

Subject: Textbook for Prof. Sheehan BLAW Classes (Fall '19)

Dear Friends:

Let me help you and/or your parents save some hard earned money! Read this entire email carefully. I am writing in an effort to explain some confusion over the textbook used by the professors who teach BLAW 220 and BLAW 321.

During the Fall '19 semester, all of the professors who have taught BLAW 220 and BLAW 321 this past year (Sheehan, Morgan, Jr., Suprunowicz, Hummel and Farley) will be using the 23rd edition of Anderson's Business Law and the Legal Environment published by Cengage Learning.

None of us "requires" that you buy a textbook, but we all "highly recommend" it.

A good choice financially is the UAlbany customized (2016) "softcover" version of the 23rd edition (ISBN: 9781337051231) now being sold at the University Bookstore for about \$224.65 (That price is about half of what the new "hardcover" book would sell for.)

The University Bookstore usually has a limited number of "used" copies of the UAlbany customized softcover 23rd edition selling for about \$168.50, but they will go fast. Either softcover customized version would be a good value for your dollar.

For those of you who prefer an on-line version, I understand that the Cengage publisher is also offering an e-book rental. Check the Cengage Learning website if you are interested. I believe the University Bookstore also has a "digital rental" option.

The changes from the 22nd edition to the 23rd edition are not substantial except for page numbers and some new case examples if you come across someone selling the 22nd edition and you decide to go that route. Feel comfortable buying either the 23rd edition or the 22nd. Do not buy both.

Sharing a textbook with a classmate is another money saving option that would work well for my classes if you like.

No Study Guide or on-line materials are necessary for any of the BLAW 220 or BLAW 321 classes.

Hope that helps. See you in a few weeks.

Prof. Sheehan
Law Area Coordinator

Subject: Welcome to BLAW 220 from Prof. Sheehan (Fall '19)

Dear Friends:

This is a brief welcome letter intended to make you feel at home in my BLAW 220 class. If you are returning to UAlbany, then welcome back. If you are arriving as a Freshman, then welcome to UAlbany...and welcome to the college life! If you are arriving as a Direct Admit student in the School of Business or as a student in our World of Business Living Learning Community, then a special welcome to you as you start your college journey with classmates who share your common interest in UAlbany's School of Business.

The BLAW 220 class focuses primarily on a wide variety of contract law issues, as well as some issues pertaining to checks and the banking system. My many years of small town law practice have provided me with a wealth of stories illustrating many of the legal principles we will be discussing. My 25 years as a local City Court Judge have provided me with numerous stories illustrating the kinds of legal headaches many people have faced in our legal system. My many years of teaching this course at UAlbany have been wonderfully good for my sanity in dealing with the real world headaches and heartaches which I have seen daily in my other jobs as a practicing attorney and as a City Court Judge. You will find that my sense of humor has remained intact, even if my hairline has receded (or actually disappeared) over all those years.

Watch for another email from me hopefully later this week explaining frequently asked questions about the textbook we will be using. I am awaiting a responding email from the publisher's campus rep to give you the most updated info.

If you are part of the World of Business Living Learning Community, I will look forward to meeting you Wednesday evening, August 21st, at the Living Learning Community kickoff event in the Campus Center Ballroom.

I will look forward to seeing all of you at our first class on Tuesday, August 27th. Come prepared to enjoy yourself in the relaxed atmosphere of my classroom... You might be surprised at how much you learn!

