



Final Review Packet

Business Law

BLAW 220



Weekly Information Sheet 02

General Legal Principles -

The simple **DEFINITION** of the concept of **LAW** is:

Rules by which civilization is ordered.

The simple **DEFINITION** of the concept of **RIGHTS** is:

The legally recognized ability to exercise power and control over an action or object.

Types and Priority of Law

- The three basic types of law are **Constitutions, Statutes** and **Case Law**.
- The priority or ranking of law is as follows:
 - 1. Constitution;**
 - 2. Statute;**
 - 3. Regulation;**
 - 4. Executive Order or Policy.**
- It should be noted that **Case Law (Common Law)** is not ranked or given a priority order because its purpose is merely to decide a case in controversy or interpret or explain a constitution, statute, regulation or executive order.
- The **Constitution (both federal and state)** are the supreme law, and no other law within the federal or state systems can out rank them.
- Other than the **Constitution**, no other law can ever out rank a statute.
- A statute is a law enacted by **Congress (federal)** or the **legislature (state)**.

Freedom is the Fundamental Pillar of American Law

- *Freedom derives from the **fundamental respect for the individual**.*
- *In order to secure our Freedom, the law protects our rights.*
- *These are **individual rights**, not community or collective rights.*
- *Freedom can be a scary thing. For is not the power to do what everyone thinks is a good idea, but rather what some think is a bad one.*

Founders and Individual Rights

- The founders maintained a clear grasp of the connection between liberty, freedom and individual rights.
- They understood that a person's unfettered ability to freely exercise their property rights, is the gateway of liberty.
- Throughout the Declaration of Independence, the Constitution and the Bill of Rights, individual rights, and a person's ability to freely exercise their individual rights, is deemed sacrosanct.
- Individual rights are thereby a foundational pillar upon which American government is built.

Common Law

Because it developed from the Common Law, most law of Business, Property and Corporations is:

State Law

The Pathway to Liberty

FREEDOM → RIGHTS → LAW

Evolution of Rights

- In our Constitutional system of law, government principle purpose is to protect the rights of individuals, especially property rights.
- Derived from Rome and England, America's legal system was the first in world history to provide such protections and recognize individual rights.
- Under American law these rights are unalienable.
- **St. Thomas Aquinas** transformed the concept of Rights by means of his concept of Grace, citing that all people had an individual relationship with God, and men like William Ockham and John Wycliffe, used this perspective to assert that human beings are instruments of God, with fundamental, individual, natural rights).

The Transformation of the Meaning of Rights

Steps in the Evolution of Rights and Protection of Individual Freedom

1. *Greek Democracy*
2. *Roman Law*
3. *The Development of English Common Law*
4. *The Magna Carta*
5. *Clerical Philosophy and the Recognition of Natural Law*
- Magna Carta - 4th Lateran Council - St. Thomas Aquinas - William Ockham - John Wycliffe
6. *Thomas Hobbes and the Social Contract Theory*
7. *John Locke and the Pronouncement of Property Rights*

Lineage of the Law

- Our laws have an important history from ancient times to today.
- The first real concept of a body of law, with an executive to enforce it, a senate to debate it, and courts to decide it, was in:

Rome

- The reason the first set of laws was developed in Rome was because they viewed their society and culture as lasting longer than a human lifetime.
- They viewed **Law** as a means to maintain that society and to:
 - **Promote the continuity of trade and commerce;**
 - **Help administrate military conquests; and**
 - **Instill consumer confidence.**
- The law we respect today has a lineage over time and distance.
- Beginning in Rome, it was transported to England as a Roman Colony.
- As English law developed, it was then brought to America when we were a British Colony.
- The law we know today in the **United States** is descended from:

England

- As a result, the body of law that was the most prevalent in Colonial and Early America, as descended from England was:

The Common Law

- **Common law** was the law made by **Judges** in deciding cases based upon precedent and custom.
- Most of the cases involved property disputes.
- In making the decisions that created the **Common Law**, **Judges** followed the legal principle of **“Stare Decisis”** which means:

“Let the Decision Stand”

Law and Equity

- Prior to 1800, Courts were divided between Law and Equity.
 - **Equity had sole jurisdiction over injunctions. Its judges were clergy.**
 - **Law had sole jurisdiction over damages (\$). Its judges were lawyers.**

Reporting on the Law

- The man who was the first to compile the reports and explanations of Case (Common) Law in British Courts, into his famous "Commentaries", that would become known as the "Bible of the Law", was:

Sir William Blackstone

- Blackstone's Commentaries would be used as the primary legal authority for common law courts in England and America until the middle of the nineteenth century, and are still often cited today.

Magna Carta

- The first real battle that was fought and won for property rights was:

The Battle of Runnymede in 1215

- At the Battle of Runnymede, the landed knights (freemen land owners) made **King John I** of England sign the **Magna Carta**, which is Latin for:

"Great Charter"

- King John was the son of King Henry and Brother to King Richard.
- A king following the Norman line started by William the Conqueror in 1066.
- The Magna Carta, signed by King John, was one of the forerunners of modern British law.
- The Magna Carta and the Fourth Lateran Council were each major developments in the evolution of rights across the world.
- It was also one of the foundational documents for the US Constitution and its Amendments (the Bill of Rights).
- Originally known by the people of England as the Charter of Liberties.
- It became a guiding document of both England, and several other countries.
- It expanded the rights and liberties of the people, and limited the power of the government.

What is in the Magna Carta

- Containing 63 clauses, this landmark document:
 - Created a council to the King (a forerunner to parliament);
 - Promised all freemen access to courts and a fair trial;
 - Specified many property rights from infringement by the king and his agents;
 - Eliminated unfair fines and punishments;
 - Gave certain legal powers to the Catholic Church; and
 - Addressed many lesser specific issues of the day.
- It should be noted, however, that **one major right the Magna Carta did not recognize, was that it did not abolish the condition of involuntary servitude (serfdom)**, since the freemen who drafted the document, depended upon this feudal system for their wealth, power and life.

Sovereignty

- Sovereignty, in which law recognizes the power of ruling, is vested in Great Britain in the government (the King in Parliament).
- In the United States, however, sovereignty vests in the people.
- Such is why the first three words in the Constitution are:

“We The People”

Constitution:

“The fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.”

What the purpose of a Constitution is:

- To Establish the Structure of Government;
- Define the Powers of Each Structure; and
- Enumerate the Rights of Citizens.

American Constitutional Government

- American Government is based upon the representative, republican model (where people are elected to represent the voters).
- The purpose of government in that system is to protect the rights of individual people, and the **sovereignty of the government is vested in the people themselves.**

American Constitutional Government Continued

- Both the States and the Federal Government are founded upon written constitutions. The first governments in human history to do so.
- When these constitutions were first drafted, they all followed the Adams framework, in his **“Thoughts on Government”** Essay.
- Under this Adams framework, all these governments contain three
 - separate, ○ independent, ○ competing and ○ co-equal branches, that would provide checks and balances, against the powers of each other.
- That is why, to this day, all the early state governments have a common structure.
- The federal government, which was modeled after these states, thus also has a similar structure.
- The states added after the US Constitution was adopted, then also followed this structure.

The New York State Constitution:

- **First State Constitution was drafted at the White Plains Convention, during military operations across New York, in 1777.**
- **Its principal author, John Jay, was a brilliant lawyer who later became the first Chief Justice of the United States Supreme Court.**
- **Followed the “Adams” Thoughts on Government model with independent, separate, co-equal, elected branches, for a Governor, Bicameral legislature (Senate and Assembly) and Judiciary.**
- **Declared sovereignty in the people, was republican in form, and provided for protection of individual rights.**
- **First Elections were held immediately after convention approved it, electing George Clinton, New York’s first Governor.**
- **Today’s Constitution is remarkably similar to the “bones” of the first one drafted by John Jay.**
- **It contains Twenty Articles, contains a Bill of Rights, retains separate, co-equal, branches, for a Governor, Bicameral legislature (Senate and Assembly) and Judiciary, and has Articles on specific areas of state needs.**
- **Amendments are authorized by passing a joint resolution by two successive legislatures, by a majority vote, that is then approved by the voters, also by majority vote, or by means of a convention then approved by the voters.**

The United States Constitution:

- **The United States Constitution was drafted at the Philadelphia Convention, 11 years after the Declaration of Independence in 1787.**
- **Its principal author, James Madison, was also brilliant lawyer who later became the Congressman who authored the Bill of Rights, then later the President of the United States.**
- **Also basically followed the “Adams” Thoughts on Government model with independent, separate, co-equal, branches, for a President (indirectly elected by the electoral college), Bicameral legislature (Senate – now directly elected by state but originally appointed by state legislatures and House of Representatives – directly elected in apportioned districts) and Judiciary (appointed by the President upon advice and consent of the Senate).**
- **Declared sovereignty in the people, was republican in form, and provided for protection of individual rights (after passage of the first ten amendments).**
- **First Elections were held immediately in 1788 after convention approved it, and it was ratified by at least 9 states, electing George Washington, the first President of the United States.**
- **Today’s Constitution contains Seven Articles, a Bill of Rights (first ten amendments), and has been amended 27 times.**
- **Amendments are authorized by passing a joint resolution by a two-thirds vote in both the House and the Senate, and then being ratified by $\frac{3}{4}$ of the state legislatures, or by means of a convention then ratified by the $\frac{3}{4}$ of the states.**



Weekly Information Sheet 03

Generally -

The simple **DEFINITION** of the concept of **Executive** is:

The branch of government responsible for effecting and enforcing laws

The simple **DEFINITION** of the concept of **Judiciary** is:

The branch of government consisting of the courts, whose function is to interpret, apply and enforce the laws."

The simple **DEFINITION** of the concept of **Legislative** is:

The branch of government, consisting of a legislature, whose function is responsible for the enacting of laws."

The Executive:

- ***The founders wanted to consolidate Executive Power in a single person, for nimbleness of action and accountability.***
- ***Designed to represent and administrate the government, and the nation or state at large, the Executive is charged with providing public protection, securing civil rights, and faithfully enforcing laws made by the Legislature and the Courts.***
- ***There have been 45 Presidents and every President, except for Franklin Roosevelt, served a maximum of two terms. There is no term limit for New York State Governor.***
- ***The President is elected by the electoral college, the governor of New York is directly elected by the people. Both serve 4 year terms.***
- ***The President must be at least 35, the governor of New York must be at least 30 years of age.***
- ***Executives use departments and agencies to Regulate, License, Adjudicate, investigate and Enforce.***
- ***70 percent of employees who work for agencies are appointed under the civil service system.***

The Judiciary:

- **The founders designed the judiciary to *hear cases in controversy and appeals*, and are charged with providing impartial decisions to secure civil rights, interpret and apply the law, and faithfully enforce laws made by the Congress and State Legislatures.**
- **The Federal Courts are Courts of *LIMITED Jurisdiction*. To get into Federal Court you must either have a federal question or complete diversity of parties (meaning residents of different states) and at least \$75000 in damages.**
- **The State Courts are Courts of *BROAD Jurisdiction*. Most law is state law. There are few restrictions to sue in state court.**
- **The Federal Courts include:**
 - **Supreme Court of the United States – The Highest Federal Court,**
 - **Federal Circuit Courts of Appeals,**
 - **Federal District Courts – The Federal Trial Court,**
 - **The US Court of International Trade,**
 - **Foreign Intelligence Surveillance Courts (FISA),**
 - **Federal Bankruptcy Courts, and**
 - **United States Court of Federal Claims.**
- **The Courts of the Unified Court System in New York Include:**
 - **Court of Appeals of the State of NY – The Highest State Court,**
 - **Appellate Division of the Supreme Court,**
 - **Supreme Courts – The State Trial Court,**
 - **Court of Claims – Suits against the State,**
 - **County Courts – The State Criminal Court,**
 - **Surrogate’s Courts, and**
 - **Family Courts.**
- **Local Courts in New York Include:**
 - **County Courts – Criminal (felony) and up to \$25,000 of civil,**
 - **Family Court – Minor Family Related Criminal and Custody,**
 - **Surrogate Court – Wills, Trusts and Estates, Adoptions,**
 - **City Court – Misdemeanor Crimes, Arraignments \$15k civil,**
 - **Town and Village Courts – Misdemeanor Crimes, Arraignments \$3k civil.**
 - **City Court Judges must be lawyers, Town and Village Justices do not**

The Legislature:

- **Congress Designed to enact written statutes involving the issues of federal concern, and provide oversight over all three branches of the federal government, the Congress is charged with enacting laws and taking measures to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty.**
- **The State Legislature was Designed to enact written statutes involving the issues of state concern, and provide oversight over all three branches of the state government, the Senate and Assembly are charged with enacting laws and taking measures to secure the blessings of liberty.**
- **Both Congress and the New York State Legislature are Bicameral (two house) legislatures whose members are elected directly by the people. Members of Congress and all State Legislators serve for a Term of Two Years. United States Senators serve for a term of 6 years.**
- **There are 435 members of the House of Representatives and 100 United States Senators. There are 150 members of the New York State Assembly and 63 New York State Senators.**
- **Legislative bodies pass bills by a majority vote which must be signed by the executive to become law (unless a veto is overridden by a 2/3 vote). They also use their Committees to conduct investigations and obtain information.**
- **United States Senators are elected from their states. All other legislators in Congress and in the states are elected from districts, which must be nearly equally apportioned within their respective houses (same size).**

Local Governments:

- **Counties:**
 - **There are 62 Counties in New York State.**
 - **The Legislative Branch of a County is known as the **County Legislature, or the County Board of Supervisors**, and the Executive Branch is known as the **County Executive**. They are elected.**
- **Cities:**
 - **There are also 62 Cities in New York State.**
 - **The Legislative Branch of a City is known as the **City Council**, and the Executive Branch is known as the **Mayor**. They are elected.**
- **Towns:**
 - **There are 932 Towns in New York State.**
 - **The Legislative Branch of a Town is known as the **Town Council**, and the Executive Branch is known as the **Supervisor**. They are elected.**
- **Villages:**
 - **There are also 551 Villages in New York State.**
 - **The Legislative Branch of a Village is known as the **Board of Trustees**, and the Executive Branch is known as the **Mayor**. They are elected**



Bob
Farley



Weekly Information Sheet 04

Generally -

- **Basis of all Law:** Contract Law is the basis for all law, and impacts all areas of human activity;
- **Freedom of Contract:** Freedom of Contract holds that individuals and corporations have an **inherent right** to make legally binding, mutual agreements without arbitrary or unreasonable legal restrictions.
- **The Common Law:** In most states, most aspects of contract law are governed by case law (i.e., “common law”), rather than by statutes. Common law further held that contracts work best when an agreement is performed.

