror for no reason at all.

## X. THE TRIAL.

- A. Opening Statements. AS the text states both attorneys are allowed to make opening statements concerning the facts to be proved.
- B. Calling Witnesses. After the opening statements, each side gets to call its witnesses.
  - 1. Direct Examination. In this case, Adams is the plaintiff and has the burden of proving his facts are correct. He will therefore call and question the first witness. This examination is call "direct examination."
  - 2. Cross Examination. Once Adams has finished is questions, it is then Jones turn to ask the witness questions. This is called "cross examination."
  - 3. Redirect and recross may occur.
- C. Move For Directed Verdict. At the conclusion of plaintiff's case, the defendant may move for a "directed verdict." Such a verdict will be issued if the plaintiff has failed to prove his case. **SUCH MOTIONS ARE RARELY GRANTED.**
- D. Defendant Puts on his Evidence. Same procedure as plaintiff (i.e. direct examination, cross examination, redirect and recross).
- E. Either party may move for a directed verdict at the end of defendant's case.
- F. Closing Arguments. After both sides have rested their case, the attorneys present a closing argument.
- G. Jury Instructions. The next step is that the judge will give the jury instructions.
- H. Jury then returns a verdict.
- I. JNOV. The losing party can ask for a judgment notwithstanding the verdict (called a "JNOV").
  - 1. The losing party must have first request a directed verdict.

2. The standard is the same as that for a directed verdict.

**VII. THE APPEAL.** A couple of quick points about appeals.

- A. Notice of appeal must be given within 30 days of entry of the judgment.
- b. Appeals courts do not hear evidence. The appeals court decision is based on the record and the briefs.
- C. The appellate court may reverse, affirm or modify a judgment.
- D. Higher Court Appeals. We have already talked about appeals to the Supreme Court.

**VIII. OTHER FORMS OF DISPUTE RESOLUTION.** There are several other forms of dispute resolution. The text lists "Mediation" and "Arbitration."

- A. Mediation. In the mediation process, the parties themselves must reach an agreement. The mediator is what we call a "facilitator." His job is to merely keep the parties talking until a resolution can be reached.
  - 1. Mediators usually are not attorneys.
- B. Arbitration. In contrast, with arbitration, the arbitrator's decision is legally binding on the parties.

## **CHAPTER 5: CONSTITUTIONAL AUTHORITY TO REGULATE BUSINESS**

- I. **QUESTION FOR A STUDENT:** In your own words **WHAT DOES THIS MEAN?** "The United States Constitution is the supreme law in this country. Neither Congress nor any state may pass a law that conflicts with the Constitution."
- II. **Goals for the Chapter.** In this chapter we will look at the structure, power and limitations of government power.
- III. **Federalism.** The United States has a federalist system. That is, the national government and the government of each of the states coexist.
  - A. The fundamental attribute of federal power is that the federal government can only assert those powers specifically granted by the U.S. Constitution.
  - B. **Comparison with the State Power.** The power of the state on the other hand are more of a "general police" power because the states have the power to protect the health, safety or general welfare of state residences.
    1. An action by the state government is valid under federal law unless it violates some specific limitation imposed by the U.S. Constitution.
- IV. **Separation of Powers.** The federal government is divided into three branches of government. The executive branch enforces the laws; the legislative branch makes the law and the judicial branch interprets the laws.
  - A. **Each Branch of Government has Separate Power.** Each branch of government has separate power granted to it by the Constitution.
  - B. **System of Checks and Balances.** A system of checks and balances is also an important part of the Constitution because it keeps any one branch of government from accumulating too much power.
    1. **Example.** The text provides several examples. Congress has the power over spending and commerce, but the president can veto that legislation.
    2. **Example.** The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the Senate.
- V. **Commerce Clause.**
  - A. Article I, Section 8 of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."
    1. **Mr.???, based on your readings, what does this mean.**
  - B. **This is probably the most powerful clause in the Constitution.** It is very powerful because it is so far reaching. **ALMOST EVERYTHING INVOLVES COMMERCE, THEREFORE THIS IS ALWAYS A FALL BACK CLAUSE.**
    1. The Supreme Court has ruled that Congress can regulate every commercial enterprise in the US. This includes the regulation of commercial activity between states and within one particular state.

C. **HEART OF ATLANTA MOTEL v. UNITED STATES.**

1. Facts. Owner of Motel refused to rent rooms to blacks. This was in violation of the 1964 Civil Rights Act.
  - a. Contact With Interstate Commerce. The motel was two interstate highways, derived 75% of its occupancy from out-of-state guests, and solicited business in national advertisements.
2. Motel Owner's Argument. The motel owner argued that Congress had exceeded its power to regulate commerce.
3. District Court Rulings. The district court said that the 1964 Civil Right Act was constitutional as it was applied to this case. The owner appealed.
4. US Supreme Court's Ruling. The Supreme Court held that the motel could constitutionally be reached by the Civil Rights Act, under the Commerce Clause.
  - a. **KEY POINTS.**
    - (1) The court took note of Congress' findings that racial discrimination discouraged travel on the part of a substantial portion of the black community, THEREFORE such discrimination could be regulated by Congress.
    - (2) The court also held that Congress had the power to regulate local incidents if it could have an effect on Commerce.
      - (A) QUESTION. MR?? How could racial discrimination discourage travel?

D. The Power of the State to Regulate. We talked earlier about the power of the state to regulate activity within its own borders.

1. We stated, that states may regulate private activities to protect or to promote the public health, safety, morals, or general welfare of its citizens.
2. MR????, what happens when state regulations interfere with Interstate Commerce?
3. Answer. The court usually applies what is called a "balancing approach."
  - a. In essence, they look at the merit and benefit to the state and compare this to the burden being placed on interstate commerce.

VI. SUPREMACY CLAUSE. Article VI of the Constitution provides that the Constitution, laws, and treaties of the United States are the "supreme Law of the Land."

A. MR???, what does this mean (In your own words)

1. Answer. Where there is a direct conflict between a federal law and a state law, the state law is simply INVALID. **FEDERAL LAW IS SAID TO "PREEMPT STATE LAW.**

B. FACTORS. In order to determine whether a federal law preempts a state law, the courts must first determine Congress' intent.

1. Look at how detailed the federal law is laid out. The more detailed the law, the more likely it will be held that the Federal law preempts the state law.

C. **BURBANK v. LOCKHEED AIR TERMINAL.**

1. Facts. In this case Burbank's city council passed an ordinance which made it unlawful for jets to take off between the hours of 11pm and 7am.
2. District Court Ruling. The district court ruled that the ordinance was unconstitutional under both the Supremacy Clause and the Commerce Clause.
3. Court of Appeals affirmed the district court's decision.
4. Supreme Court. The Supreme Court also held that the ordinance was unconstitutional because federal law did in fact "preempt" the ordinance. The court noted that "the pervasive nature of the scheme of federal regulation of aircraft lead them to conclude that there is pre-emption.

VII. **TAXING AND SPENDING POWERS**. Under the taxing and spending powers, just note that Congress does in fact have the power to tax individuals and companies AND Congress has the right to spend the monies they have accumulated.

VIII. **FREEDOM OF SPEECH**.

A. **General Rule**. The First Amendment provides that "**Congress shall make no law that reduces the freedom of speech.**"

1. Exceptions. We just need to note that there are a few exceptions to the first amendment. They include (1) obscene material, (2) profanity and (3) fighting words (i.e. those things that tend to incite riots or violence).

**DON'T REVIEW METROMEDIA v. SAN DIEGO**

IX. **FREEDOM OF RELIGION**. The First Amendment contains two distinct clauses designed to protect religious freedom.

- A. Establishment Clause. The first is called the "Establishment Clause." It forbids any laws which establish religion
- B. Free Exercise Clause. The second clause is called the Free Exercise Clause. It bans laws that prohibit the free exercise of religion.
- C. Purpose of the Clauses. The purpose of the clauses is to protect the freedom of every individual to worship or not worship as he or she wishes (**without government interference**).

X. **SEARCH AND SEIZURE**.

- A. Fourth Amendment. The fourth amendment protects the rights of people to be free from unreasonable searches and seizures.
  1. Search Warrant. In most cases the government is required to obtain a search warrant prior to searching a person's property.
    - a. Exception to the Search Warrant. One of the exceptions to the search warrant

requirement is when the police officer believes that the item will be removed before a warrant can be obtained.

2. The Requirements for a Warrant to be Issued. In order for a search warrant to be issued, there are at least two general requirements:
  - a. Requirement One. The warrant must be issued by a neutral magistrate or judge. This means that the judge can't have any political or monetary ties to the case.
  - b. Requirement Two. The warrant must state the place to be searched and the items to be seized.

## XI. SELF-INCRIMINATION

- A. Fifth Amendment. The Fifth Amendment guarantees that no person "shall be forced to testify against himself." TWO OTHER COMMENTS
  1. The fifth amendment does not apply to corporations or partnerships.
  2. Sole Proprietors who have not incorporated may also plead the fifth.

## XII. DUE PROCESS.

- A. Introduction. The text summarizes three (3) courses into one page. This was a stuff task.
- B. Fifth and 14th Amendments. The 5th and 14th amendments provide that no person shall be deprived of life, liberty or property without due process of law.
- C. TWO PARTS TO DUE PROCESS. There are two aspects of due process.
  1. Procedural Due Process. The first aspect is procedural due process. This requires that when government takes private property or upset someone's rights, there must be fairness in the process when is used.
  2. Substantive Due Process. The second aspect is substantive due process. This focuses on the content or substance of the legislation. A couple of key points:
    - a. Fundamental Rights. If a law or government action limits a fundamental right, the action must be **necessary to promote a compelling and averring government interest**.
      - (1) Fundamental Rights include (1) the right to travel, (2) the right to privacy, (3) the right to vote and (4) all first amendment rights (i.e. speech, religion, etc.)
    - a. If not Fundamental Right. If it is not a fundamental right, all the government must show is that the law is **rationally related to a legitimate government interest** (a far less stringent standard).

**XIII. EQUAL PROTECTION**. The fourteenth amendment provides that "no State shall make or enforce any law which shall deny person within its jurisdiction the equal protection of the law."

- A. Definition. Equal protection means that the government must treat similarly situated individuals in the same manner.

- B. Classification. Classification is the key to this area of the law. In essence look at individuals in the same class and see whether they are treated differently. If they are equal protection has been violated.
1. Example. All males are given an "A" in Legal Environments and all females are given a "C".  
**THIS VIOLATES EQUAL PROTECTION**
  2. Example. All females got A's because they scored higher on the exams than the males. **THIS DOES NOT VIOLATE EQUAL PROTECTION.**

## **CHAPTER 6: TORTS AND STRICT LIABILITY**

- I. **Introduction.** Today we look at the world of "torts."
- II. **Working Definition.** First let's establish a working definition of what a tort is. A "tort" is wrongful conduct by one person that causes injury to another.
  - A. **Examples.**
    - 1. Gomer is preparing to sit in a chair. As a joke, Barney Fife pulls the chair back just as Gomer is getting ready to sit down - This is a tort.
    - 2. Aunt Bee is very angry at Claire for stealing her boyfriend. To keep Claire from seeing him again, Aunt Bee locks her up in a room. Claire tries to get out, but can't - This is also a tort.
- III. **Tort Law vs. Criminal Law.** First of all torts and criminal incidents are both wrongful acts.
  - A. **Primary Distinction.** The primary distinction between tort and criminal law is that criminal law is considered a wrong against the state. **A tort is a action where one person brings a suit against another party.**
    - 1. **Compensation.** Under a criminal action the injured party does not get compensated, while under a tort action that is one of the primary reasons for bringing the suit.
- IV. **Kinds of Torts.** There are three kinds of torts. We will look at each kind individually, but let me first list them:
  - A. **The first tort is "intentional torts."**
  - B. **The second tort is "negligence."**
  - C. **The third tort is a tort in which the defendant's conduct is neither intentional or careless. BUT the defendant is made "strictly liable" because of the nature of the activity.**
- V. **Intentional Torts.** The text states that an Intentional torts arise from an act that the defendant consciously desired to perform, either in order to harm another or knowing with substantial certainty that injury to another could result.
  - A. **Simpler Version.** A much simpler version is this, "in order to prove that an intentional tort was committed, the plaintiff must show:
    - 1. That the defendant acted with the intent to cause harm and actual harm resulted. Note, the harm does not have to be to the person who the defendant intended to harm. It could be to anyone else.
    - 2. Let's look at some intentional torts.
  - B. **ASSAULT.** Assault is the intentional causing of an apprehension of harmful or offensive contact.
    - 1. **Explanation.** In other words, the defendant has committed an assault if he intentionally caused the plaintiff to think that he (the plaintiff) will be subjected to harmful or offensive contact.
      - a. **Example.** Otis Campbell goes to Floyd's barber shop and tell Floyd he needs a drink. Floyd tell Otis he doesn't have one and to get out of his barber shop. Otis takes a swing at Floyd, but misses. This is an assault.
  - C. **Battery.** Battery is just one step above assault. It is the intentional infliction of a harmful or offensive

bodily contact.

1. Difference Betw. Assault and Battery. Notice the difference between assault and battery. With assault, no contact occurs; only the threat of contact. To have a battery, you must make contact.

- a. Example. In the prior example, Otis took a swing at Floyd, but he missed. If Otis had made contact, then this would have been a "battery."

- D. Defenses to Assault and Battery. There are several defenses to assault and battery. The text lists four of the more common ones (i.e. Consent, Self-Defense, Defense to others and Defense to Property).

1. Consent. A defendant will not be liable for a tort act if the plaintiff consent to the act. Consent may be expressed or implied from prior conduct.
2. Self-Defense. When a person has reasonable grounds to believe that he is being or is about to be attacked, he may use such force as is reasonably necessary for protection against the potential injury.
3. Defense to Others. This merely deals with the situation where you are coming to the aid of another individual.
4. Defense of Property. The general rule is that a person may use reasonable force to prevent the commission of a tort against their property.

- E. False Imprisonment. False imprisonment is defined as the intentional confinement or restraint of another person without justification.

1. What Constitutes Confinement. There are several ways in which confinement may be accomplished.

- a. You can confine by using physical barriers.
    - b. You can confine by using "**physical restraint**."
    - c. You can confine by using "**threats of physical force**."

2. **Examples**.

- a. Aunt Bee was fooling around with Otis Campbell. Otis' wife wasn't pleased. To get even, Otis' wife locked Aunt Bee in the "Root Cellar." Aunt Bee had no means of escaping. This is False Imprisonment.

3. False Imprisonment and Shoplifting. WHAT ABOUT SHOPLIFTING.

- a. Question - If an employee in Penny's thought that I had taken something without paying for it, can they detain me and ask me questions?

- b. If they search me and find nothing, is this a case of false imprisonment?
      - (1) Answer. It depends!!! It depends on whether the employee probable cause that I was shoplifting.
      - (2) Even with probable cause, the detention must be conducted in a reasonable manner and only for a reasonable length of time.

- F. **Intentional Infliction of Mental Distress**.

1. Introduction. This tort is used when the others can't be used.
2. Definition. The text defines this tort as "**an intentional act that amounts to extreme and outrageous conduct resulting in severe emotional distress to another.**"
3. This is one of the more difficult torts to prove because you not only have to prove that the defendant had the intent to commit the act, but you also have to prove that the act was extreme or outrageous.

G. **Defamation**. A person's interest in his reputation is protected by a tort action called defamation.

1. Proof for Defamation. An individual has a case for defamation if he can show:
  - a. Defamatory Statement. There was a false and defamatory statement concerning him;
  - b. Publication. The statement was communicated to a third party;
  - c. Fault. The statement was either intentionally made or negligently made; and
  - d. Special Harm. Some special harm resulted.
2. Slander. If a statement is merely spoken it is called slander.
3. Libel. If the statement is written, it is called libel.

H. **Defenses to Defamation**. There are several defense to defamation. They can be broken into two categories called absolute defenses or privileges.

1. Absolute. Truth is an absolute defense. But the statement must be 100% truthful.
2. Public Figure. Public figures include officials and employees who exercise substantial governmental power, and generally in persons in the public limelight.
3. Privileges. The following are recognized as privileges:
  - a. Statements made in Judicial Proceedings
  - b. Statements made in Legislative Proceedings
  - c. Statements made by government official in the course of their jobs.

I. **Invasion of Privacy**. Invasion of privacy primary deals with the right to be **left alone**. There are four different acts which qualify as an invasion of privacy.

1. Appropriation. The first act is called appropriation. Under this act a plaintiff can sue if his name or picture has been appropriated by another for his financial benefit.
2. Intrusion. The second act is called intrusion. This is the intrusion upon an individual's right of seclusion.
  - a. The text list a couple of good examples. I.E. invading someone's home or illegally searching someone's briefcase.

3. **False Light**. The third act is publication of information that places a person in a false light. The plaintiff can sue if he is placed before the public eye in a false light, and this false light would be highly offensive to a reasonable person.
  - a. **Example**. Mayor Pike is a war hero. Gomer makes a movie about Mayor Pike's life. The movie contains a false romance between Mayor Pike and Aunt Bee. This is invasion of privacy.
4. **Publicity of Private Life**. The fourth act is the public disclosure of private facts about an individual that an ordinary person would find objectionable.
  - a. **Example**. Guber owes Floyd money for prior hair cuts. Floyd is mad because Guber hasn't paid him. Floyd puts a poster in the window of his store stating that Guber owes him money and has not paid him. This is invasion of privacy.

**J. Misrepresentation**. The text state that misrepresentation involves the use of fraud and deceit for personal gain.

1. **Elements for Misrepresentation**. The elements for misrepresentation are listed on page 63 and they include:
  - a. A misrepresentation of fact or condition with knowledge that it is false or reckless disregard for the truth.
  - b. Intent to induce another to rely on the misrepresentation.
  - c. Justifiable reliance by the plaintiff
  - d. Damages to the plaintiff stemming from the reliance.
2. The representation is normally made in words.
3. When a statement of opinion is made, look to see who is making the statement.
  - a. You usually rely on an opinion when it is made in a professional capacity by someone with superior knowledge in that area. For example a lawyer or doctor's statements.
4. **More than "Puffing" Is Required**. Mere trade talk is not considered misrepresentation.
  - (1) **Example** Dealers says "This is the best little two-door car you=re gonna find for the money anywhere." This is puffing.

**V. PROPERTY TORTS**. Three kinds: (1) Trespass to land and personal property, (2) conversion and (3) nuisance

- A. Trespass to Land**. A trespass to land can occur when a person enters the land of another or causes something or another person to enter that land.
1. **Example of Trespass**. The text lists some goods examples of trespass including (1) walking or driving on the land , (2) shooting across the land with a gun, and (3) throwing rocks onto the land.
  2. **Right and Duties of Trespassers**. A couple of additional points about trespass.
    - a. A guest in a home is not a trespasser. If you ask the guest to leave and he refuses, then

he is trespassing.

- b. Damages. A trespasser is liable for any damages he causes to the property.
- c. No Liability of Owner. Generally, a trespasser can not sue the landowner for injuries he incurred on the land. **Notice, I said generally; there are some exceptions such as:**
  - (1) Attractive Nuisance Doctrine. This doctrine imposed liability upon landowners who maintained a condition which induced children onto the land.
- 3. Defenses to Trespass to Land. Some of the more common defenses to trespass is (1) consent and (2) wrongful possession of land.

**VI. Trespass to Personal Property**. Trespass to personal property involves the interference with a person's right to possess his or her property .

**VII. Conversion**. Conversion occurs when a party substantially interferes with the rightful owner's possession of property.

- A. Intent. Conversion is an intentional tort. The intent does not have to include a desire to harm the rightful owner's interest.
  - 1. Innocent Mistake. An innocent mistake as to ownership of the goods may still be conversion.
- B. Damages. Whoever suffers a conversion is generally entitled to recover the reasonable value of the lost goods.
- E. Example. Spock lends Kurt his car in order for Kurt to sell it. Which of these is conversion:
  - 1. Kurt drives the car 10 miles. This would not be conversion because it is not substantial.
  - 2. Kurt drives the car 2,000 miles. This would be conversion because of the substantial amount of miles driven.
  - 3. Kurt drove the car 5 miles and another car ran into him and demolished Spock's car. This is conversion because Spock's car was totally destroyed and Kurt intended to drive it.

**VIII. Nuisance**. A nuisance is an improper activity that interferes with another's enjoyment or use of her property.

- A. Two Types of Nuisances. Nuisances are divided into two types:
  - 1. Public Nuisance. The first type is a public nuisance. A "public nuisance" is an interference with a "right common to the general public."
  - 2. Private Nuisance. The second type of nuisance is a "private nuisance." A private nuisance is an unreasonable interference with the owner's use and enjoyment of his land.
- C. Remedies. Two of the most common remedies for a nuisance are damages or have the nuisance stopped by obtaining an injunction.

**IX. NEGLIGENCE**

- A. Introduction. The key distinction between negligence and the intentional torts is the actor's mental state.

1. With "intentional torts" the actor intends to cause the act.
  2. With negligence, the actor has no intent to cause an act, but through his unreasonable conduct the act did in fact occur.
- B. Elements of Negligence. There are four element to negligence. I will make only general COMMENTS about each element.
1. The defendant owed a duty of care to the plaintiff. This is a duty requiring the defendant to conduct himself according to certain standards so as to avoid unreasonable risks to others.
  2. The defendant breached that duty.
  3. The plaintiff suffered injuries.
  4. The defendant's breach of duty caused the plaintiff's injury.
- a. **Causation**. Causation has two primary parts.
- (1) **Causation in Fact**. First there must be causation in fact. If an injury would not have occurred without the defendant's act, then there is causation in fact.
    - (A) **But For Test**. The "but for" test is applied.
    - (B) **Example**. Earnest T. dug a hole. Howard stepped in the hole and broke his leg. But for Earnest T's hole, Howard would not have broken his leg.
  - (2) **Proximate Cause**. If causation in fact is found, then you must find proximate cause
    - (A) Proximate cause deals with the extent of defendant's liability.
    - (B) **Major Question**. The major question is whether a negligent defendant's responsibility should extend to consequences that could in no way have been anticipated.
      - (I) **Foreseeability**. Foreseeability is the current test. Under this test, the duty of care extends to a victim who is located within a foreseeable zone of danger.
- 8      **Example**. Al Bundy negligently runs Marcie off the road. Floyd sees Marcie and attempts to help her. When Floyd pulls Marcie out of the car, he severely injures her back. It is foreseeable that a third party would lend assistance and could danger Marcie, therefore Al would be liable.
- (3) **Superseding Intervening Forces**. The defendant will attempt to show that some act has intervened after his action and that the second act caused the injury. This is "superseding intervening forces." **This doctrine is close kin to proximate cause**.

(A) **Example.** Floyd sprayed a toxic chemical in Andy's hair thinking it was hair tonic. Andy needs medical assistance, therefore Barney puts Andy in the squad car and drives off to the hospital. On the way, lightning strikes the left front tire and blows the tire out. Andy suffers two broken legs. **Is Floyd liable for the broken legs?**

**Answer.** First of all "but for" Floyd's mistake, Andy would have never had to go to the hospital, but **(1) such an accident was foreseeable and (2) there was a superseding intervening force**

X. **DEFENSES TO NEGLIGENCE.** An individual who is negligent may not have to pay damages if he has a defense. The following are recognized defenses to negligence.

A. **Assumption of Risk.** The first defense is "assumption of the risk." A plaintiff is said to have **assumed the risk** of certain harm if he has voluntarily consented to his chance that the harm will occur.

1. **Requirements for this Defense.** The text lists two requirement of this defense: (1) knowledge of the risk and (2) voluntary assumption of the risk.
  - a. **Example.** Andy likes to watch bronco riding. He goes to the rodeo and tells the operator that he wants to ride a bronco. The operator tells Andy that this is dangerous and he could be hurt. Andy say "**let's do!!!**" Andy signs release forms. Andy is subsequently thrown from the bronco and breaks a leg. The owner may assert the defense.
  - b. **Example.** What happens if Andy just wanted to ride an ordinary horse and the owner said this horse is fine for riding purposes. When Andy gets on the horse throws him.

**Answer.** No assumption of risk. A plaintiff does not assume a risk different from or greater than the risk normally carried by the activity.

B. **Contributory Negligence.**

1. **Introduction.** This defense is loved by defendants, particularly insurance companies.
2. **Definition.** The essence of this defense is that a plaintiff who does not take reasonable care to protect his own safety is negligent. If the plaintiff's negligence contributes to his injuries then the plaintiff **CAN NOT RECOVER ANYTHING**.
3. **KEY COMMENT.** **Contributory negligence is not a defense to intentional torts or strict liability.**

C. **Comparative Negligence.** Contributory negligence is an "all or nothing" system. In contrast, the comparative negligence system rejects the all or nothing approach.

1. **Definition.** Under comparative negligence, liability is divided between the plaintiff and defendant in proportion to their relative fault.
2. **Example.** Plaintiff suffers damages of \$100,000. A jury finds that plaintiff was 30% negligent and that Defendant was 70% negligent. Plaintiff will recover \$70,000 (i.e. \$100,000 minus 30% x \$100,000).

D. **Last Clear Chance.** This is a defense to contributory negligence.

1. **Definition.** The general impact of this rule is: "If just before the accident, the defendant has an

opportunity to prevent the harm, and the plaintiff does not have such an opportunity, the doctrine swipes out the effect of the plaintiff's contributory negligence.

## XI. **STRICT LIABILITY.**

- A. Introduction. Strict liability is sometimes called "liability without fault." There are several categories of strict liability, but the most important one is **Abnormally Dangerous Activities**.
- B. Category One: Abnormally Dangerous Activities. Abnormally dangerous activities is the first category. The text lists three element:
  1. The activity involves potential harm, of a serious nature, to persons or property.
  2. The activity involves a high degree of risk that cannot be completely guarded against by the exercise of reasonable care.
    - a. Example. CP&L's Nuclear Plants in Wake and Brunswick counties.
  3. The activity is not commonly performed in the community or area.

## **CHAPTER 7: TORTS RELATED TO BUSINESS**

I. Introduction. In a large number of cases businesses have their own separate torts. For example, a company who has spent a considerable amount of money and time on a new drug would want to protect that investment.

A. Example. Or a company who has built a large customer list would want to protect that list. This will usually come into play when an employee leaves the company and starts competing against his former employer.

B. Business Tort Defined. The text defines business torts as wrongful interference with another's business rights. We will cover the five causes of action list on page 78. They are:

1. Wrongful Interference with a Contractual Relationship.
2. Wrongful interference with a business relationship.
3. Wrongfully entering into business.
4. Infringement of trademarks, trade names, patents, and copyrights.
5. Disparagement of Property or Reputation.

### **II. Wrongful Interference with a Contractual Relationship.**

A. Element which will Constitute Wrongful Interference with a Contractual Relationship. The text list three elements which are necessary to prove that a wrongful interference with a contractual relationship exists. They are:

1. A valid, enforceable contract must exist between the parties.
2. A third party must know that this contract exists.
3. The third party must "intentionally" cause either of the parties to the contract to break the contract.

B. Example. Floyd has been training Gomer to become a barber. In fact, Gomer has become so good at cutting hair that Floyd and Gomer entered into a contract. The contract states that Gomer will cut hair only in Floyd's shop.

1. Howard Sprange recognizes Gomer's talent and he was also aware of the contract between Floyd and Gomer. Howard persuades Gomer to cut hair in his new barber shop. What's the result.

Answer. Howard has interfered with the Contract between Floyd and Gomer because:

- a. There was a valid contract between Floyd and Gomer
- b. Howard knew about the contract
- c. Howard intentionally caused Gomer to break the contract when Gomer came to work for him.