Prof. Sheehan

Fall 2019

BLAW 220

BLAW 321

Aug. 27	Intro	Aug. 27	Intro
Aug. 29	NYS Courts	Aug. 29	POA
Sept. 3	NYS Courts	Sept. 3	POA
Sept. 5	Definitions/Offers	Sept. 5	HCP/LW
Sept. 10	Termination of Offers	Sept. 10	Agency
Sept. 12	Acceptances	Sept. 12	Agency
Sept. 17	Contractual Capacity	Sept. 17	Agency
Sept. 19	Genuine Assent	Sept. 19	Agency
Sept. 24	Consideration	Sept. 24	Agency
Sept. 26	Legality/Pubic Policy	Sept. 26	Agency
Oct. 1	Off (J. H.)	Oct. 1	Off (J. H.)
Oct. 3	Off (Greg)SF/PE Rule	Oct. 3	R/E Agents (Greg)
Oct. 8	SF/PE Rule	Oct. 8	R/E Agents (JWS)
Oct. 10	Review Session	Oct. 10	Review Session
Oct. 11	Both 220 Exams (Fri.)	Oct. 11	Exam (Friday)
Oct. 15	Off (Columbus Day ext.)	Oct. 15	Off (Columbus Day ext.)
Oct. 16	Both 220 M.U. Exams(Wed. 8am)	Oct. 16	321 M.U. Exam (Wed. 8AM)
Oct. 17	Exam Review	Oct. 17	Exam Review
Oct. 22	Rules of Construction	Oct. 22	Bus Org
Oct. 24	Third Party Beneficiaries	Oct. 24	Bus Org
Oct. 29	Assignments	Oct. 29	Ptr
Oct. 31	Discharge of K's	Oct. 31	Ptr
Nov. 5	Dis of K's/ B/K Remedies	Nov. 5	Ptr
Nov. 7	B/K Remedies & Comm. Paper	Nov. 7	Ptr
Nov. 12	Comm. Paper	Nov. 12	Ptr/LLC
Nov. 14	Comm. Paper	Nov. 14	Corp
Nov. 19	Comm. Paper	Nov. 19	Corp
Nov. 21	Comm. Paper	Nov. 21	Corp
Nov. 26	Off	Nov. 26	Off
Nov. 28	Thanksgiving	Nov. 28	Thanksgiving
Dec. 3	Comm. Paper	Dec. 3	Bankruptcy
Dec. 5	Review Session	Dec. 5	Review Session
Dec. 10	Reading Day	Dec. 10	Reading Day
Dec. 16	8:45 Exam (Mon. 3:30)	Dec. 16	Exam (Mon. 8:00)
Dec. 17	D.A. Exam (Tues. 8:00)		

BUSINESS LAW

CLASS POLICIES: FALL '19

Course: BLAW 220 #2659 (8:45 class)
OFFICE: BB355
Office Hrs.: See attachment.

PROF. JOSEPH W. SHEEHAN
Email: jsheehan@albany.edu

Recommended Text: Anderson's Business Law & The Legal Environment (* 23rd or 22nd Edition) (Comprehensive Vol.) by Twomey & Jennings, published by Cengage Learning. "Softcover" edition customized for UAlbany also now available at the UA Bookstore or directly from the publisher at a price much lower than the hardcover version. E-book rental also available through publisher. The publisher's Study Guide is not required for this course. There is no outside reading or on-line material required for this course.

Point of Emphasis: "Buddy System" required: Make a friend to keep updated!

COURSE DESCRIPTION AND OBJECTIVES:

Emphasis in this course is placed upon the growing interrelationship of legal, ethical and business concepts. The course topics of the New York State Court System, contract law and laws pertaining to negotiable instruments, essential knowledge for business and accounting students, and other students in general, are presented with related matter in a context which involves the political and social forces that impact upon contemporary business. Relevant legislation and court decisions are examined to illustrate the existence of an evolving business environment in which social and ethical considerations give rise to new legal rights and duties.

At the conclusion of this course the student will have acquired an understanding of the relationship of law to business and the business person. In addition, the student will have acquired specific knowledge of the major legal principles pertaining to the law of contracts and negotiable instruments. The student will have the ability to apply these principles to complex factual situations and reach conclusions determining legal rights and obligations. Further, the student will be aware of the importance of ethical behavior in the conduct of business and in the performance of professional duties.

PROGRAMMATIC LEARNING GOAL:

Each student will understand the economic and legal environment of business.

ATTENDANCE:

Your regular attendance is expected and required. If you want to do well...Be here!

A class list will be circulated during each period for your signature. Signing a classmate's name when he or she is absent or a classmate doing the same for you will be considered an act of academic dishonesty on the part of both students and will be considered grounds for failing the course. If your attendance record becomes a concern to you because of health, family or other personal reasons, see the instructor before the matter becomes a problem rather than later.

Please note: Excessive class absences will affect your grade.

EXAMINATIONS/GRADING:

Mid-term Exam (45%): Friday, October 11th, 2019 (Mid-Afternoon time and location TBA)

Final Exam (55%): Monday, December 16th, 2019 at 3:30PM (Location TBA)

Both Exams will be objective in nature and contain True/False and/or Multiple Choice questions. Exams will be graded on criteria which will include issue recognition and application of legal principles. Each Exam will run One Hour in length.