Definition of Contract:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Elements of a Contract:

- Agreement,
- Between Competent Parties,
- Based on Genuine Assent,
- Supported by Consideration,
- for Lawful Purpose Subject Matter,
- in Legal Form.

Nature of Contracts:

- Parties – A Promisor (offeror) and Promisee (offeree),
- Reciprocal Duties and Benefits,
- A Contract Arises when an offer made by an offeror is accepted by an offeree,
- The Parties Intend to make a Binding Agreement.

Classes (types) of Contracts:

- Formal and Informal Contracts;
- Written and Oral Contracts;
- Express and Implied Contracts;
- Valid and Voidable Contracts;
- Void Agreements;
- Executed and Executory Contracts;
- Bilateral And Unilateral Contracts;
- Quasi Contracts; and
- Internet/Electronic Contracts.

Offers -

Definition of Offer:

“The act or instance of presenting something for acceptance; by means of a promise to do or refrain from doing some specified thing in the future, conditioned on an act, forbearance, or return promise.”

Offers Continued -

Requirements of an Offer:

- **Contractual Intention** - The Offeror, by their offer, must intend to create a binding agreement, as determined by reasonable person (objective standard).
- **Definiteness** - The Offeror, by their offer, must express definite and understandable terms of the offer, which are clear and spelled out, again as determined by reasonable person (objective standard).
- **Communication of Offer to Offeree** - "The offer, and its terms, must be clearly communicated by the Offeror to the Offeree."

Termination of an Offer:

- **Generally** - An offer can be terminated so as to not support a valid contract, and an Offeree cannot accept a terminated offer.
- **Revocation** - An offer that has been revoked by the Offeree cannot support a valid contract, and generally, an offer may be revoked at any time by the Offeror PRIOR TO the offeree's acceptance.
- **Counter Offer** - A Counteroffer by the Offeree constitutes a Rejection of the Offer, and such a counteroffer, constitutes a new offer, where the Offeree now becomes Offeror.
- **Rejection** - A communicated Rejection by the Offeree constitutes a Termination of the Offer, and as an offer must be accepted to create a contract, no contract is created.
- **Lapse of Time** - When an Offer is conditioned upon acceptance within a specific period, and the Offeree fails to accept such offer within such time period, constitutes a Rejection of the Offer, and when no time is specified in the offer, then an acceptance is required within a reasonable period of time
- **Death or Disability** - If either the Offeror or Offeree dies, or becomes mentally incompetent, before the offer is accepted, the offer is deemed by law to be automatically terminated.
- **Subsequent Illegality** - If the performance of the contract becomes illegal after the offer is made, but before the contract is able to be fulfilled, then the offer is also deemed terminated.

Acceptances –

Definition of Acceptance:

"An offeree's assent, either by express act or by implication from conduct, to the terms of an offer in a manner authorized or requested by the offeror, so that a binding contract is formed."

Requirements of an Acceptance:

- **What Constitutes An Acceptance** - An Acceptance is the offeree's manifestation of assent to the terms of the offer, made in a manner invited or required by the offer, as determined by reasonable person (objective standard), and where there is no contractual intention, there is no valid acceptance.

Acceptances Continued –

Requirements of Acceptance Continued:

- **Privilege of Offeree** - An Acceptance must be in response to an offer, not in response to something other than an offer, such as a solicitation of offers, and as an offer is directed to the offeree, it is the offeree who has the privilege of the power of acceptance or rejection, and it is essential to for a valid contract that each party manifest assent.”
- **Effect of Acceptance** - An Acceptance creates a valid contract, and once a contract is created, neither party can subsequently withdraw from, or cancel, the contract without the consent of the other party.
- **Nature of Acceptance** - The Nature of an Acceptance includes the following:
 - A manifested intent to Accept;
 - An objective or outward appearance of Acceptance, not some subjective or unexpressed intent of the offeree;
 - An absolute and unconditional intent to Accept the offer; and
 - An Acceptance of just what is offered, without changes.
- **Who May Accept** - Only the person to whom an offer is directed may accept it, and an Acceptance is made by the offeree (the person to whom the offer is directed), and unless the offer says otherwise, only the offeree may accept the offer.
- **Manner and Time of Acceptance** - The offeror is always the master of the offer, and it is the offer that is controlling with respect to the manner and time of its acceptance, but overall, the manner and time of the Acceptance must be in the manner and time invited or required by the offer, and any such Acceptance takes effect when the offeree communicates an absolute and unconditional intent to Accept the offer.
- **Communication of Acceptance** - Acceptance by the offeree is the last step in the formation of a bilateral contract, and the offeror’s receipt of the acceptance is the point in time when the contract is formed and its terms apply, but in order to have an Acceptance, the offeree must be communicate such Acceptance to the offeror, and under the “mailbox rule”, Acceptance by mail takes effect at the time and place when and where the letter is mailed (or FedEx’d) or when the fax is transmitted by the offeree.

Auctions:

- **Invitation to Negotiate** - statements made by the auctioneer to draw forth bids are merely invitations to negotiate;
- **Each Bid is an Offer** - and the bidder may generally withdraw the bid at any time before it is accepted by the auctioneer.
- **Bid Acceptance** - Acceptance of the Bid (the offer) is usually done by the fall of the auctioneer’s hammer, and the auctioneer indicating that the highest bid made has been accepted.
- **Without Reserve Auctions** - When the auction sale is without reserve, the auctioneer must accept the highest bid.
- **Generally** - A person making a bid is making an offer, and the acceptance of the highest bid by the auctioneer is an acceptance of that offer and gives rise to a contract.



Weekly Information Sheet 05

Contractual Capacity

Definition of Contract:

"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."

Definitions of Competency and Capacity:

Competence: *"A basic or minimal ability to do something"*

Capacity: *"The power to create or enter into a legal relation under the same circumstances in which a normal person would have such power to do so."*

Contractual Capacity: *"The ability to understand that a contract is being made, and to comprehend its general meaning, to the extent that genuine assent may be given to its terms."*

Reasoning for Capacity:

Without **Contractual Capacity** there can be no genuine assent to a contract, as the ability of the parties to understand the terms, conditions, duties and responsibilities of the agreement to which they are entering, is called into question due to age, mental illness, brain injury, or intoxication from medication, illegal drugs or alcohol.

Classes of Capacity:

Status Incapacity: *Minors (persons under 18 - the legal age of majority) do not have the legal capacity to contract. If they have been emancipated from their parents, however, they are presumed to have capacity. Contracts with minors are therefore often found to be voidable at the option of the minor.*

Factual Incapacity: *Mental incompetence due to mental illness, brain injury, or intoxication from medication, illegal drugs or alcohol.*

Minors:

Defined: *A Person under 18 years of age.*

Ability to Contract: *Minors do not have the legal capacity to contract, but as with anyone who has capacity questions, they may enter into a contract, so long as the other party understands that they are contracting with a party of insufficient capacity. Such contract will be VOIDABLE by the minor*

Issues Concerning Voidable Contracts:

Restitution after Disaffirmance: *Minors must make restitution to the extent possible.*

Contracts for Necessaries: *A minor can disaffirm a contract for necessities but must pay the reasonable value for such.*

Liability of Parent or Guardian: *Parent can be held liable for contracts for necessities and medical expenses when a third person supplies the parents or guardian of a minor with goods.*

Minors Cannot Avoid Contracts:

- *For Educational/Student Loan;*
- *For Medical Care;*
- *Made while running a business;*
- *Approved by a court;*
- *Made in performance of a legal duty; and*
- *Relating to bank accounts, insurance policies, or corporate stock.*

Contractual Capacity - Continued

Mentally Incompetent Persons:

Defined: A person is determined to be incompetent when they have been found to be unable to manage their own affairs.

Ability to Contract: Mentally Incompetent people do not have the legal capacity to contract, just as minors. Such contract will be VOIDABLE by the mentally incompetent person or their legal representative. If their mental disability is removed they can ratify or disaffirm the contract.

Intoxicated Persons:

Defined: A person is intoxicated when they experience a diminished ability to act with full mental and physical capabilities, because of alcohol or drug consumption.

Effect of Intoxication: The capacity of a party to contract, and the validity of the contract, are not affected by the party's being impaired by alcohol or drugs at the time of making the contract, so long as the party knew that a contract was being made.

If the degree of intoxication, however, is such that a person does not know that a contract is being made, the contract is VOIDABLE by that person.

After becoming sober, the individual may avoid or rescind the contract, but an unreasonable delay in taking steps to set aside a known contract, entered into while intoxicated, may bar such person from asserting this right.

Mistake:

Definition:

“An error, misconception, misunderstanding, or erroneous belief with respect to the terms, conditions, duties and/or responsibilities contained in a contract.”

Why Mistakes Matter: Because of the requirement of genuine assent, the validity of a contract may be affected by the fact that one or both of the parties made a mistake. In some cases, the mistake may be caused by the misconduct of one of the parties. In others, the mistake is the result of a non purposeful error.

Not Every Misunderstanding is a Mistake: It is important to understand that not every erroneous idea, is a “mistake” in a contractual context.

For purposes of rescinding contracts, a “mistake” refers only to a mistaken belief about an existing fact, NOT an erroneous belief about what will happen in the future.

Nor is a “mistake” a misunderstanding as to the “meaning” of the contract.

For a misunderstanding in the meaning of is not an error as to some external fact, but rather an error as to the meaning of a manifestation of assent, which is ultimately resolved by the process of interpretation.

Three Types of Mistake:

- Unilateral Mistake;
- Mutual Mistake; and
- Mistake due to transcriptions or printing.

Unilateral Mistake: Is a mistake made by only one of the parties. A party making the mistake may avoid the contract, only if the other contracting party knew, or should have known, of the mistake. This is because the mistake in such case was avoidable for the victim of the mistake. (2)

Mistake Continued:

Three Types of Mistake Continued:

Mutual Mistake: Is a mistake made by both of the contracting parties. It is a mistake as to a fact, that does affect the contract, and such mistake is shared by both parties, so that it is often held that no contract was formed at all, or that the contract should be subject to either rescission (i.e., cancellation) or reformation (i.e., re-writing by the court).

When Can a Contract Be Rescinded or Reformed for Mutual Mistake: When both parties are mistaken about a basic, material fact of the contract, the adversely affected party may generally avoid the contract.

Three Requirements: Three requirements are generally must be satisfied before the adversely affected party may avoid the contract on account of mutual mistake:

- The mistake must concern a basic assumption on which the contract was made;
- The mistake must have a material effect on the “agreed exchange of performances”; and
- The adversely-affected party (the one seeking avoidance) must not bear the risk of the mistake.

Transcription or Printing Mistake: Is a mistake that is made in the typing or printing of a written contract. This can happen when the parties make an oral agreement, and in the process of committing it to writing, or when printing it from a manuscript (a hand written document), a phrase, term, or segment is inadvertently left out of, or inadvertently altered in, the final, signed document.