### **C. Texaco, Inc. v. Pennzoil Co.**

1. Facts. Pennzoil agreed to purchase and Getty Oil agreed to sell its controlling interest in Getty Oil. While the finishing touches were being worked out, in comes Texaco with a new and improved bid. Getty's board of directors accepted Texaco's bid. Of course Penzoil sued.
2. Trial Court. The trial court agreed with Penzoil and really stuck it to Texaco. Among other things it found
  - a. That there was a valid agreement between Pennzoil and Getty;
  - b. Texaco "**knowingly and intentionally**" interfered with this agreement;
  - c. Damages were assessed at over \$10 billion dollars (**that's with a "B"**).
3. Findings of the Court of Appeals. The Appellate Court agreed with the lower court's decision. The court's major points were:
  - a. **There was a contract between Getty Oil and Penzoil as long as the essential terms were agreed upon.**
  - b. The court said as long as the party has knowledge of the contract he is interfering with is sufficient. **HE NEED NOT APPRECIATE THE LEGAL SIGNIFICANCE.**
  - c. The court said Texaco knew of the agreement between Getty Oil and Penzoil. The court lists several factors which lead them to that decisions including:
    - (1) Notice of the Contract in the Wall Street Journal.
    - (2) Texaco's strategy to defeat Penzoil's deal by stopping the signing. AND
    - (3) Getty Oil's demand for full indemnity from Texaco against any claims by Penzoil arising from their agreement.

### **III. Wrongful Interference with a Business Relationship.**

- A. Introduction. The general rule is "one can not interfere unreasonably with another's business." The key to this section is **what is unreasonable behavior?**
1. The primary focus of this portion of the chapter is to distinguish between good competition and behavior that borders on being a tort.
  2. Text's Emphasis. Although there is no clear definition of what a wrongful interference with a Business Relationship is, the text list several key points:
    - a. A business can not unreasonably interfere with an economic advantage gain by a competitor through advertising
      - (1) The text gives an example of Store A positioning himself in front of Store B and taking Store B's prospective customers.
    - b. A salesperson can not follow another company's salesperson through the city, soliciting the same customers.

- (1) One reason for this is that the other salesperson would get the benefit of the first one's effort. **I'm not sure I agree with this!!**

B. Azar v. Lehigh Corp.

1. Facts. Lehigh Corp. was a developer of real estate.
  - a. It's practice was to get solicit individuals to look at its property in hope of purchasing lots or condominiums.
  - b. Lehigh would provide prospective customers with accommodations while they give you the "**pitch**" to purchase their product (**Just like time shares**).
  - c. Azar knew Lehigh's process because he used to work for them.
  - d. When Azar saw a prospective client go into Lehigh's office, he also made a play for them, offering them similar property at **a cheaper price**.
  - e. Lehigh brought an injunction against Azar to keep him from during this. Lehigh claimed this was Azar was tortitiously interfering with the business relationship between Lehigh and his customers.
  - f. Azar said this is merely friendly competition.
2. Trial Court. The trial court allowed the injunction thus restraining Azar from interfering with Lehigh.
3. Court of Appeals. The court of appeals agreed with the trial court. The found that Azar conduct was unfair because it met the requirements of interference with a business relationship. The 3 requirements were:
  - a. the existence of a relationship where plaintiff has legal rights
  - b. Intentional, unjustified Interference and
  - c. Damages resulted.

C. Defenses to Wrongful Interference with a Contractual or Business Relationship. When allegations of wrongful interference are alleged, the classic defense it is "**this is merely bona fide competition.**"

1. Public Policy Favors Free Competition. Bona fide competition is usually a good defense because public policy favor competition.
  - a. Key Point. The primary point I'm trying to make is the customer has a right to buy his product from anyone he wants.
  - b. Example 1: Mr. ??? what about this; Seimens sells telephone switches to Bellcore for \$25,000 apiece. Northern Telecom calls Bellcore and tells them that they can sell the same switch to Bellcore for \$22,000 plus give them more feature. **Is this illegal???**
  - c. Example 2: Mr. ??? what do you think about this: Seimens sells telephone switches to Bellcore for \$25,000. Northern Telecom hires "Andy" as a sales representative. Andy's dad is a chief executive of Bellcore. Bellcore starts to purchase from Northern vs.

Seimens. **Is this illegal.**

#### **IV. WRONGFULLY ENTERING INTO BUSINESS.**

- A. General Rule. The general rule is that anyone can enter into any "**legal**" business they want.
  - 1. Exceptions. There are two exceptions to this rule.
- B. Entering a Business in Violation of the Law. The simplest example of this is the Utility Industry.
  - 1. The state gives utilities certain geographic locations in which to operate.
  - 2. This is done for several reasons:
    - a. The first reason is that the providing of electric is very expensive (Shearon Harris cost \$6 billion).
    - b. The second reason is that the government regulates this type of industry and to a certain tells them how much money they can make.
    - c. The third and probably the most important is that such companies have strict guidelines under which they must operate under.
  - 3. Therefore, it would not be cost efficient.
- C. Operating a Business for the Sole Purpose of Running another out of Business. You can not operate a business for the sole purpose of running another out of business.
  - 1. There is a "FINE" line. All I will say about this is that there is a fine line between competition and running someone out of business. Take the airline industry and the number of companies that have went under.
  - 2. Collusion. Companies definitely can't get together with the intent of running competitors out of business.
  - 3. Tuttle v. Buck.
    - a. Facts. Edward Tuttle owned and operated a barber shop in Howard Lake Minnesota. Cassius Buck was a local banker in the same city.
      - (1) Buck allegedly established a competitive barbershop with the intent of running Tuttle out of business.
      - (2) Buck used his personal influence within the community to take customers away from Tuttle. Including forcing some customers to use his shop (Extortion).
      - (3) Buck also spread false and malicious reports about Tuttle.
      - (4) This resulted in Tuttle losing a lot of his business.
    - b. Trial Court and Appellate Court. The trial court and appellate court rendered a decision in favor of Tuttle.
    - c. Minnesota Supreme Court. The Minnesota Supreme Court held that Buck was guilty of maliciously interfering with Tuttle's business.

- (1) The court reasoned that competition should be preserved but its duty was also to guard against abusive practices.
- (2) The court said the line between competition and abusive practice was not clear.
- (3) The court looked at Buck's intent and held that his primary purpose was not drive Tuttle out of business (and not to make a profit). **This was wrong.**

## V. APPROPRIATION.

- A. Introduction. A few weeks ago someone approached me with very nice **Michael Jordan** reproduction. It was had painted and read on the front "**Just Like Mike.**" This is a classic form of "appropriation."
- B. Definition of Appropriation. Appropriation is merely the use of a person's name or likeness by another, without his permission for commercial advantage.
  - 1. The only other comment is that this is illegal and can get you into a lot of trouble.

## VI. DISPARAGEMENT OF PROPERTY

- A. Example. In addition to running the local barber shop in Mayberry, Floyd also shop that deals in rare coins. Floyd's coin shop is very popular and is quite successful.
  - 1. Barney becomes jealous of Floyd's success and starts spreading rumors that Floyd mints his own coins and they are really cheap.
  - 2. **This is Disparagement of Product which can be defined as "unprivileged publication of false information about another's product." This kind also be called "trade libel."**
- B. Proof Required. In order to prove this the plaintiff must show there was actual damages. The plaintiff must show that because of the statements, a third party refrained from dealing with him.

## VII. RICO - Racketeer Influenced and Corrupt Organizations Act.

- A. Introduction. The "RICO" Act is an attempt by Congress to keep organized crime out of legitimate business.
- B. Prohibitions under RICO. RICO specifically prohibits four things.
  - 1. The use of income obtained from racketeering to purchase any interest in a business.
  - 2. The use of income obtained from racketeering to maintain a business.
  - 3. To conduct or participate in the affairs of an enterprise through racketeering activity
  - 4. To conspire to do any of the above three things.
- C. Penalties. The penalties are severe for engaging in this type of activity including
  - 1. Stripping the individual of his interest in the business.
  - 2. Private individual may under certain situation recover "treble damages", plus attorney fees for injuries they have incurred.



## **CHAPTER 8: INTELLECTUAL PROPERTY & COMPUTER LAW**

### **I. Infringement of Trademarks, Trade Names, Patents, and Copyright.**

A. Introduction. The text uses a term called "passing off" which is falsely inducing buyers to believe that one product is another.

1. Things included in "Passing Off." Passing off includes Infringement of **a trademark, a trade name, a patent, or a copyright.**

#### **B. Infringement of Trademarks and Service Marks.**

1. Definition of Trademark. A trademark is special or distinctive mark, logo or device a manufacturer places on his product to distinguish it from others.

2. Why are trademarks important?

Answer. One of the primary purposes is to distinguish products. This distinction is important so that customers may make informed decisions.

3. Things that are not Trademarks. Names, words, place that are descriptive are usually not trademarks and can be used by anyone. Uncommon words may be trademarks.

4. Definition of Service Mark. A service mark is similar to a trademark, but it is used to distinguish services versus products.

1. Bart Simpson would probably be a service mark.

5. When Does Infringement Occur. Trademark Infringement usually occurs after the trademark or service mark has been registered and someone attempts to copy it.

- a. Vuitton v. Crown Handbags.

(1) Facts. Crown offered for sale and sold to an undercover agent of Vuitton, handbags which imitated Vuitton's trademark.

(B) Vuitton sued Crown for trademark infringement.

(2) Court's Decision. The court held that Crown was in fact guilty of trademark infringement and assessed damages and enjoined Crown from selling the bags in the future.

(A) The court held that Vuitton would suffer because of loss profits and customers would suffer because they were purchasing inferior merchandise.

#### **C. Infringement of Trade Names.**

1. Definition of Trade Names. Trade Names are names used to identify a business such as Brooks Brothers, Aigner, Alexander Julian.

- a. The Trade Name is Usually Directly Related to Goodwill. Generally, the Trade Name is directly related to the good will of the business. This happens when the Company establishes a reputation of providing top products or services.

- b. Generic Use of a Name. One of the biggest problems occur when a trade name acquires generic use. Some of the more common trade names that are becoming generic are (1) aspirin, (2) Clorox, (3) Kleenex and (4) Xerox.

### **Read the Coca-Cola Case - p. 85**

D. Infringement of Patents.

1. Definition of Patent. AS the text states, a patent is a grant from the government that gives an inventor exclusive right to make and sell a product for a given period of time (Usually 17 years).
2. Requirements to Obtain a Patent. In order to obtain a patent, the inventor must show that the item is genuine, novel and useful.
3. Primary Purpose of a Patent. A patent's primary purpose is to give notice to others who may want to make the same item.
  - a. Patents are very popular especially in the pharmaceutical industry.
4. Notice the Difference in Price. Once a company has a product that is useful and they have patented it, the price is usually very high.
  - a. Once the patent ends, and other companies are allowed to produce the same product, the price drastically drop.

E. Infringement of Copyright.

1. Definition of Copyright. A copyright is a statutory right given to authors or originators of literary or artistic productions.
2. Computer Programs Copyright Protected. The biggest change in copyright has come in the copyrighting of computer programs such as Lotus 123, WordPerfect, Symphony, and Harvard Graphics.
3. When does Infringement Occur. Copyright infringement occurs when someone copies or reproduces the originator's work without his permission but **more importantly without paying for it.**
  - a. The reproduction does not have to be exact. If a substantial portion is reproduced, a copyright infringement exists.
4. Copyright Act. Section 107 of the Copyright Act permits copyrighting under certain conditions. Look at page 86.

F. Theft of Trade Secrets.

1. Definition of Trade Secrets. Trade secrets are information or processes used by a business to obtain a competitive edge. **This includes (1) customer lists, (2) marketing techniques, and (3) secret formulas.**
2. How they are Protected. Trade secrets are usually protected by the company requiring all employees not to divulge the information while employed or upon leaving their employment.



## **CHAPTER 9: CRIMINAL LAW AND PROCEDURES**

**I. INTRODUCTION.** First of all, criminal law is related to other branches of law, but it is dealt with separately by our legal system.

**II. DEFINITION OF CRIME.** The first thing we must do is "define" what a crime is. A crime is a social harm defined and made punishable by law. **Keep concepts are:**

- A. It is an offense against the state for which the state may institute a legal action.
- B. The victim of a crime does not bring the criminal action. ONLY the state, through the prosecutor, may bring formal criminal charges.
- C. One key difference between a civil and a criminal wrong is that a **civil wrong are generally intended to compensate the injured party**, while a **criminal wrong is concerned with punishing the wrongdoer**.

**III. CLASSIFICATION OF CRIMES.** The text states that crimes are classified as felonies or misdemeanors according to their seriousness. Two things are usually looked at: (1) the first is the type of prison the individual is sent to (2) the second is the length of the prison sentence.

- A. **Felonies.** AS the text states, felonies are the more serious crimes. These crimes are usually punishable by death or imprisonment for more than one year.
  1. **Felony-Murder Rule.** The text also mentions the felony murder rule. This rule states that if a someone is killed during the commission of a crime, the wrongdoer can be charged with murder, even if he did not actually kill the person.
    - a. **Example.** Guber and Gomer decides to go to Mount Pilot to hold up the local bank. After the holdup, Gomer puts his coat and hat on another person as a disguise. The police shoots that person thinking it was Gomer.

**Question.** Can Guber and Gomer be charged with felony-murder.

**Answer.** Yes, because the crime was still being committed and any death occurring during the commission of the crime can be considered felony-murder.

- B. **Misdemeanors.** Misdemeanors are crimes punishable by a fine or confinement for less than one year.
- C. **Attempt.** An attempt to commit a crime is just what it says. It is a step toward a criminal act with specific intent to commit that particular offense. BUT for some reason, the act can't be carried out.

1. **Mere preparation is not sufficient.** Preparing to commit a crime is not an attempt. Again, there must be a step toward a criminal act.

- D. **Conspiracy.** Conspiracy is an agreement between two or more persons to engage in an unlawful act. Two important points:

1. Conspiracy is a crime in itself and no other act need be committed.
2. With some crimes, you merge them into the bigger crime. Conspiracy doesn't merge with anything.
3. **Example 1:** Guber, Gomer and Ernest T. Bass agree to holdup Mayberry National Bank. The holdup occurs at 3:00 pm. By 4:00pm Andy and his faithful deputy Barney captures the trio.

Question. What crimes can Guber, Gomer and Ernest T. be convicted of?

Answer. They can be convicted of robbery because they actually robbed the bank. They can also be convicted of conspiracy because they made an agreement to rob the bank.

4. Example 2: Suppose, on the way to the bank Gomer decides he doesn't want to be part of the holdup and he tells this to Ernest T. and Guber.

Question. Mr. ????? what crime or crimes can Gomer be convicted of?

Answer. Gomer can't be convicted of robbery because he did not go through with the robbery. Gomer can be convicted of conspiracy because he did in fact make an agreement with the other two to rob the bank.

- E. Federal vs. State Crimes. Generally, "States" have jurisdiction of crimes committed within their borders. In some instances, there are federal codes which will make that crime a federal one.

1. In addition, if criminal activity happens across state lines, it can also be considered a federal crime.

**IV. ELEMENTS OF CRIMINAL LIABILITY.** There are two elements which are necessary for the completion of a criminal act:

- A. Performance of a Prohibited Act. The first is the performance of a prohibited act. **Please note, an act must actually be completed.** Mere thoughts of an act is not enough.

1. The text also states that in some instances, the omission of act will be a crime.

Example. Assume that Guber's truck runs Howard off the road. Guber comes over and finds Howard seriously injured. Guber looks at Howard and then leaves. Howard subsequently dies.

Answer. Guber had a duty to help Howard since he caused the accident. His lack of help is criminal.

- B. State of Mind or Intent. The second element is "there must be a wrongful mental state." This merely means that the person must intend the act. **Without intent, there is no crime.**

**V. CRIMES AFFECTING BUSINESS.** The next section crimes affecting business.

- A. Introduction. What does all of the crimes listed on Pages 160-163 have in common.

Answer. The deal the taking or destroying of property (which also includes money).

- B. Forgery. Let's start with "forgery." Forgery consists of **making or altering of a false writing with intent to defraud.**

1. Common Form of Forgery. The most common form of forgery is where one person signs and cashes a check of another.

2. Other Forms of Forgery. The text also lists other forms of forgery including: (1) changing trademarks, (2) falsifying public records, (3) counterfeiting, and (4) altering legal documents.

- C. Robbery, Burglary and Larceny. Robbery, Burglary and Larceny are similar in that they all involve the taking of property. **But there are some differences.**

1. Larceny. Larceny consists of a taking or carrying away of personal property of another. Force

- or intimidation is not used in a larceny.
2. **Robbery.** Robbery consists of (1) a taking, (2) of personal property of another, (3) from the other's person, (4) by force or intimidation, (5) with the intent to permanently deprive him of it.
- Robbery is a Physical Form of Larceny.** Robbery is thus a physical form of larceny because in order for a robbery to take place there must be some force or intimidation.
  - Example 1.** Earnest T. Bass walks up behind Floyd and takes his wallet out of his pants. Is this larceny or robbery?
- Answer. This is larceny because no force was used.
- Example 2.** Let's say Earnest T. Bass walks up to Aunt Bee and says give me \$10 in a very rough tone. Is this larceny, robbery or what?
- Answer. It depends. If the court finds that Earnest T. was just asking for a hand out, it is not robbery. But if they find that there was substantial intimidation and Earnest T meant to intimidate Aunt Bee into giving him the money, then it is robbery.
3. **Burglary.** Let's look at burglary. Burglary is the breaking and entering of a dwelling house of another at night with the intent to commit a felony.
- Be careful that the intent to commit a felony is present.**
  - Example.** Otis Campbell is drunk and mistakes Howard's house for his. Since Otis lost his keys, he crawls in through the window. The next morning Otis discovers this is not his house, but he sees a couple of bottles full of liquor and takes them. Is this burglary?
- Answer. NO this is not burglary because when Otis entered the house he did not intend to commit a felony.
- Question. this larceny.
- Answer. Yes, this is larceny because Otis carried away personal property of Howard's. **NOTE, some may say Otis has a defense of "necessity."**
- D. **Obtaining Goods by False Pretenses.** Obtaining Goods by False Pretenses consist of (1) obtaining title, (2) to the property of another, (3) by an intentional false statement, (4) with intent to defraud. Statutes on this crime vary from state to state.
- E. **Receiving Stolen Goods.** First and foremost, **receiving stolen goods is a "crime."** The elements of receiving stolen goods are (1) receiving possession and control, (2) of stolen personal property, (3) known to be stolen by another, and (4) with intent to permanently deprive the true owner of possession.
- F. **Embezzlement.** Embezzlement is the fraudulent conversion of property of another **by a person in lawful possession of that property.**
- Common Situation is Bank Embezzlement.** A large amount of companies face this problem. At my last job, an individual who was responsible for petty started skimming money off the top. Through regular audits she was caught and fired.
  - Distinguish between Embezzlement and Larceny.** Embezzlement is not larceny because, as the text states, to commit embezzlement the wrongdoer must first have lawful possession of the

property.

- G. Arson. Arson is defined as the malicious burning of a building or some structure owned by another. In a business context, arson usually arises when the owner of the structure wants the insurance proceed and he hires someone to torch the building.

## **VI. WHITE-COLLAR CRIMES.**

- A. Introduction. This is where the "big bucks" are. White collar crimes are nonviolent acts by businesses or individual used to obtained a personal or business advantage.

- B. Bribery. The first type of white-collar crime is "bribery." Bribes consist of corrupt payment or receipt of anything of value in return for official action.

1. Foreign Corrupt Practices Act. In 1977, Congress passed the Foreign Corrupt Practices Act. The act (1) prohibited bribery of foreign official by US companies and (2) the act required companies to keep "detailed" records that properly reflect the companies financial activities.

- a. Violation of the act may result in large fines or imprisonment.

2. You can also be convicted of bribery of public official and giving or receiving "kickbacks".

- C. Bankruptcy Fraud.

1. Introduction. This is one of the fastest growing forms of legal expertise. Bankruptcy filings in North Carolina have increased more than 5 times in the last 10 years.

2. Requirements to File. Certain formalities must be followed in order to file for bankruptcy.

- a. The debtor must disclose all assets.

- b. The assets are taken into possession by a trustee.

- c. The assets are distributed by the trustee based on some predetermined process.

3. Common Forms of Bankruptcy Fraud. Some of the more common forms of bankruptcy fraud are listed in the text.

- a. False Claims of Creditors. The first kind is where a creditor files a false claim to assets held by the trustee.

- b. Transfer of Property. The second situation is where a debtor transfers his property to a third party prior to filing for bankruptcy. If this was allowed, the debtor would file for bankruptcy but would have no assets.

- c. Scam Bankruptcy. The third and final category is "scam bankruptcies." This is where a bankruptcy is planned in advance. The typical situation is where a business obtains merchandise on credit, sells the goods and then skips town.

- E. Corporate Crimes. Corporate Crimes are crimes against the corporation. Since the corporation is not a real person, usually only fines may be assessed. Generally, a natural person within the corporation may be convicted of crimes which the corporation can't be (e.g. perjury, bribery, etc.)

## **VII. DEFENSES TO CRIMES. The law recognizes certain conditions that will relieve a defendant of criminal**

liability. The conditions are called "defenses." Some of the more common defenses are listed in your text.

A. Infancy. The first defense is "infancy." Most states still retain the common law approach to the infancy defense. Under the common law:

1. A child under 7 years of age was absolutely presumed not to have criminal capacity.
2. A child between the ages of 7 and 13 was presumed not to be able to commit a criminal act. The state could attack this presumption by demonstrating that the child understood the nature of his act.
3. A child 14 or older is treated like an adult.

B. Intoxication. Intoxication may occur from alcohol or drugs. There are two kinds:

1. Involuntary Intoxication. Involuntary intoxication occurs when a person is physically forced to drink or take alcohol or drugs or when drugs are taken under medical advice.
  - a. Complete Defense. Involuntary intoxication may be a complete defense if its effect was to make a person either (1) incapable of understanding that the act committed was wrong or (2) incapable of obeying the law. **IN OTHER WORDS, THE PERSON MUST NOT KNOW RIGHT FROM WRONG.**
  - b. Burrows v. State. Burrows, a teenager was traveling in the Arizona desert and got a ride with Martin. Martin was drinking and told Burrows to drink or he would put him out of the car. Burrows had never tasted alcohol before, BUT he drank because he had no money and feared being left in the desert. Burrows became drunk and shot and killed Martin. Burrows did not realize what he had done until after he had killed Martin. Burrows was charged with "MURDER."

Holding. The court held Burrows was under duress when he drank the alcohol, therefore his intoxication was involuntary. The court said Burrows committed the act when he did not know right from wrong, therefore he can not be convicted of murder.

2. Voluntary Intoxication. Voluntary intoxication can be used ONLY for what is called specific intent crimes such as murder, larceny, etc. It is not a defense to recklessness or negligence.

C. INSANITY. A defendant cannot be convicted if, at the time of the crime, he was so impaired by mental illness or defect as to be insane within the meaning of the law.

1. What is Insanity. Over the years, the courts have struggled with the proper definition of insanity, and numerous tests have been developed.
2. There is a General Presumption of Sanity on the part of the Defendant. In most jurisdictions, there is a general presumption of sanity which the defendant must initially challenge.
3. Three Primary Tests. The text states the 3 major test which are used in deciding whether someone is insane. **(1) Model Penal Code, (2) M'Naghten test, and (3) the Durham Test.**
  - a. Common Elements. The common elements seem to be (1) there must be a mental defect or illness and (2) because of the defect or illness, the defendant can't tell **right from wrong**.

E. Mistake.

1. General Rule on Mistake of Law. Generally, ignorance of the law will not keep you out of jail. This rule has been relaxed in some jurisdiction to allow mistake of law as a defense if defendant shows either:
  - a. The law was not published or reasonably made known to the public OR
  - b. the person relied on an official statement of law that was in error. (e.g. judicial opinion, administrative order, etc.)
2. Rule for Mistake of Fact. The wrong is quite different for a mistake in fact. A mistake in fact is generally a good defense. There are 3 requirements which are not listed in your text. **You should know these:**
  - a. The mistake is honestly believed;
  - b. The mistake is based upon reasonable grounds; and
  - c. The conduct of the defendant would have been lawful if the facts had been as believed by the defendant.

F. Consent. Consent of the other party can be a defense in a criminal action, depending on the nature of the crime.

1. For example a person can't consent to murder, prostitution or drug use.
2. Just note that there is a fine line with consent. For example if a woman consents to a kiss and is raped, the man can not defend himself on the grounds of consent.

G. Duress. Compelled consent is no consent at all. This typically deals with "duress." Duress exists when the wrongful threat of one person induces another person to perform an act that he would not otherwise have performed.

1. Requirements for Duress. In order to find duress, text lists the following requirements:
  - a. **The threat must be of serious bodily harm or death.**
  - b. **The harm that is threatened must be greater than the harm that will be caused by the crime.**
  - c. **The threat must be immediate and inescapable and**
  - d. **The people who plead duress as a defense must have been involved in the situation through no fault of their own.**

H. Justifiable Use of Force. What about self defense. This is the most commonly used defense.

1. Distinguish between "use of deadly force" and "use of nondeadly force.". The first thing we must do is distinguish between deadly force and nondeadly force.
  - a. Deadly Force. Deadly force in most jurisdictions is permitted to prevent a crime **only if the crime is a dangerous felony.**
    - (1) Dangerous Felonies. Dangerous felonies are those which offer some risk of

serious bodily harm **such as murder, arson, burglary, rape and kidnaping.**

- b. Nondeadly Force. Nondeadly force is permitted in all circumstances if the person has a reasonable belief that such force is necessary.
- I. Entrapment. The general rule for entrapment is **if a law enforcement officer entraps a person into committing an illegal act, the person cannot be convicted of the offense.**
  - A. Intent of the Defense. The defense is not intended to prevent the government from setting a trap; **it is intended to prevent them from pushing an individual into it.**
  - B. KEY QUESTION. The key question is whether a person was going to commit the crime anyway or whether the government's actions pushed him into committing the crime.
- J. Statute of Limitations. Another word for statute of limitation is "time bar." This primarily deals with whether the time limit has run as to when this crime may be brought.
  - 1. Time Limit Varies From State to state. Time limits vary from state to state. Felonies usually have longer statute of limitations than misdemeanors and there is no time limitation on "**murder.**"
- K. Immunity. The last defense we will cover is "immunity." At times, the government negotiate with defendants. In return for information, the government may agree to prosecute the defendant for a lesser crime or drop the charges all together.
  - 1. Can't Refuse to Testify After Immunity is Given. Once immunity is given, a person cannot refuse to testify on 5th Amendment grounds.

## **VI. CRIMINAL PROCEDURE.**

- A. Introduction. In theory, under the law a person is innocent until proven guilty. For an individual to be convicted of a crime, **the government must prove guilt beyond a reasonable.**
- B. Constitutional Safeguards. An alleged criminal must be accorded "due process of law" regardless of how serious the crime is. Constitutional safeguards apply to federal as well as state courts. The text list some of the more common safeguards including:
  - 1. Fourth Amendment protection from unreasonable searches and seizures.
  - 2. Fourth Amendment probable cause requirement for issuance of a warrant for search or arrest.
  - 3. fifth Amendment requirement that no one can be deprived of "life, liberty, or property without due process of law."
  - 4. Fifth Amendment protection against being tried for the same crime twice (called "double jeopardy.")
  - 5. Sixth Amendment right to speedy trial, trial by jury, a public trial, the right to confront witnesses, and the right to a lawyer at various stages in some proceedings.
  - 6. Eight Amendment prohibition against excessive bail.
- C. Criminal Process. There are 3 primary and broad stages to the criminal process. They are arrest, indictment, and trial.

1. Arrest. Let's look at arrest first.
  - a. What is an "Arrest?" An arrest occurs when the police take a person into custody against her will for purposes of criminal prosecution or interrogation.
  - b. General Rule. The general rule is that in order for an arrest warrant to be issued there must be "**probable cause**" that the person committed the crime.
    - (1) What is "Probable Cause?" Probable cause is defined as a substantial likelihood that the individual committed the crime.
  - c. Sometimes Warrant are not Required. In certain situations warrants are not required but there always must be probable cause.
2. Indictment. The next stage is the "indictment." First of all, you can't have a trial until you have been charged with a specific crime.
  - a. Grand Jury or Magistrate. If the grand jury issues the charge, it is called an indictment. Otherwise it is issued by the magistrate (and is called an "information.")
  - b. Charge must be based on Sufficient Evidence. Before a charge can be issued, the grand jury or the magistrate must determine that there is sufficient evidence to justify bringing the individual to trial.
3. Trial. The last stage is the "trial stage." Although all stages are critical, this is by far the most important. Mr. ??? why would this be the most important.

Answer. This is the stage in which your guilt or innocence is determined. After this stage, the court will either let you go or tell the bailiff to take you back to prison.

- a. Burden of Proof is on Prosecution. At the trial stage, the burden of proof is on the prosecution. This means that the defendant does not have to prove he is innocent. **THE PROSECUTION MUST PROVE HE IS GUILTY.**
  - (1) Proof Beyond a Reasonable Doubt. The prosecution's proof must be beyond a reasonable doubt. This means that the prosecution must show that the defendant's guilt is clear and unquestionable.

## **CHAPTER 11: NATURE AND TERMINOLOGY**

- I. Introduction. This chapter is an introduction to contract law.
- II. Definition of Contract. A contract is an agreement or promise which the law will enforce in some way.
- III. Structure of a Contract.
  - A. Promise between 2 or more people to perform an act or refrain from doing something.
    1. If the promise is not fulfilled, there is a breach.

- a. Non breaching party may get legal (money) or equitable remedies including:
  - (1) Money Damages
  - (2) Specific Performance
- 2. General Rule. The court will enforce promises if:
  - a. They are knowingly made (i.e. with knowledge that this will create a contract)
  - b. The promise must be "**voluntary.**"
- 3. Exceptions to the General Rule. A court will not enforce a promise if it is made against some public policy. Three examples are:
  - a. Promise is made by a Child - Lacks capacity.
  - b. Promise is Made by an Insane Person - Lacks capacity
  - c. Person is given false information.

#### **IV. Purpose of Contract Law.**

- A. It ensures compliance with a Promise. Economic factors make it costly to comply with a promise.
- B. Helps Nonbreaching Parties get Relief.
- C. Foundation for other Types of Law. Especially sale of goods, remedies, secured transactions, etc.
- D. Example. Gomer does a little farming and Barney also owns a farm supply shop. Barney and Gomer agree that Barney will sell seed to Gomer for \$10 a pound starting in May. The price of seed drastically increases. If Barney sells to Gomer for \$10 a pound, he will lose money. **Does Barney have to sell at that price?**

#### **V. The Basic Requirements of a Contract. This will be discussed in great detail in Chapters 8-11.**

- A. Agreement.
  - 1. Agreement requires an **offer and acceptance.**
- B. Consideration. This is what the parties are exchanging such as:
  - 1. Cash
  - 2. Property
  - 3. Goods
  - 4. Services
- C. Contractual Capacity. The parties must be competent to enter into the contract.
- D. Legality. The outcome of the contract must be legal.

#### **VI. Types of Contract.**

- A. Primary Parties to a Contract. There are two primary parties to a contract:

1. Offeror. This is the person making the offer to contract.
2. Offeree. The is the person to whom the offer is made.

B. Distinction Between Bilateral and Unilateral Contracts.

1. Major Factor. The major factor is what the offeree must do to accept the offer.
2. Bilateral Contract. This contract consists of an exchange of promises.
  - a. Example. Barney tells Otis I will pay you \$50 if you promise not to drink for a week. This is a bilateral contract.
3. Unilateral Contract. This is a contract in which only one party promises to do something. The other party may or may not act.
  - a. Example. Barney promises Otis that he will give him \$50 if he will not drink for one week. If Otis doesn't drink for one week, then the contract is binding. If Otis does drink, there is no contract.
  - b. What happens if one party starts to perform and the other party tries to revoke the contract.
    - (1) Traditional View. A party can revoke prior to complete fulfillment of the act. **Therefore if Otis had been sober for 3 days, Barney still could revoke and owe Otis nothing.**
    - (2) Modern View. If the party has begun the act, you must give him time to finish it.

C. Express "versus" Implied Contracts.

1. Expressed Contracts.
  - a. The terms of the contract are fully and clearly stated.
  - b. The contract may be oral or written.
2. Implied Contracts.
  - a. Look at the parties's conduct versus their words.
  - b. Example. I'm an attorney. A client walks in and wants a divorce. I tell them that I can perform this service for \$500, but I will need certain documents to do this. The next day the client brings the documents in. It is implied that once I finish the work, I will be paid.
  - c. Steps for an Implied in Fact Contract-p. 119.
    - (1) The party furnished some service or property.
    - (2) The party expected to be paid for the service or property
    - (3) The other party knew or should have known of this expectation.

(4) The other party had a chance to reject the service or property and did not.

VII. Objective Theory of Contract. The Intent of the parties is one of the primary factors in the formation of a contract.

A. Intent is determine by the what is called the Objective Theory of Contracts. The parties must intend to have a contract.

1. Reasonable Person Standard. The test for intent is the reasonable person standard. **Would a reasonable person in the other party's position believe that a contract had been made.**
2. Objective Factors Which are Used to Judge Intent.
  - a. What the party said when entering the contract
  - b. How the party acted
  - c. The circumstances surrounding the transaction.
3. Example. A says to B, "I'll will sell you my house for \$1,000. The house is worth a lot more than \$1,000.
  - a. If B can show that by A's tone of voice or by his own that of Business knowledge that this lead B to reasonably conclude that A was serious, then there is a binding contract. **Even if A was joking.**
  - B. If on the other had a person in B's position would reasonably understand that A was joking, the court will hold that no contract was created.

VIII. Quasi-Contracts or Contracts Implied in Law.

A. This is not a Contract in the technical.

1. It is a way of rewarding someone for their efforts and
2. to keep someone from getting benefits without paying for them (called "unjust enrichment")
3. The relief sought is called "quantum meruit."

B. Example of Quasi Contract.

1. A doctor who renders emergency service to an injured person.
2. P agrees to work for one year for D for \$120. P works for 9 months and quits. Although P has breached the contract, she may recover for the reasonable value of her service up to that point.

C. Limitation on Quasi Contract. Quasi contracts are not enforceable under three situations which are listed in the text.

1. Where the benefit has been incurred unnecessarily.
2. Where the benefits have been incurred as a result of misconduct
3. Where the benefit has been incurred as a result of negligence.

**IX. Formal vs. Informal Contracts.**

- A. Formal Contracts are contracts that require a special method of creation to be enforceable. It includes:
1. Contracts under Seal. It is a writing with a special seal attached. Not very important today.
  2. Negotiable instruments including checks, notes, drafts and certificates of deposit.
  3. Letters of Credit which are agreements to pay after the invoice has been received.

B. Informal Contracts are all other contracts. They are simple contracts with no special requirements.

**X. Executed versus Executory Contracts.**

- A. Introduction. Contracts are classified according to their stage of performance. Two kinds.
- B. Executed Contract is a contract that has been fully performed.
- C. Executory Contract is a contract that has not been fully performed.

**XI. Valid, Void, Voidable and Unenforceable Contracts.**

- A. Valid Contract is a contract that meets the four elements we mentioned earlier: (Agreement, Capacity, Legality and Consideration).
- B. Void Contract no contract has been performed. **They have no legal effect.**
- C. Voidable Contract is one which one party may at his option either enforce or not enforce.
1. If the contract is voided, both parties are released from it.
  2. If it is ratified, both parties must perform.
- D. Unenforceable Contract is a contract BUT because of certain defenses it can not be enforced. Examples include;
1. A valid contract voided by the Statute of Limitation (i.e. too much time)
  2. Oral Contract that comes under the Statute of Frauds



## CHAPTER 12: AGREEMENT

- I. Introduction. In order to have a binding contract, one party must make an offer and the other party must accept it.
- A. If the four elements of a contract are present it is a valid contract: (consideration, legality, capacity, and an agreement)
- B. All contracts must include 4 items.
1. Identification of Parties
  2. Identification of the Object or Subject Matter
  3. The consideration paid
  4. The time of performance.
- II. Mutual Assent.
- A. Introduction. WE briefly discussed this earlier.
1. When we talk about mutual assent we are referring to offer and acceptance.
- B. Intent. In looking at whether the parties intended to form a contract, use the reasonable person standard.
1. Reasonable Person Standard. A parties words and conduct are held to mean whatever a reasonable person in the offeree's position would think they mean.
- III. Requirements of the Offer.
- A. Introduction. The text lists three requirements for an offer to be effective. They are:
1. There must be an intent to create an offer
  2. The offer must be reasonably certain or definite
  3. The offer must be communicated to the offeree.
- B. Intent to Create An Offer. We've hit the intent aspect a number of times. This goes back to the reasonable person standard.
1. There are several things that are "non-offers."
    - a. Expressions of Opinions. An expression of opinion does not contain a promise.
    - b. Statement of Intentions. An intention to enter into a contract is also not binding. No contract is performed because **a reasonable person would conclude that the party is merely thinking about entering into a contract.**
    - c. Preliminary Negotiations. This also is not binding. One example of this is where Alonzo Mourning tells George Shinn that he will not sign for less than \$5 million a year.
    - d. Advertisements, Catalogues and Circulars.
      - (1) General Rule. The general rule is that an advertisement, mail order catalogue,

price list and circulars **not offers, but merely invitation to negotiate.**

- (A) **Rationale.** The reason is because most merchants don't have unlimited supply of the goods. **Then you might have a breach of contract.**
  - (2) **Exception to the General Rule.** If the advertisement is so definite that it is apparent that there is an offer, then it will be binding.
    - (A) **Example.** If the advertisement said "Out they go Saturday... First Come, First Serve." **This is probably an offer.**
2. **Auctions.** Under Modern law and the UCC an auctioneer who puts an item up for a bid is not making an offer. **He is soliciting offers to bid.**
    - a. **We must distinguish between an auction "with reserve" and "without reserve."**
      - (1) **An Auction With Reserve** means that even after the bidding has started, the auctioneer may withdraw the item.
      - (2) **IF the Auction is "Without Reserve"** the auctioneer is deemed to have made an offer to the highest bidder.
  3. **Agree to Agree** is also not a contract.
  4. **Sham Transaction** is a transaction entered into by two parties to deceive a third person. It is also unenforceable.

### III. Definiteness. An offer must have reasonably definite terms (e.g. definite quantity terms).

#### A. Petersen v. Pilgrim Village.

1. **Facts.** Petersen was employed by Pilgrim Village for nearly 10 years. His contract provided for a stated salary. Petersen also claimed that Pilgrim promised him profit sharing. When Petersen left Pilgrim, Pilgrim owed his \$667. Petersen sued for the \$667 and back profits.
2. **Trial Court.** The trial court awarded Peterson the \$667 plus \$8,000 in back profits.
3. **Pilgrim Appealed** arguing that the parties had never come to any definite agreement as to what amount of profit Petersen would get.
4. **Supreme Court of Wisconsin** agreed with Pilgrim. The court said that the offer must be definite to be binding.
  - a. The court said, in this case, the parties had never come to a definite agreement of what the share of the profits would be.
  - b. The court allowed Petersen a new trial so that he could establish whether he was entitled to an additional sum of money based on the services he had performed.

### IV. Communication.

- #### A. Introduction. The third element of an offer is that there must be a communication of this offer to offeree.
1. **Example.** The text gives a good example. A party offers a reward for his lost dog. Without

knowing about the award, Baldwin returns the dog.

Conclusion. Baldwin gets nothing because he did not know about the award.

V. Termination of the Offer.

A. Introduction. Even though an offer has been made it does not become effective until it is properly accepted. A offer may fail (or be terminated) by actions of either party. Three of the more common methods of terminating an offer are: (1) **Revocation of the offer by the offeror**, (2) **Rejection of the offer by the offeree** and (3) **counteroffer by the offeree**.

B. Revocation of the Offer by the Offeror.

1. General Rule. The general rule is an offer may be revoked by the offeror at any time prior to an acceptance.

2. Ways to Revoke. Revocation can be made by:

a. Direct Revocation. Expressly stating to the offeree that you are revoking.

(1) Revocation is effective when received

b. Indirect Revocation. Indirect revocation occurs when the offeree has knowledge through a reliable source that the offeror has revoked the offer.

c. Revocation to General Public. Revocation is effective to all parties with or without actual knowledge of the revocation, if it is made in a similar manner as the offer

(1) Example. By newspaper.

3. Exception to the General Rule - Irrevocable Offers. Due to the nature of some offers, they may be irrevocable. The text lists three of them.

a. Option Contracts. An offer which has been re-enforced by an option contract is irrevocable during the option. An option contract is created when the offeree pays for the promise to keep the contract open.

(1) Example. Smith offers to sell her home to Allen for \$175,000 stating, "you may have 15 days to accept this offer." Allen responds: "I will give you \$10 if you will hold that offer open for the next 15 days. Smith accepts the \$10 from Allen. Allen has formed an option contract and the offer can not be revoked during the 15 day period.

b. Firm Offer Rule. The firm offer rule is governed by the Uniform Commercial Code. Under this rule, if a merchant makes a written, signed offer to buy or sell goods and states that the offer will be held open, the offer cannot be revoked regardless of lack of consideration.

(1) Merchant Defined. A merchant is a person who deals in goods of the kind involved in the transaction or holds himself out as having knowledge.

(2) Elements Necessary for a Firm Offer. There are four elements necessary for a "firm offer."

(A) The offer must be for the purchase or sale of goods.

- (B) The offer must be made by a merchant dealing in those goods.
  - 8 The offer must be written and signed by the merchant.
  - (D) The offer must give assurance that it will be held open.
- c. **Detrimental Reliance**. An offer which has induced reliance on the part of the promisee is irrevocable. See **legal lines..**

C. Rejection of the Offer by the Offeree.

1. **Introduction**. Another method of terminating the offer is rejection by the offeree.
  - a. If the offer is rejected, it **cannot** be later be accepted.
    - (1) **Any attempts to accept will be a new offer to the original offeror**.
2. **Rejection is Effective When Received by the Offeror**. Rejection is effective when received by the offeror.
3. **Mere Inquiry is not a Rejection**. A mere inquiry about the offer is not a rejection. **Words such as "Is this your best offer" or "Will you take \$X for it" have been construed to be mere inquiries.**

D. Counteroffer by the Offeree. Method 3 for termination is a "counteroffer."

1. **Basic Concept**. In its barest sense, a counteroffer is a rejection of the original offer and at the same time, the making of a new offer.
2. **Mirror Image Rule at Common Law**. At common law, the acceptance had to match the offer. If they didn't match the offer terminated.
  - a. **The UCC Fixed this Problem**. The UCC addressed and came up with a solution for this problem. Under UCC 2-207, a contract is formed if the offeree makes a definite expression of acceptance, even though the terms of the acceptance modify or add to the terms of the original offer.
    - (1) **The new terms become part of the contract unless one of three things happen**.
      - (A) The original offer expressly required acceptance of these terms.
      - (B) The new or changed terms materially alter the contract.
      - (C) The offeror rejects the new or changed terms within a reasonable period of time.
    - (2) **If one or both parties are not merchants, then the contract is formed under the original terms**.

VI. Termination by Operation of Law.

- A. **Introduction**. The text lists four (4) ways in which an offer can be terminated by operation of the law:

B. Lapse of Time. The first method is "**lapse of time**." Because the offeror is the "**master of his offer**," he can set a time limit for acceptance. At the end of this time limit, the offeree's power of acceptance automatically terminates.

1. When does the offer begin to run. When a written offer provides that the power of acceptance will continue for a specified period of time, **that period is usually measured from the time the offer is received, not the time the offer is sent**.

a. Exception. If the offer itself makes clear that the duration of the power of acceptance dates from the sending of the offer, that language must be respected.

b. Example 1. Floyd mails a written offer to Barney dated January 29 which states: "I'll give you eight (8) days in which to accept the offer. Barney receives the letter on February 2. On February 8, Barney sends a telegram accepting. Floyd receives the telegram on February 9. **Is this an effective acceptance?**

Answer. Yes, this is an effective acceptance, because Barney had eight days from February 2 to accept.

c. Example 2. Floyd mails a written offer to Barney dated January 29 which states: "I'll give you eight days from January 29 in which to accept the offer. Barney receives the letter on February 2. On February 8, Barney sends a telegram accepting. Floyd receives the telegram on February 9. **Is this an effective acceptance?**

Answer. No, because Barney must accept by February 7, which is eight days.

2. Delay in Transmission of the Offer. Where the written offer is delayed, and the offer lists a time period for acceptance, the time period starts to run when the offer **would have been received had there been no delay**. **THE OFFEREE MUST KNOW THE OFFER WAS DELAYED OR SHOULD HAVE KNOWN IT WAS DELAYED!!!**

a. Example. Howard sends an offer to Any in a letter dated March 1. The offer states that it will be open for two (2) weeks. Due to the Post Office's failure, Andy does not get the letter until March 15, but the March 2 postmark indicates to Andy that there has been a delay. **When will the offer start to run?**

Answer. Andy's two week notice starts to run on the day he should have received the letter, not on the day he actually received it.

b. Example 2. If the delay had not been apparent through the postmark, the two-week period would begin on the receipt by Andy.

3. No Time for Acceptance Stated. If the offer does not set a time limit for acceptance, the power of acceptance terminates "**at the end of a reasonable time period**."

a. **The court must determine what a reasonable time for acceptance is. In making its decision, the court relies on all circumstances existing when the offer and attempted acceptance are made.**

C. Destruction of the Subject Matter. The second type of termination by operation of law is "**destruction of the subject matter**." As the text states, an offer is automatically terminated if the specific subject matter of the offer is destroyed before the offer is accepted.

D. Death or Incompetence of the Offeror or Offeree.

1. **General Rule.** The general rule is if either the offeree or the offeror dies, or if either loses the legal capacity to enter into the contract (e.g. insane), the power to accept is terminated.
  - a. **This rule applies even if the offeree does not learn of the offeror's death or incapacity until after he has dispatched what he intends as an acceptance.**
  - b. **Exceptions to the General Rule.** If the offer is irrevocable (e.g. option contract or firm offer), the offeree's power to accept it is not terminated by the death or incapacity of either party.
- E. **Supervening Illegality of the Proposed Contract.** If a contract, which would have been legal at the time the offeror proposed it, becomes illegal through a new statute, the power of acceptance is terminated.

VII. Acceptance.

- A. **Introduction.** As the text states an acceptance is a voluntary act (either words or conduct) by the offeree that shows an agreement to the terms of the offer.
- B. **Who May Accept the Offer. The general rule is that an offer may be accepted only by the person in whom the offeror intended to create a power of acceptance.**
  1. **Example.** Al Bundy sends Andy an order for 100 pairs of shoes. Al has always thought Barney was incompetent and therefore refused to purchase shoes from him. Andy sells his business to Barney. Barney ships the shoes to Al without notifying him that he purchased Andy's business. **Is there a valid acceptance?**  
**Answer.** No, Al did not create a power of acceptance in Barney, therefore Barney's acceptance is ineffective and there is not contract.
  2. **Exceptions to the General Rule.** There are two basic exceptions to the general rule.
    - a. The first exception is where the offer is an option contract. Options usually are assignable and transferable to others.
    - b. Additionally, if the offeree is an agent for a principal, the acceptance may be made by the principal and there still will be a valid contract.

X. Unequivocal Acceptance.

- A. **General Rule.** In order for acceptance to be effective, the offeree must at least communicate it to the offeror, in a reasonable, prompt and clear manner.
  1. **Changes or New Conditions not Effective.** If acceptance is subject to new terms or if the original terms were materially altered, then there is no acceptance.
- B. **Be Careful.** Be careful. Language that merely shows dissatisfaction with the terms of the offer may still be effective.
  1. The text gives an illustration of where a buyer accepts the goods but states that "The price seem unfair."
- C. **Even with Additional Language Acceptance still may be effective.** The text gives an example of the sale

of a farm. The purchaser agrees to the price "**provided that he gets marketable title.**" Such title is usually implied in a sales contract, therefore the acceptance is still valid.

XI. Acceptance by Silence.

- A. General Rule. The general rule is that silence can not be an acceptance.
  - 1. Rationale. The policy consideration in effect is that the burden should not be on a person to affirmatively reject an offer.
- B. Exceptions to the General Rule. There are several ways in which silence can act as an effective acceptance:
  - 1. Acceptance of Services. An offeree who silently receives the benefit of services will be held to have accepted a contract for them if he (1) had a reasonable opportunity to reject them and (2) knew or should have known that the provider of the services expected to be compensated for them.
  - 2. Prior Conduct Making Acceptance by Silence Reasonable. Prior course of dealings may also make it reasonable that the offeree's silence be construed as consent.
    - a. Example. The classic example, in which the text illustrates, is where goods are shipped from the supplier to the buyer over some time period. If the buyer previously accepted the goods without consenting, the he must notify the supplier that he doesn't want any more of the goods.
  - 3. Offeree Solicits the Offer. If the offeree solicits the offer, he must speak in order to reject it. **Good example on bottom of page 139.**
- C. Mail Order Items. By statute if you receive merchandise in the mail that you did not order, you don't have to pay for it or return it.
  - 1. NOTE, this does not apply to Columbia House Record deals where you have to accept some kind of offer.

XII. Communication of Acceptance. Acceptance differs depending on whether it is a unilateral or bilateral contract.

- A. Unilateral Contract. A unilateral contract is created when the offeror proposes that the offeree accepts by performing an act, rather than by making a promise.
  - 1. Acceptance is not complete until the act has been substantially performed.
    - a. Example. Andy offers Ernest T. Bass \$200 to clean out his basement. Ernest T. can accept by cleaning out the basement.
  - 2. NOTE, if it is difficult to determine whether the task has been completed or when the offeror requests notice of acceptance, then acceptance must be given.
- B. Bilateral Contract. A bilateral contract consists of an exchange of promises. The offeree must use reasonable efforts to communicate the acceptance to the offeror.
  - 1. Example. George Jefferson writes Archie Bunker and states "I hereby offer to sell you Jefferson Cleaners for \$50,000." Archie composes a letter to George accepting the offer, but he doesn't mail it for several days. During this time period, George revokes the offer. **Is the acceptance**

**effective?**

**Answer.** The acceptance never became effective since Archie never made a reasonably prompt attempt to communicate it to George.

2. **Where Offer Indicates Notification Unnecessary for Acceptance.** Please note, if the offer itself indicates that an acceptance can become effective even before any attempt to communicate it is made, then the acceptance will indeed become immediately effective.

- a. **Example.** Homer sells water-purifying equipment. Homer gives Andy a proposal, which states that it "**becomes a contract when accepted by Andy and Homer's President.**" Andy accepts the offer and signs it. Homer takes the offer back to his president and he promptly signs it. Andy wants to back out of the deal. **Can he?**

**Answer.** No because the proposal indicated that the contract would become effective after it was signed by Andy and Homer's President.

- C. **UCC.** Under the UCC, acceptance is permissible if it is a unilateral or bilateral contract.

### XIII. Mode and Timeliness of Acceptance.

- A. **Introduction.** We now turn to the rules governing the time at which an acceptance becomes effective.
  1. **Key Question.** The underlying question in this area is "**at the moment at which acceptance became effective was the offer still in effect? If it was, then a contract has been performed.**
- A. **General Rule.** The general rule is that acceptance is timely if it is made while the offer is still open.
  1. **Mailbox Rule.** Most court follow the general rule that the acceptance is effective when it is dispatched the offeror. **This rule is called the "mailbox rule."**
    - a. **Example.** On Sept 10, Jim sends Rick a letter offering to sell him wool; Rick receives the letter on Sept 12. Rick mails an acceptance on Sept 13. There is a binding contract and acceptance took place on Sept. 13.
- B. **Offeror may require Specific Method of Acceptance.** Just note that the offeror may require a specific method of acceptance (e.g. by telegraph). If this is required that the offeree must comply if he is reasonably able to do so.
- C. **Where the Mode of Acceptance is not Specified,** the text lists on Page 140, the implied authorized means for acceptance.
- D. **Exception to the Acceptance of Dispatch Rule.** The text list three exceptions to the acceptance on Dispatch Rule.
  1. **Misdirection of Acceptance.** Most courts take the view that even if an unreasonable means of communicating the acceptance is used, or the acceptance is misaddressed, it is still effective when dispatched **if it is received within the time in which a properly dispatched acceptance would normally have arrived.** If it is not received within this time, it is effective only as of the time it is actually received.
  2. **Specific Time Requirement.** The offeror can specifically condition his or her offer on receipt of acceptance by a certain time.
  3. **Offeree Send both Acceptance and Rejection.** Where an offeree sends a rejection first and then

sends an acceptance, the look to see which is received first.

- a. If the rejection is received first, then no contract.
- b. IF the acceptance is received first, then there is a contract.

## **CHAPTER 13: CONSIDERATION**

- I. Introduction. It is often said that for there to be a binding contract, there must be not only "the offer and acceptance", but also something known as **consideration**.
  - A. At the outset, you should be aware that consideration is not required for all contracts. We will look at several situations where consideration is not necessary.
- II. Consideration Defined. Consideration is defined as the value given in return for a promise. In order for a particular contract to be "supported by consideration," the following conditions must be met:
  - A. Something of a legal value must be given in exchange for the promise. This means that the promisee must either do or promised to do something that he is not legally obligated to do, or he must refrain from doing or promises to refrain from doing something that he has a legal right to do.
  - B. There must be a "Bargain for Exchange." A performance or promise is bargained for if **it is sought by the promisor in exchange for his promise and is given by the promisee for that promise**.
    1. Purpose of the Bargain. The principal purpose of the bargain requirement is to prevent the enforcement of promises that are in reality promises to make gifts.
- III. Legal Sufficiency of Consideration. Legal sufficiency is critical to the creation of a contract. To be legally sufficient, consideration must be either detrimental to the promisee or legally beneficial to the promisor.
  - A. Hamer v. Sidway.
    1. Facts. Story promises his nephew \$5,000 if he will refrain from smoking, drinking and gambling until he reaches the age of 21. Nephew agreed and fully performed. Story died without paying nephew.

Holding. The court held that the uncle's promise was "bargain for," and therefore supported by consideration. The court noted that while the uncle may have derived no economic benefit from his nephew's actions, he was clearly attempting to obtain something he regarded as desirable (his nephew's health and morality).

      1. In addition, the court said that even though nephew didn't suffer any economic harm and probably benefitted from his action, his inaction was a kind of "detriment" because he gave up his right to do them.
- IV. Adequacy of Consideration.
  - A. Introduction. There are some situations in which the parties exchange things that do not have the same value. This may be due to (1) party giving a gift, (2) to the fact that one party is more ignorant than the other or (3) to the fact that the parties are mistaken.
    1. **In such situations, as long as the promisee suffers some detriment, no matter how small, the court will not question the amount of consideration given.**
    2. In extreme cases, courts will review the Consideration. Under some situations, the court may review the consideration. The adequacy of consideration will be reviewed if there is evidence of fraud, duress, undue influence, or some other incapacity (e.g. insane or the under age person).
  - B. Equity Courts have Different Rules. Courts of equity (i.e. specific performance or injunctions, etc.), as opposed to courts of law (i.e. monetary) have traditionally been much more willing to examine the

adequacy of consideration for a contract.

1. They will deny relief to a party where they see evidence of an **unfair bargain**.

V. Preexisting Duty Rule.

A. General Rule. The general rule is if a party does or promises to do what he is **already legally obligated** to do, he has not incurred the kind of "detriment" necessary for his performance to constitute consideration.