When Can a Contract Be Rescinded or Reformed for Transcription or Printing Errors: When an error takes place as a result of a faulty transcription or printing, the aggrieved party may petition the court to rescind or reform the contract to reflect the actual agreement of the parties. The burden of proof in such case, however, is heightened to clear and convincing evidence that such a transcription or printing mistake was made.

Back to the Actual Intent of the Parties: A mistake in transcription is completely different in nature from a mistake of fact. When the mistake is in printing or transcription, the desired relief is to have the writing changed to reflect what was actually agreed.

Deception or Pressure:

Definition:

When there is a **Deception** or **Pressure** in the contract, there can be no genuine assent, as the ability of the parties to truly understand the terms, conditions, duties and responsibilities of the agreement to which they are entering, is not what they believed it to be, or they were forced against their will to enter into it (so as to remove the essential element of assent).

Types of Deception or Pressure:

Intentional Misrepresentation: The act of intentionally or purposefully making a false or misleading assertion about something with the intent to deceive.

Fraud: An intentional misrepresentation of a material fact, made for the purpose of inducing another to act to their detriment.

Negligent Misrepresentation: A careless or inadvertent false statement made in circumstances where care should have been undertaken.

Non Disclosure: The failure or refusal to reveal something that either might be or is required to be revealed.

Undue Influence: The improper use of power or trust in a way that deprives a person of free will and substitutes another’s objective.

Duress: A threat made to compel or induce a person to do something against their will or judgment. This can be physical duress or economic duress (type of threat).

Unconscionability: Where one party to a contract of exerts such extreme unfairness in a contract (when viewed through an objective standard), so that the other party lacks a meaningful choice. In such case, the contract’s terms are deemed so shockingly unfair as to unreasonably favor the other party, and thereby “shock the conscious of the court”.



Weekly Information Sheet 06

Consideration

Definition of Contract:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Elements of a Contract include:

- Agreement,
- Between Competent Parties,
- Based on Genuine Assent,
- Supported by Consideration,
- for Lawful Purpose Subject Matter,
- in Legal Form.

Definition of Consideration:

“Something (such as an act, a forbearance or a return promise) bargained for and received by a promisor from a promisee, that motivates a person to do something.”

It's a **“Bargained-for-Exchange”** and requires **“Mutuality of Promises”**

Purpose and Function of Consideration:

- The purpose of consideration is to distinguish between those promises that are enforceable, and those promises that are not.
- Promises to make a **gift** are unenforceable because they lack consideration.
- There are two primary functions of consideration – evidentiary and cautionary.

Measure and Adequacy of Consideration:

Measure of Consideration: Legal Detriment and Bargained for Exchange

Adequacy of Consideration:

- Amount of Consideration Considered Immaterial
- Sufficiency of Consideration Not Reviewable
- Exceptions –
 - Past Consideration, Pre-existing Legal Obligations and Moral Obligations
 - Sham, Incidental, Unconscionable or Fraudulent Consideration

Forbearance, Illusory and Conditional Promises Consideration

Forbearance – Positive Consideration and Forbearance Consideration

Illusory Promises – Not Consideration because not a Promise

Bilateral Contracts - To be enforceable, there must be mutuality of obligation.

Conditional Promises: Depends on the occurrence of a future specified condition in order for the promise to be binding. Such promises are enforceable.

Exceptions:

- **Charitable Subscriptions** - A charity's reliance on the pledge, will be a substitute for consideration
- **Uniform Commercial Code** - In some situations, UCC abolishes the requirement of consideration.
- **Promissory Estoppel** - This doctrine known as detrimental reliance, is applicable when:
 - The promisor makes a promise that lacks consideration;
 - The promisor intends, or should reasonably expect, that the promisee will rely on the promise;
 - The promisee in fact relies on the promise in some definite and substantial manner; and
 - Enforcement of the promise is the only way to avoid injustice.

Legality

Definition of Legality:

Requirement: To be a valid Contract, it must be for a lawful purpose subject matter.

Legality Defined: “Strict adherence to the law, prescription or doctrine, and the quality of being legal and/or being in compliance with the law.”

Subject Matter Defined: “The issue or topic presented, represented or performed in the contract.”

Illegality Defined: “An act that is not authorized by law, or a state or condition of being unlawful (in contravention of the law).”

Effect of Illegality:

Generally: An agreement is illegal when its formation or performance is a crime or a tort, or when it’s provisions are unconscionable, oppressive, unfair or made in bad faith.

Effect of Illegality: Ordinarily, an illegal agreement is void. When an agreement is illegal, the parties are usually not entitled to the aid of the courts.

Exceptions to Effect of Illegality:

Protection of One Party: When the law that the agreement violates is intended to protect one of the parties, that party may seek relief.

Unequal Guilt: When the parties are not in *pari delicto*—equally guilty—the least guilty party may be granted relief when public interest is advanced by doing so.

Partial Illegality: An agreement may involve the performance of several promises, some of which are illegal and some legal. The legal parts of the agreement may be enforced, provided that they can be separated from the parts that are illegal.

Crimes and Civil Wrongs:

There is a difference between illegality and criminality.

Criminal Conduct in Contract: A contract to commit a crime (such as where one of the parties pays the other to murder someone) is not enforceable and its making, or performance, will lead to criminal prosecution.

Non Criminal but Unlawful: Not all illegal contracts are criminal. A statute or the common law could simply forbid a type of contract or a contract term without making the violation of the law a criminal offense. For purposes of contract law, it is not concerned with whether the transaction attracts criminal penalties.

Good Faith and Fair Dealing:

Implied Covenant: This means that in every contract there exists an implied covenant of good faith and fair dealing. This means each party a duty of good faith and fair dealing in its performance and its enforcement.

General Obligation: The general obligation of good faith and fair dealing is imposed by law on both parties in the performance and enforcement of the contract. This duty is expressly recognized in both case law and the UCC.

Based Upon the Reasonable Expectation of the Parties: the determination of whether a party acted in good faith must be made with reference to the reasonable expectations of the parties in the context of the transaction.

Legality Continued

Unconscionability:

Defined: Black's Law Dictionary defines "unconscionability" to mean:

"Contract terms that unreasonably favor the other party, and where such are so unreasonably unfair or oppressive, that they shock the conscience of the court"

Generally: Ordinarily, a court will not consider whether a contract is fair or unfair, is wise or foolish, or operates unequally between the parties.

However, in certain unusual situations, the law may hold a contract provision unenforceable because it is simply too harsh or oppressive to one of the parties.

What Constitutes Unconscionability: A provision in a contract that gives what the court believes is too much of an advantage over a buyer may be held void as unconscionable, if it "shocks the conscience of the court".

An Equitable Remedy: Unconscionability originated as discretionary equitable relief in a contract suit. It is the function of a court of equity to do justice between the parties, and thereby decline relief to a plaintiff who had unfairly taken advantage of the other party.

Under the principles of equity, the court has the power to refuse enforcement of an unconscionable contract or to adjust the contract by removing or modifying the unconscionable provision.

Public Policy

Definition of Public Policy:

Requirement: To be a valid Contract, it must be for a lawful purpose subject matter.

Contracts which are deemed invalid because of **Public Policy** are the same as those which fail for the lack of a lawful purpose subject matter.

Public Policy Defined: *"Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society"*

Agreements Affecting Public Policy:

Agreements Contrary to Public Policy: The law will not recognize certain agreements that a legislature or the courts deem are substantially against the public interest, and harmful to society as a whole. These agreements, that may harm the public welfare, are thereby condemned as being contrary to public policy, and are therefore held not to be binding.

Types of Agreements that Are Not Upheld: Agreements that interfere with public service or the duties of public officials, obstruct legal process, or discriminate against classifications of individuals may be considered detrimental to public welfare and, as such, are not enforceable. These agreements are struck down by courts in the same manner as if they were illegal.

No Clear Delineation

Unenforceable Contracts:

- **Societal Protections:** The protection of the public welfare, health, or safety;
- **Personal Protections:** The protection of persons or property; and
- **Institutional Protections:** The protection of recognized social institutions.

Courts Are Hesitant to Use This Remedy

Public Policy Continued

Gaming Wagers and Lotteries:

Gaming Generally Illegal

Exception: State regulated casino gambling and contracts involving such, are enforceable and valid.

Exception: In many states, public lotteries (lotteries run by a state government) have been legalized.

Promotional Sweepstakes with Purchased Tickets – Illegal

Free Gift Promotions – Lawful so long as no purchase is required

Skilled Activity – Is not gambling.

Regulation of Business:

Business Regulations: These laws can take the effect of everything from licensing, to operational limitations on the business and its employees, to disclosure requirements, to consumer protections.

Effect of Violation: Whether an agreement made in connection with business conducted in violation of the law is binding or void, depends on how strongly opposed the public policy is to the prohibited act. Most courts take the view that the agreement is not void unless the statute expressly specifies such.

Consumer Protection Statutes: Consumer protection legislation often gives the consumer the right to rescind the contract in certain situations.

Licensed Callings or Dealings:

Required Licenses: Some professions and trades require that a person to obtain a license before engaging in such professions or trades. These professions and trades often require a high degree of education, training and/or skill to be deemed proficient.

Licensed Professions and Trades: Such professions and trades include law, medicine, accountancy, real estate brokers, stock brokers, insurance agents, hotel keepers, pawn brokers, electricians, and plumbers. In most jurisdictions, a license is required by law in order to practice these professions or trades in order protect the public from unqualified persons.

Contracts with Unlicensed Persons Unenforceable: A contract made by an unlicensed person in these types of enterprises would be unenforceable.

Quantum Meruit: The doctrine of Quantum Meruit is an equitable remedy that allows a person who performs services to recover the reasonable value of services, and damages incurred, in compensation for work performed in a quasi contractual relationship.

Certain business regulations of home improvement contractors, however, forbid an unlicensed contractor from not only enforcing a home improvement contract against a home owner, but also prohibit any recovery in quantum meruit as well.

Contracts in Restraint of Trade:

Restraint of Trade: Restraint of trade is an action that interferes with competition in a free market. Agreements (contracts) that unreasonably restrain trade are illegal, and void on the ground that they are contrary to public policy. In addition to the illegality of the agreement based on general principles of law, both federal and state statutes explicitly declare monopolies illegal and subject the parties to various civil and criminal penalties.

Agreements Not to Compete:

Permissible Under Certain Circumstances But Disfavored Enforceable Non-Compete Contracts if:

- It is narrowly drawn to protect the employer's legitimate business interests;
- It is not unduly burdensome on the employee's ability to earn a living;
- The geographic restriction is not overly broad, and
- A reasonable time limitation is given.

Usury:

Defined: According to Black's Law Dictionary, Usury is defined as "charging of an illegally high rate of interest".

New York Usury Rates: Section 5-501 of the New York State General Obligations law establishes a civil usury rate cap of 16 percent per year. Section 190.40 of the New York State Penal Law established a criminal usury rate cap of 25 percent per year. Certain borrowing transactions are not subject to civil usury, including credit cards.



Weekly Information Sheet 07

Contract Rules and Interpretation

Definition of Contract:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Elements of a Contract include:

- *Agreement,*
- *Between Competent Parties,*
- *Based on Genuine Assent,*
- *Supported by Consideration,*
- *for Lawful Purpose Subject Matter,*
- *in Legal Form.*

Statute of Frauds

Oral and Written Contracts:

Oral or Written: Contracts in most situations can be an oral or written agreement.

Oral Contracts: Unless otherwise required by law, a contract does not have to be in writing to be a binding and enforceable legal obligation.

Written Contracts: Although it is always a good idea to make contractual agreements in writing (as such tends to reduce confusion) under certain legal requirements sometimes contracts are mandated to be in writing.

Statute of Frauds: In accordance with the legal principle known as the statute of frauds, there are some types of contracts that must be recorded in writing, and signed by the party to be charged in order to be enforceable.

Basic Rule and Intent:

Basic Rule: The basic rule of the statute of frauds is that a contract within its scope may not be enforced unless a memorandum of it is written and signed by the party to be charged. This gives rise to a three observations:

First: The statute does not require the entire contract to be written, but only a memorandum of it.

Second: Only the party who is to be charged, that is, against whom enforcement is sought, needs to have signed it, and thus the signature of the other party is not needed.

Third: The consequence of noncompliance is usually unenforceability, not invalidity.

Intent: The statute is intended to prevent a person from enforcing a falsely alleged contract through perjured testimony.