1. Rationale. A key reason for this rule is that courts want to deter "hold-up" behavior by which one party attempts to take unfair advantage of the other by threatening not to live up to his obligations.

- a. Example. Al Bundy owns a fishing boat which requires a crew of 7. His current crew is under a fixed contract for the entire fishing season. The boat travels from San Francisco to Alaska and back. When the boat arrives in Alaska, the crew refuses to do anymore work unless they are given a substantial increase. Since Al Bundy can't find another crew, he agrees. **When the boat arrives back in San Francisco, is Al required to pay the additional wages?**

Answer. No, the agreement to pay the extra money was without consideration, since by agreeing to work back to San Francisco, the crew were doing only what they were legally obligated to do.

B. Exceptions to the Preexisting Duty Rule. The text lists three exceptions to the preexisting duty rule:

1. Rescission and New Contract. The first exception is rescission and new contract. This occurs when courts become unhappy with the preexisting duty rule. Under this concept, the court holds that the original contract was **rescinded** by the parties and a subsequent new contract was created.

- a. Example. Andy hires Gomer to work as a deputy sheriff for one year at \$90 per week. Gomer gets an offer from the sheriff in Mount Pilot for \$110 per week. Andy agrees to pay Gomer \$100 per week and a new contract is drawn up. Andy fires Gomer two months later. **Can Gomer get the extra \$10.**

Answer. Yes, because the first contract was properly rescinded by mutual consent of both parties. Therefore, the new contract was effective since Andy and Gomer were both exchanging mutual promises.

2. UCC Sale of Goods. In the case of contracts for the sale of goods, the UCC has in effect abolished the "preexisting duty rule." The UCC provides that "**an agreement modifying a contract within this Article (2-209) needs no consideration to be binding.**"

3. Unforeseen difficulties. Relief may be granted when a party runs into unforeseen and substantial difficulties that could not have been anticipated when the contract was formed.

- a. NOTE, this does not include things such as fluctuation in prices.
  - b. Example. Rock contracts with the city to collect garbage. The original contract entitles Rock to \$150,000 per year for his service. New unforeseen housing developments have sprung up which means Rock will have additional work. Rock asks for \$10,000 increase. **If granted is this enforceable?**

**Answer.** Yes the modification is enforceable. The modification seems fair and equitable, it was voluntarily entered into and was motivated by events which were not anticipated at the time the original contract was created.

- VI. **Moral Obligations.** Very briefly, the first sentence sums this up. **"Promises based on moral duty or obligation are not enforceable because moral obligation is not held to be sufficient consideration."**
- VII. **Past Consideration.** Another kind of situation in which the "bargain is missing" is that in which the promise is made in return for detriment previously suffered.
  - A. Where the detriment has been suffered before the promise is made, it is not "bargained for" by the promisor.
  - B. **Example.** Opie worked for Paramount Pictures for 25 years. Paramount passed a resolution that Opie be given the right to retire with a \$10,000 monthly pension. Opie retires but Paramount refuses to pay. **Can Opie require them to pay.**

**Answer.** Maybe!! First, the services performed by Opie prior to the awarding of pension were not consideration for those rights since "past services are not a valid consideration for a promise.

**Promissory Estoppel.** Opie could argue that he relied on the pension to his detriment and therefore the pension should be enforceable.

### VIII. Problem Areas in Business Concerning Consideration.

- A. **Introduction.** I have numerous friends who have started small businesses. Some of them have been quite successful, while others are barely surviving. When we look at contract between businesses, we must be aware of the ever changing nature of the market. In order for businesses to grow and prosper, contracts have to be somewhat more flexible. The text lists three (3) consideration issues which need to be discussed.
- B. **Promises Exchanged for Which Total Performance by the Parties is Uncertain.** Consideration must exist on both sides of the contract. There are many agreements in which one party has become bound but the other has not. Such an agreement is said to be "illusory" and therefore consideration fails and there is no contract.
  - 1. **Example of Illusory Promise.** Andy offers to deliver to Barney at \$2 a bushel as many bushels of wheat as Barney may choose to order within the next 30 days (NOTE, Barney may still order wheat from others). Barney gives Andy an order and Andy refuses to sell at that price (because the price of wheat is now \$3 a bushel). Barney sues for breach. **Can he recover?**

**Answer.** NO, because Barney's promise is illusory. He did not commit himself to do anything. All he said was that "I promise to buy from you whatever I choose to." Therefore no consideration.

**NOTE.** If Barney had said he would only buy from Andy, then there would be consideration.

- 2. **Types of Uncertain Contracts.** Certain situations do, however, exist where the consideration will be found to exist even though the promisor has some discretion or choice.
  - a. **Requirement and Output Contracts.** The first types are **requirement and output contract.**

- (1) A requirement contract is a contract in which the buyer agrees to purchase from the seller exclusively all of a particular good the buyer needs.
  - (2) **An output contract** is a contract in which the seller agrees to sell to the buyer exclusively all of what the seller produces.
  - (3) **UCC**. The UCC states that such contracts are enforceable. **Under the UCC, the following are also required:**
    - (a) The agreement must be made in good faith.
    - (b) The contract may not be unreasonably disproportionate to any stated estimate OR
    - (c) IF there is no stated estimate, it must not be unreasonable to prior output or requirements.
- b. **Exclusive Dealing Contracts-"Best Effort" Rule.** As the text states, an exclusive dealing contract gives a party the sole right to deal in or with the product of the other party.
- (1) **Best Effort Rule.** The key point under such a contract is that the parties are under a duty to use their best efforts to perform under the contract.
- c. **Option to Cancel Clauses**. Some contracts include a clause giving one or both parties the right to cancel the contract before the stated period ends. This is said to be an "**option to Cancel Clause.**"
- (1) **General Rule.** The general rule is that a contract with such a clause is enforceable if the party with the option has given up another opportunity.
  - (2) **Example for Text.** The text gives a good example where in the first situation, there is a contract for \$4,000 per month which is cancelable at anytime. This is said to be an illusory contract.
    - (a) The second example is different in that the other party must be given a 30 day notice. Therefore, the promisor has binded himself for at least 30 additional days after the notice.

## X. Settlement of Claims.

- A. **Introduction.** Long drawn out litigation usually hurts all parties involved, therefore businesses would rather come to an agreeable resolution. The text considers three types of agreements.
- B. **Accord and Satisfaction.** Accord and satisfaction involves a creditor's agreement to accept a payment by his debtor of a lesser sum in satisfaction of the full debt. **The creditor's acceptance of the lesser amount is the "accord." The actual payment is the "satisfaction."**
1. **Distinguish Between Liquidated and Unliquidated Debt.** When evaluating accord and satisfaction, we must distinguish between liquidated and unliquidated debt.
    - a. **Liquidated Debt.** Liquidated debt deals with obligations where the parties are in agreement as **to the amount and liability.**
      - (1) **No Accord and Satisfaction.** Accord and satisfaction do not apply to liquidated debt.

- (a) Rationale. The rationale for this rule is that the debtor already has a preexisting duty to pay this amount and no new consideration is given.
- b. Unliquidated Debt. In contrast, if the debt is said to be unliquidated, a settlement for a lesser amount will be enforceable.
  - (1) Requirements for Unliquidated Debt. A settlement for a lesser amount will be enforceable if either of the following occurs:
    - (A) If the debtor in good faith and not unreasonably disputes his liability on the debt OR
    - (B) If the debtor reasonably and in good faith disputes the amount of the debt.
    - (C) Example. George Jefferson asserts that Archie Bunker owes him \$200 for cleaning bills. Archie claims, reasonably and in good faith, that he owes George only \$100. George agrees to accept \$150 in settlement of the debt. If Archie pays the \$150, then this is enforceable because the total claim was in dispute. **George can not later sue for the \$50 balance.**

C. Creditors' Composition Agreement. A creditors' composition agreement deals with one debtor and two or more creditors.

- 1. In this situation, each creditor will attempt to recover a portion of what he is owed in satisfaction of his full debt. **In return, the debtor will usually agree not to file for bankruptcy.**

D. Release and Covenant Not to Sue.

- 1. Release. A release is the giving up of a right by the person in whom it exists against whom it might be demanded. Releases are valid and enforceable if the following criteria is met:
  - a. The release is secured and given in good faith (i.e. no fraud, duress, etc.)
  - b. The release must be signed in many states.
  - c. Consideration for the release is given.
- 2. Covenant Not to Sue. A covenant not to sue is very similar to a release. The only difference is that a "release" takes effect immediately and a "covenant not to sue" promises not to sue on this claim (usually in return for some contractual obligation).

XI. Promises Enforceable without Consideration.

- A. Introduction. We previously stated that in order for a promise to be enforceable, it must be supported by consideration. There are several situations where a promise will be enforceable without consideration.
- B. Promises to Pay Debts Barred by a Statute of Limitations.
  - 1. General Rule. The text clearly states that Statutes of limitation require creditors to sue within a specified period of time. IF the creditor fails to sue within this period, the debt is said to be barred by statute.

- a. NOTE, a debtor who promises to pay a previously barred debt **STILL makes an enforceable promise, even without new consideration.**
  - b. Scope of Promisor's Duty. A promise to pay a previous debt is held enforceable only to the extent of the promise. Thus if the promisor only promises to pay a portion of the pre-existing debt, only that portion may be collected.
    - (1) Example. The text gives an example where a debtor owes \$5,000 to bank but the statute of limitation has run. When debtor agrees to pay \$2,500 that is what he is limited to.
- C. Promises to Pay Debt Barred by Discharge in Bankruptcy. There is a separate chapter on Bankruptcy which is covered in Business Law. Just remember most courts will enforce a promise to pay a debt discharged in bankruptcy. In order for such a promise to be enforced, it must be **clear and explicit**.
- D. Promissory Estoppel.
- 1. Introduction. The consideration doctrine is designed to enforce promises which are "bargained for." Some promises are enforceable even though there is no bargain for exchange. Promissory estoppel fits in this category.
  - 2. Definition. The text states that promissory estoppel involves a promise given by one party that induces another party to rely on that promise to his detriment.
    - a. Key Elements of Promissory Estoppel. There are two key element to promissory estoppel:
      - (1) First, there should be a promise in which the promisor should reasonably expect the promisee to rely on
      - (2) The promisee relies on the promise to his detriment.
    - b. Example. The 1992 Legal Environment Class promises to donate \$100,000 to the School of Business and Economics. In reliance on the promise, the School of Business and Economics adds two new classrooms. **The test has been met.**
- E. Charitable Subscriptions.
- 1. Introduction. Suppose a person promises to give a specified amount to a particular charity. Such a promise would not ordinarily be enforceable since there was no bargain for exchange. But as in the example above, a large number of courts are filling the void by using "Promissory Estoppel."
    - a. Rationale. The theory is that the charitable institution has relied on the promise and has changed their position based on it (e.g. purchase of land, construction of building, etc.)

## CHAPTER 14: CAPACITY

- I. Introduction. In this chapter, we discuss the concept of "Lack of Capacity." Lack of Capacity refers to the fact that the defendant is either too young to enter a contract, or too mentally incompetent to be held to the contract.
- II. Capacity.
  - A. Introduction. Certain classes of persons have only a limited power to contract. The most important of these classes are infants and the mentally ill. In most instances, these persons can in effect "**have their cake and eat it too.**" That is, if they enter a contract they can enforce it against the other party. But if they wish to escape from the contract, they may do so. In other words, the contract is voidable at their option (**but not at the option of the other party**).
  - B. Minors. Until a person reaches his majority, any contract which he enters into is voidable at his option. The age of majority is a matter of statute, and in most states is now 18.
    1. Example. Opie, a minor agrees to sell Greenacre to Al Bundy. Opie later changes his mind and refuses to go through with the sale. Al Bundy may not enforce the agreement against Opie. But Opie, if he wishes, may enforce it against Al Bundy.
    2. Unavoidable Transactions. Statutes, or case law may prevent a minor from avoiding certain kinds of contractual obligations. Obligations that are held to be unavoidable include **(1) agreement by the minor to support his illegitimate child, (2) bail bond taken out to secure his bail, (3) student loans, (4) medical care and (5) a promise by a minor employee not to use his employer's secret customer lists.**
    3. Disaffirmance. In most states, a minor may avoid the contract even before he reaches majority. He may do so orally, by his conduct or any other way that brings home the fact that the infant does not wish to proceed.
      - a. Conveyance of Land Exception. Where the contract is for a conveyance of land, however, most states do not allow the minor to disaffirm the contract until he has reached majority.
        - (1) Rationale. The rationale is that land contracts should be treated more seriously than other contracts. The theory is that the minor is not mature enough to know whether the contract is in his interest or not until he has reached adulthood.
    4. Ratification. Because a contract made by a minor is not void, but merely voidable at his option, he can choose to enforce it if he wishes. If he chooses to enforce it, he is said to have **ratified the contract. He may not ratify it until he has reached adulthood. RATIFICATION MAY OCCUR IN THREE WAYS:**
      - a. Failure to Make a Timely Disaffirmance. The minor may be held to have ratified the contract by inaction, if he fails to disaffirm it within a reasonable time after reaching his majority.
        - (1) There is no test for determining reasonable time.
      - b. Express Ratification. The contract may be ratified by words, either written or oral.
      - c. Ratification by Conduct. If the former minor actively induces the other party to perform, this conduct may constitute a ratification.

5. **Duty of Restoration.** In a large number of cases, the issue of infancy and disaffirmance arise only when a suit is brought against the minor because he has not gone through with the contract.
  - a. **General Rule.** The general rule is that the non-minor will not be allowed to recover profits he would have made under the contract or any other contract damages.
    - (1) He will have a limited right to require the minor to return the goods or other value if the minor still has them.
    - (2) If the minor has disposed of the goods or destroyed them, he generally has no obligation to pay for their reasonable value.
  - b. **Minors' Rights.** When a minor disaffirms, all property that he or she has transferred to the adult as consideration may be recovered even if it is in the hands of a third party. **THE ONLY EXCEPTION IS A BFP FOR VALUE.**
6. **The Effect of a Minor's Misrepresentation of Age.** If the minor willfully lies about his age, to induce the other party to contract with him, courts differ as to the effect of such misrepresentation.
  - a. **First Instance.** In some states misrepresentation of age is enough to prohibit disaffirmance of the contract.
  - b. **Second Instance.** Some states prohibit disaffirmance unless the minor can return the consideration received or pay the reasonable value for the goods.
  - c. **Third Instance.** Some states allow the other party to bring an independent action in tort for misrepresentation against the infant.
7. **Liabilities for Necessaries.** **Briefly**, Virtually all jurisdictions allow a person who supplies "necessaries" to a minor to recover the reasonable value (not sales price) of those necessities. Food, clothing and shelter are generally considered necessities.
8. **Miscellaneous Issues.** The text goes into a little more detail on some items we have already discussed.
  - a. **Insurance and Loans.** Generally insurance and loans are not necessities.
    - (1) Depending on the jurisdiction the court may allow a minor to disaffirm a contract for insurance. In other jurisdictions, the court may prohibit disaffirmance especially if the minor contracts for medical or life insurance.
    - (2) If money is lent to purchase necessities and the minor does in fact purchase necessities, then the majority of jurisdiction will obligate him to repay the loan.
  - b. **Ratification.** We have already discussed ratification. The key points again are:
    - (1) The person must have reached the age of majority in order to ratify the contract.
    - (2) Ratification may be done by **(1) failure to make a timely disaffirmance, (2) express ratification, and (3) ratification by conduct (i.e. implied ratification).**
9. **Non-Voidable Contracts and Torts.**

- a. **Contracts**. Again, this chapter starts repeating itself. Just remember there are certain types of contract which are non-voidable. They include (1) loans for education, (2) medical care, (3) bail bond taken out to secure bail, and (4) contracts to enlist in the armed services.
- b. **Torts**. The general rule is that minors are liable for their torts. Age, mental capacity and maturity are factors which are used to evaluate the degree of liability.
  - (1) **Merging Torts and Breach of Contract**. Generally, a breach of contract is not treated as a tort. When the breach and the tort are independent, courts may allow recovery for the tort.
  - (A) **Example**. The text give an example of a minor renting a power boat. The minor may disaffirm the contract, but if he negligently misuses the boat, he may be held under a tort action. **This is particularly true if the minor injures a third party.**

#### 10. Parents' Liability.

- a. **General Rule**. The general rule is that parents are not liable for the contracts made by their minor children. **This is why parents usually cosign for the children.**
  - 1. **Exception to the General Rule**. The text states one major exception. Parents who have neglected the care of their minor child can be held liable for the reasonable value of necessities supplied to the child.
- b. **One Additional Comment**. In some instances, parents may be held liable for the children's torts. The parent must know of the child propensity to commit a wrongful act and the parent must have the ability to control the act.

C. **Intoxicated Persons**. If a person is so intoxicated that he doesn't really understand what he is contracting for, he will have the power to avoid the contract.

- 1. **Comprehension will not Void Contract**. If, despite intoxication, the person understands the legal consequences of his act, the contract will still be enforceable.
- 2. **Avoidance or Ratification**. As stated earlier, a person's intoxication may be grounds to disaffirm a contract.
  - a. **Full Restitution Required**. If the contract is disaffirmed, the majority of the courts require the intoxicated person to return all consideration received.
  - b. **Ratification**. On the other hand, once a person becomes sober he may ratify the contract.

D. **Mentally Incompetent Persons**. Mental incompetents, like minors, are treated as having limited contractual capacity.

- 1. **Definition**. A person is mentally incompetent if he doesn't understand the contract, or if he understands it, but acts irrationally, and the other person knows he is acting irrationally.
- 2. **Ratification**. Contracts made by an incompetent, like those made by a minor, are voidable, not void. Thus if the maker regains his mental capacity, or has a guardian appointed for him, the contract may be ratified. **The other party never has the power of avoidance.**

3. Contract May be Valid. A person who is incompetent in one aspect may still be competent to enter into a contract. If this is the case, the contract will be valid.
  4. Only a Lucid Moment Required. If a person has a lucid moment during his incapacity, he may enter into a contract and the contract would be valid.
- E. Aliens. In general legal aliens have the right to enter into contracts.

## **CHAPTER 15: GENUINENESS OF ASSENT**

I. **Genuineness of Assent.** A contract may be uncertain if the parties have not genuinely assented to its terms. Genuineness of Assent may be lacking because of mistakes, misrepresentation, undue influence, or duress.

A. **Mistakes.** The text makes one very important distinction. It distinguishes between a mistake in value and a mistake as to fact. Usually, only a mistake as to fact is voidable. **Before one can determine whether a party may avoid the contract on the grounds of mistake, one must first determine whether the mistake was made by one party (traditionally called a unilateral mistake) or whether it was caused by both parties (called a "mutual or bilateral mistake).**

B. **Unilateral Mistakes.**

1. **General Definition.** As the text states, a unilateral mistake occurs when one contracting party makes a mistake as to some material fact.

2. **General Rule.** The general rule is where the mistake is made by only one party, court often hold that no relief can be granted to that party. **There are two exceptions to the general rule.**

a. **Exception #1.** First, the rule is not applied if the other party knew or had reason to know of the mistake.

b. **Exception #2.** The second exception where there has been a mathematical mistake in addition, subtraction, division or multiplication. **Courts are much less willing to all rescission where the error is a mistake in judgment rather than math.**

1. **Example.** For example, if the bidder on a construction job makes a mistake in estimating the amount of labor required to do the work, he will not be entitled to avoid the contract.

c. **Text's Example.** The text gives you an example which summarizes all of these points. In this example the bidder's secretary left out the amount for the pipe fitting.

(1) If the prime was not aware of the mistake and couldn't have reasonably aware of it (i.e. it was within range of other bids), then the contract will be enforced.

(2) If it could be shown that the prime should have been put on notice that there was a mistake (e.g. the bid was extremely low), then the contract will not be enforceable.

C. **Mutual Mistake.**

1. **General Rule.** A mutual mistake is one where the mistake was made by both parties. In order to avoid a contract for mutual mistake, three requirements must be met:

a. **Basic Assumption.** The mistake must concern a basic assumption on which the contract was made.

b. **Material Effect.** The mistake must have a material effect on the "agreed exchange of performance" and

c. **Risk of Mistake.** The party seeking to avoid the contract must not bear the risk of the mistake.

2. Boyd v. Atena Life.

- a. Facts. This is a case where the couple (Mr. and Mrs. Boyd) were separated. Mrs. Boyd was the beneficiary of an insurance policy that paid death and disability benefits in the event of Mr. Boyd's death or disability.
  - (1) Mrs. Boyd continued to keep the policy on Mr. Boyd even though they were separated and she did not know where he was.
  - (2) Mrs. Boyd and Atena agreed to surrender of the policy in exchange for its cash surrender value.
  - (3) It was later discovered that Mr. Boyd was disabled. The disability occurred prior to the agreement between Mrs. Boyd and Aetna.
  - (4) Mrs. Boyd claimed the full death and disability benefits under the theory that her agreement with Aetna was a mutual mistake of the same material fact.
- b. Court's Decision. The court agreed with Mrs. Boyd. The court said both parties had made a mistake concerning the health of Mr. Boyd.

3. Mutual Mistake in Value.

- a. General Rule. The general rule is that a mistake in value is not sufficient to void a contract.
  - (1) Rationale. The rationale is that each party is considered to have assumed the risk that the value may change.
- b. Text's Example. The text gives an example where Chin purchased a violin from Weiler for \$250. When the purchase was made, neither party knew that it was a Stradivarius, worth thousands of dollars.
  - (1) This was a mistake in value and therefore the contract could not be rescinded.
- c. **BE CAREFUL.** If the value was based on a material fact in which each party believed to be true, then the contract may be rescinded.
  - (1) Text's Example. Again, the text gives an example of two farmers who negotiated the sale and purchase of a cow. Both parties believed that the cow could not bear calves, therefore the price was substantially lower. **This is a situation where rescission may take place.**

D. Misrepresentation - Fraud.

1. In General. The text states that fraudulent misrepresentation refers to a misrepresentation that is made with the knowledge that it is false and with the intent to mislead another.
  - (a) Remedies. When such a statement is made, the innocent party has several options:
    - (1) He can avoid the contract.
    - (2) He can enforce the contract and seek damages for any injuries resulting from the fraud.

2. Elements of Fraud. The text list four elements of fraud:
  - a. A misrepresentation of a material fact has occurred.
  - b. There is intent to deceive.
  - c. The innocent party has justifiably relied on the misrepresentation.
  - d. The innocent party has been injured.
3. Element #1. The first element is to show that a misrepresentation of a material fact has occurred.  
A couple of key points
  - (1) First, the misrepresentation must be one of **fact not opinion**. **Statements of opinion are generally not subject to a claim of fraud.**
  - (2) The misrepresentation may be by words or conduct. **Concealment is one form of misrepresentation by conduct.**
    - (a) The text list an example of where a car was sold as new, but it really was a DEMO with its miles rolled back. **Chrysler did something similar when it was test driving its cars.**
3. Misrepresentation of Law.
  - a. In General. It is generally held that a "statement of law" can not constitute misrepresentation.
    - (1) Rationale. The rationale is that people are assumed to know state and local law where they reside. Also a layperson should not rely on another layperson about points of law.
  - b. Exception to the General Rule. The courts are willing to make some exceptions:
    1. Exception #1. One exception is when the misrepresenting party is in a professional which generally requires greater knowledge of the law than the average person would have.
    2. Exception #2. This is not in your text, but some courts will allow you to avoid a contract where a statement of law is really a statement of fact.
      - (a) Example. For example "this house conforms to all building and zoning requirements."
4. Silence.
  - a. In General. Most misrepresentations are affirmative statements such as "This car has less than 50,000 miles." In some situation, the sellers merely fails to disclose information to the buyer.
  - b. General Rule. The general rule is failure to disclose information will not be constitute misrepresentation. Therefore, a contract will not be set aside because certain pertinent information is not volunteered.

- c. Exceptions to the General Rule. As always, there are exceptions to the general rule.
    - (1) Serious Defect Known to the Seller. If a serious defect or potential problem is known to the seller but the buyer could not reasonably find it or suspect it, then the seller must disclose.
    - (2) Half Truths. If part of the truth is told, but another portion is not, so as to create an overall misleading impression, this will constitute misrepresentation.
    - (3) Positive Concealment. If the party has taken positive action to conceal the truth, this will constitute misrepresentation even though it is not verbal.
    - (4) Fiduciary Relationship. If the parties have some kind of fiduciary relationship so that one believes that the other is looking out for his interest, there will be a duty to disclose material facts.
5. Knowledge of the False Representation - Intent to Deceive. **The second element of fraud is intent to deceive.** Intent to deceive involves a state of mind commonly referred to as "scienter or guilty knowledge."
- a. What Constitutes Scienter. There are three ways in which a person may be found guilty of scienter.
    - (1) he knew or believed that he was not telling the truth; OR
    - (2) he did not have the confidence in the accuracy of his statement that he stated; OR
    - (3) he knew that he did not have the grounds for his statement that he stated.
  - b. As the text states, proof of intent is not necessary if the circumstances surrounding a transaction are such that one can infer intent.
6. Reliance of the Misrepresentation. **The third element of fraud is justifiable reliance on the misrepresentation.**
- a. Justifiable Reliance. One of the key aspects of this element is that the plaintiff must show that his reliance was justifiable.
    - (1) AS the text states, reliance is not justified if the innocent party knows the true facts or relies on an untrue statement that is obvious.
7. Injury to the Innocent Party. The last element of fraud is injury to the innocent party. A couple of key comments:
- a. Rescission or Cancellation of Contract. In a large number of cases, if the innocent party merely wants to cancel the contract, showing injury has been held to be unnecessary.
  - b. Damage Recovery. In the case of damages, once the innocent party has met the other requirements he may recover damages. **There are two primary measures of damages.**
    - (1) Reliance Damages. The first one is called "reliance measure." It attempts to put

the innocent party in the position he was in before the misrepresentation.

- (A) Example. Al Bundy induces Marcie to buy a car for \$10,000 even though it is only worth \$7,000. If Marcie can prove, fraud, her reliance damage is \$3,000 (i.e. 10,000-7,000).

- (2) Benefit of the Bargain Measure or Expectation. The second measure is called "expectation damages or benefit of the bargain." Under this approach, the innocent party seeks to be put in the position he would have been in had the misrepresented facts been true.

- a. Example. Al Bundy induces Marcie to buy a car for \$10,000 by telling her the car is worth \$15,000. The car is only worth \$7,000. In this situation, Marcie may recover \$8,000. **This reflects difference between what Al said the car was worth (i.e. \$15,000) and what the car is actually worth (i.e. \$7,000).**

- c. What about Punitive Damages. The texts also states that in some instances, the court will award "punitive damages." These are damages of and above actual damages.

- (1) Rationale. Such damages are based on "public policy" of actually punishing the wrongdoers.

8. Innocent Misrepresentation. The texts gives a good summary of innocent misrepresentation.

- a. In effect, if a person makes a statement that he or she believes to be true but that actually misrepresents material facts, the is not guilty of fraud.

- b. The usual recourse is to rescind the contract. **This is usually looked at as a mistake.**

9. Negligent Misrepresentation. Most American courts allow recovery for negligent misrepresentation.

- a. Definition. An action will constitute negligent misrepresentation if the party fails to exercise reasonable care in uncovering or disclosing the fact or does not use the skill and competence that his business or profession requires.

E. Undue Influence.

1. In General. AS the text states, undue influence can arise in many situations

- a. Proof. Undue influence may be established by showing that the victim was subjected to "over persuasive pressure" by the other party.

F. Duress.

1. General Rule. The general rule is that the defense of duress is available if the defendant can show that he was unfairly coerced into entering a contract or modifying it.
2. Duress consists of any "**wrongful**" act or threat which overcomes the free will of a party. **This is critical because a threat to exercise a legal right is not ordinarily illegal and usually does not constitute duress.**
3. Ways of Committing Duress. There are generally four categories of duress.