Statute of Frauds (Continued)

Covered Items:

Contracts Involving the Sale or Conveyance of an Interest in Land: The statute of frauds requires that contracts concerning the sale or conveyance of an interest in land, must be in writing;

Contracts That Cannot Be Performed Within a Year: The statute of frauds further requires that any contract, which cannot be performed within a year, must be in writing;

Contracts For the Sale of Goods in Excess of \$500: The statute of frauds additionally mandates that a contract for sale and/or purchase of goods, in excess of \$500, must be in writing;

Contracts To Answer for the Debt or Obligation of Another: The statute of frauds also requires that suretyship contracts, meaning a contract to pay another person's debt or obligation, must be in writing;

Contracts Made by Executors or Administrators to Answer for the Duty of Their Decedents: The statute of frauds further requires that contracts in which the executor or administrator of an estate assumes personal liability to a creditor of the decedent for a debt or obligation incurred by the decedent before his death, must be in written form;

Contracts Made upon Consideration of Marriage: The statute of frauds requires that prenuptial contracts motivated by the impending marriage must be in writing. This is not a promise of marriage, which can be, and usually is an oral agreement; and

Contracts Involving the Assignment of, or the Naming of a Beneficiary of, a Life, Health or Accident Insurance Policy: That any contract, involving a promise to assign, or name a beneficiary of, a life, health or accident insurance policy, must be in writing.

Writing and Signature:

What Constitutes Writing: Although writing is traditionally the inscription of words on a tangible surface, such as paper, it is clear in contemporary law that "writing" includes a retrievable recording in an electronic or other medium. The statute of frauds is silent as to the particular formality needed for the writing as long as it contains the statute's minimum required content and signature.

Can Be a Memorandum and Not the Entire Contract: A written memorandum of the contract can suffice to satisfy the statute of frauds, and need not be in a single document.

What Constitutes Signing: In accordance with the statute of frauds, the contract, or memorandum thereof, must be signed by the party sought to be bound by the contract. A signature is any mark or symbol placed by the party on the writing with the intention of authenticating it. This includes electronic signatures under the UETA and the ESRA.

Who Must Sign – The Party to be Charged: In accordance with the statute of frauds, the "party to be charged" (i.e. the party sought to be held liable to perform the duties under the agreed to contract), must have signed the contract.

Exceptions:

Partial Performance: The doctrine of partial performance, allows an oral contract to be upheld, when the parties begin performance, because such provides reliable evidence of a contract.

Judicial Admission: The doctrine of judicial admission also allows an oral contract to be upheld, when the party being charged admits in pleadings or testimony that a contract was made.

Estoppel / Detrimental Reliance: The statute of frauds may be circumvented when the party seeking to get around the statute of frauds is able to prove estoppel and detrimental reliance.

Parole Evidence Rule

Parole Evidence Rule:

Basic Statement and Rationale: The Parole Evidence Rule holds that no oral or extrinsic evidence (evidence outside the provisions of the written contract) shall be considered when determining the meaning of the contract itself.

The Written Contract Represents the Final Expression of the Parties: The Parole Evidence Rule is based on the principle that when the parties record their agreement in writing, they intend the written record to be the final expression of their agreement. Accordingly, under the Parol Evidence Rule, no oral or extrinsic evidence may be admitted to supplement, explain, or contradict the written contract.

The Written Contract Supersedes All Previous Discussions and Agreements: When parties reduce the contract to writing, and sign the same, the courts hold that they intended such to supersede anything that might have been proposed, discussed, or agreed to prior to execution of the writing but not ultimately recorded in it. This is why the Parole Evidence Rule requires that the court should not hear evidence of any terms that were allegedly agreed to but are not reflected in the writing, as such evidence is suspect, unreliable, and irrelevant, and is more likely to mislead and confuse than to inform.

Purpose and Premise of the Parole Evidence Rule: The primary purpose of the parole evidence rule is to control the court's decision making and to shield it from evidence that is suspect and unreliable. This Rule also promotes efficiency in the conduct of litigation, by excluding such suspect evidence at the outset thereby saving the time that would otherwise be wasted in presenting such less reliable evidence. Lastly, the Rule also promotes transactional efficiency, because due to its existence, contracting parties are more likely to make an effort to record their agreement more fully and accurately.

Exceptions:

Ambiguity: If a written contract is **ambiguous** or clearly has term which can have two or more different meanings, then parole evidence may generally be admitted by the court to clarify the meaning.

Fraud, Duress, Mistake or Illegality: Under certain circumstances involving fraud, duress, mistake, or illegality, parole evidence may also sometimes be admitted:

Contract Modification: The Parol Evidence Rule prohibits only the contradiction of a complete written contract. It does not prohibit proof that the contract is incomplete or was subsequently, thereafter modified or terminated.

Rules of Construction and Interpretation

Ascertaining the Meaning of an Agreement:

Process: The processes of interpretation (inferring meaning from facts) and construction (inferring meaning as a matter of law) of contracts follows several rules and legal methods in the areas examined.

Areas of Examination: These include the Intention of the Parties; Examination of the Whole Contract; Analysis of Contradictory and Ambiguous Terms; Determination of Implied Terms; Conduct and Custom of the Parties; and Manner of Avoidance of Hardship.

Disputes of Law vs. Fact: Whereas construction determines the legal effect of the words or actions in a contract, interpretation identifies the meaning of such words or actions.

Rules of Construction and Interpretation

Areas of Examination:

Intent of the Parties: When people enter into a contract, it is to be presumed that they intend for their agreement to have some effect. A court will strive to determine the intent of the parties in order to give this effect to it. A contract, therefore, is to be enforced according to its terms. But a court cannot remake or rewrite the contract, under the pretense of interpreting what the intent of the parties actually is.

Examination of the Whole Contract: The provisions of a contract must be construed as a whole in such a way as to examine the whole contract so that every part is given effect. Every word of a contract is therefore to be given effect if reasonably possible. The contract is thus to be construed as a whole, and if the plain language of the contract thereby viewed solves the dispute, then the court is to make no further analysis.

The Four Corners of the Contract: Proper contractual interpretation first focuses on the normal, accepted meaning of the words used by the parties within the four corners of the contract.

Plain Meaning: Where the court has no evidence of meaning extrinsic to the bare language of the contract, an examination is necessarily confined to the four corners of the agreement interpreting that language to ascertain its meaning. Where the contract expresses the disputed term in clear and unambiguous language, extrinsic evidence as to its meaning is rejected and/or treated with caution. Courts are quite strongly resistant to considering extrinsic evidence if the language used in the contract is clear on its face. Under the doctrine of Parol Evidence, it is the written contract itself that contains the intent of the parties, and from which such can be determined.

New York Four Corners Rule: The New York Court of Appeals has explicitly held that the four corners approach should be followed, and that an examination of the entire contract must be done to determine the meaning of its terms. In *WWW Associates v. Giancontieri*, 77 NY2d 157 (1990) the court held “[E]xtrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.” Id at 163. “Such court further stated that “when parties set down their agreement in a clear, complete document, ... [e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.” Id at 162. Under this New York doctrine, when the plain meaning of an integrated writing is unambiguous, that meaning governs.

Analysis of Contradictory and Ambiguous Terms: The provisions of a contract must not conflict or have different meanings. If a term in a contract conflicts with another term, or one term has two different meanings, then it is necessary for a court to determine whether there is a contract and, if so, what the contract really means.

Determination of Implied Terms: In certain cases, a court will imply a term to cover a situation for which the parties failed to provide or, when needed, to give the contract a construction or meaning that is reasonable. In such instances, the court will imply details of the performance of a contract not expressly stated in the contract. In contracts to perform work, courts will find an implied promise to use such skill as is necessary to properly perform the work.

Conduct and Custom of the Parties: The conduct of the parties and the customs and usages of a particular trade may give meaning to the words of the parties and thus aid in the interpretation of their contract.

Manner of Avoidance of Hardship: As a general rule, a party is bound by a contract even though it proves to be a bad bargain. This means, that if possible, a court will interpret a contract to avoid hardship. Courts will also, if possible, interpret a vague contract in a way to avoid any forfeiture of a party's interest. As a result, when hardship arises, because the contract makes no provision for the situation that has occurred, the court will sometimes imply a term to avoid the hardship.



Weekly Information Sheet 08

Contract Rules and Interpretation

Definition of Contract:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Elements of a Contract include:

- *Agreement,*
- *Between Competent Parties,*
- *Based on Genuine Assent,*
- *Supported by Consideration,*
- *for Lawful Purpose Subject Matter,*
- *in Legal Form.*

Third Party Beneficiaries

Third Party Beneficiaries:

Ordinarily, only the parties to a contract may sue on it. This is a concept known as “**privity of contract**”. In certain cases, however, a third person, who is not a party, but who is a beneficiary of the contract may sue.

Definitions:

Third Party Beneficiary: *“A Person who, though not a party to a contract, stands to benefit from the contract’s performance.”*

Privity of Contract: *“The relationship between the parties to a contract, allowing them to sue each other but preventing an outside third party from doing so.”*

Third-Party Beneficiary Contracts: When a contract is intended to benefit a third person, in certain circumstances, such a person is an intended third-party beneficiary, and may bring suit on and enforce the contract.

Creditor Beneficiary: *An intended beneficiary is sometimes classified as a creditor beneficiary when the promisee’s primary intent is to discharge a duty owed to the third party (and thus the beneficiary is deemed to have provided some degree of consideration for the benefit).*

Donee Beneficiary: *A second type of intended beneficiary is a donee beneficiary to whom the promisee’s primary intent in contracting is to give a benefit. A life insurance contract is such an intended third-party beneficiary contract. Such an individual third-party beneficiary has a right to sue under a broad range of insurance policies.*

Necessity of Intent: A third person does not have the status of an intended third-party beneficiary unless it is clear at the time the contract was formed, that the parties intended to impose a direct obligation with respect to the third person.

In determining whether there is intent to benefit a third party, the surrounding circumstances as well as the contract must be examined. There is a strong presumption in the law, however, that the parties to a contract intend to benefit only themselves.

Third Party Beneficiaries (Continued)

Intended and Incidental Beneficiaries:

Incidental Beneficiaries: Are persons whose benefit was purely a fortuitous and incidental result of a transaction between others. The contracting parties may have been pleased, indifferent, or resentful to see someone else derive benefits from their contract, but the parties did not make the contract for the purpose of conferring third-party benefits;

Intentional Beneficiaries: In contrast to these more commonplace situations in which the positive effects of the contract on a third party occur merely by happenstance, a contract may be entered for the deliberate purpose of bestowing a benefit, and more importantly, a power to enforce that benefit, on a third party. Such persons are intentional beneficiaries. These contracts properly describe the benefit of a third party manifesting the intent to give such benefit to a third party, which is directly enforceable by that third party, against the contracting party who undertakes to perform it. It is the creation of this directly enforceable right, that is the hallmark of a contract for the benefit of an intentional third party beneficiary. **These beneficiaries are given the right of Independent Enforcement.**

Means of Modification and/or Termination:

Assent of the Parties;

**Express Contractual Provision to Modify or Terminate Rights; and
Discharge, Operation of Law or Bankruptcy.**

Restrictions:

Vesting and Consent: The general rule is that the promisor may assert against an intended third party beneficiary any defense which he could assert against the promisee. The right to rescind or modify a third party beneficiary contract, without the assent of the beneficiary, ceases once the contract is accepted, adopted or acted upon by the intentional third party beneficiary. **The rights of the third party "vest" when they learn of the initial contract, and assent to it, or when they materially change their position in justifiable reliance on it, or when they bring suit on it.**

Qualification of Rights: As creators of the benefit, the contracting parties can confer it subject to whatever limitations and conditions they see fit. Thus the contract, can retain the power of the parties to modify it or take away a benefit even after any right has vested in the intended beneficiary. **Absent an express provision in the contract, however, allowing for the modification or termination of beneficiary rights, the contracting parties' power to alter these rights, terminates as soon as the benefit vests.**

Rights and Liabilities of Beneficiaries and Parties:

Intended Third-Party Beneficiary: Although the intended third-party beneficiary rule gives the third person the right to enforce the contract, it obviously gives no more rights than the contract provides. That is, the intended third-party beneficiary must take the contract as it is. Additionally, if the contract is not binding for any reason, that defense may be raised against the intended third-party beneficiary suing on the contract.

The Promisee's Parallel Rights of Enforcement Against the Promisor: Notwithstanding the conferral and vesting of rights in the beneficiary, the promisee continues to be a party to the contract. As such, except to the extent that the beneficiary has enforced and obtained satisfaction of the performance, the promisee has the right to enforce the promise just as they would have had in an ordinary bilateral contract.

The Promisor's Ability to Raise Defenses Against the Beneficiary: The beneficiary's rights derive from the contract, and as such, they are limited by any defense arising out of the contract. As a result, unless the contract makes it clear that it confers rights on the beneficiary free of defenses, the beneficiary's rights are subject to any limitations inherent in the contract.

Assignment and Delegation

Assignment and Delegation:

Ordinarily, The parties to a contract have both rights and duties. These rights and duties, under certain circumstances, can be transferred or sold to another person or entity. This is known as assignment and delegation.

Definitions:

Assignment: “The transfer of contractual rights to a third party.”

Delegation: “The act of entrusting another with authority to perform the duties of a contract.”