- a. Violence or threats of it.
- b. Imprisonment or threats of it.
- c. Wrongful taking or keeping of a party's property or threats to do so.
- d. Threats to breach a contract or commit other wrongful acts.

G. Adhesion Contracts and Unconscionability. The text also discusses adhesion contracts and unconscionability.

1. In General. The general rule is that a party is bound to the terms of a contract which he signs. **If the contract is grossly unfair, the court may rescind it. THE TWO PRIMARY SITUATIONS ARE (1) ADHESION CONTRACTS AND (2) CONTRACTS WHICH ARE UNCONSCIONABLE.**
2. Adhesion Contracts. An adhesion contract usually does not include bargaining terms, **but rather a "take it or leave it approach."**
  - a. Superior and Weaker Party Involved. Adhesion contracts usually include a party in a superior bargaining position and a party in a much weaker position who really needs the goods.
  - b. Contract include Fine Print. AS the text states, adhesion contracts usually contain fine print disclaiming the maker's liability for everything imaginable.
  - c. Proof Required for Avoidance. In order to avoid enforcement, the victim must show that he had substantial unequal bargaining position and that enforcement would be unfair or oppressive.
    - (1) Unconscionable. If the victim is successful in his proof the contract will be said to be unconscionable and will not be enforced. Since the consumer has no choice, the contract is contrary to public policy.
      - (A) Other Unconscionable Contracts. Another example of an unconscionable contract is a contract which is said to "**shock the conscience**" of the court.
        - (i) Example. There is a very good example in Chapter 11. Under this example, a welfare recipient with a 4th grade education signs an agreement to purchase a refrigerator costing \$2,000, payable in installments over two years. This refrigerator usually sell for \$400. **This type of contract has been held to be unconscionable.**

## **CHAPTER 16: LEGALITY AND STATUTE OF FRAUDS**

I. Introduction. This chapter deals with the legality or illegality of a contract. Illegality is a defense based upon the fact that the subject matter of the proposed contract is **unlawful**.

II. Contracts Contrary to Statute.

A. In General. As the text states, statutes proscribe what terms of contracts are legal and which are illegal.

B. Usury.

1. In General. Every state has its own usury statute. Under these statutes, the state sets the maximum rates of interest that can be charged for different types of transactions. **If a lender makes a loan above this rate, he is guilty of "usury."**

Maximum Rate Varies. The maximum rate of interest varies from state to state.

a. Usually Applies to Individuals Only. The usury laws of most state apply only to loans made to individuals, not to those made to corporations.

2. Distinguish between Maximum Rate of Interest and Legal Rate of Interest or the Judgment Rate of Interest. We must distinguish between the Maximum Rate of Interest and the Legal Rate of Interest or the Judgment Rate of Interest.

a. Maximum Rate. Self explanatory

b. Legal Rate of Interest. The legal rate of interest is a rate fixed by statute when the parties to a contract intend for interest to be paid, **but the rate is not specified.**

c. Judgment Rate of Interest. A judgment rate of interest is used when damages are awarded. It is the rate applied to judgments from the moment the judgment is awarded by a court until the judgment is paid.

3. Things are than the Actual Rate included in the Calculation. Many states require that "add-on" fees be included in the calculation of the maximum interest rate. **The text gives a good example on page 185.**

a. Example. 100 in yearly interest was charged to borrow. Therefore the rate would be 10%. But if the company required you to carry life insurance and pay services charges this would increase the rate (e.g. assuming \$50 a year for these services, the rate goes from 10% to 15%).

4. Exceptions to Usury. There are several exceptions to usury statutes.

a. Corporate Loans. As mentioned early, many states exempt corporate loans from usury laws.

b. Special Situation Rates. Most states have adopted special statutes allowing for higher rates to be charged on certain small loans.

(1) Rationale. The rationale is that this will keep the individuals away from loan sharking activities.

C. Gambling.

1. In General. Contracts involving wagering are generally held illegal and unenforceable.
2. Definition. Gambling is a scheme whereby one person distributes money to another in a game of chance. If the person wins, the value of the property given up will be greatly enhance because of the risk involved.
  - a. Look at the State Law. The legality of a particular wager will depend on whether the underlying wager is a crime in that state.
3. Future Contracts. Future contracts are a form of legalized gambling. Under this type of contract, a person is buying or selling commodities in hope that the future price of those commodities will be favorable to him. **This has been held to be legal.**

D. Sabbath Laws. There are some statutes that prohibit the formation of contracts on Sunday. **These are called Sabbath Laws.**

1. State Law Varies. As the text states, some States prohibit formation of any contracts on Sunday, while others may limit the sale of certain merchandise. **These are called "blue laws."**
2. Exceptions for Necessaries. Some states allow exceptions for necessities such as food and charity work.

E. Licensing Statutes.

1. In General. All states require licenses to practice in certain occupations.
2. Requirements. Some licenses require a massive amount of study and training while others merely require good moral character.
3. Contracts with Unlicensed Professionals. When a person enters into a contract with an Unlicensed professional, the statutes determine whether that contract is enforceable. **If the statute doesn't state whether it will be enforceable, look to the underlying purpose of the licensing requirement.**
  - a. Purpose to Raise Revenue. If the purpose of the license is merely to raise revenue, then a contract with that person will be enforceable even if he or she is not licensed.
  - b. Purpose is to Protect the Public. If the purpose of the license is to protect the public, then such a contract will usually not be enforceable.

F. Contracts to Commit a Crime. The general rule is any contract to commit a crime violates the statutes and is not enforceable.

III. Contracts Contrary to Public Policy.

- A. In General. Some contracts are not enforceable because they have an adverse impact on society. As the text states these contracts are **contrary to public policy**.
- B. Contracts in Restraint of Trade.
  1. Basic Assumption. One of the basic assumptions of the US Economy is individuals are allowed to buy and sell as they please. Competition in theory is good for a free market.

- a. Restraint of Trade is not. Restraint of trade is not. Contracts in restraint of trade usually antitrust statutes.
  - b. Per Se Illegal. Some contracts are said to be "per se" illegal. This means they will be held to be illegal even if they don't violate restraint of trade. (**Possible example is price fixing - use only if asked**)
  - c. Exceptions to the Restraint of Trade Doctrine. In some situations, contracts which are reasonable will not be a restraint on trade.
2. Covenants not to Compete. Covenants not to compete is a classic form of restraint on trade which is not illegal.
- a. Two Major Situations. There are two main situations in which a person can promise not to compete with another person:
    - (1) Sale of a Business. The first situation is as part of the sale of a business to another party.
      - (A) General Requirement. If a seller of a business is selling its "**goodwill**" (**or reputation**) as well as its physical assets, his promise not to compete in the same business to the purchaser will be upheld if it **IS NOT UNREASONABLY BROAD EITHER GEOGRAPHICALLY OR IN DURATION**.
        - (i) Geographic Area. If the geographical area specified is substantially greater than the area in which the parties are currently operating or potential for expansion, it will be too broad.
        - (ii) Duration of Time. Also, if it is for a length of time longer than the seller's goodwill is likely to continue, then it will be invalid.
    - (3) Employment Contracts. The second situation deals with employment contracts.
      - (A) Requirement. An employee will often be required, as part of his employment contract, to sign an agreement in which he promises not to compete with his employer if he leaves the employer.
        - (i) Usually okay. Courts will permit this type of covenant if it is designed to accomplish one of the following two purposes:
          - (I) Trade Secrets. To prevent the employee from disclosing or using confidential information or trade secrets gained from the employer; or
          - (II) Taking of Good Will. To prevent the employee from taking advantage of his contracts with the employer's customers by approaching them and trying to steal them from the employer.

### C. Exculpatory Contracts.

1. In General. There are a number of situations in which one party may contract to reimburse or

hold harmless another from tort or contract liability. The legality of such contracts depends upon who the victim is, and on the kind of tort or contract liability involved. **Such a clause in a contract is called "exculpatory."**

2. General Rules. A couple of general features of exculpatory clauses.
  - a. Release by Potential Defendant. If A promises B that A will not hold B liable for torts which B may commit in future, the agreement will be held to be illegal if B commits an intentional tort against A.
    - (1) Negligence Okay. If the tort was due to negligence, then this will be valid.
  - b. Indemnification for Torts and Crime. If A promises to reimburse B for any consequences that occurs in performing a crime, the contract will be unenforceable, **unless B acts in good faith and without knowledge that the act is illegal.**

D. Adhesion Contracts and Unconscionability. **We have already discussed this concept in Chapter 10.**

E. Discriminatory Contracts. As the text states, a contract in which a party promises to discriminate in terms of color, race, religion, national origin, or sex is contrary to public policy and is therefore **unenforceable**.

1. Example. The text gives one example of a property owner promising not to sell to a particular race. This type of contract would be invalidated and unenforceable.

F. Contracts Injuring Public Service. Contracts which interfere with a public officer's duties are contrary to public policy and may be unenforceable.

1. Lobbying Groups. The text focuses on actions of lobbying groups. **Believe me, they are powerful and have money to back them up (e.g. Utility Lobbyist, Nursing Assoc., AICPA lobbyist, Environmental lobbyist).**

- a. Providing of Factual Information. If the lobbying group is merely providing factual information to support its cause, then this is not illegal.
  - b. Paying off Legislators. The problem comes into play when those lobbyists try to buy votes or influence legislative decisions by giving congressmen money. **This is illegal if the contribution is tied to some future promise.**

2. Conflict of Interest. The text also briefly discusses public official and potential conflicts of interest.

- a. How it Arises. This would typically arise where the public official's private business would benefit from his elected office.
  - b. What's the Remedy. To remedy this situation, public officials are required to either (1) give up their interest in their private business or (2) take no part in the day to day operations of the company. **TERRY SANFORD IS A KEY EXAMPLE.**

G. Agreements Obstructing Legal Process. The text states that an agreement that is intended to delay, prevent, or obstruct the legal process is illegal.

1. Example. The text gives a couple of good examples.
  - a. An agreement to pay some specified amount if a criminal prosecution is terminated is

- illegal.
- b. Agreements to suppress evidence in a legal proceeding or to commit fraud upon a court are illegal.
  - c. Tampering with a jury by offering juror money in exchange for their votes is illegal.
2. **Witnesses**. Most witnesses are paid a flat fee to testify. **This does not include "expert" witnesses. Their fees are based on the market.**
  3. **Prosecutions**. A promise to refrain from prosecuting a criminal in return for a reward is also enforceable, as well as a reward given under the threat of arrest or prosecution.

### **III. Effect of Illegality.**

- A. **General Rule**. As a general rule, neither party to an illegal contract may enforce it. This is the case even where only one party's performance is illegal
  - 1. **Example**. If Barney promises to paint Floyd's house in return for Floyd setting fire to Andy's squad car, this would not be enforceable.
    - a. Note, even if Barney actually paints Floyd's house, Floyd can not be made to set fire to Andy's squad car.
- B. **Exceptions to the General Rule**. As always, there are exceptions to the general rule.
  - 1. **Ignorance of Fact**. If one of the parties to an illegal bargain is justifiably unaware of the facts which make the contract illegal, he may be allowed to recover damages for breach of contract.
    - a. **Example from Text**. The text gives you a good illustration of the point. In this example Driver A contracts to move cargo, unaware that the cargo is illegal. **He may recover the contract price for moving the goods in this case.**
  - 2. **Members of a Protected Class**. Some statutes are designed to protect one party, and make only the other party's conduct criminal.
    - a. Where such a statute is involved, the person for whose protection the statute is designed may enforce the contract or sue for its breach.
    - b. **Example**. One of the primary set of laws used in this area is the "**Blue Sky**" laws. These laws are designed to protect investors from shady investment schemes.
  - 3. **Withdrawal from Illegal Agreement**. The text also refers to withdrawal of illegal agreements. If the illegal agreement has been only partly performed and the illegal part of the bargain has not yet been performed, the party rendering performance can withdraw from the bargain.
    - a. **Example**. The text illustrates this point. Two individuals make an illegal bet on a fight. The money is given to a third party to hold until the fight is over.
 

When the money was given to the third party, each party had performed part of the agreement.

But the illegal part will occur will only occur when the money is paid to the winner.

Before the payment is paid, either party may withdraw.

4. Fraud, Duress or Undue Influence. We have already discussed these concepts.

C. Severable, or Divisible Contracts.

1. Severable Contract Defined. The text defines a severable contract a contract which consists of distinct parts which can be performed separately with separate consideration.
2. General Rule. The general rule is that if a divisible part of a contract could be performed on both sides without violating public policy, the court will enforce the divisible portion.
3. Key Requirements. There are a few key requirements in order for this to be actionable.
  - a. Divisibility. First, the contract itself must indeed be divisible. That is, it must be possible to separate the parties performance.
  - b. Not Affect Entire Agreement. The second requirement is that the illegality must not affect the entire agreement.
4. FINAL POINT. This is not in the text but it is also important. **If a contract is legal at the time it is entered into, but due to subsequent legislative action becomes illegal before its performance, the contract is treated as being "impossible to perform."**
  - a. Both parties are discharged and returned as much as possible to the position they were in prior to the contract.
  - b. Example. Seller in North Carolina contracts to sell equipment to Buyer in Iran. Buyer makes a \$10,000. The US breaks off all diplomatic relations with Iran and passes legislation restricting all sells to that country. **In this situation, buyer could recover his \$10,000 but the seller could not be made to comply with the contract terms.**

IV. Statute of Frauds

- A. Introduction. The general rule is that an oral contract is enforceable. The rules requiring certain kinds of contracts to be in writing is known as the **A Statute of Frauds.**
- B. Categories of Contracts. There are five categories of contracts which fall within the Statute of Frauds and must there be in writing.

1. A contract for the sale of land
2. A contract that is not to be performed within one year from its making
3. Suretyship Contracts (or commonly called ACollateral Promises). This is a contract one person answers for the debt or duty of another.
4. A contract made upon consideration of marriage
5. Contracts for the sale of goods priced at \$500 or more

C. Contracts Involving Interest in Land. A promise to buy or transfer an interest in land is within the Statute of Frauds, therefore it must be in writing.

1. Promise to Pay. If the promise is not in writing, it is not enforceable in two respects:
  - a. First, you can't enforce the promise to transfer the property.
  - b. Second, you can't enforce the promise to pay for the property.
2. Other Interests in Land. The text lists several other interests in land which fall within the Statute of Frauds:
  - a. Life Estate. As the text states, a life estate is an ownership interest in land that lasts for a person's lifetime. **The life tenant may live on the land and use it for as long as he/she lives.**
    - (1) At their death. The interest reverts to another party.
    - (2) Example of a Life Estate. A To Ulysses Taylor for life, then to my heirs.
  - b. Mortgages. A mortgage is merely security or collateral used when you borrow money. The most common kind of mortgage is a real estate mortgage.
  - c. Easements. An easement is a legal right to the use of land without owning it. The most common kinds are the rights granted to utility companies to run utility lines through another's property.
    - (1) Expressed vs. Implied. An easement may be expressed or implied.
      - (A) Expressed Easement. An expressed easement is created when the land owner expressly agrees to allow another to use his property.
      - (B) Implied Easement. An implied easement can be created by past conduct of the parties. **One example is where one farmer uses land of another to get to his property.**
  - d. Leases. A lease is a transfer without title of real property for a certain period of time. Leases are generally held to be interests in land.
    - (1) Exception. However, in most states oral leases are enforceable if its duration is one year or less.

D. The One-Year Rule.

1. **General Rule.** Generally, a contract that cannot, by its terms, be performed within one year from the date it was formed, must be in writing to be enforceable.
2. **Performance Must be Impossible within the One-year Period.** The one-year rule provision applies only if complete performance is **Aimpossible** within one year after the making of the contract.
  - a. **Example.** Bank agrees to loan a consulting company money as long as it will remain in business. **Since the consulting firm could go out of business within one year, this is not subject to the Statute of Frauds.**
  - b. **Example.** Suppose, the bank had agreed to lend money for two years with no acceleration clause. **In this case, it would fall within the Statute of Frauds because the contract could not be completed within one year.**
3. **Time Runs from the Making of the Contract.** The one year period is measured from the **Atime of execution of the contract, not the time it will take the parties to perform.**
  - a. **Example.** On January 10, 1997, Andy promises to make a one-hour television appearance on February 1, 1998. **The contract is within the Statute of Frauds and must be in writing.**
  - b. **Example.** A college professor is hired on March 1 for a nine month term which will run from September 1 through 31. **This contract is within the Statute of Frauds because the contract can=t be completed within one year (i.e. March 1 through May 31 not Sept 1 through May 31).**

#### E. Collateral Promises/Suretyship Contracts.

1. **General Rule.** A promise to pay the debt or default of another is within the Statute of Frauds and is therefore unenforceable unless it is in writing.
  - a. **Purpose of the Rule.** This rule is designed to make sure that this kind of contract is not enforced unless there is sufficient evidence of its existence.
    - (1) **Precautionary Purpose.** This rule also serves as a precautionary measure. By requiring the contract to be in writing, it makes the surety take his time and think about what he is doing.
2. **Types of Collateral Promises.**
  - a. **Promises by Executor of an Estate to Pay Personally the debts of the Estate.** In summary, if the executor promises that he will pay any outstanding debt of the deceased, then it must be in writing.
  - b. **Promises to Answer for the Debt or Duty of Another.** There are 3 elements which must be present in order for this to come into play:
    - (1) There must be at least 3 parties involved.
    - (2) There must be at least 2 promises (i.e. primary promise and secondary promise)
    - (3) The secondary promise is to pay a debt or fulfill a duty only if the first promisor

fails to do so.

(A) **Guarantor=s Liability is Secondary.** Please note that the guarantor=s liability is secondary. The guarantor becomes liable only if the debtor is unable or unwilling to pay.

(B) **Example.** David wants to borrow \$10,000 from Bancroft. His parents contract with Bancroft stating that they will pay if David can=t.

**NOTE**, if David=s parents had merely said that they would pay, then they are primarily liable for the loan.

3. The AMain Purpose Rule@ Exception.

- a. **In General.** In the prior situations, it is clear that the promisor=s main purpose in making the promise was to benefit another.
- b. **Rule.** If the facts are such that the chief purpose in making the promise is to further the promisor=s interest, then this does not fall under the Statute of Frauds (therefore no writing is required). **This is called the Amain purpose rule.@**
- c. **Example.** Oswald contracts with Machine Manufacturing to build custom machines. Oswald tells a third party that if they continue to supply Machine with materials, Oswald will guarantee payment. **In this situation, Oswald=s main purpose is to fill his order, therefore an oral contract would be sufficient.**

F. Promises Made in Consideration of Marriage.

1. **Rule.** The general rule is a promise for which the consideration of marriage or a promise of marriage is within the Statute of Frauds
2. Applicable to Prenuptial and Separation Agreements.

G. Contracts for the Sale of Goods under the UCC.

1. **General Rule as to Goods.** Section 2-201 of the UCC provides that Aa contract for the sale of goods for the price of \$500 or more must be in writing.**@**
  - a. **Requirements are lenient.** Only 2 elements must be present to fulfill the writing requirement:
    - (1) **Quantity Terms.** The quantity to be bought or sold must be stated. **Even if the amount was not accurately stated, it still will be enforceable up to the amount stated.**
    - (2) **Signing Requirement.** The writing must also be signed by the person who refuses to perform.

2. Exceptions to the General Rule.

- a. **Goods Specially Manufactured.** No writing is required if the goods are to be specially manufactured for the buyer and the goods are not suitable for sale to others in the ordinary course of the seller=s business.
  - (1) **Seller must have made Substantial Progress.** In order for this exception to apply,

the seller must have substantially begun manufacturing the product.

- (2) Example. Shaq places an oral order for special furniture due to his size. **If the manufacturer had made substantial progress in the manufacture of the furniture, then this contract would be enforceable.**

b. Confirmation of an Oral Contract between Merchants

- (1) Rule. If there is an oral contract for the sale of goods it still may be enforceable. **Alf one merchant sends to another merchant, a written confirmation of an oral contract, the merchant receiving the confirmation must object in writing within 10 days of receipt.**
- (A) If there is no objection, then the oral contract will be valid and enforceable.
- (B) NOTE, the merchant receiving the confirmation must have reason to know of its contents.
- (C) Example. One merchant agreed to buy and the other merchant agreed to sell a machine for \$10,000. The agreement was oral, but a confirmation letter was later sent. **The purchaser must reject the confirmation within 10 days.**

- c. Admissions. Likewise, if the party admits, in court, that an oral contract was formed, the contract will be enforceable.

d. Partial Performance.

- (1) In General. If you have a contract that has been fully performed by all parties, it is not subject to the Statute of Frauds.
- (2) Sale of Land. Under certain conditions, an oral contract for the sale of land may be enforceable under the Aspecific performance concept.<sup>@</sup>
- (A) Significant Steps to Toward Ownership is Required. Payment of the purchase is not always sufficient. Taking possession and making improvements will usually be sufficient.
- (3) Sale of Goods. An oral contract is enforceable to the extent a seller accepts payment or a buyer accepts delivery of the goods contracted for.
- (A) Example. If a sale of 100 units for \$1,000 is agreed upon, and the buyer accepts 10 units, he will have to pay \$100.

V. Sufficiency of the Writing.

- A. Safe Approach. When writing a contract, the best approach is not to leave anything to the imagination. If part of the contract is unclear by its words, it would be okay to include examples to illustrate the point.
- B. UCC and State of Frauds Writing Requirements. The UCC and the Statute of Frauds require either a written contract or a written memorandum signed by the party who the contract is trying to be enforced against.

1. **Signature.** The signature requirement is loosely defined. The signature can be placed anywhere on the document. The signature can include your name, initials, a stamp or an AX@ if it is intended to show your acceptance of the agreement.
2. **UCC Writing Terms.**
  - a. **Quantity Terms.** The quantity to be bought or sold must be stated. **Even if the amount was not accurately stated, it still will be enforceable up to the amount stated.**
  - b. **Signing Requirement.** The writing must also be signed by the person who refuses to perform.
3. **Essential Writing Terms under the Statute of Frauds.**
  - a. The writing must state the quantity terms.
  - b. The writing must be signed by the person who refuses to perform.
  - c. The writing must name the parties to the contract.
  - d. The writing must state the subject matter and consideration given.
  - e. The writing must state any essential terms. Essential terms may include the price and description of the subject matter.

## **VI. The Parole Evidence Rule.**

- A. **Background.** Typically, before signing a written agreement, the parties engage in preliminary oral and written negotiations. There may be exchanges of paper to clarify points.
  1. Usually suits are brought when parties allege preliminary negotiations were part of the contract.
- B. **The Rule.** The parole evidence rule=s purpose is to bar evidence of prior negotiations, prior agreements, or contemporaneous oral agreements that contradicts the written contract.
- C. **Key Points.**
  1. Evidence of subsequent modification of contracts is okay.
  2. Oral evidence can be introduced to show that the contract was voidable or void.
  3. Evidence to show meaning of contracts terms is okay (i.e. where the terms were not clear).
  4. Evidence may be entered to explain or supplement a written contract by showing a prior dealing, course of performance or usage of trade.

## CHAPTER 17: THIRD PARTY RIGHTS

- I. Introduction. Under the "privity of contract doctrine" third parties have no right in a contract to which they are not a party.
  - A. Chapter's Main Premise. This chapter considers contracts which more than two parties are involved. The discussion focuses on multiple parties in two different kinds of contracts:
    1. The first is contracts in which a person who is not an actual party is a beneficiary of the contract.
    2. The second is contracts in which a party seeks to assign his rights to a third person, or delegate his duties to a third person.
- II. Third Party Beneficiary Contracts.
  - A. Introduction. A party may form a contract the main purpose of which is to benefit not himself, but a third party. **This is called a "third party beneficiary contract."**
  - B. Three Parties to the Contract. As the text states, with a third party beneficiary contract, there are three (3) parties who have rights under the contract.
    1. The one making the promise (called the promisor)
    2. The one to whom the promise is made (called the promisee) and
    3. The third party on whom the promisee intends to confer a benefit (called third party beneficiary)
      - a. Third Party may Bring an Action. If the promisor fails to keep the promise the third party may bring an action.
      - b. Text's Example. The text gives you a good example. Abbott contracts with Baker to pave Baker's driveway. In return, Baker promises to pay Carlson \$375. Carlson is a third party beneficiary and he may enforce the contract against Baker.
    4. Right Must occur At the time the Contract was entered into. One additional point. A third party beneficiary relationship must be created when the contract is formed. Not after the contract is formed.
  - C. What Kind of Beneficiary Can Recover. A third party beneficiary has legal rights (and therefore may sue) depending on which of two categories he falls into.
  - D. Intended Beneficiary. If a third party is classified as an "intended beneficiary," he has legal rights and may have an action to sue.
    1. Intended Beneficiary Defined. An intended beneficiary is one who the promisee intends to give the benefit of the promised performance.
    2. Kinds of Intended Beneficiaries. There are two primary types of intended beneficiaries.
      - a. Creditor Beneficiary. If the promisee's main purpose in making a contract is to discharge a duty or debt he owes to a third party, then the third party is a "creditor beneficiary."
        - (1) Text's Example. Abbott owes Carlson \$5,000 and the debt is now due. Abbott transfers the title to his car to Baker in return for Baker's promise to pay Carlson

**\$5,000. A third party contract has been established.**

- (A) Baker is the promisor because he made the promise which will benefit Carlson
  - (B) Abbott is the promisee because Baker made teh promise to Abbott.
  - (C) Carlson is the creditor beneficiary.
  - (D) If Baker Breaches the Contract, the Following may Result"
    - (i) Carlson could sue Abbott under the old contract
    - (ii) Abbott could sue Baker under the newer contract
    - (iii) Carlson could sue Baker
- b. Donee Beneficiary. If the promisee's main purpose in making a contract is to confer a gift upon a third party, then the third party is a "donee beneficiary."
- (1) Text Example. The text gives an example. Abbott offers to paint Baker's house if Baker pays \$750 to Carl (Abbott's son). Abbott wants to give the money to Carl as a gift. **Carl is a donee beneficiary and can enforce Baker's promise to pay \$750.**

E. Incidental Beneficiaries. If a third party benefits indirectly from a contract, he is said to be an incidental beneficiary.

1. No Right Under the Contract. Incidental beneficiaries have no right under the contract. This means that, they can not enforce in which they are not a party to.

F. How do You Determine Whether a Party is an Intended or Incidental Beneficiary. Several factors are listed in the text which will help in identifying whether an individual is an intended or incidental beneficiary.

1. Was the performance directly related to the third party.
2. The rights of the third party to control details of performance.
3. Express designation in the contract.

G. Examples of Incidental Beneficiary Relationships. The text list three examples of incidental beneficiaries.

1. Example 1. Jon and Pate contract to build a factory. Jon specifies that Ad Company's pipe is to be used. Ad Company is an incidental beneficiary.
2. Example 2. Ken contracts to build a recreation facility in a Pete's neighborhood. This will enhance the property value in that neighborhood. Pete is an incidental beneficiary **therefore if Ken decides not to build Pete can not sue Ken.**
3. Example 3. Hank is promised a promotion if his company land a particular contract. Hank is an incidental beneficiary and cannot sue his company if they failed to get the contract.

H. When Can a third Party Sue. The key question is "**when can a third party enforce the contract?"**

1. Rights Must Vest. The general rule is that until the rights of a third party vest, the third party cannot enforce a contract against the original parties.
2. When do they Vest. As the text states the rights of a third party vest when the original parties cannot rescind or change the contract without the consent of the third party.
3. Ways to Vest. The intended beneficiary's rights vest if one of the following happens:
  - a. The third party beneficiary learns of the contract and agrees to it at the request of the promisor and the promisee.
  - b. The third party beneficiary brings suit upon the contract.
  - c. The third party materially alters his or her position in detrimental reliance on the contract.
4. Key Addition. One additional, critical point. If the contract expressly reserves to the contracting parties the right to cancel, rescind or modify the contract, the rights of the third party beneficiary is subject to any changes made.

III. Assignment of Rights and Delegation of Duties.

A. Introduction. This section deals with attempts by a party to an existing contract to substitute another in his place.

1. He may wish to do this by transferring to another his own rights in the contract, by appointing another to perform his duties under the contract, or both.

B. Assignment Distinguished from Delegation.

1. Assignments. When a party to an existing contract transfers to a third person his right under the contract, he has made an assignment.
2. Delegation. If the existing party appoints a third person to perform his duties under the contract, he has made a delegation.

C. Distinguish Assignment/Delegation from Third Party Beneficiary. Assignments and delegations are attempts to create right or duties in a third person after the contract has been executed.

1. This is different from a third party beneficiary because the rights of the third party are contemplated at the time the contract is made.

D. Distinguish Assignments/Delegation from Novation.

1. Point #1. A novation requires a written agreement whereby all the parties to a contract that a third party shall take the place of one of them. **With assignments or delegation, this can occur at the will of one party.**
2. Point #2. one delegates his duties he remain liable if the other party does not perform. **A party who is released by a novation is completely discharged from all liability.**

E. Assignments. An assignment is a present transfer of one's rights under a contract.

1. Definition of Terms.
  - a. Assignor. This is the party making the assignment. **This person can also be called the obligee because he was originally owed some right or duty.**
  - b. Assignee. The assignee is the party receiving the assignment. Can also be called the third party.
  - c. Obligor. The obligor is original party to the contract. He is the one who must perform.
2. Assignor's Rights Extinguished. When a valid assignment occurs, the assignor's rights under the contract are extinguished. This means that the assignee is the only one who can exercise these rights.
  - a. Example. The text gives an example where Baker owes Abbott \$50. Abbott assigns to Carlson the right to receive the money. **This is a valid assignment. Carlson may bring suit against Baker if Baker doesn't pay.**
3. Key Defense. The assignee's rights are subject to any defense that the obligor has against the assignor.
  - a. Text Example. Here's the text example. Baker contracts to sell his boat to Abbott for \$40,000. Abbott assigns the rights to the boat to Carlson.
    1. Abbott gives Baker a worthless check.
    2. Therefore Abbott has breached the agreement with Baker. **Baker does not have to surrender the boat to Carlson.**
4. Statute of Frauds. As the text states, assignments may be written or oral. The preferred method is for them to be in writing.
  - a. If the assignment is covered by the Statute of Frauds, it must be in writing to be enforceable.
5. Consideration. The general rule is that no consideration is needed for an assignment to be effective.
  - a. Gratuitous Assignments OK. A gratuitous assignment is just as effective.
  - b. What Happens if the Assignor wants to break a Gratuitous Assignment? The general rule is that if the assignment was made in return for consideration, it can not be revoked.
    - (1) If no consideration is involved, the assignor may revoke or cancel the right of the third party. **The text lists several ways in which a gratuitous assignment can be revoked**
      - (A) The subsequent assignment of the same right to another third party.
      - (B) The death of the assignor.
      - (C) The bankruptcy of the assignor.

(D) A notice of revocation given to the assignee.

**\*NOTE, reliance may make the assignment irrevocable.**

6. Rights That Cannot Be Assigned. The general rule is that all rights are assignable. The text lists for situations where rights are not assignable.

- a. Assignment Prohibited by Statute. The first type is assignments expressly prohibited by statute.
  - (1) Text Example. The text gives you an example. Worker, as collateral for a loan, assigns his workers' compensation benefits in the event worker is injured. **This is prohibited by statute.**
- b. Contract stipulates Rights Can't be Assigned. The second situation is where the contract states that it is a "non assignable contract."
- c. Person Service Contract. Personal service contracts are usually not assignable.
  - (1) Text Example. The text gives an example. Baker contract to tutor Abbott's children. Abbott transfer this right to Carlson. **This is not a valid assignment.**
- d. Assignment will Materially Vary the Risk. An assignment will not be allowed if it will materially vary the risk assumed by the obligor.
  - (1) Text Example. One company attempts to assign its insurance coverage to another company.

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7. Anti-Assignment Clauses. WE briefly discussed his earlier. In general some individual will attempt to place restrictions on assignment of rights to a contract.

- a. Mortgage Contracts. This is typically seen in mortgage contract and rental agreements.
    - (1) Due on Sale Clauses. Some mortgage companies will have a "due-on-sale" clause in the mortgage. **Under this contract, once the property is sold, the entire balance owing is due.**
  - b. Other Contracts. Other clause will make the contract itself void if it is assigned.
8. Notice of the Assignment. The text states that once an assignment is made to a third party, notice **should be given to the obligor**, even though it is not required. According to the text, two problems arise when notice is not given.
- a. When Assignor assigns the right to TWO different People. The first situation is where the assignor assigns the right to two different people.
    - (1) Majority rule. The majority rule is priority is given to the first assignment.
    - (2) Minority Rule. Some courts give priority to the first assignee who gives notice.
    - (3) Text Example. Baker owes money to Abbott. On May 1, Abbott assigns his right to the money to Carlson. On June 1, Abbott assigns the same rights Dullus.

- (A) **The majority of the states would give priority to Carlson because he was the first assignee. In some jurisdictions, if Dullus gave notice first, then he would prevail.**
- b. Without Notice, the Obligor will Discharge his obligation to the Assignor. If notice is not given, the obligor will discharge his obligation by performance to the assignor. **If this happens, then the obligor is not responsible to the assignee.**
  - (1) **Once notice is given, the obligor must discharge his obligation to the assignee.**
  - (2) Text Example. Baker owes Abbott \$1,000. Abbott assigns payment to Carlson but does not tell Baker. If Baker pays Abbott, then he has no other liability.
  - (A) If Baker had notice, then his debt to Carlson would not have been discharged even if he paid Abbott.

#### F. Delegation of Duties

1. Introduction. Delegation refers to duties under a contract, not to rights. **IF a party to a contract wishes to have another person perform his duties under that contract, he delegates them.**
2. Continued Liability of Delegator. When a right is assigned, the assignor's interest in that right is normally extinguished.
  - a. In contrast, when the performance of a duty is delegated, the delegator remains liable.
    - (1) Rationale. The reason behind this is if this was not so, every solvent person could obtain freedom from his debts by delegating them to a person who is insolvent.
3. Form of Delegation. As the text states, no special form of delegation is required. **The key is that the delegator expresses a present intent to make the delegation.**
4. Duties that Cannot Be Delegated. The general rule is that any duty can be delegated. The text lists several exceptions to the general rule.
  - a. When performance depends on the personal skill or talent of the obligor.
  - b. When special trust has been placed in the obligor.
  - c. When performance by a third party will vary materially from the performance expected by the obligee under the contract.
  - d. When a contract restricts either party's right to delegate duties.
5. Effect of Delegation of Duties.
  - a. If the delegation is enforceable the person who is owed the performance (Obligee) must accept the performance from the delegatee.
  - b. Performance can be refused only if the duty is one which can not be delegated.
  - c. The delegator's liability continues until the obligation has been fully performed.

6. Liability of the Delegatee to the Obligee. **What recourse does the obligee have if the delegatee fails to perform?**

- a. If the delegatee has made a promise of performance that will directly benefit the obligee, he must perform, otherwise he is in breach.
- (1) Text Example. Abbott contracts with Carlson to build Carlson a house. Abbott delegates this to Baker. Baker fails to perform. **The outcome is:**
  - (A) Carlson may sue either Baker or Abbott or both

## CHAPTER 18: PERFORMANCE AND DISCHARGE

I. Introduction. As the text states the discharge of a contract is ordinarily accomplished when both parties perform those acts promised in the contract.

A. Other Methods of Discharge. A contractual obligation may be discharged in a variety of other ways. This chapter explores four of those ways:

1. The occurrence or failure of a condition upon which a contract is based.
2. Performance or breach of contract
3. Agreement of the parties
4. By Operation of law.

II. Conditions.

A. Introduction. In a bilateral contract, each party promised the other party to perform in some way. Some of these performances will be conditioned on the happening of some event.

1. **An event which must occur before a particular performance is due is called a "condition" of that performance.**
2. Text Example. A offers to buy B's land on the condition that B's neighbor also sells his land.

B. Distinguish between an "absolute promise" and the failure or nonoccurrence of an express condition. The text also makes a distinction between an absolute promise and the failure of an express condition.

1. Text Example. I tell Bob "If you wash my car, I'll pay you \$10." **My duty to pay is conditioned on Bob washing my car. If Bob doesn't wash my car neither side can bring suit.**

Text Example 2. I tell Bob "If you promise to wash my car and you do in fact wash it, I'll pay you \$10. Bob promises to wash my car. **If Bob doesn't perform, then I may get him for breach of contract.**

C. Kinds of Conditions. There are three types of conditions. We will look at each one individually.

1. Condition Precedent. The first type is a "condition precedent." A condition precedent is any event which must occur before performance under a contract is due.

a. Text Example. Fisher promises to contribute \$1,000 to Salvation Army if Calvin completes college. **Fisher's promise is subject to Calvin completing college therefore it is a "condition precedent."**

2. Condition Subsequent. The second type of condition is a "condition subsequent." **A condition subsequent is an event which operates by agreement of the parties to discharge a duty of performance after it has become absolute.**

a. Text Example. Hartman promises to work for San Pedro for one year unless he is admitted to Graduate School.

(1) **Hartman duty is absolute until he is accepted to graduate school.**

(2) Once Hartman is admitted, then the absolute duty to San Pedro ends.

3. **Concurrent Conditions.** The final condition is a "concurrent condition." A concurrent condition is a special kind of condition precedent which exists only when the parties to a contract are to exchange performances at **the same time**.
  - a. **Text Example.** Buyer promises to pay for goods when they are delivered by the seller. **The buyer's duty to pay doesn't become absolute until the seller delivers the goods.**
4. **Express and Implied Conditions.** As the text states conditions may be classified as (1) express, (2) implied in fact, or (3) implied in law.
  - a. **Express Condition.** Expressed conditions are found in the contract. They are usually prefaced by the word "**if**", "**provided**", "**after**", or "**when**".
  - b. **Implied in Fact.** In contrast an implied in fact condition is not expressly stated in the contract. The court infers them from the promise.
  - c. **Implied in Law.** An implied in law condition is also known as a constructive condition. This is a condition that is imposed by law.
    - (1) **Text Example.** A contract to build a house may omit the date of payment. It is implied that payment will occur when the house is complete or substantially complete.

III. Discharge by Performance.

- A. **Introduction.** Most contracts are discharged by performance. In essence, the agreement has been completed when both parties fulfill their respective duties under the contract.
  1. **Tender.** As the text states, performance can also be accomplished by "tender." Tender is an unconditional offer by one party to perform. That party must be willing and able to perform.
    - a. **Text Example.** Buyer offers to pay for goods in essence has tendered performance and can demand the goods.
- B. **Types of Performance.** The text groups performance into three categories.
  1. **Complete Performance.** The first type is complete performance. This is self explanatory in that the parties fully discharge their obligations.
  2. **Substantial Performance.** The second type of performance is "substantial performance." As the text states, in order to qualify as substantial, the performance **must not** vary greatly from the performance promised in the contract.
- C. **Performance to the Satisfaction of Another.** The key question under this heading is how is the measure of satisfaction determined.
  1. **Personal Contracts.** As the text states, when the subject matter of the contract is personal, the performance must be to the individual's satisfaction.
    - a. **Text Example.** Contracts for portraits, works of art, medical and dental work fit into this category.

2. Contract involving Mechanical Fitness. In contrast, if the contract involves mechanical fitness, utility or marketability look at the "reasonable person standard."
    - a. Text Example. Duplex agrees to rebuild Garden's boiler. The work is done satisfactorily, but Garden is dissatisfied and refuses to pay. **If a reasonable person would be satisfied, then Duplex is entitled to be paid.**
  3. Contracts Requiring Satisfaction of Third Party. Some contracts require the satisfaction of a third party.
    - a. Text Example. I contract to pave streets. The work must be done to the satisfaction of the supervising engineer. **Some courts say use the reasonable person standard, while others hold that the individual will not be paid unless it meets the approval of the third party.**
- D. Material Breach of Contract.
1. Introduction. When a party who owes a present duty under a contract fails to perform that duty, he has breached the contract.
    - a. Material Breach. There are a number of factors which may be considered in determining whether a particular breach is material or not.
      - (1) **The overall principle is that the more the breach defeats the entire purpose of the contract, and the expectations of the nonbreaching party, the more likely it is to be considered material.**
    - b. Consequences of Material Breach. A material breach has the effect of allowing the nonbreaching party to sue immediately for damages. **The nonbreaching party is also excused from performing under the contract.**
    - c. What happens with a Minor Breach? If on the other hand the breach is minor (or non-material), the nonbreaching party's duty to perform may be suspended until the breach is remedied.
      - (1) **Once the minor breach has been cured, the nonbreaching party must resume performance.**
      - (2) **Any breach entitles the nonbreaching party to sue for damages, but only material breaches will discharge the nonbreaching party from performing.**
  - d. Text Example. Raytheon contracts with the US Government to build **an all weather tactical force system that use Hawk missiles.**
    - (1) The missiles by contract must be coated with paint so that they will deflect weapons heat sensors.
    - (2) Raytheon builds the missiles on schedule. The only problem is that they function only under **good weather conditions.**
    - (3) The government is entitled to treat this as a breach of contract because the missiles **don't have all weather capability.**
    - (4) The government can sue Raytheon for damages.

- e. Text Example. If the only problem was the Raytheon did not coat the Hawk missiles with deflective paint, this is not material.
  - (1) Raytheon will be given time to cure the defect and the government will not be able to treat the contract as a discharge.

E. Anticipatory Breach.

- 1. Introduction. A party may make it unmistakably clear, even before his performance under a contract is due, that he does not intend to perform. **When he does so, he is said to have anticipatorily repudiated the contract.**
  - a. Consequences. Such a repudiation allows the other party to suspend and perhaps cancel his own performance.
- 2. Reasons for Treating Anticipatory Breach as a Present, Material Breach. The text lists two reasons for treating an anticipatory breach as a present, material breach.
  - a. The nonbreaching party should not be required to remain ready and willing to perform when the other party has already repudiated the contract.
  - b. The nonbreaching party should have the opportunity to seek a similar contract elsewhere.
- 3. In Some Instances the Nonbreaching Party may Retract his Repudiation. Until the nonbreaching party treats this repudiation as a breach, the breaching party may retract his repudiation by giving proper notice. **This restores the parties to their original contract.**
- 4. Reason for Anticipatory Breach. As the text states, one of the primary reasons for an anticipatory breach is a sharp fluctuation in market prices. **This may cause the contract to be extremely unfavorable to one of the parties.**

F. Time for Performance. The next issue is what is the time frame for performing under the contract.

- 1. Where no Time is Stated. If no time for performance is stated in the contract, a reasonable time will be implied.
- 2. Specific Time Stated. If there is a specific time, the parties usually must perform prior to that time. **Note, minor delays still will not destroy the contract.**
  - a. Time of the Essence Clauses. IF there is a "time of the essence" clause, performance must be completed within that time frame. The time element becomes a "condition" of the contract.

IV. Discharge by Agreement.

- A. Introduction. A contractual obligation may be discharged in a number of ways. The normal route is through performance. This section will explore other ways in which a contract is discharged.
- B. Discharge by Rescission. The first method is discharge by rescission.
  - 1. Rescission Defined. The text defines rescission as the process whereby the parties cancel the contract and are returned to the position they occupied prior to forming the contract.

- a. Mutual Rescission. When both parties to the contract agree to cancel the whole contract, it is called "mutual rescission."
  - (1) The text states that in order to rescind such a contract, you need an offer, acceptance and consideration.
    - (A) With mutual rescission, you in essence are getting those elements.
  - (2) No Writing Required for Mutual Rescission. A mutual rescission does **not normally have to be in writing**.
    - (A) If the original agreement falls within the Statute of Frauds, the rescission may have to be in writing.
    - (B) If the contract falls under the UCC Sale of Goods Principle, a writing is required if the contract states it is required.
  - (3) What happens if One Party has Fully Performed? The question is can a contract be rescinded if one party has fully performed?
    - (A) If the contract has been fully performed on one side, a mutual rescission will not be effective.
      - (i) **Rationale.** The reason for this is that there is no mutual consideration; **the party who has fully performed is giving up his right to the other party's performance, and is not getting anything in return.**
    - (B) Text Example. Alberto's Food Company agrees to purchase 40 truck loads of oranges from Citrus Products. The parties agree to call off the deal. **This is okay because neither party has performed.**  
  
Text Example. If Citrus had already delivered to the oranges, an agreement to call off the deal would not be enforceable, because Citrus has already performed.

### C. Discharge by Novation or Substituted Agreement.

- 1. Novation. As the text states, the process of novation substitutes a new party for one of the original parties. **The next list four requirements for a novation to be effective.**
  - a. There must have been a previous valid obligation.
  - b. An agreement of **all** the parties to a new contract.
  - c. The extinguishment of the old obligation
  - d. A new contract that is valid.

**read example on page 234**

- 2. Substitution. Substitution is the process by which the original contract is immediately discharged and replaced with a new agreement.

- a. Example. Debtor owes Creditor \$1,000 payable in 30 days.
    - (1) Creditor says to Debtor "If you promise to pay me \$1,100 in 60 day, I will immediately cancel the \$1,000 debt that is payable in 30 days." Debtor promise to do so.
    - (2) The parties have made a substituted agreement, immediately discharging the original debt.
  - b. What Happens if the Old Contract is Not Expressly Discharged? What happens when the old contract is not expressly discharged? **If the parties do not expressly discharge the old contract, it will be impliedly discharged.**
- D. Discharge by Accord and Satisfaction. As the text states, for a contract to be discharged by accord and satisfaction, the parties must agree to accept performance different from the performance originally promised.
- 1. Accord Defined. An accord is an agreement by one party to render substitute performance and a promise by the other party to accept it.
  - 2. Satisfaction. A satisfaction is the performance of the accord.
  - 3. **An accord and satisfaction discharges the original obligation.**
  - 4. Text Example. Court ordered Brown to pay Matthew \$3,000. Matthew and Brown agrees that Brown will give Matthew his coin collection in satisfaction of the debt. **This is a valid accord and satisfaction.**

V. Discharge by Operation of Law. This section was discussed in other Chapters.

## CHAPTER 19: BREACH OF CONTRACT AND REMEDIES

- I. Introduction. Again, the text starts repeating itself. In this chapter we look at breach of contract and remedies in a little more detail.
  - A. Breach Defined. Breach of contract is the failure to perform what a party is under a duty to perform.
  - B. Remedy. If the party breaches, the nonbreaching party has several remedies at his disposal.
    - 1. **A remedy is the relief provided to an innocent party when the other party has breached the contract.**
  - C. Common Remedies. The text lists the four most common types of remedies which are (1) damages, (2) rescission, (3) specific performance and (4) reformation.
- II. Damages.
  - A. Introduction. Damages are designed to compensate the nonbreaching party for the loss of the bargain. **IN this section we will look at four categories of damages:**
    - B. Compensatory Damages. The first type is compensatory damages. **Compensatory damages provide an award of money to the nonbreaching party to compensate for his loss.**
      - 1. Text Example. Wilcox contracts to perform services exclusively for Hernandez for \$2,000. Hernandez cancels the contract and is therefore in breach. Wilcox gets other employment but can only earn \$500. **Wilcox may sue Hernandez for \$1,500.**
      - 2. Measure of Damages. The measure of damages depends on the type of contract.
        - a. Sale of Goods. In a contract for sale of goods, the usual measure of damages is the difference between the contract price and the market price.
          - (1) Text Example. Chrysler contracts to buy 10 computer terminal from Sperry Rand for \$8,000 a piece. Sperry fails to deliver. The market price is now \$8,150. **Chrysler may recover from Sperry \$1,500 (i.e. 8,150 Mkt Price - 8,000 contract price x 10)**
      - 3. Sale of Land. Under a land contract, usual remedy is specific performance (i.e. making the parties perform). This is because land is unique. **In some instances, the sale measure of damages used in sale of goods will be used.**
      - 4. Construction Contracts. With construction contracts, look at who the breaching party is and at what stage the breach occurred.
        - a. Breaches by Owner. Let's look at breaches by the owner first.
          - (1) Breach Before Performance Begins. If the owner breaches before performance begins, the contractor can recover only the profit (i.e. contract price less cost of material).
            - (A) Example. A enters into a contract with B whereby B will build a barn. Contract price is \$10,000. Material cost is \$7,500. **B may recover \$2,500 (\$10,000 - \$7,500)**

(2) Breach During Performance. If the owner breaches during performance, the contractor may recover (1) cost incurred to this point plus profit.

(A) Example. B has incurred \$4,000 of cost toward building the barn. **B may recover \$6,500 (\$4,000 cost plus \$2,000 profit)**

(3) Breach After Performance has been Completed. If the owner breaches after the contract has been completed, the contractor may recover the **full contract value**.

b. Breach by the Contractor. What happens when the contractor breaches.

(1) Partial Performance. If the contractor breaches after partially performing the contract, the measure of damages is the cost of completion.

(2) Breach after Substantial Performance. If the contractor breaches after substantial performance, the court may use the **cost of completion method (i.e. look to see how much it would cost to complete the contract)**

(A) NOTE, under this method, if economic waste will be incurred, then no recovery allowed.

(i) Example. It would cost \$10,000 to move an unexpected large rock 1ft. If this rock does not materially alter the contract, then performance will not be required.

c. Quantum Meruit Recovery. The text also talks about recovery in "quantum meruit." **We briefly discussed this in Chapter 7.**

(1) Quantum Meruit looks at how much the breaching party has benefitted from the contract and allows the nonbreaching party to recover at least that amount.

(A) Primary Purpose. Its primary purpose is

(i) it rewards the nonbreaching party for their efforts and

(ii) it keeps the breaching party from getting benefits without paying for them.

## C. Consequential Damages.

1. Introduction. In Chapter 4 we discussed the concept of "foreseeability." Foreseeability focuses on whether the breaching party had reason to know of the nonbreaching party's special needs.

a. If the breaching party is aware of these special needs, then the nonbreaching party may recover those damages. Such damages are called "consequential damages."

b. Text Example. If seller fails to deliver goods and the seller knows that the buyer plans to immediately resell them, then buyer may get consequential damages. **These damages would include (1) loss profits from the planned resell and (2) compensatory damages which is the difference between the contract price and the market price.**

2. Requirements for Consequential Damages. In order to recover consequential damages the breaching party must know of the nonbreaching party's special circumstances.

a. Hadley v. Baxendale. Hadley operated a mill which was forced to shutdown because of

a broken crankshaft. Hadley took the shaft to Baxendale (who was a common carrier) for shipment to another city for repairs.

- (1) Hadley claimed that Baxendale was informed that the mill would be shut down and that the crankshaft must be sent immediately.
- (2) The crankshaft was sent for several days. Hadley sued Baxendale for loss profits.
- (3) Court Holding. The court said that Hadley had not clearly communicated its special needs to Baxendale.
  - (A) The court said that damages are awarded only if the defendant could foresee that his breach would cause such an occurrence.
  - (B) If the injury was unusual (i.e. not common), the plaintiff must show that the defendant had reason to know of the plaintiff's special situation.

D. Punitive Damages. We discussed punitive damages in Chapter 10. These are damages of and above actual damages.

1. Rationale. Such damages are based on "public policy" of actually punishing the wrongdoer and are also used as a deterrent.
2. Rare in Contract Cases. Such damages are rarely assessed in contract situation; normally are allowed in tort cases.
  - a. Establish Breach and a Tort Claim. A party may attempt to get punitive damages by showing a breach of contract and a possible tort (e.g. showing that breaching party was also negligent).

E. Nominal Damages. Where a breach has occurred, but there is no harm, the nonbreaching party may recover "nominal damages."

1. Defined. Nominal damages is a small sum that is fixed without regard to the amount of harm.
2. Purpose. The purpose of such damages is to establish that the defendant acted wrongfully.

### III. Mitigation of Damages.

- A. General Rule. All courts agree that a plaintiff must use reasonable effort to avoid damages even if he did not cause them. **This is called the duty to "mitigate damages."**
1. Only Reasonable Effort Required. This rule merely requires the plaintiff to make **reasonable efforts** to mitigate damages.
    - a. The plaintiff is not expected to incur great expense, time and damage to his reputation in order to mitigate the breach.
  2. Classic Example. The classic example is employment contracts. If the employer breaches an employment contract, the former employee has a duty to seek similar employment.
    - a. He does not have to take anything that comes along. **For example an engineer would be wrongfully fired "doesn't" have to take a job as a fry cook.**

#### IV. Liquidated Damages versus Penalties.

- A. **Liquidated Damages.** Parties negotiating a contract often make an explicit agreement as to what each party's remedy for breach of contract shall be. **Such an agreement is called liquidated damages provision.**
1. **Standard.** In order to be enforceable, the liquidated damage clause must meet two requirements:
    - a. **Reasonable Forecast.** The amount fixed must be reasonable relative to the anticipated or actual loss from the breach and
    - b. **Difficult Calculation.** The harm caused by the breach must be uncertain or very difficult to calculate accurately, even after the fact.

- B. **Penalties.** Penalties are designed to penalize the breaching party. Courts, as a general rule, refuse to enforce penalty clauses.

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#### V. Rescission and Restitution.

- A. **Introduction.** There is a "finite" amount of law. This is the reason you keep seeing the same terms repeated over and over.
1. We discussed rescission in Chapter 10, but I'll try to highlight the key points again.
- B. **Rescission.** As the text states, rescission is an action to undo or cancel a contract. **In other words, rescission puts an end to the transaction and leaves the parties as though the contract had never been made.**
1. **Unilateral Rescission.** Unilateral rescission is available where the party can show fraud, mistake, undue influence, duress or lack of capacity.
    - a. **Notice Required.** The rescinding party must give prompt notice to the breaching party.
  2. **Both Parties must make Restitution.** When a contract is rescinded, both parties generally must make restitution.
    - a. **Restitution Defined.** Restitution is the returning of goods or property previously conveyed.
    - b. **Text Example.** Anne give Bob \$10,000 in return for Bob's promise to design Anne's dream house. Bob calls Anne and tells her he can't design her house. **Anne is entitled to get back her \$10,000.**

#### VI. Specific Performance.

- A. **Definition.** As we stated in Chapter 1, specific performance is a remedy by which one party to a contract is ordered to perform according to the contract's terms.
1. **Money Damages must be Inadequate.** Specific performance will not be granted if there are adequate money damages.

- B. **Sale of Land.** As we stated earlier in the course, specific performance will usually be granted for the sale

of land.

1. Rationale. The reason is that land is unique and therefore money would not usually be adequate.

C. Contracts for Personal Service. In contrast, contracts for personal service will usually not be enforced.

1. Rationale. If such contracts were enforceable, this would be a form of slavery.

## VII. Reformation.

A. Introduction. Parties may orally agree on a deal, but by mistake prepare and execute a document which incorrectly reflects the oral agreement.

1. **In such a situation either party may obtain from the court a "reformation" (i.e. a rewriting) of the written document, so that it correctly reflect the prior agreement.**

B. Example. Seller orally agrees to sell Blackacre to Buyer for \$100,000. Their oral agreement includes a provision that Buyer will also an existing mortgage of \$50,000.

1. Buyer's lawyer neglects to include this provision. Neither seller or buyer is aware of this until after the agreement is signed.

2. **Either party may ask the court to rewrite the contract to include this provision.**

## VIII. Recovery Based on Quasi-Contract.

A. Introduction. Again we've discussed this concept about 3 different times. Quasi contract deals with one party getting the benefit of another's effort without paying for it.