The Nature of an Assignment: An assignment is a voluntary manifestation of intention by the holder of an existing right to make an immediate transfer of that right to another person.

When a Right to be Assigned Comes into Existence: A right comes into existence and can be assigned as soon as the contract creating it has been formed, and such right can be conditional or not yet due at the time of assignment, so long as it has been created already.

The Nature of a Delegation: An obligor is entitled to delegate his contractual duties unless the delegation violates the terms of the contract or public policy.

What is Assignment and Delegation: Assignment and delegation involves a decision made by one of the parties, after the contract has been entered, to transfer his rights, or his duties, or both to a third party. Assignment and delegation are only possible once a contract has been made and those rights and obligations have come into existence.

General Rule: The well-established general rule, is that unless a contract specifically prohibits a party from transferring their rights acquired, and duties assumed thereunder, or the nature of the contract is such that the transfer would impair the other party’s reasonable expectations, or would offend public policy, a party has the power and ability to transfer contractual rights and obligations to another third person.

Rights vs. Duties: The transfer of rights is called an assignment, and the transfer of duties is a delegation.

Rights of Assignee: Unless restricted by the terms of the assignment or applicable law, the assignee acquires all the rights of the assignor. An assignee stands exactly in the position of the assignor. The assignee’s rights are no more or less than those of the assignor. If the assigned right to payment is subject to a condition precedent, that same condition exists for the assignee.

Assignment Form and Notice:

Form: Generally, **an assignment may be in any form**. Certain statutes, however, may require that some kinds of assignments must be in writing or be executed in a particular form.

Notice: An assignment, if otherwise valid, takes effect the moment it is made. As a result, **the assignee should give immediate notice** of the assignment to the obligor, setting forth the obligor’s duty to the assignee, in order to prevent improper payment.

Permissibility of Assignments:

Generally: Generally assignments of contracts are permissible unless they are expressly prohibited in the contract or are violative of public policy.

Prohibition of Assignment of Rights: A clear and specific contractual prohibition against the assignment of rights is enforceable at common law. Absent such a prohibition, or a prohibition based upon public policy, however, an assignment of rights is permissible.

Nonassignable Rights: If the transfer of a right would materially affect or alter a duty or the rights of the obligor, an assignment is not permitted.

Assignment and Delegation (Cont)

Liabilities of Assignors and Assignees:

Continuing Liability of Assignor: The making of an assignment does not relieve the assignor of any obligation of the contract. As a result, in the absence of a contrary agreement, an assignor continues to be bound by the obligations of the original contract. Upon assignment, the assignor could, however, seek indemnification from the assignee, for any breach caused by the assignee, in the event the other party to the contract seeks to hold the assignor liable.

Liability of Assignee: It is necessary to distinguish between the question of whether the obligor can assert a particular defense against the assignee and the question of whether any person can sue the assignee. Ordinarily, the assignee is not subject to suit by virtue of the fact that the assignment has been made.

Warranties of the Assignor: When the assignment is made for a consideration, the assignor is regarded as providing an **implied warranty that the right assigned is valid**. The assignor also warrants that the assignor is the owner of the claim or right assigned, and that the assignor will not interfere with the assignee's enforcement of the obligation.

Delegation – Duties Under the Contract:

Delegation: An obligor is generally entitled to delegate his contractual duties unless it violates an express provision of the contract or public policy.

Performance of the Contract: The effect of a permissible and effective delegation is that the delegator commits no breach of the contract by having his duty performed by the delegate, and the delegate's conforming performance discharges the delegator's contractual obligation. If a performance is properly delegated but the obligee refuses to accept it, this will be a breach by the obligee in the same way as it would have been to refuse the delegator's own performance.

Effect of Delegation of Duties: A delegation of duties is a transfer of duties by a contracting party to another person who is to perform them. Under certain circumstances, a contracting party may obtain someone else to do the work. When the performance is standardized and nonpersonal, so that it is not material who performs, the law will permit the delegation of the performance of the contract. In such cases, however, the contracting party remains liable in the case of default of the person doing the work just as though no delegation had been made.

A Requirement of Personal Performance: If the performance of a party to a contract requires the contractor, and no other person to perform the duties of the contract, such as where the performance involves personal skill, talents, judgment, or trust, the delegation of duties is barred unless consented to by the person entitled to the performance. Examples of this include contracts for performance by professionals such as physicians, dentists, lawyers, consultants, celebrities, artists, professional athletes and/or craftpersons with unusual skills.

Intention to Delegate Duties: An assignment of rights does not in itself delegate the performance of duties to the assignee. In the absence of clear language in the assignment stating that duties are or are not delegated, all circumstances must be examined to determine whether there is a delegation. When the total picture is viewed, it may become clear what was intended. The fact that an assignment is made for security of the assignee is a strong indication that there was no intent to delegate to the assignee the performance of any duty resting on the assignor.

Delegation of Duties under the UCC: With respect to contracts for the sale of goods, "an assignment of 'the contract' or of 'all my rights under the contract' or an assignment in similar general terms is an assignment of rights and, unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise ... to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract."



Weekly Information Sheet 09

Contractual Breach and Remedies

Definition of Contract:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

Elements of a Contract include:

- *Agreement,*
- *Between Competent Parties,*
- *Based on Genuine Assent,*
- *Supported by Consideration,*
- *for Lawful Purpose Subject Matter,*
- *in Legal Form.*

Contract Fulfillment:

Contractual Discharge: *To conclude a contract, there are three methods of contractual discharge. These include a discharge by performance, a discharge by action, and a discharge by external causes.*

Contractual Discharge Defined: *Black’s Law Dictionary defines the term discharge to mean, “Any method by which a legal duty is extinguished”, which with respect to contracts means performance, action or external causes.*

Breach of Contract:

Defined: *Blacks Law Dictionary defines a Breach of Contract as:*

“A violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance.”

What constitutes a Breach of Contract: *A breach of contract is the failure to act or perform in the manner called for by the contract. When the contract calls for performance, such as painting an owner’s home, the failure to paint or to paint properly is a breach of contract. If the contract calls for a creditor’s forbearance, the creditor’s action in bringing a lawsuit is a breach of the contract.*

Meaning: *Breach of contract is a legal cause of action, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract, by non-performance or interference with the other party’s performance.*

What Constitutes Breach: *To determine whether or not a contract has been breached, the contract needs to be examined. This examination must consider: the existence of a contract, the requirements of the contract, and if any modifications were made to the contract.*

When a Breach Occurs: *A breach of contract occurs when:*

- *A party to a contract fails to fulfill its obligation, whether partially or wholly, in the contract, or*
- *Communicates an intent to fail the obligation, or*
- *Appears not to be able to perform its obligation under the contract.*

Contractual Breach and Remedies Cont

Breach of Contract Continued:

Notice: *The plaintiff must notify the defendant of the breach prior to filing a lawsuit.*

Damages: *Where a breach of contract has occurred, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party.*

Rescission: *If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.*

Waiver of Breach:

Defined: *A Waiver of Breach is defined as:*

“When a party to a contract, that is injured by the other party’s breach, voluntarily waives or excuses the breach of contract.”

Meaning: *The meaning of a waiver of breach means the breach of a contract may have no importance because the injured party to the contract waives or excuses the breach in question.*

Cure of Breach by Waiver: *The fact that one party has breached a contract does not necessarily mean that there will be a lawsuit or a forfeiture of the contract. For practical business reasons, one party may be willing to ignore, excuse or waive the breach.*

Contract Fulfillment:

Contractual Discharge: *To conclude a contract, there are three methods of contractual discharge. These include a discharge by performance, a discharge by action, and a discharge by external causes.*

Contractual Discharge Defined: *Black’s Law Dictionary defines the term discharge to mean, “Any method by which a legal duty is extinguished”, which with respect to contracts means performance, action or external causes.*

Conditions Relating to Fulfillment: *The ordinary method of discharging obligations under a contract is by performance. Certain promises, however, may be less than absolute and instead come into effect only upon the occurrence of a specified event, or an existing obligation may be extinguished when an event happens.*

Discharge by Performance:

Normal Discharge of Contracts: *A contract is usually discharged by the performance of the terms of the agreement. In most cases, the parties perform their promises, and the contract is fulfilled and is thereby discharged. A contract may also be discharged by the expiration of the time period specified in the contract.*

Nature of Performance: *Performance may be the doing of an act or the making of payment.*

Contractual Breach and Remedies Cont

Discharge by Performance Continued:

Tender: An offer to perform is known as a tender. If performance of the contract requires the doing of an act, the refusal of a tender discharges the party offering to perform and is a basis for that party to bring a lawsuit. A valid tender of payment consists of an unconditional offer of the exact amount due on the date when due. A tender of payment is not just an expression of willingness to pay, it must be an actual offer to perform by making payment of the amount owed.

Payment: When the contract requires payment, performance consists of the making of the payment.

Time of Performance: When the date or period of time for performance is specified in the contract, performance should be made on that date or within that time period.

No Time Specified: When the time for performance is not specified in the contract, an obligation to perform within a reasonable time is implied. The fact that no time is specified neither impairs the contract on the ground that it is indefinite nor allows an endless time in which to perform. What constitutes a reasonable time is determined by the nature of the subject matter of the contract and the facts and circumstances surrounding the making of the contract.

When Time Is Essential: When a contract fixes by unambiguous language a time for performance and where there is no evidence showing that the parties did not intend that time should be of the essence, failure to perform within the specified time is a breach of contract entitling the innocent party to damages.

When Time Is Not Essential: Unless a contract so provides, time is ordinarily not of the essence, and performance within a reasonable time is sufficient.

Adequacy of Performance: When a party renders exactly the performance called for in the contract, no question arises as to whether the contract has been performed. In other cases, there may not have been a perfect performance, or a question arises as to whether the performance satisfies the standard set in contract. Questions can arise concerning substantial performance or performance of a third party.

Discharge by Action:

Discharge by Action Defined: A contract may be discharged by the joint action of both contracting parties or, in some cases, by the action of one party alone.

Discharge by Unilateral Action: Ordinarily, a contract cannot be discharged by the action of either party alone. In some cases, however, the contract does give one of either party the right to cancel the contract by unilateral action, such as by notice to the other party.

Consumer Protection Rescission: Certain consumer protection statutes provide consumers a chance to think things over and to rescind certain consumer based contracts. The New York State General Business Law and the Federal Consumer Credit Protection Act (CCPA) give the debtor the right to rescind a credit transaction within three business days when the transaction would impose a lien on the debtor's home.

Discharge by Agreement: A contract may be discharged by the operation of its provisions or by a subsequent agreement.

Contractual Breach and Remedies Cont

Discharge by External Causes:

Discharge by External Causes Defined: Circumstances beyond the control of the contracting parties may discharge the contract.

Discharge by Impossibility: The party asserting the defense of impossibility bears the burden of proving “a real impossibility and not a mere inconvenience or unexpected difficulty.” Courts will generally only excuse nonperformance where performance is objectively impossible, and only in extreme circumstances. Financial inability to perform a contract that a party voluntarily entered is not an impossibility.

Causes of Impossibility:

- Destruction of Particular Subject Matter;
- Change of Law;
- Death or Disability;
- Unforeseen Act of Third Party;
- Force Majeure (Uncontrollable Event);
- Natural or Man Caused Disaster (Weather/Volcano/War/Terrorism).

Discharge by Operation of Law: A contract is discharged by operation of law by:

- An alteration or a material change made by a party;
- The destruction of the written contract with intent to discharge it;
- Bankruptcy;
- The operation of a statute of limitations; or
- A contractual limitation.

Remedies – Definitions:

Defined: Blacks Law Dictionary defines a Remedy as:

“The means of enforcing a right or preventing or redressing a wrong, by means of providing legal or equitable relief.”

What Remedies are Available for a Breach of Contract: There are two principle remedies for a breach of contract. They are as follows:

Damages: The principle remedy for a breach of contract is monetary damages. These monetary damages are generally categorized into three separate areas.

- **Expectation Damages:** These damages attempt to put the plaintiff in the position they would have been had the defendant performed, awarding the injured party their out-of-pocket costs incurred, together with whatever profit they would have made had the contract been completed;
- **Reliance Damages:** These damages attempt to put the plaintiff in as good a position as they were in prior to the making of the contract, by allowing them to recover their out-of-pocket expenditures incurred in performing the contract; and
- **Restitution:** These damages attempt to prevent the unjust enrichment of the defendant by returning to a plaintiff who has partially performed the value of the performance they have rendered to the defendant.

Equitable relief: Another possible remedy that a party who has been injured by a breach of contract may pursue is equitable relief. Equitable relief is awarded when a plaintiff can demonstrate that money damages would not prove an adequate remedy. This relief is generally categorized into two separate areas:

- **Rescission:** This remedy is an order to effectively cancel the contract, so as to place the parties in the position as if the contract had never occurred.
- **Specific Performance:** This remedy is an order to of the breaching party to actually render the promised performance of the contract;
- **Injunction:** This remedy is an order to direct the breaching party to refrain from doing something relating to the contract provisions; or
- **Reformation:** This remedy is where the court will actually re-write the contract or a provision that is inequitable.