B. Elements. The text lists, **again**, the four element necessary to recover under quasi-contract.

1. He or she conferred a benefit on the other party.
2. He or she conferred the benefit with the reasonable expectation of being paid.
3. He or she did not act as a volunteer in conferring the benefit.
4. The party receiving the benefit would be unjustly enriched by retaining the benefit without making payment.

## IX. Election of Remedies.

A. Introduction. Election of remedies merely require the nonbreaching party to choose what method of recovery he wants. Choices include (1) money damages and (2) specific performance.

1. Can't Get Both. The key emphasis of this section is that you can't get more than one remedy on a particular claim.

2. Text Example. McCarthy agrees to sell his land to Tally. When McCarthy changes his mind Tally may get compensatory damages or specific performance, but not both.

B. Doctrine Not Used in Sale of Goods. This doctrine is not used in the sale of goods. UCC 2-703 and 2-711 explicitly states this.

1. **Text Example.** Carpenter was fraudulently induced to purchase land for \$100. He spent \$140 moving onto the land before he realized the fraud.
  - a. Since Carpenter sued to rescind the contract, he could not recover the \$140 because the seller never had them.
  - b. If Carpenter had sued for damages, he could have recovered \$100 plus the \$140, but he would still have to abide by the contract.

## X. Waiver of Breach.

- A. **Introduction.** As the text states, under certain circumstances, a nonbreaching party may be willing to accept a defective performance of the contract.
  1. When he relinquishes the right to full performance, this is called a "waiver."
- B. **Consequences of Waiver.** The effect of a waiver is to keep the nonbreaching party from suing on the portion of the contract waived.
  1. **Note, the waiver may only affect a portion of the contract. It does not have to affect the entire agreement.**
- C. **Effect on Future Contracts.** The general rule is that a waiver on the present contract will not affect future contracts.
  1. **Especially True for Unrelated Contracts.** As the text states this is always true when the subsequent breaches are unrelated to the first breach.
  2. **Exception to the General Rule.** A waiver will be extended to subsequent defective performance if a reasonable person would conclude similar defective performances were acceptable. **Look at the pattern of conduct.**
    - a. **Text Example.** Construction contract is performed in 6 stages.
      - (1) If the first stage was late in being completed and waived, it would not necessarily extend to the next five.
      - (5) But if the first five stages were late and each was waived, it is reasonable to believe that this would also extend to Stage 6.

## XI. Contract Provisions Limiting Remedies.

- A. **Introduction.** Contracts may include clauses which state that what the damages will be in the event of a breach.
  1. **Exculpatory Clause.** If the clause calls for no damage recovery this is an "exculpatory clause."
  2. **Limitation of Liability Clause.** If the clause affect the availability of certain remedies, they are called limitation on liability clauses.
- B. **Mutual Assent to Limitation.** In order for such a clause to be effective, there must be "knowing consent" by both parties.
  1. **Fine Print.** The court will look at whether the parties knew about the limitation. They will look

at whether the provisions were put in the fine print of the contract or on the back of a very long contract.

- a. Without Knowledge, not Enforceable. If either party did not know about the limitation, it will not be a part of the contract.

C. Types of Breach Covered. If the court determines that the provision is part of the contract, then analysis of the provision must be done to determine whether it is enforceable.

1. Intentional Torts. A provision excluding liability for intentional torts will not be enforceable.
2. Illegal Acts. A clause excluding liability for illegal acts will not be enforceable.
3. Negligent Acts. A clause excluding liability for negligence may be enforceable if both parties have equal bargaining power.

D. Limited Remedies - UCC.

1. Introduction. The rules are slightly different for the sale of goods under the UCC.
  - a. Must State the Remedy is Exclusive. If only a certain remedy is desired, the contract must state that the remedy is exclusive.
  - b. Failure of Its Essential Purpose. If the remedy fails in its essential purpose, then it will not be enforceable.
    - (1) Text Example. Purchase a car from the dealer and it breaks down several times. Also assume that the dealer is unable to fix it.
      - (A) **In this case, the exclusive remedy fails in its essential purpose and other remedies under the UCC are available.**
2. Seller Can Never Limit Personal Injury Recovery. The UCC will allow the seller to limit most things. It will not allow the seller to limit his liability for personal injuries **when the buyer is purchasing "consumer goods."**
  - a. **Liability may be limited when purchasing "commercial goods."**

## CHAPTER 32: AGENCY FORMATION AND DUTIES

- I. Agency Defined. An agency relationship is one in which one party (called an agent) is authorized to represent the other party (called a principal) in business dealings with third parties.
- II. Kinds of Agency Relationships. As the text states, the first step in analyzing an agency relationship is to determine what kind of relationship it is. The text lists three types.
  - A. Principal-Agent. The first type is the principal-agent relationship.
    1. In this type of relationship, the principal and the agent consent to the agent acting on the principal behalf.
    2. If this is a true principal-agent relationship, the acts of the agent will bind the principal.
  - B. Employer-Employee. The next type of relationship is that of the employer-employee.
    1. Master-Servant is Traditional Term. As the text states the traditional term used for employer-employee relationships was "master-servant".
    2. A servant is defined as an employee and a master as an employer.
      - a. Employee Defined. The text defines employee as one whose physical conduct is controlled, or subject to the control, of the employer.
        - (1) Control is Key. The key aspect of an employer-employee relationship is that the employer has the right to control the way the employee performs his task.
        - (2) Employee as Agent. In some situations, an employee can also be an agent with power to bind the employer in his business dealings.
          - (A) Example. Hugh McColl is chief executive of Wachovia. He is an employee of Wachovia, but he is also an agent because he has the authority to enter into agreements on Wachovia's behalf.
    - C. Principal-Independent Contractor. In contrast, in a principal-independent contractor relationship, the independent contractor usually controls the mode and means of performing his task. **The principal tells him what he wants done and the independent contractor decides how to do it.**
      1. Factors Used in Determining Relationship. The text lists seven factors which are used in determining whether there is a principal-independent contractor relationship or merely an employer-employee relationship. **Remember, control is the key aspect.**
        - a. How much control can the principal exercise over the details of the work? **The more control, the more likely it is employer-employee relationship.**
        - b. Is the employed person engaged in an occupation or business distinct from that of the principal. **If the business is different, the more likely principal -indpt contractor.**
        - c. Is the work usually done under the principal's direction, or is it done by a specialist without supervision. **If its done under the principal's direction, then it is more like employer-employee.**
        - d. Does the principal supply the tool? **If he does, it is more like employer-employee.**

- e. For how long is the person hired or retained? **If hired merely for one job, more likely principal-indpt contractor.**
- f. What is the method of payment. **If the method is by time period versus at the end of the job, it is more likely employer-employee.**
- g. What is the degree of skill required to do whatever it is the person was hired to do? **The more skill required, the more likely it is principal-indpt contractor.**

### III. Formation of Agency Relationship.

- A. Introduction. This section looks at the form of an agency relationship. It is critical that both the principal and the agent consent to the relationship.
- B. The Agency Agreement.
  1. No Writing Required. An agency relationship does not have to be in writing.
    - a. **It may be created by a written agreement, it may be oral or it can be created by acts or conduct of the parties.**
  2. Exceptions to the Writing Required. There are two situations where the agency agreement must be in writing.
    - a. **Power of Attorney.** The first is where there is a power of attorney. **As the text states, a power of attorney gives the agent either full or restricted authority to act in the principal's behalf. This must be executed in a notarized writing.**
    - b. **Statute of Fraud.** The other situation is where the contract in which the agent is authorized to enter into for the principal is controlled by the Statute of Fraud.
- B. Legal Capacity and Purpose.
  1. Principal need Legal Capacity. In such a relationship, the principal must have legal capacity to enter into the contract.
    - a. **Rationale.** A person who cannot legally enter into contracts directly should not be allowed to indirectly (through an agent) enter into a contract.
  2. Agency needs only Minimal Capacity. In contrast, the agent needs only minimal capacity. Legal capacity is not required.
    - a. **Therefore a minor could be an agent but not a principal.**
    - b. **A mentally incompetent person could be an agent.**
  3. Usually Relationship Can be Created for Any Purpose. As the text states, an agency relationship can be created for any purpose except (1) if the purpose is illegal or (2) the purpose is contrary to public policy.
    - A. Text Example. Jones (as principal) contracts with Smith (as agent) to sell drugs. **The relationship is unenforceable because selling drugs is illegal and against public policy.**

C. Agency by Ratification or Estoppel.

1. Introduction. In some instances a person will agent when there is not a agency relationship.
  - a. Principal Approves. If the principal approves of these acts, he is said to have "**ratified**" them.
2. Estoppel. You can also have an agency agreement by "estoppel." This occurs when a **principal** causes a **third party** to believe that another person is his **agent**.
  - a. Example. A partner in a law firm holds an associate attorney out as being a partner.

D. Agency by Operation of Law. The text also briefly discusses agency by operation of law.

1. Such an agency is created based on either social duty (i.e. for support of the family) or in an emergency situation (i.e. when the agent is unable to contact the principal).

IV. Duties of Agents and Principals.

A. Introduction. This section reviews the duties the agent owes the principal and the duties the principal owes the agent.

B. Agent's Duties to Principal.

1. Introduction. Usually the duties owed by the agent to the principal are set out in the agreement. The text lists the five most common duties.
2. Duty of Performance. I generally call this the duty of care. **The duty of care is a duty to carry out the agency with reasonable care as measured by local community standards.**
  - a. Special Skills. In most situations, look at the reasonable person standard. **If the agent has special skills, he may be held to a higher standard of care.**
    - (1) Text Example. An insurance who fails to obtain the insurance requested by the principal is guilty of breach.
  - b. Gratuitous Agent. The general rule is that a gratuitous agent can not be liable for breach of contract. **The reason is, there is no contract.**
    - (1) Subject to Tort Liability. A gratuitous agent may be subject to tort liability.
    - (2) Text Example. Real Estate Broker (Agent) promises principal (seller) she will find a buyer for farm without cost.
      - (A) If agent doesn't try to find a buyer, she is not guilty of breach of contract because there was no contract.
      - (B) If agent finds a buyer but neglects to provide the buyer a sells contract she may be found guilty of the tort of negligence.

3. Duty of Notification.

- a. Requirement. This duty requires that the agent notifies the principal of all significant or material matters that come to his attention concerning the subject matter of the agency.

- (1) **Rationale.** The reason behind this duty is that the principal is presumed to know what the agent knows **thus he will be liable for the agent's acts.**

4. Duty of Loyalty.

- a. **Introduction.** The duty of loyalty is a duty to avoid activities adverse to the interests of the principal. **This includes:**

(1) Not representing two principals in the same transaction unless they both know and agree to it.

(2) Not representing a competing business interest unless the principal consents.

(3) No secret profits. **This means that an agent who is representing the principal can not buy from or sell to himself the goods associated with the principal without his consent.**

- b. **Information Confidential.** The duty of loyalty also has a confidential element. It would be a breach of loyalty if the agent disclosed confidential information either during the agency or after. **Keep situation is attorney-client privileges.**

5. Duty of Obedience.

- a. **Introduction.** The next duty is duty of obedience. Duty of obedience is a duty to obey all reasonable directions of the principal.

- b. **Reasonableness Defined.** Reasonableness is determined by reference to the nature of the work, the contractual understanding and custom.

- c. **Emergency Situations.** In emergency situations, where the principal is unavailable, the agent may use his best judgment and deviate from the instructions given.

6. Duty of Accounting.

- a. **General Rule.** The general rule is that an agent has a duty to keep and make available to the principal an account of all the property and money received and paid on the principal's behalf.

- b. **No Commingling.** The agent should not mix his funds with those of the principal. **Even if done innocently, I know for a fact that attorneys can get into serious trouble doing this.**

C. Duties Owed by Subagents.

1. **Subagent Defined.** A subagent is defined as any person employed or appointed by an agent in transacting affairs of the principal.

- a. **If the agent has authority to appoint a subagent, that subagent can bind the principal.**

(1) **Principal must Approve.** **In most situations, the principal must approve of the subagent.**

- (A) Normal Business. If this is the custom, then the principal does not have to approve the subagent.
2. Subagent's Duty. The subagent owes the principal the same duties as the agent.
  3. Where no Authority Given. If no authority is given by the principal the following rules apply:
    - a. The subagent has no legal relationship to the principal. **Thus a principal will not be liable to a third party for the subagent's acts.**
    - b. The agent who hired the subagent will be liable to both the principal and any third parties for the subagent's acts.

D. Principal's Duties to Agent.

1. Duty of Compensation. Unless the agent has agreed to act for free, the principal owes the agent (or any authorized subagent) the duty of compensation. **He must pay them.**
  - a. Amount of Compensation. If the amount is agreed upon, the principal must pay that amount. **If not amount is agreed on, the principal must pay the "customary" amount.**
    - (1) **If no amount is stated and there is no customary amount, the reasonable value of the service will be sufficient.**
2. Duty of Reimbursement and Indemnification. Unless the agent was solely at fault, the principal owes the agent a duty to reimburse or indemnify him for all expenses or losses reasonably incurred in fulfilling the authorized duty.
  - a. Amount usually Specified. The amount of indemnification is usually specified in the agreement.
    - (1) If not specified, the courts will determine what amount is appropriate by looking at the nature of the business and the type of loss or expense.
  - b. Authorized Subagent can also Recover. Authorized subagent may recover either from the agent or the principal. **If the agent pays the subagent, the agent can then get reimbursed from the principal.**
3. Duty of Cooperation. In essence the principal must cooperate with the agent in performing his tasks. The principal owes a duty to the agent to not interrupt the agent's authorized activities (unless necessary).
4. Duty to Provide Safe Working Conditions. Safe working conditions is also an essential duty.
  - a. The principal has a duty to inspect working conditions and inform agents of unsafe areas.

V. Remedies and Rights of Agents and Principals.

- A. Introduction. Once the duties of each party is determined, the next task is to determine what remedies and rights are available to them.
- B. Agent's Rights and Remedies against Principal.

1. Rights Again. As early stated, the agent has the right to (1) be compensated, (2) be reimbursed, (3) safe working conditions, and (4) not be interfered with by the principal.

2. Remedies. An agent normally can bring contract damages or tort claims against the principal.

C. Principal's Rights and Remedies against Agent.

1. Remedies. The principal has three primary remedies.

2. Damages in Contract or Tort. First of all, the principal may bring an action for contract damages or a tort action.

a. The right to contract damages exist only when the agent is compensated. **All agents are liable in tort claims.**

3. Constructive Trust. A principal may also get a constructive on benefits received by an agent in a breach of loyalty case.

a. Text Example. Andrews, a purchasing agent gets cash rebates from a customer. **If Andrew keeps the money, he has violated a fiduciary duty to his principal. Principal may sue and recover the money.**

b. No Self Dealing. An agent also can't take opportunities that were meant for the principal.

(1) Text Example. Principal wants to purchase property. Agent learns that a valuable tract of land has just became available. **If principal purchases the land for her benefit, a constructive trust on the land will be imposed.**

4. Avoidance. The principal may also merely void the contract.

5. Indemnification. In some situations, a principal may be sued by the third party for an agent's negligent acts.

a. If this is so, the principal may sue the agent to recover this amount. **This is called indemnification**

## **CHAPTER 35: LIABILITY TO THIRD PARTIES AND TERMINATION**

I. Introduction. Let me tell you how this text works. First, we give you a chapter on the general principles. Then the next three chapters go into a lot more detail. **Chapters 32-34 are no different.**

A. We will start with a closer and more detailed look at the scope of an agent's authority.

II. Scope of Agent's Authority.

A. Introduction. Usually a principal will be liable to a third party based on the acts of his agent. The text lists three sources of the agent's authority.

B. Actual Authority. The first two sources fall under the category of actual authority. Actual authority is **authority the agent reasonably believes it has to satisfy the objectives of the principal**

B. Express Authority. The first source of actual authority is "**express authority.**"

1. Based on Actual Communication Betw. P and A. Express authority is based on actual communication from the principal to the agent.

2. Can be oral or written. Express authority can be oral or written. **As stated earlier, if the contract being executed is required to be in writing, then the agent's authority must also be in writing.**

a. Ratification will Validate. The principal may ratify in writing an act done originally without written authorization.

(1) Text Example. Principal orally asks agent to sell the ranch. Agent finds a buyer and signs a sales contract. Since the agency was oral, the contract is not enforceable. **The principal could make the contract enforceable by ratifying the agency in writing.**

**no bloom case because we have not discussed "joint tenancy"**

C. Implied Authority.

1. Defined. Implied authority is authority the agent reasonably believes he has based on the instructions of the principal.

2. How Arise. Implied authority can arise from (1) custom and usage, (2) principal's past approval of agent's acts, and (3) emergency or necessary situations.

3. Text Example. Adams is employed to manage a grocery store. No express authority is given to Adams. **It is implied that he will have whatever authority is necessary to run a manage a grocery store.**

D. Apparent Authority and Estoppel.

1. Defined. Apparent Authority is authority that the third person believes the agent has based on the principal's conduct, even though the agent has no express or implied authority. **TWO PRIMARY THINGS ARE NEEDED:**

a. The third party has a reasonable belief that the agent is authorized and  
b. The principal induced such belief either verbally, in writing, or by conduct.

2. How Does This Arise. This type of authority will arise in three ways:
    - a. The agent never had any kind of authority.
    - b. The agent once had actual authority. It was terminated, but now apparent authority lingers.
    - c. The agent still has actual authority, but this particular act exceeds that authority.
  3. Examples of Agent Never having Authority.
    - a. **Example 1.** P tells T "if you want to buy my car, see my roommate X." T sees X who sells car to T because he knew P wanted to see the car.  
**Result. P is liable to t. T had a reasonable belief that X was authorized based on P's manifestation. The manifestation was P's comment.**
    - b. **Example 2.** T walks into a dealership owned by P and buys a car from X, who is a janitor at the dealership. P knows that X is a frustrated salesman but has never taken steps to restrain X from his unauthorized dealings with customers.  
**Result. X has authority to bind T because it is reasonable to believe X has that authority. The manifestation is P's failure to restrain X.**
  4. Examples of Lingering Apparent Authority.
    - a. **Example 1.** A is told by P to go out and find people to borrow money from P. A negotiates a contract with T to borrow money payable in 6 months. P then fires A, but does not notify T with whom A negotiated that A has been fired. A goes out to T at the end of the 6 months and collects the loan.  
**Result. P does not have an action against T because T has a reasonable belief that the agent can collect money based on P's "failure" to notify T. NOTICE IS KEY**
  5. Examples of Actual Authority Exceeded.
    - a. **Example 1.** A, an employee of a radio station was asked to negotiate "ON AIR" sales for the radio station. It was customary in the industry for As to negotiate barter agreement in which a restaurant owner agreed to let radio workers eat free in exchange for free radio ads. **The agent was instructed not to do this, but he did it anyway.**  
**Result. Since this is a industry custom, failure to notify restaurant will make P liable.**
- E. Emergency Powers. The agent may have "emergency power" to act for the principal when some unforeseen emergency develops and the agent is unable to communicate with the principal.
1. **Example.** Agent was a bus driver for principal, a bus company. Agent suffered a heart attack while driving the bus. A retired bus driver (we will call "S") was present and asked Agent if he could drive the bus out of traffic. Agent consented. S drove the bus through an intersection and caused an accident. **Is Principal liable.**
    - a. **Result.** Yes principal is liable, because this was an emergency situation and Agent had implied authority to deal with the emergency. This may include the right to delegate to a subagent.

F. Ratification.

1. **Introduction.** There are situations where an agent will purport to act on behalf of a principal without any type of authority. **In such a situation, the principal may still be bound by the agent's act if he subsequently ratifies the act.**
2. **Defined.** Ratified authority is the **affirmation of a previously unauthorized contract or act.**
  - a. Ratification can be either expressed or implied.
3. **Laundry List Concerning Ratification.** The text gives you a lot of deals on ratification; let's try and summarize them:
  - a. **Principal Bound.** When the principal ratifies an unauthorized transaction by agent, the principal becomes bound on the contract.
    - (1) **The principal binds himself to the whole contract.**
  - b. **Contract Given Retroactive Effect.** If ratified, a transaction will be treated as if it had originally been entered into with authority. This is called "retroactive effect."
  - c. **Principal Must Ratify.** If the principal does not ratify, there is no contract.
    1. **The third party may get out of the contract at any time before the principal ratifies it.**
  - d. **Knowledge by Principal.** In order to ratify the contract, the principal must have knowledge of all material facts regarding the transaction.
  - e. **Ways to Ratify.** The principal may ratify the contract in the following ways:
    - (1) **accepting the benefit of the transaction between the agent and third party when it is still possible to decline.**
    - (2) **remaining silent**
    - (3) **suing the third party on the contract.**
  - f. **Death of Third Party.** Death or incapacity of the third party "before" ratification will void an unauthorized contract.

III. Principal's and Agent's Liability for Contracts.

- A. **Introduction.** After it has been established that the agent entered into a valid contract for the principal, the next step is to determine who the parties to the contract are and what their right and liabilities are under the contract.
- B. **Disclosed Principal Situation.**
  1. **Defined.** A disclosed principal is one whose identity is known by the third party at the time the contract is made by the agent.
  2. **Disclosed Principal Liable.** A disclosed principal is always liable on a contract entered into by his authorized agent.

3. Agent Generally not Liable. A third party generally has no action against an agent in a disclosed principal situation
  - a. Agent Has No Authority. If the agent has no authority, then the principal is not liable. The agent may be held liable in this situation.

C. Partially Disclosed Principal.

1. Defined. A partially disclosed principal is one whose existence, but not identity, is known to the third party (**i.e. you know there is a principal but you don't know his name**).
2. Both Agent and Principal Liable. Where the principal is partially disclosed, both the agent and the principal are liable on a contract entered into by the agent.

D. Undisclosed Principal.

1. Defined. An undisclosed principal is a principal whose identity is totally unknown by the third party, and the third party has no knowledge that the agent is acting for someone else.
2. Both Agent and Principal Liable. Where the principal is undisclosed, both the agent and the principal are liable on a contract entered into by the agent. **This is how it works.**
  - a. The third party is deemed to be dealing with the agent personally, therefore the agent is bound.
  - b. If the agent has acted within the scope of his authority, the principal must go through with the contract.
  - c. If the principal breaches the contract and the agent is required to pay the third party, the agent may recover from the principal.
3. Situations where Principal is not Bound. The text lists three situations where the principal may not be bound on the contract:
  - a. If the undisclosed principal was expressly excluded from the contract.
    - (1) Text Example. An agent contracts for the lease of a building from the landlord. The lease says no assignments and landlord doesn't know of the existence of principal. **Agent is liable only.**
  - b. The contract is a negotiable instrument. **Under the UCC, the agent is liable if the instrument does not name the principal or show that it was signed in a representative capacity.**
  - c. If the performance of the agent is personal to the contract. **Examples would include extension of credit and highly personal service contracts.**

E. Warranties of Agent. As the text states, when the agent either (1) lacks authority or (2) exceeds his authority, **the action "is not" a breach of contract, but it is a "breach of implied warranty of authority."**

1. This warranty can be breached if the act was intentional or a good faith mistake.
2. The agent will not be held liable if the third party knew of the mistake at the time of the contract.

#### IV. Liability for Agent's Torts.

- A. Introduction. The text lists three situations in which the principal may be liable for the torts of his agent.
- B. Principal's Tortious Conduct. The first situation is where the principal's conduct is tortious. This involves a principal, who in some way is reckless or negligent which he conducts business through an agent.
  - 1. **This includes (1) giving improper instructions, (2) authorizing the use of improper material/tools, (3) establishing improper rules or (4) failing to prevent other tortious conduct on the principal's property.**
- B. Principal's Authorization of Tortious Conduct.
  - 1. Introduction. If a principal authorizes an agent to commit a tort, the principal, likewise may be held liable.
    - a. Text Example. Principal tells agent to cut corn he doesn't own. The principal has committed a trespass and is liable to the corn's owner.
- C. Misrepresentation.
  - 1. Introduction. A principal is also exposed to liability when an agent makes a misrepresentation to a third party on the principal's behalf.
  - 2. Major Issue. The key issue is whether that misrepresentation was made within the scope of the agency.
    - a. Text Example. Principal gives agent authority to go door to door to advertise his product. The agent is allowed to demonstrate the product and answer questions.
      - (1) **If the agent makes a misrepresentation, the principal may be held liable if the third party relied on that misrepresentation.**
  - 3. Fraudulent Schemes by Agent. The principal may also be held liable if the agent defrauds a third party while the agent is acting in his capacity as an agent.
    - a. Rationale. The reason is that the agent's position conveys to the third party that the agent has authority to act in such a manner.
    - b. Text Example. Agent is a loan officer. Agent tells client that additional collateral is needed otherwise client's loans will be called. Client gives additional collateral. Agent keeps collateral for his personal use.
      - (1) **The principal (i.e. the loan company) will be liable because a reasonable person would have believed that the agent had the authority to make such a statement.**
  - 4. Innocent Misrepresentation. When an agent innocently misrepresents facts, this is usually grounds for rescission of the contract by the third party.
    - (1) Where Principal has Knowledge. If the principal is aware that the agent has not been apprised of all of the facts, he may be liable to the third party for damages.

D. **Doctrine of Respondeat Superior.**

1. **Introduction.** An employer may be held liable to third parties for torts committed by his employee under the doctrine of "respondeat superior."
2. **Necessary Elements.** Two basic elements must be established:
  - a. **Employer-Employee Relationship.** First, there must have been an employer-employee relationship when the act was done.
  - b. **Conduct Within Scope of Employment.** Second, the employee's conduct must have been committed within the scope of the employment relationship.
    - (1) **Factors to determine Scope of Employment.** The text lists on page 554, eight (8) factors which may be used in determining whether the act was within the scope of employment. **You need to become very familiar with them.**

V. **Liability for Independent Contractors.**

- A. **General Rule.** As the text states the general rule is that a principal is not liable for physical harm caused to a third party by the negligent act of an independent contractor.
  1. **Rationale.** The principal has no legal power to control the details of the physical performance of the contract.
  2. **True Independent Contractor.** Remember, an independent contractor is one (1) who has a calling of his own, (2) is hired to do a particular job, (3) is paid a given amount for that job, and (4) who follows his own discretion in carrying out the job.
- B. **Exception to the General Rule.** The primary exception to the independent contractor rule is where there is an exceptionally hazardous activity involved.
  1. **Examples.** This would include things such as (1) blasting operations, (2) the transportation of highly volatile chemicals and (3) the use of poisonous gases.
  2. **Strict Liability is Imposed.** Strict liability is imposed in these situations. (i.e. he will be liable even if he was not at fault).