Contractual Breach and Remedies Cont

Monetary Damages:

Generally: The principle remedy for a breach of contract is monetary damages. Monetary damages are commonly classified as compensatory damages, nominal damages, and punitive damages.

Compensatory Damages: The most prominent form of damages for breach of contract are compensatory damages. These damages compensate a plaintiff for the injury incurred as a result of the breach of contract. Compensatory damages have two classifications within their scope, as follows:

- **Direct Damages:** These are monetary damages (sometimes called general damages), that the law presumes directly follow the type of wrong complained of, and which are awarded to compensate the plaintiff for a proven injury or loss, that directly flow from the breach of contract. These damages, as aforementioned, include expectation, reliance and restitution damages; and
- **Consequential Damages:** These are monetary damages that do not flow directly and immediately from the breach of contract, but rather flow as a “consequence” of the breach. Consequential damages may be recovered only if it was reasonably foreseeable to the defendant that the kind of loss in question could be sustained by the non breaching party if the contract were broken.

Nominal Damages: These are compensatory damages which represent a trifling or trivial sum (such as \$1) which indicate an actual but extremely small amount of loss by the plaintiff; and

Punitive Damages: These are damages in excess of actual loss, imposed for the purpose of punishing or making an example of the defendant, are known as punitive damages or exemplary damages. These damages are very seldom awarded in contract actions.

Mitigation of Damages: The injured party is under the duty to mitigate damages if reasonably possible. This means that the injured party is obligated under the law to take all reasonable efforts possible to prevent any increase possible in the amount of damages that occurs as a result of the other party’s breach of the contract.

Examples of Mitigation:

- **Cessation of Further Damages:** The duty to mitigate applies so that the injured party must generally stop any performance under the contract which would avoid any further damages resulting from the breach;
- **Replacement of Items:** The duty to mitigate damages may further require an injured party to buy or rent elsewhere the goods that the wrongdoer was obligated to deliver under the contract; or
- **Seeking Alternative Contract:** In the case of breach of an employment contract by the employer, the employee is required to seek other similar employment, so that the wages earned from other employment must be deducted from the damages claimed, but the discharged employee, is not required to take employment of less-than-comparable work.

Effect of Failure to Mitigate Damages: The effect of the requirement of mitigating damages is to limit recovery by the non-breaching party to the damages that would have been sustained had this party mitigated the damages where it was possible to do so.

Contractual Breach and Remedies Cont

Non Monetary Damages:

Generally: Although the principle remedy for a breach of contract is monetary damages, there are certain instances when monetary damages will prove an inadequate or insufficient remedy. In such cases, equitable remedies can be employed, including recession, specific performance and injunction.

Rescission: When one party commits a material breach of the contract, and monetary damages prove insufficient, the injured party may seek rescission (cancellation) of the contract.

- **Purpose:** The purpose of rescission is to restore the injured party to the position occupied before the contract was made.
- **Restitution:** An injured party who rescinds a contract after having performed services may recover the reasonable value of the performance rendered, however, the party seeking such restitutionary damages must also return what this party has received from the party in default.
- **Materiality:** A breach must be material (meaning that it is so substantial that it defeats the object of the parties in making the contract) in order to attain rescission.

Specific Performance: Under special circumstances, an injured party may obtain the equitable remedy of specific performance, which compels the other party to carry out the terms of a contract.

- **Limitation:** Specific performance is, however, only granted if the subject matter of the contract is “unique,” thereby making an award of money damages an inadequate remedy. Contracts for the purchase and sale of land, for example, will be specifically enforced, whereas specific performance of a contract to sell personal property can be obtained only if the article is of unusual age, beauty, unique history, or other distinction.

Injunction: When a breach of contract results from a party performing an act prohibited by the contract, a possible remedy is an injunction by a court, ordering the breaching party from doing the act.

Reformation: At times, a written contract does not correctly state the agreement already made by the parties. When this occurs, either party may seek to have the court reform or correct the writing to state the agreement actually made.

- **Rare Action, Requiring High, Clear Burden of Proof:** This is a rare action awarded by courts, and a party seeking reformation of a contract must clearly prove both the grounds for the reformation, and what the agreement actually was. This burden is particularly great when the contract to be reformed is written.
- **Unconscionability:** This action is sometimes taken when the court finds the contract is unconscionable as written, thereby requiring the court to reform the contract.

Contractual Breach and Remedies Cont

Liquidated Damages:

Generally: The contract itself may contain provisions that affect the remedies available to the parties or their recovery of damages.

Liquidated Damages: The parties may stipulate in their contract that a certain amount should be paid in case of a breach. This amount is known as liquidated damages and may be variously measured by the parties. When delay is possible, liquidated damages may be a fixed sum, such as \$1,000 for each day of delay. When there is a total default, damages may be a percentage of the contract price or the amount of the down payment.

Attorney's Fees:

Attorney's Fees: The American rule provide that each party is responsible to pay for their own attorneys' fees in the absence of an express contractual or statutory provision to the contrary. Even in the event of a valid contractual provision for attorneys' fees, a trial court has the discretion to exercise its equitable control to allow only such sum as is reasonable, or the court may properly disallow attorneys' fees altogether on the basis that such recovery would be inequitable.

- **Contractual Exception:** The parties may, by contractual provision, specify that the losing party shall be responsible to pay for the reasonable attorney's fees of the prevailing party.
- **Statutory Exception:** Certain statutes also provide that the prevailing party may make an application to the court to have the losing party pay for the reasonable attorney's fees of the prevailing party. Federal and state civil rights statutes and many federal and state consumer protection statutes are examples of this exception.

Court Costs and Fees: Although Attorney's Fees are not generally awarded without a contractual or statutory exception, court costs and fees (which are generally vastly less than attorney's fees) are generally awarded to the prevailing party. These include items such as court filing and motion fees.

Limitation on Liability:

Limitation of Liability Clause: While contracts that exculpate persons from liability are generally not favored by the courts, because they encourage lack of care, and are therefore strictly construed against the person or entity seeking to escape liability, nevertheless when the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld. This principle arises out of the broad policy of the law, which accords to contracting parties' freedom to bind themselves, as they themselves best see fit.

Releases: Release forms signed by participants in athletic and sporting events declaring that the sponsor, proprietor, or operator of the event shall not be liable for injuries sustained by participants because of its negligence are generally binding.



Weekly Information Sheet 10

The Criminal Law

Definitions:

The Criminal Law: The body of law defining offenses against the community at large, regulating how suspects are investigated, charged and tried, and establishing punishments for convicted offenders.

The Criminal Justice System: The collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded.

Substantive Criminal Law:

Substantive criminal law defines crimes, the conduct that constitutes them, and the punishment that is proscribed for such conduct.

Substantive criminal law defines crime and punishment.

For example, what act constitutes murder or what punishment a murderer should receive.

In New York State, substantive criminal law is contained within the New York State Penal Law.

Criminal Procedure:

Criminal Procedure establishes the procedures for the implementation and enforcement of substantive criminal law.

Criminal procedure is concerned with the legal rules to be followed, and the steps taken, to investigate, apprehend, charge, prosecute, convict, and sentence to punishment individuals who violate substantive criminal law.

For example, criminal procedure describes how a murder trial must be conducted.

In New York State, procedural criminal law is contained within the New York Criminal Procedure Law.

Purpose of the Criminal Law:

The Criminal law seeks to protect the public from harm by:

1. **Inflicting punishment on those who have already done harm, and**
2. **Threatening with punishment those who are tempted to do harm.**

Many Crimes Are Also Torts:

In many cases, a person's wrongful and harmful act can invoke both criminal and civil law responses.

As a result, most crimes also contain a civil remedy, known as a tort.

Different Theories of Criminal Punishment:

Various theories have been advanced to justify or explain the goals of criminal punishment.

These include:

Retribution;

Deterrence;

Restraint (or incapacitation);

Rehabilitation; and

Restoration.

Criminal Law - Common Law Felonies

MR & MRS LAMB.



Murder
Rape
Manslaughter
Robbery
Sodomy
Larceny
Arson
Mayhem
Burglary



Common Law Felonies vs. Modern Felonies

At common law, a **felony** was a capital offense, meaning the ultimate **punishment** was **DEATH**.

Today, a **felony** under New York law is generally considered a **crime that can be punished by more than a year in jail**. While a **Misdemeanor** is generally considered a **crime that can be punished by less than a year in jail**.

Murder

A person is guilty of murder when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person;
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or
3. Acting either alone or with one or more other persons, he commits or attempts to a felony, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants.

Rape

A person is guilty of rape (in the first degree) when:

He or she engages in sexual intercourse with another person:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or
3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.

Robbery

Robbery is forcible stealing.

A person forcibly steals property and commits robbery when:

In the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Weekly Information Sheet 11

Torts

Definition of Tort:

“A civil wrong, other than a breach of contract, for which a remedy may be obtained, usually in the form of damages, most often resulting from a breach of duty that the law imposes on persons who stand in a particular relation to one another.”

The Essence of Tort Law:

Tort law establishes standards of conduct for all members of society. It defines as civil wrongs the following antisocial behaviors:

- **Intentional Torts:** Intentional interference with one’s person, reputation, or property;
- **Negligence:** The failure to exercise reasonable care; and
- **Strict Liability:** Liability without a demonstration of fault.

The Intersection Between Torts and Crimes:

Torts are often the civil side of behavior that may also rise to the level of a crime.

Intentional Torts:

These are torts that are based on willful misconduct or intentional wrongs. They include:

- **Assault;**
- **Battery;**
- **Conversion;**
- **Defamation;**
- **False imprisonment;**
- **Intentional Infliction of Emotional Distress;**
- **Interference with Contractual Relations;**
- **Malicious Prosecution;**
- **Trespass.**

Torts of Negligence:

Elements of Negligence: The elements necessary for an action in negligence are:

- **Duty:** Negligence requires a duty or standard of care recognized by law;
- **Breach of Duty:** Negligence also requires a breach of duty from the failure to exercise reasonable care;
- **Harm:** Negligence requires that a person must sustain provable harm from the breach of duty;
- **Causation:** Negligence requires that the harm sustained was caused by the breach of duty; and
- **Foreseeability:** Negligence lastly requires that the harm sustained was foreseeable from the breach of duty.

Actions in Negligence:

- **Personal Injury:** Persons who sustain a physical injury as a result of another's breach of a duty of reasonable care can sustain an action in negligence.
- **Product Liability:** Persons who sustain an injury as a result of product defects, including defects in design, manufacturing defects, and warning defects, may be able to obtain a recovery in negligence. This recovery can be had from anyone in the chain of sale or manufacture.
- **Malpractice:** Persons who are injured from professional negligence may also recover in an action for negligence. Professionals are held to have a higher degree of knowledge, skills, or experience than a reasonable person, and are consequently required to use that capacity, and accordingly must act as would a reasonably skilled, prudent, competent, and experienced member of that same profession.

Liability:

Defined: Liability is defined as "the quality or state of being legally obligated or accountable, pursuant to a legal responsibility to another, and enforced by means of a civil remedy."

Determination of Liability: The question as to whether liability exists in a tort action is determined by a jury. In order to deliver a finding that liability exists, the jury must determine that all of the elements necessary for an action in negligence are present.

Liability and Damages: Whereas the question as to whether liability exists in a tort action is a yes or no question, the issue of damages is a matter of degree. The jury will determine that degree, by deciding what is the monetary value of the plaintiff's loss. In making that determination, the jury will assess the damages, considering both economic and non-economic damages.

Economic Damages: Lost earnings, lost earning capacity, and medical and other out-of-pocket expenses are considered economic or tangible damages, since they are actual dollar losses that can be calculated.

Non-Economic Damages: Conversely, harm suffered, such as pain, suffering, infliction of emotional distress and loss of consortium and loss of enjoyment are non-economic or intangible damages which the jury has no mathematical or accounting basis for valuing, and must be instead determined by a jury's considered judgment.

Strict Liability:

Defined: Strict Liability is defined as "liability that does not depend on a finding of actual negligence or intent to harm, but instead is based upon the breach of an absolute duty to make something safe."

Determination of Strict Liability: Strict Liability is often the product of a statutorily defined obligation, or in certain instances of product liability (liability for the defective manufacture, design or sale of a consumer product). It can also be found in certain ultra-hazardous activities, where society has a particular interest in making an important activity as safe as possible (such as scaffolds or explosives). In strict liability cases, the jury merely determines that the defined duty was breached and then determines the extent of damages sustained by the plaintiff.