VI. **Termination of an Agency.**

- A. **Introduction.** As the text states, agency law is somewhat like contract law. Such like contract law, there are several ways to terminate an agency relationship.
- B. **Termination by an Act of the Parties.**
  1. **Introduction.** An agency relationship may terminate by an act of the parties. The text lists several ways in which this can happen:
  2. **Lapse of Time.** The first is lapse of time. An agency relationship may specify the time period in which the agency will be in effect.
    - a. **At the end of that time period the agency relationship will cease to be effective.**
    - b. **Text Example.** Able and Paula sign an agreement of agency which will run from January 1, 1989 to December 31, 1993. **At December 31, 1993, the agency**

**relationship ends.**

- c. **Where No Time Period Stated.** If no time period is stated, the agency relationship will run for a reasonable period of time.
- 3. **Purpose Achieved.** An agency relationship may also terminated when the stated purpose has been achieved.
- 4. **Occurrence of a Specific Event.** Another method for termination of an agency relationship is when a specific event has occurred.
  - a. **Text Example.** Paula appoints Able to handle her business affair while she is gone. **When Paula returns, the agency is terminated.**
  - b. **Partial Termination.** There are situations where the agency doesn't terminate but a specific aspect of it will.
    - (1) **Text Example.** Paula permits Able to grant a line of credit of \$1,000 to anyone who maintains a minimum of \$1,000 in their savings account.
      - (A) As long as the individuals maintain \$1,000 in their savings, Able may grant them a loan, but once that balance drops below \$1,000, he can't.
- 5. **Mutual Agreement.** One of the most common forms of termination is by mutual agreement of the principal and agent.
  - a. Such agreements relieve each party of rights, duties, and powers which were part of the agency agreement.
- 6. **Termination by One Party.**
  - a. **General Rule.** The text states that as a general rule either party can terminate the agency relationship.
    - (1) **Agent's Act.** The agent's act is called **renunciation of authority**.
    - (2) **Principal's Act.** The principal's act is called **revocation of authority**.
  - b. **Breach May Occur.** In certain situation the termination by one party may result in a breach of contract. The nonbreaching party may be entitled to damages.
    - (1) **Text Example.** Able has a one year employment contract with Paula to act as her agent for \$18,000. Paula fires Able before the contract ends.
      - (A) **Paula has breached the contract, therefore Able may recover damages from her.**
- 7. **Agency Coupled with an Interest.** An agency coupled with an interest is an agency created for the benefit of the agent.
  - a. **Not Revocable by the Principal.** Due to the fact that the agent has an interest in this contract or agency, the principal will not be able to terminate this kind of agency at will.
  - b. **Text Example.** Sarah borrow \$10,000 from John. The loan is unsecured. Sarah delivers jewelry to John and signs a letter giving him the power to sell the jewelry (as her agent)

if she doesn't repay him.

(1) **If after receiving the money, Sarah tells John she is revoking his power to sell the jewelry will not be enforceable.**

(2) **John has an agency coupled with an interest (i.e. his \$10,000).**

C. Termination by Operation of Law. There are other events which may cause the termination of an agency. They are listed under the section "Termination by Operation of Law."

1. Death or Insanity.

a. General Rule. The general rule is death or insanity of either the principal or the agent will terminate the agency relationship.

b. Agent's Transactions are not Binding. An agent's transactions that occur after the death of the principal are not binding on the principal's estate.

2. Impossibility. Just like contract law, when the subject matter of the agency has been destroyed, the agency relationship terminates.

a. Text Example. Paula employed Able to sell her house. The house is destroyed by fire prior to the sale. The agency terminates when the house is destroyed.

3. Changed Circumstances. An agency relationship may also be terminated when an event occurs which materially alters the agency agreement.

a. Text Example. Paula hires Able to sell a tract of land for \$10,000. Able learns that there is oil under the land with a value of \$1,000,000.

(1) **The agency and Able's authority to sell the land for \$10,000 has terminated.**

4. Bankruptcy. Bankruptcy by either the principal or agent may also terminate the agency.

5. War. War between the principal's country and the agent's country also terminates the agency.

D. Notice Required for Termination.

1. Operation of Law Termination. Usually when an agency is terminated by operation of law, notice to a third party is not required, **unless the agency is coupled with an interest.**

2. Termination by Parties. If the parties in some way terminate the agency, notice to a third party is generally required. **This responsibility falls on the principal.**

a. Notice to Agent. An agent's actual authority continues until the agent receives some notice of termination.

b. Notice to Third Party. When dealing with a third party, an agent's apparent authority continues until notice is given to that third party.

(1) Apparent Authority Defined. Apparent authority is authority that the third party believes the agent has based on the principal's conduct.

(2) Principal Required to Give Third Party Notice. The principal is required to

notify any third party he knows has dealt with the agent.

(A) If a third party has not dealt with the agent, the principal is only required to give him "constructive notice."

(i) Constructive Notice Defined. Constructive notice is any information that a party could obtain with a little effort. **Classic example is newspaper publication.**

## CHAPTER 38: FORMS OF BUSINESS ORGANIZATION

- I. Introduction. This chapter is very short. It deals with the three common types of business organizations.
- II. Sole Proprietorship. The first type is called a "sole proprietorship." This form of business reflects a single individual going into business.
  - A. No Taxes Assessed to Business. With a sole proprietorship, no taxes are assessed to the business. They are assessed again the owner.
  - B. Takes all of the Profits and Losses. The owner accepts all of the profits and takes all of the losses.
- III. Partnership. A partnership is an agreement between two or more individuals to carry on a business for profit.
  - A. Expressed or Implied. A partnership may be formed by written agreement or by the conduct or actions of the parties.
    - 1. Example - Cain has a large supply of lemon. Able has a large supply of sugar. Homer has access to water and a bucket. They agree to put the ingredients together and make lemon-aid. **A PARTNERSHIP HAS BEEN CREATED.**
  - B. Partners may Agree to Anything Legal. The partnership agreement may include anything the partners desire as long as it is legal.
  - C. Partners are Agents of the Partnership. The partners are agents of the partnership.
    - 1. Acts of Partners Bind other Partners. The acts of one partner may bind the other partners.
    - 2. Joint and Severable Liability. Joint and severable liability is key in a partnership. **If your partner causes damages to a third party, you may have to come out of your own pocket to pay those damages off.**
      - a. Example. Consider the lemon aid stand. What happens if Cain's lemons were rotten and one of the buyer's of the lemon aid had gotten sick. ANSWER - Cain, Able and Homer would be jointly liable. The buyer could sue all of them or either one of them.
  - D. Partnership "Does Not" Pay Taxes. The key thing with a partnership is that, it does not pay taxes. All income of the partnership is presumed to be distributed to the partners. **Thus the tax liability falls on the partners.**
    - 1. This is Good. This is good from the standpoint that income will not be taxed twice.
- IV. Limited Partnership. A limited partnership is very similar to a regular partnership. **There are a few "key" differences.**
  - A. Structure. First the limited partnership has limited partners and at least "one" general partner.
    - 1. Certificate of Partnership is Required. The limited partnership is created by agreement. A certificate of partnership must be filed in the state.
  - B. Limited Liability. The key benefit of a limited partnership is that the limited partners have limited liability.

1. **What does this Mean.** This means that a limited partner's liability for lawsuit and money at risk will be limited to his investment in the partnership.
  - a. This is different from a general partnership because where the partners may have to go into their own personal wealth to pay off debts.
  - b. **Limited Partners Treated as Investors.** The limited partners are treated as investors.
  - c. **Limited Partners must act like Limited Partners.** One very important point. The limited partner must confine his/her activities to an investment role. If she actively becomes involved in the business, she be presumed to be a general partner.
2. **General Partners still Liable.** This does not relieve the general partners' liability.

V. **CORPORATIONS** are different animals altogether.

- A. **Legally Separate Entity.** This business unit is legally separate from its owners.
  1. The owners interest is represented by "stock" and the owners are called "stockholders."
    - a. The stockholders are liable only to the extent of their investment in the corporation.
  2. **Before a corporation can do business, it must obtain a "charter" from the state.**
    - a. The state must approve the Articles of Incorporation which describes the purpose and the structure of the corporation.
  3. **Management of the Corporation consists of;**
    - a. **Board of Directors.** They determine corporate policy including (1) declaring dividends, (2) authorizing contracts, and (3) determining executive salaries.
      - (1) Directors are appointed by Shareholders.
    - b. **Corporate Officers.** They are responsible for the daily operations of the company.
      - (1) Corporate officers are appointed by the Board of Directors.

## CHAPTER 45: ADMINISTRATIVE LAW

- I. Introduction. This chapter focuses on Federal Administrative Law.
  - A. Definition. Administrative law may be defined as "**that branch of law which controls the administrative operation of the government.**"
  - B. Primary Function. Administrative law has three primary functions:
    1. **It sets forth the powers which may be exercised by administrative agencies.**
    2. **It lays down the principles governing the exercise of those powers. AND**
    3. **It provides legal remedies to those aggrieved by administrative action.**
- II. Purpose and Methods of Regulation.
  - A. Factors. The growth of administrative agencies is due to two factors.
    1. A market that is totally free and unregulated may not be in the best interest of the public
    2. Congress just don't have time or the expertise to watch dog each market.
  - B. Congress Passes Statute. Congress will pass a statute setting forth an outline of broad regulations. **Congress will leave the details to the administrative agency.**
  - C. Purpose of Regulation. The text gives several objectives of regulation.
    1. Control Monopoly. The first objective is to control monopolies.
      - a. Definition. A monopoly results when a single company controls an entire market and charges more than a competitive price for its product.
      - b. Examples. Airlines and railroads used to be primary examples of monopolies.
    2. Rationing Scarce Resources. Another key objective is the rationing of scarce resources.
      - a. FCC Example. The text illustrates this rationing by looking at the function of the Federal Communications Commission.
        - (1) The FCC was created because the transmission distance of radio and TV was limited.
        - (2) The FCC requires specific frequencies and requires the frequencies to be separated to ensure clear signals.
    3. Correcting Unequal Bargaining Power. Correcting unequal bargaining power is another objective.
      - a. NLRB. The National Labor Relations Board played a key role.
        1. The NLRB established rules governing unions and labor relations.
    4. Social Regulation. Social regulation is also a key objective. This would include provisions which will help protect the community at large.

- a. Example. One social regulation was to establish emission control standards for automobiles.
- b. Example - FDA. The Food and Drug Administration also protects the public. **All drugs are required to be safe and effective before than can be marketed in the US.**

E. Methods of Regulation. The text also lists several methods of regulation: They include;

- 1. Rate Setting. Rate Setting. The Federal or State Governments set the price at which a company could sell its products. **Included under this heading is utilities, railroads and natural resource monopolies.**
- 2. Licensing. The second method is "licensing." **The FCC and FDA both in a sense license the products under their jurisdiction.**
  - a. **Another form of license is patents and trademarks.**
- 3. Setting Standards. Setting standards is another method of regulation. **This consists of an agency requiring specific standards that the companies must meet.**
  - a. Example - EPA. The Environmental Protection Agency is one example. One of its primary duties is to control pollution.
  - b. Example - OSHA. The Occupational Safety and Health Administration is another example. This administration outlines health and safety provisions for corporations during business in the US.

III. Requirements of Administrative Law.

- A. Checks on Administrative Agencies. One of the big problems created by administrative law was "tremendous power" given to the administrative agencies.
  - 1. Over Stepping Authority. Some companies felt that the agencies were overstepping their authority.
  - 2. No Uniform Rules. Others felt that there was no uniformity.
- B. APA Was passed. In response to these complaints Congress passed The Administrative Procedure Act. **This Act established rules on how businesses would be regulated:**
- C. Procedural Requirements. The following is a summary of the procedural requirements:
  - 1. Notice of Proposed Rulemaking. The first step is to give notice of the proposed rulemaking.
    - a. **This notice should describe the intended purpose and nature of the planned rule.**
    - b. **The notice will normally include a draft of the proposal.**
    - c. **Publish in Federal Register. The notice should be published in the Federal Register.**
  - 2. Public Comment. The next step is public comment by group's interested in the regulation.
    - a. The public is usually given at least 60 days to submit written comments.

- b. Formal vs. Informal Rulemaking. If the regulation involves informal rulemaking (????), there usually is no opportunity for oral comments.
  - 1. **When the statute requires formal rulemaking, the agency must have a public hearing on the matter. Individuals are then allowed to orally make comments to the administrators.**
- 3. Final Rule. The last stage is the publication of a final rule by the agency.
  - a. This will occur after the agency reviews the information obtained from the public.
  - b. The final rule is usually published in the Federal Register.
- 4. Ex Parte Contacts. In some situations, there will be informal communication between the administrators and the public.
  - a. The APA does not prohibit such communication, but the agency is not allowed to solely rely on such communication either.
    - 1. Adequate support must be found in the public records.

C. Substantive Requirements.

- 1. What Happens if there is Still Opposition to the Rule. **The next question is "what happens if there is still opposition to the rule after the agency has followed the proper procedures.**
  - b. Answer. The APA allows an interested party to have a court determine the validity of the rule.
    - (1) Standing Required. That interested party must have "standing" to challenge the rule.
      - (A) **Standing requires that a person have a sufficient, direct interest in the rule.**
  - b. Requirement to Challenge. The APA requires that the challenge not be "arbitrary or capricious."
    - (1) The Standard. To meet the standard a person must show "**a serious flaw in the agency's judgment.**"
  - c. Stricter Standards for Formal Rulemaking. Just note there may be stricter standards for formal rulemaking.

D. Agency Adjudication-The "Judicial Power".

- 1. Introduction. As the text states, some agencies have two types of power.
  - a. The first type is the authority to make rules.
  - b. The second type is the power to determine whether someone has violated or broken

those rules.

2. Administrative Law Judges Handle a Lot of Disputes. A large number of the disputes are handled by "administrative law judges." **KEY POINTS:**
  - a. Administrative law judges are employees of the agency. **But they are independent from the rest of the agency.**
  - b. One of the key points the text brings out is that ALJ's are **paid well**.
  - c. Agency Adjudication. As the text, a controversy brought before the agency is similar to any other court hearing.
    - (1) The individuals involved in the action have a right to be represented by counsel and **have a right to cross examine witnesses**.
    - (2) Most actions began with a complaint filed by the agency against the violator of the statute.
    - (3) This is followed by a hearing. **There is no jury**.
    - (4) Administrative hearings are more liberal with kind and amount of evidence allowed to be presented.

**THE TEXT GIVES YOU AN EXAMPLE OF AGENCY ADJUDICATION ON PAGE 712.**

E. Agency Enforcement and Administration-The "Executive Power".

1. Introduction. As the text states, Administrative Agencies are with at least three other powers.
2. Investigatory Powers. The first is called "investigatory powers." Congress has delegated this power to the administrative agencies
  - a. What Does the Power Include. This power includes the authority to **issue subpoenas for documents or testimony, inspect records, and request information**.
  - b. The Constitution puts a Limit on these Powers. The Constitution puts a limit on the authority of Administrative Agencies.
    - (1) Due Process protects against unreasonable and arbitrary demands being placed on companies.
    - (2) Fourth Amendment protects against unreasonable search and seizure.
    - (3) The Fifth Amendment protect against self incrimination (by individuals, but not corporations).
3. Enforcement Powers. As the text states, most agencies have **enforcement powers**. These powers include:
  - a. the power to issue orders to individuals who are in violation of the rule and statutes.

- b. For each violation, there usually is a specific penalty. **These penalties are binding unless they are reversed by the reviewing court.**
- 4. **Administrative Powers.** Most agencies also have administrative powers. These powers include **(1) the power to hire employees, (2) make rules for office management, (3) the authority to disburse money through grants or loans.**

#### IV. Public Accountability.

- A. **Introduction.** Because of the wide range of power given to these agencies, there were many instances of abuse. **Several laws were passed to make these agencies more accountable to the public. THE TEXT DISCUSSES THREE OF THREE OF THESE LAWS.**
- B. **Freedom of Information Act.** The first law is the "Freedom of Information Act."
  - 1. **Disclosure Requirement.** This act requires the federal government to disclose certain records to any person **upon request.**
    - a. You do not have to state why you want the information. **You must state a reasonable description of the information sought.**
      - (1) **If the agency denies the request, you can go to court and require them to comply.**
    - b. **Exemptions.** Certain information may be statutory exempt. The text lists nine categories of exemptions.
      - (1) Classified information related to national defense or foreign affairs.
      - (2) Information related solely to the internal personnel rules and practices of an agency.
      - (3) Information specifically exempted by other statutes.
      - (4) Trade secrets and privileged commercial information obtained by the government from private persons.
      - (5) Certain private intra-agency or inter-agency memoranda.
      - (6) Personnel and medical files.
      - (7) Information related to the supervision of financial institutions.
      - (8) Privileged geological data.
      - (9) Investigatory records that may be related to future prosecutions.

- C. **Government-in-the-Sunshine Act.** The next act is called the "Sunshine Act." This act has two basic requirements:

- 1. First, official meetings of the agency must be held open to the public.
- 2. The public must also have notice of "planned agency" meetings.
- 3. **In some instances the law allows the agency to have "closed" meetings. This includes:**

- a. Discussions that involve accusing any person of a crime.
- b. If a open meeting would frustrate the implementation of a future agency action.  
**(Sometimes the public will talk so much that nothing will get accomplished)**
- c. Discussions that involve agency participation in future rulemaking or litigation.

#### **BOTTOM LINE, THE EXCEPTION COVER A LOT OF AREA**

- c. Regulatory Flexibility Act. Congress also passed the "Regulatory Flexibility Act. **This act comes into play when a new rule significantly impacts on small businesses.**
  - 1. This act requires the Agency to analyze the impact of the new law on the small businesses. **The analysis must include two things:**
    - a. Measure the cost of the new act on the small business AND
    - b. Identify and consider alternatives which will less burdensome of the business.

## CHAPTER 46: CONSUMER PROTECTION

**QUICK COMMENT: THIS CHAPTER WILL HIT YOU SQUARE IN THE FACE AT SOMETIME IN THE VERY NEAR FUTURE. IT IS PROBABLY THE MOST IMPORTANT ONE IN THE TEXT.**

I. Introduction. Historically, the buyer assumed the risk of what he purchased. **This was called "caveat emptor"** or "let the buyer beware."

A. Current Trend. The government saw that this was not meeting the needs of its citizen therefore more legislation was introduced to protect consumer against seller who were "**less than honest.**"

1. **THIS ARE OF THE LAW IS KNOWN AS "CONSUMER PROTECTION."**

B. Focus on Federal Regulation. This chapter focuses on federal regulation, BUT each state also has specific provisions which protect the public.

II. Advertising.

A. Introduction. Advertising are probably one of the most abusive instruments toward the public. **LOOK AT THE RECENT ELECTIONS.**

1. Some of the bigger brokerage houses were constantly advertising on TV and in professional magazine about their service.

a. **A lot of these firms have been indicted for various violations. FIRST JERSEY SECURITIES WAS A CLASSIC EXAMPLE.**

B. FTC Stepped In. One of the earliest forms of consumer protection was the **Federal Trade Commission Act..**

1. Federal Trade Commission Established. This act created the "Federal Trade Commission."

a. Five Members. The commission is made up of five members.

b. Max from one Party is 3. No more than three members of this commission can belong to any specific political party.

2. Purpose of the ACT. As the text states, the act authorizes the FTC to prohibit "**unfair or deceptive acts or practices.**"

C. FTC Procedures.

1. Procedures in Detail. The procedures involved in a deceptive advertising issue are formal and strict. I will attempt to outline them.

a. FTC Learns of the Possible Deceptive Advertising. The first thing is that the FTC learns of the possible deceptive practice.

b. Commission Investigates. The commission must then investigate the complaint. **The commission may compel a party to give it information so it can investigate them.**

c. Administrative Law Judge Hears the Case. If the FTC believes there has been some form of deceptive advertising and the company doesn't, the case goes before an "**administrative law judge.**"

- d. Administrative Law Judge Rules. After hearing evidence from both sides, the Administrative Law Judge rules.
  - e. Impact of Company Losing. If the company loses, it may appeal to the FTC Commissioners.
    - (1) If the company loses again, it may appeal to the US Court of Appeals.
2. Cease-and-Decease Order. IF the FTC finds that unfair or deceptive advertising has occurred, it will issue a "**cease-and-decease**" order.
- a. What Happens when the Company Ignores this Order. If the company ignores this order, the FTC has two forms of action.
    - (1) It can fine the company \$10,000 for each illegal advertisement or
    - (2) it can reform or cancel contract which were previously made using misleading advertisements.
3. Counter-Advertising.
- a. FTC Mandate. The FTC has instituted a new type of advertising. It is called "counter-advertising."
  - b. How Does it Work. Counter advertising works this way: **If a company has been found guilty of deceptive or misleading advertising, the FTC makes "CORRECT THEIR EARLIER STATEMENT."**
    - (1) Example. The text gives you an example where Listerine advertised that their mouthwash could prevent or cure colds and sore throats.

**The FTC required them to retract that statement.**
4. Unfair or Deceptive Acts. Unfair and deceptive advertising comes in many forms and favors.
- a. Scientifically Untrue. The text states that advertising may be deemed deceptive if it is "scientifically untrue." **Example would include (1) cosmetics that would give your skin new life or one type of bread is more nutritious than another (It might taste better).**
    - (1) **The FTC may require the company to have supporting documentation for its advertisements.**
  - b. Endorsements by Celebrities.
    - (1) Introduction. Most of you have seen endorsements by celebrities of different products. **Most of the weird or "unconventional" endorsements come when the celebrity is getting older and can't do anything else.**
    - (2) FTC Regulates. The FTC also regulates these.
      - (a) Deceptive if Celebrity Doesn't Use. AS the text states, the advertisement may be considered deceptive if the celebrity **does not** use the product.

- (i) Example was anti-acne products in which Pat Boone said his daughter used.
- (3) **THE KEY QUESTION IS "WHAT'S THE CRITERIA FOR DECEPTIVE ADVERTISING?** Advertising will be deceptive only if a reasonable person would be mislead.
- (A) **NOTE**, if the advertisement is overly exaggerated, it will be okay because **a reasonable person would know this**.
- (i) Example. The text gives you an example of a statement "When you're out of Schlitz, you're out of beer." **This would be legal**.

C. Bait-and-Switch Advertising.

1. Introduction. I walked into Circuit City a year or so and wanted to buy the VCR they had on sale. The saleswoman told me they were out, but they had another one that was very similar and it only cost \$150 more.
2. **This is a classic form of bait and switch**. This is a classic form of bait and switch. The store lures you in with some low price on a particular item. **This is called the "bait."**  
The salesman then tries to get you to buy a more expensive item. **The is called the "switch."**
3. Requirement for "Bait" Advertising. According to FTC, bait advertising has occurs in the following situations:
  - a. The seller refuses to show the advertised item.
  - b. The seller fails to have adequate quantities of the advertised item available.
  - c. The seller fails to promise or deliver the advertised item within a reasonable time.
  - d. The seller discourages employees from selling the item.

III. Labeling and Packaging Laws. The government has also passed specific legislation requiring the manufacturer of certain products to put warning labels on them.

- A. **Classic example would be cigarette. The manufacturer must give the Surgeon General's warning.**
- B. Fair Packaging Act. One of the most significant pieces of legislation in this area was the 1966 Fair Packaging Act.
  1. Requirements. This act requires that **consumer goods** have labels that identify (1) the product, (2) the manufacturer, (3) the packer or distributor, and (4) its place of business, the net quantity of the contents, and the quantity of each serving.

IV. Sales. The FTC may control other unfair sales practices as well.

- A. Door-to-Door Sales.
  1. Introduction. Constantly, when I'm home the door bell rings and someone is in a contest and they want to help them out by buying a magazine or they want to sell me discount coupons.
  2. New Legislation. New legislation was enacted to combat unfair and deceptive "door-to-door" sales.

a. Cooling Off Period. One of the most significant rules established by the FTC was to require door-to-door salespersons to give consumers three days in which to cancel the sale. **This is called a "cooling off period."**

- b. Certain Salesperson are required to Present their Business Cards. As the text states, some salespersons are required to present their business cards which disclose that they are an agent of that business.

B. Industry Specific Regulations. The FTC also has industry specific regulations.

1. Used Cars. For example a dealer in used cars must have a label in the used car and it must give the following.
  - a. Disclose whether the car has a warranty or is being sold "as is."
  - b. Give information on any service contract or promises; and
  - c. Suggest that the consumer obtain an inspection of the car and get all promises in writing.
2. Funeral Home Regulations. The text also gives you a summary of few home regulations. Look on page 723.

C. Real Estate.

1. Introduction. A common occurrence was older individual attempting to find a place to be put out to pasture (i.e finding a place to retire). **In a large number of cases, these individuals bought land that was not habitable.**
2. 1968 Interstate land Sales Full Disclosure Act. Legislation was enacted in 1968 to help with this problem.
  - a. **The law requires anyone who sells land "interstate" (i.e. betw parties in different states) to file a statement with the Department of Housing and Hurban Development.**
    - (1) If the law is violated, the purchaser may cancel the contract and get his money back.
3. 1974 Real Estate Settlement Procedures Act. In 1974 Congress passed the "Real Estate Settlement Procedures Act.
  - a. Requirements of the Act. The acts primary goal was to ensure that buyers of residential property are given all necessary information about the settlement process. **BUYING A HOUSE IS A PAIN BECAUSE THE LAWYER PUSHES DOZENS OF PIECES OF PAPER IN FRONT OF YOU TO SIGN.**

V. Credit Protection. The government has also passed legislation which regulate the extension of credit and the recovery of debt.

- A. Truth-in-Lending Act. The first major piece of legislation was the "**Truth in Lending Act.**" This act requires creditors to disclose certain loan terms.
1. Purpose. The purpose of this disclosure is so that consumer are well informed and can shop

around for the best bargain.

2. Transactions Covered by this Act. Three types of transactions are covered by this act. **They include (1) person who lend money, (2) persons who sell on credit and (3) persons who arrange for the extension of credit.**
3. Disclosure Requirements. Some of the more common items which must be disclosed include:
  - a. The seller must you what the total interest charges will be.
  - b. He must tell you want the annualized interest rate is.
  - c. He must tell you what the monthly payments will be.
  - d. He must tell you how many payments you are going to make (**This is real important, because you can now finance a new BMW or Mercedes for 7 years**).
  - e. He must tell you want date the payment is due.
  - f. He must tell you whether there is a penalty for paying early.

B. Credit Cards. The biggie is "credit cards." **The problem with credit cards is that the interest rate is between 16.9% and 22%, but the banks only want to give you 5% on your account.**

1. Key Provisions. The text list several key provisions which will protect holders of credit cards. They include:
  - a. A credit card holder may with hold payment if there is a dispute with the seller of faulty goods. **This must be in good faith.**
  - b. The holder of a credit card may request the issuer to investigate potential errors in the bill.
    1. During the investigation, the debtor has no liability for that debt.
    2. If it is determined that he does in fact owe that amount, he will be charged for it **plus interest.**
  - c. A card holder liability is limited to \$50 for unauthorized purchases on his card.

C. Other Federal Laws. There are also other federal laws which protect consumers. **The major one is the Fair Credit Reporting Act.**

1. This law protects consumers from inaccurate or unfair credit reports.
2. You have a right to know what's in your credit file and you have a right to object to anything that is misleading.
3. If there is a dispute, you also have a right to add a **one-hundred-word** statement defending yourself.

VI. Debt Collection.

- A. Introduction. Debt collection is another area where Congress has attempted to help the Consumer.
- B. Illegal Debt Collection Practices. Certain debt collection practices have been declared illegal by the FAIR Debt Collection Practices Act. **The text list five practices that are illegal. They are listed on page 727. I would advise you to become familiar with them.**
- C. Garnishment. Typically when a creditor can't collect, he will attempt to garnish your wages.
  - 1. Definition. Garnishment is the legal procedure by which a creditor can legally seize a portion of your wages to pay off a debt.
    - a. **The government uses this method a lot.**

## VII. Health and Safety

- A. Introduction. Another form of protection given to consumers is laws designed to increase product safety.
- B. Consumer Product Safety Act. The most significant legislation was the Consumer Product Safety Act. **This act created the Consumer Product Safety Commission.**
  - 1. Span of Control. This commission is primary responsible for product safety where the products will be used as **consumer goods or for schools**.
  - 2. Certain Products Exempt. As the text states, certain products are exempt from this act. They include tobacco, guns, and automobiles.

## VIII. State Laws

- A. Introduction. The states may also regulate consumer safety. Two of the most important means are **(1) the Uniform Commercial Code and (2) the Uniform Consumer Credit Code**.
- B. UCC. The UCC will prohibits transactions which are said to be "unconscionable." This means that the transaction is so unfair that the court would be shocked by it.
  - 1. Other Things. The UCC also regulates consumer warranties and places restrictions on the seller's ability to limit liability for defective consumer products.
- C. Uniform Consumer Credit Code. The primary provision of this code is that it sets maximum credit service rates for various amount of debts. **It is not widely used.**