Defenses to a Negligence Action:

Generally: Often in a negligence lawsuit, the defense will raise what are called "affirmative defenses." This could mean that even if a plaintiff's claims of negligence are true, the defendant may not be responsible if the affirmative defenses can be proven. These defenses include Comparative Negligence, Assumption of Risk and Statutes of Limitations.



Weekly Information Sheet 11

Commercial Paper

Negotiable Instruments:

Defined: Section 3-104(a)(1) and (2) of the UCC defines a negotiable instrument as: “an unconditional promise or order to pay a fixed amount of money, ... if it

(1) is payable to Bearer or order...;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction ... to do any act in addition to the payment of money”

Simple Definition:

A negotiable instrument is a record of a signed promise or order to pay a specified sum of money.

The Purpose of Negotiable Instruments

Generally: For convenience, and as a way to facilitate transactions, businesses accept certain kinds of paper called commercial paper or negotiable instruments.

A Money Substitute: Commercial paper is accepted as a substitute for money, or as a means of offering credit. Negotiable, commercial paper is thereby created for the purpose of facilitating the transfer of funds and payment in business transactions.

Types of Negotiable Instruments:

Generally: There are two categories of negotiable instruments:

- **Promises to Pay:** These include promissory notes and certificates of deposit; and
- **Orders to Pay:** These include drafts and checks.

Specific Negotiable Instruments:

- **Promissory Notes:** A promissory note is a written promise made and signed by the maker to pay a sum certain in money to the holder of the instrument.
- **Certificates of Deposit:** A certificate of deposit is a written promise to pay issued by a bank, and through a CD, a bank acknowledges the customer's deposit of a specific sum of money, and promises to pay the customer that amount deposited, plus interest, when the certificate is surrendered.
- **Drafts:** A Draft, or Bill of Exchange, is a written, unconditional order, by one person upon another, signed by the person giving it, and ordering the person to whom it is directed, to pay upon demand, or at a definite time, an amount certain, in money, to order or to bearer.
- **Checks:** A check is defined as “a draft, other than a documentary draft, payable on demand and drawn on a bank.” A check, therefore, is an order by a depositor (the drawer) on a bank or credit union (the drawee) to pay a sum of money to the order of another party (the payee).

Types of Checks:

- An **Ordinary Check** is drawn by the bank upon a depositor's account.
- A **Cashier's Check** is a draft drawn by a bank on itself.
- A **Teller's Check** is a draft drawn by a bank on another bank in which it has an account.
- A **Traveler's Check** is a check that is payable on demand, provided it is countersigned by the person whose signature was placed on the check at the time the check was purchased.
- **Money Orders** are issued by both banks and nonbanks. A **Money Order** drawn by a bank is also a check.

Parties to Negotiable Instruments:

Maker: The maker is the party who writes or creates a promissory note, thereby promising to pay the amount specified in the note.

Drawer: The drawer is the party who writes or creates a draft or check.

Drawee: The drawee is the party to whom the draft is addressed and who is ordered to pay the amount of money specified in the draft. The bank is the drawee on a check, and the credit union is the drawee on a share draft. A drawee on a draft has no responsibility under the draft until it has accepted that instrument.

Payee: The payee is the person named in the instrument to receive payment.

Acceptor: When the drawee of a draft has indicated by writing or record a willingness to pay the amount specified in the draft, the drawee has accepted liability and is called the acceptor.

Secondary Obligor (Accommodation Party): When a party who is not originally named in an instrument allows their name to be added to it for the benefit of another party, in order to add strength to the collectability of the instrument, that party becomes a secondary obligor (formerly called an accommodation party) and assumes a liability role. The UCC now refers to drawer, endorsers, and accommodation parties as “secondary obligors”.

Negotiability:

Defined: Article 3 of the UCC determines whether an instrument is Negotiable. If an instrument is negotiable, it is governed by Article 3 of the UCC, and it may be transferred by negotiation. “*Negotiation*” is “a transfer of possession, whether voluntary or involuntary, of an instrument, by a person, other than the issuer, to a person who thereby becomes its holder.”

Purpose of Negotiability: Negotiability, as a form of transfer, permits the transferee to acquire rights greater than those afforded assignees of contracts under contract law. The quality of negotiability in instruments creates opportunities for transfers and financings that streamline payments in commerce. Transfers can be made with assurance of payment without the need for investigation of the underlying contract.

Requirements of Negotiability: Negotiability has certain fundamental requirements. To be negotiable, an instrument must be:

In Writing: The instrument must be evidenced by a record;

Signed: The instrument must be signed (authenticated) by the maker or the drawer;

A Promise or Order to Pay: The instrument must contain an unconditional promise or order to pay;

An Amount Certain: The instrument must pay a sum certain;

Payable in Money: The instrument must be payable in money;

Payable on Demand or at a Defined Time: The instrument must be payable on demand, or at a definite time; and

Payable to Order or Bearer: The instrument must be payable to order or bearer, using what are known as words of negotiability

Ambiguous Language: Ambiguous language is language that has more than one reasonable interpretation. The following rules are applied when ambiguous language exists:

- **Words control figures where conflict exists;**
- **Handwriting supersedes conflicting typewritten and printed terms; and**
- **Typewritten terms supersede preprinted terms**

Statute of Limitations: Article 3 of the UCC establishes a three-year statute of limitations for most actions involving negotiable instruments. (2)

Transfers, Problems and Warrantees:

Definitions:

Holder: A **Holder** of a negotiable instrument is someone in possession of a negotiable instrument that runs to that person (i.e., the instrument is made payable to that person, is indorsed to that person, or is bearer paper).

Holder in Due Course: A **Holder in Due Course** is a holder who has:

- **given value for the instrument;**
- **taken the instrument in good faith;**
- **Has no knowledge that the instrument will be dishonored, or that it is overdue; and**
- **Has no knowledge of any defenses to the instrument.**

A holder in due course is accordingly afforded special rights and status.

Transfer of Negotiable Instruments:

Ease of Transfer: Negotiable instruments are transferred by the process known of negotiation. Much of the commercial importance of negotiable instruments lies in the ease with which they can be transferred.

Effect of Transfer:

Rights of the Transferor are Given to the Transferee: When a contract is assigned, the **transferee** has the rights of the transferor. Thus, the transferee is entitled to enforce the contract but, as assignee, has no greater rights than the assignor. This is because the assignee is in the same position as the original party to the contract, and is subject to any defense that could be raised in a suit on an assigned contract.

Transferee Becomes the Holder: When a negotiable instrument is transferred by negotiation, the transferee becomes the **holder** of the commercial paper. A holder who meets certain additional requirements may also be a **holder in due course**. The status of a holder in due course gives immunity from certain defenses that might have otherwise been asserted against the transferor.

How Negotiation Occurs:

The Order or Bearer Character of the Paper: The order or bearer character of the paper determines how it may be negotiated.

Determined By Language on the Instrument: The order or bearer character of an instrument is determined according to the words of negotiability used.

Determined at the Time of Transfer: The character of an instrument is determined as of the time negotiation takes place, even though its character originally may have been different.

Order Instruments: Instruments that qualify as order paper have a **named payee** on the instrument.

Bearer Instruments: Instruments that qualify as bearer paper are those **payable to bearer** or “**cash**”.

Indorsements:

Indorsement: The signature of the payee on commercial paper is known as an indorsement.

Defined: Black's Law Dictionary defines an indorsement as “The placing of a signature, sometimes with an additional notation, on the back of a negotiable instrument to transfer or guarantee the instrument or to acknowledge payment.”

Indorser: The person making the indorsement on the commercial paper is known as the indorser.

Indorsee: The person to whom the indorsement is made on the commercial paper is known as the indorsee.

Types of Indorsements: Indorsement and transfer of possession can be made by the payee or indorsee or by an authorized agent of that person. Although words of negotiability are required on the front of negotiable instruments, it is not necessary that indorsements contain the word **order** or **bearer**. Indorsements include the following types:

Blank Indorsement: A Blank Indorsement is an indorsement that does not name the person to whom the paper, document of title, or investment security is negotiated.

Special Indorsement: A special indorsement is an indorsement that specifies the person to whom the instrument is indorsed.

Qualified Indorsement: A qualified indorsement is an indorsement that includes words such as “without recourse” that disclaims certain liability of the indorser to a maker or a drawee.

Restrictive Indorsement: A restrictive indorsement is an indorsement that restricts further transfer, such as in trust for or to the use of some other person, is conditional, or for collection or deposit.

Commercial Paper - Continued

Parties to Negotiable Instruments:

Definitions:

Assignee: An Assignee of a negotiable instrument is a third party to whom contract benefits are transferred.

Holder: A Holder of a negotiable instrument is someone in possession of a negotiable instrument that runs to that person (i.e., the instrument is made payable to that person, is indorsed to that person, or is bearer paper).

Holder in Due Course: A Holder in Due Course is a holder who has:

- **given value for the instrument;**
- **taken the instrument in good faith;**
- **Has no knowledge that the instrument will be dishonored, or that it is overdue; and**
- **Has no knowledge of any defenses to the instrument.**

A holder in due course is accordingly afforded special rights and status.

Rights of Parties to Negotiable Instruments:

Rights:

Assignee: Any assignee has all of the rights given through and under the negotiable instrument. Their rights are no different from the rights of an ordinary holder.

Holder: Any holder has all the rights given through and under the negotiable instrument. paper). These rights include a right of payment, as well as a right of discharge, release and recovery.

Holder in Due Course: A Holder in Due Course has all the rights given through and under the negotiable instrument. Additionally, the law gives these holders in due course special rights by protecting them from certain defenses. This protection makes negotiable instruments more attractive and allows greater ease of transfer.

Special Rights: To obtain the preferred status of a holder in due course, a person must first be a holder. The preferred status of Holder in Due Course also requires the additional standards set forth above. Unlike ordinary holders or assignees, holders in due course take free of contract assignment defenses, that are good against ordinary holders or assignees. Only universal defenses can pierce the status of a Holder in Due Course.

Defenses to Negotiable Instruments:

Defenses:

Defenses against Assignee or Ordinary Holder: Assignees of negotiable instruments are subject to every defense raised. Similarly, a holder who does not become a Holder in Due Course is also subject to every payment defense just as though the instrument were not negotiable.

Limited Defenses Available against a Holder but Not Against a Holder in Due Course: Holders in Due Course are not subject to any of the following defenses, but ordinary holders are:

Ordinary Contract Defenses: In general terms, the defenses that could be raised in a breach of contract claim cannot be raised against a Holder in Due Course. The defenses of lack, failure, or illegality of consideration with respect to the instrument's underlying transaction cannot be asserted against the Holder in Due Course. Misrepresentation about the goods underlying the contract is also not a defense.

Incapacity of Maker or Drawer: Ordinarily, the maker's or drawer's lack of capacity (except minors) may not be raised as a defense to payment to a holder in due course. Such incapacity is a defense, however, if the incapacity is at a legal level that makes the instrument a nullity.

Fraud in the Inducement: If a person is persuaded or induced to execute the instrument because of fraudulent statements, such **fraud in the inducement** cannot be raised against a party with Holder in Due Course status.

Miscellaneous Defenses: The limited defenses listed in the preceding three subsections are those most commonly raised against demands by Holders in Due Course for payment. The following are additional limited defenses that might be asserted: (1) prior payment or cancellation of the instrument, (2) non-delivery, (3) conditional or special-purpose delivery, (4) breach of warranty, (5) duress consisting of threats, (6) unauthorized completion, and (7) theft of a bearer instrument. Like the above, these miscellaneous defenses, however, also have a very limited effect in defending against a Holder in Due Course's demand for payment.

Universal Defenses against Holders in Due Course: Certain defenses are regarded as so basic that the social interest in preserving them outweighs the social interest of giving negotiable instruments their free transferable qualities. Accordingly, such defenses are given universal effect, and may be raised against all holders, assignees, and Holders in Due Course. These defenses are called **universal defenses**. Accordingly, such defenses are given universal effect and may be raised against all holders, including Holders in Due Course. These defenses include:

Fraud as to the Nature or Essential Terms of the Instrument: The fact that a person signs an instrument because the person is fraudulently deceived as to its nature or essential terms is a defense available against all holders.

Forgery or Lack of Authority: The defense that a signature was forged or signed without authority can be raised by a drawer or maker against any Holder in Due Course.

Duress Depriving Control: A party may execute or indorse a negotiable instrument in response to a force of such a nature that, under general principles of law, duress makes the transaction void rather than merely voidable. Duress is a universal defense.

Incapacity: The fact that the defendant is a minor who under general principles of contract law may avoid the obligation is a matter that may be raised against any kind of holder. Other kinds of incapacity may be raised as a defense if the effect of the incapacity is to make the instrument void, as when there has been a formal declaration of insanity.

Illegality: If an instrument is void by law when executed in connection with certain conduct, such as any act of illegality, such a defense may be raised against a Holder in Due Course.

Alteration: An alteration is an unauthorized change or completion of a negotiable instrument designed to modify the obligation of a party to the instrument. Alteration, like forgery, is a universal defense.

Checks and Fund Transfers:

Defined:

Check: Black's Law Dictionary defines a check to be **a draft signed by the maker or drawer, drawn on a bank, payable on demand, and unlimited in negotiability.** UCC Section 3-104: This section of law defines "Check" to mean "a draft ... payable on demand and drawn on a bank or ... a cashier's check or teller's check."

Fund Transfer: Black's Law Dictionary defines a fund transfer to be a sum of money or other liquid assets that are transferred from one party to another.

Electronic Fund Transfer: The Electronic Funds Transfer Act (EFTA) defines an electronic fund transfer to be any transfer of funds (other than a transaction originated by a check, draft, or similar paper instrument) that is initiated through an electronic terminal, a telephone, a computer, or a magnetic tape so as to authorize a financial institution to debit or credit an account.

Nature of a Check:

Generally: A check is a demand instrument which carries with it a presumption when made that sufficient funds are on deposit to pay the holder. It must be in writing and its delivery is not an assignment.

Certified Check:

Generally: A certified check is a check where the bank has, upon review of the check and the account from which it is drawn, set aside the amount of the check, and promises to pay such upon presentment.

Dishonor of a Check:

Generally: If the bank refuses to make payment, the drawer is then subject to the same secondary liability as the drawer of an ordinary draft. To be able to attach that secondary liability, the holder of the instrument must notify the drawer of the dishonor by the drawee. This notice of dishonor may be oral, written, or electronic.

Stopping Payment of a Check:

Generally: A drawer may stop payment of a check by notifying the drawee bank in the required manner. This is accomplished by means of a **stop payment order**, which is an order by a depositor to the bank to refuse to make payment of a check.

Fund Transfers:

Generally: Consumers are using electronic methods of payment at an increasing rate. From the swipe of the card at the grocery store checkout, to the retrieval of funds from the local automated teller machine, *electronic funds transfers* represent a way of life for many consumers. A combination of state and federal laws protect consumers making electronic funds transfers.

Electronic Funds Transfer Act: In 1978 Congress passed the Electronic Funds Transfer Act (EFTA) to protect consumers making electronic transfers of funds. Under this statute, Electronic funds transfer (EFT) means any transfer of funds (other than a transaction originated by check, draft, or similar paper instrument) that is initiated through an electronic terminal, a telephone, a computer, or a magnetic tape that authorizes a financial institution to debit or credit an account. The service available from an automated teller machine is a common form of EFT.

UCC Laws for Commercial Funds Transfers: Fund transfers made by commercial businesses are governed by the UCC and Federal Reserve regulations. In states that have adopted Article 4A of the Uniform Commercial Code, such article governs these commercial fund transfers. In addition, whenever a Federal Reserve Bank is involved, the provisions of Article 4A also apply by virtue of Federal Reserve regulations. The transfers regulated by Article 4A are characteristically made between highly sophisticated parties dealing with large sums of money. Speed of transfer is often an essential ingredient. An individual transfer may involve many millions of dollars, and the national total of such transfers on any business day can amount to trillions of dollars.



Weekly Information Sheet Cases

Cases

Marbury v. Madison

This case **established the doctrine of judicial review.**

Here William Marbury, a judicial appointee of President John Adams, sued the New President's (Thomas Jefferson) Secretary of State, James Madison, for a court order to deliver the certificate of appointment that Madison was refusing to do so.

The Court, in a decision written by Chief Justice John Marshall, who was Adams' secretary of state (and the man who was initially supposed to deliver the certificate to Marbury, but didn't) wrote a decision stating that Marbury could not get the decision, because the law under which he was appointed (the Organic Act) was unconstitutional, and thus invalidated such law as unconstitutional.

How A Bill Becomes A Law

This class exercise **established the procedure as to how a bill becomes a law in New York State.**

A bill must be introduced and sponsored by both a Senator in the Senate and a Member of the Assembly in the Assembly.

After introduction, it is referred to a committee, which must vote to report such to the floor of the respective house.

Once reported, the bill is put on an active list by the leader of each house (the Majority Leader in the Senate and the Speaker in the Assembly). Once on an active list, it is brought up for a vote by all members of the House, and must pass by a vote of at least 32 Senators (out of a house of 63) and a vote of at least 76 members of the Assembly. A bill must pass both houses in the same year to be sent to the Governor.

The house that passes the bill first must send it to the Governor in the same year in which it passes. The Governor has 10 days (exclusive of Sundays) to decide whether to sign the bill. If the Governor signs the bill, it becomes law. If the Governor does not sign the bill, and does not veto the bill, it becomes law. If the Governor vetoes the bill it is returned to the Senate and Assembly for override.

If the Senate and Assembly vote to override the governor's veto, by a 2/3 majority in each house, it becomes law.

Kolchins v. Evolutionary Markets

This case established that a contract comes into existence when there is a manifestation of mutual assent to its essential terms.

Here Andrew Kolchins, a stock broker for the brokerage firm of Evolution Markets, sued his employer over a renegotiation of his employment contract.

The Court, in a decision written by the New York State Appellate Division, found that emails and other writings between the parties, proved that the parties reached an agreement on the material terms of an employment contract renewal, under specifically defined terms. As a result, a new employment contract came into existence.

Gerstein v. Broad Hollow Company

This case established that although Duress or Pressure can invalidate a contract, there is no duress when the party accused of such, has the legal right to do the act complained of.

Here David Gerstein, a real estate developer, sued Broad Hollow Company, a real estate holding company, over a contract for lease of a premises in Melville, Long Island, which Broad Hollow claimed was executed under Duress and Undue Pressure.

The Court, in a decision written by the New York State Appellate Division, found that merely because Gerstein had made a very good deal for the terms of the lease, did not mean such was obtained by duress or undue pressure. In fact, such duress must "involve an act, or a threat of action from, which the person sought to be influenced is entitled to be free".

In this case no such act occurred, and Gerstein was legally entitled to his good deal.

Allegheny College v. Nat'l Chautauqua Bank

This case established that strict adherence to the requirement of consideration is not always necessary in cases involving a pledge to a charity.

Here Allegheny College, an institution of higher learning and a charity, sued the Executor of Mary Yates Johnston's Estate, seeking to collect on a pledge for a scholarship fund she made before her death.

The Court, in a decision written by the famous Chief Judge Benjamin Cardozo of the New York State Court of Appeals, found that strict adherence to the requirement of consideration is not always necessary in cases involving a pledge to a charity, based upon the fact that the charity relied upon the pledge in establishing the scholarship, and would be unjustly harmed if the pledge was not fulfilled.

Bethlehem Steel v. Turner Construction

This case established that a contract's terms are determined from the four corners of the written document that creates it.

Here Bethlehem Steel, a steel manufacturer, sued Turner Construction, for payment on steel components provided in the construction of the MONY building in Manhattan.

The Court, in a decision written by the New York State Court of Appeals, found that the written contract, contained a specific provision, found within the "four corners of the document" that required Turner to pay for an increased adjustment for steel based on market conditions.

Turner, who had a fixed priced contract with MONY did not wish to pay the increase. The court found that the contract between Bethlehem and Turner was controlling, and that despite the fixed priced contract with MONY (Mutual of New York), Turn was liable to pay the adjusted price pursuant to their contract with Bethlehem.

Fourth Ocean Putnam Corporation v. Interstate Wrecking Company

This case upheld the principle that the parties to an original contract must intentionally make it for the benefit of a third party beneficiary in order for such beneficiary to recover.

Here, plaintiff, Fourth Ocean Putnam Corporation, owned a seaside hotel (known as the Atlantic Beach Hotel) in the Village of Atlantic Beach, (Town of Hempstead, Nassau County, Long Island) New York. The Hotel sustained a serious fire, and was severely damaged. Due to the damage, and plaintiff's inability to repair the same, the Hotel quickly became a public nuisance and fire hazard, in a very high traffic location, along the beach, in a very affluent community. After numerous community complaints, the Village of Atlantic Beach, obtained a court order compelling Fourth Ocean to remove the dilapidated and dangerous structure.

Fourth Ocean, which was pursuing plans to redevelop the site, failed to comply with the court order in a timely manner, so the village next entered into a demolition contract, with the defendant, Interstate Wrecking Company, to perform the work of demolition and removal of the building. The contract was solely for the benefit of the village and not made considering the interests of Fourth Ocean, who was merely an "incidental beneficiary".

Although the contract between the Village and the Demolition company called for the company to completely remove all the remaining foundation, the court found, that as merely an incidental beneficiary, Fourth Ocean could not enforce such provision for its benefit as the property owner.

Newburger v. Lubell

This case **upheld the principle that a person must perform a contract to avoid its breach.**

Here, plaintiffs, Newburger Brothers Investment Company were stock brokers for the Defendant.

At the height of the great depression, Defendant lost a great deal of money in the stock market and was unable to pay Plaintiff's for the trades they made on his behalf. The brokerage agreement had a clause that provided all disputes would go to arbitration. To recover some of their losses, plaintiff's sought to withdrawn funds from a brokerage account that Defendant maintained with his brother. They sued for a declaratory judgment to see if a court could authorize them to recover such funds from the brother's account.

Defendant asserted the defense that they could not ask a court for a declaratory judgement as the contract required all disputes to go to arbitration. The court disagreed. Finding no breach of contract by the plaintiffs, as they had performed on all aspects of the brokerage agreement, they allowed the declaratory judgement and permitted the brokerage firm to attach the brother's account.

Regina v. Dudley and Stephens

This case **held that necessity is not a valid defense to the crime of murder.**

Here, defendants were sailors, shipwrecked at sea after a storm which sank their main vessel. After a month, starving and sunbeaten, they decided to murder and eat the young cabin boy who was a part of their crew.

Upon rescue they were tried for capital murder and sentenced to death. Their defense that they were starving and that it was necessary to save their own lives to kill and eat the cabin boy was not recognized at law. Only self defense, which is to prevent the killing of oneself or of another person can be deemed a valid defense to murder. Such did not occur in this case.

Mac Pherson v. Buick

This case **upheld duty and foreseeability as requirements in products liability.**

Here, defendant, Buick Motor Company was a manufacturer of automobiles.

In the regular course of its business, it sold an automobile, a 1909 Buick Runabout, to a retail dealer. The retail dealer resold to the car to plaintiff, Donald MacPherson, and while the plaintiff was traveling in the car, it suddenly collapsed, causing him to be thrown out, and suffering serious physical injuries.

The cause of the collapse was due to the fact that one of the car's wheels was made of defective wood, allowing its spokes to crumble into fragments. The wheel was installed by Buick but manufactured by third party.

The court found Buick liable for its failure to properly inspect the wheel, finding both duty and foreseeability, which could not be absolved by others.

Manhattan Savings v. NY National Exchange

This case upheld the principle of a holder in due course.

Here, the plaintiff brought an action in replevin to recover ten bonds which it claimed to own, and which it alleged the defendant wrongfully detained. The defendant answered that it was a holder in due course.

It was undisputed that the bonds were stolen from plaintiff as part of a bank robbery. It was also undisputed that such bonds:

- Were negotiable securities;
- Were pledged to the defendant by a person named Pell;
- That nine of the bonds were pledged as collateral to a loan of \$7,500 and delivered to the defendant at the time the loan was made;
- That the tenth was given as additional security some time after the loan was actually made; and
- That \$7,000 of the money loaned had not been repaid, causing the defendant to claim the right to retain the securities.

This above facts make defendant a holder in due course who had no responsibility to determine who the rightful owner of these bearer bonds was. As such, the plaintiff may seek recovery from the party who stole them, or who wrongfully knew they were not theirs, but not from a holder in due course.

Sabine v. Paine

This case upheld the principle that Universal Defenses, such as usury, are a valid defense against a holder in due course.

This action is upon a promissory note, with the note being made by the defendant Maggie Paine in the sum of \$2100.

The note was payable, four months after its date, to the order of Eugene F. Vacheron, a former Assemblyman and attorney, and was delivered to Mr. Vacheron as the agent of the defendant, for the purpose of having it discounted.

After, indorsing it, he transferred it to the plaintiff for the sum of \$1850.

It is undisputed that plaintiff, C. Olivia Sabine is a Holder in Due Course, and that such note collects a sum greater than allowed by the New York State Usury Laws.

The court found the plaintiff to be a holder in due course in accordance with the accepted definition, they also found the promissory note in question to violate the state's usury laws, which establishes the maximum amount of interest that can be charged to a borrower.

With the finding of usury, the court found such to be a universal defense to payment of the note, holding that "it was an established rule of law in this state and many other jurisdictions that a holder of a note void by virtue of a statutory declaration because of usury, who became such before the maturity of the note for value and without notice of the usury, could not enforce the note. The rule is an exception to the general principle." (5)