Make-up exams are not given absent extraordinary circumstances such as medical excuses or the death of an immediate family member. The instructor must be informed in advance of the exam if the student is unable to take the exam. The instructor will require proof sufficient to justify the administering of a make-up exam. (A bus ticket home for Columbus Day weekend is not a valid excuse.)

Please note that University policy prohibits an instructor from permitting a student to submit additional work or to be reexamined for the purpose of improving a student's grade after the course has been completed (See Undergraduate Bulletin). Exams scoring and grades are not negotiable.

ACADEMIC INTEGRITY:

University policy pertaining to academic integrity is set forth in the current Graduate and Undergraduate Bulletins. It is the student's responsibility to become familiar with the standards, penalties and procedures contained therein. Penalties for academic dishonesty of any nature are determined at the discretion of the instructor and are severe. Such penalties include, among other things, the assignment of a final course grade of "E". In addition, the matter may be referred to the University Judicial System and result in further penalties, including suspension and expulsion from the University. Students attending this course will be held to the highest ethical standards of behavior and are cautioned that the Department of Accounting and Law requires strict compliance with all policies pertaining to academic integrity. Accordingly, it is to be understood that students who commit any act of academic dishonesty will be penalized and that a possible result of academic dishonesty is the assignment of a failing grade in this course.

ELECTRONIC DEVICES:

Cell phones are required to be silent and **out of sight** while class is in session. **Texting during class is strictly prohibited.** No electronic devices, including but not limited to cell phones, headphones, recorders and computers, are permitted to be used or brought into exam rooms without the permission of the instructor. A violation could result in a failing grade.

LEGAL INQUIRIES:

Serious professional and ethical considerations prohibit the instructor from providing legal advice on students' personal legal inquiries. Students will not be accepted as legal clients.

COURSE SYLLABUS

This is the basic one semester Business Law course that places emphasis on acquiring a knowledge of our law with coverage of our courts, contracts and negotiable instruments. The course will also focus on how individuals in the business world interact with the legal system, certain legal concepts and certain legal principles on an almost daily basis. Case studies from the instructor's private law practice and City Judge job will be used to illustrate the kinds of real problems experienced by real people.

INTRODUCTORY TOPIC: N.Y. State Court System

CONTRACTS:

Elements: Agreement
Competent Parties
Genuine assent
Consideration
Lawful objective
Form required by law, if any

Kinds: Valid, void and voidable
Express and implied
Quasi-contracts

Offers: Jests
Invitations to negotiate
Need to be definite
Need to be communicated (i.e. reward cases)
Termination of offers

Acceptance: Party who may accept
Method of acceptance
Silence as acceptance?
Communication of acceptance

Contractual Capacity: Competent parties
Minors--avoidance, ratification, necessities
Insane persons
Intoxicated persons
Liability of parents?

Genuine Assent: Mistakes--unilateral, mutual, identity of subject matter
Misrepresentation
Fraud
Undue influence
Duress

Consideration: Definition
Past consideration
Sufficiency and exceptions

Legality of subject matter: Illegality and partial illegality distinguished

Statute of Frauds/Parol Evidence Rule/Rules of Construction:

History of Statute of Frauds

Requirements of a writing

Party to be charged significance, realty sales, agreements that cannot be completed within a year, promises to answer for a debt of another, promise by executor or administrator to pay an estate claim from his or her personal funds, sales of personal property in excess of \$500.

Parol Evidence Rule: Definition, application and exceptions

Rules of Construction:

Intention of the parties control

Whole contract concept

Contradictions and ambiguities

Strict construction against the drafting party

Avoidance of hardship

Conduct of the parties: Past practice

Transfer of Contracts: Third party beneficiary contracts:
Creditor, donee, and incidental beneficiaries distinguished
Assignments

Discharge of Contracts: By Performance - Substantial performance, tender of performance, legal tender, "Time is of the essence"
By Agreement
By Impossibility
By Operation of Law

Breach of Contract Remedies: Money damages, rescission, and specific performance. Reformation distinguished.

NEGOTIABLE INSTRUMENTS:

Kinds of Instruments, Parties and Negotiability

Definition of Negotiable Instrument

Kinds of Instruments: Promissory Notes, drafts and checks

Parties:

Promissory Note: Maker and Payee

Check: Drawer, Drawee, Payee, Indorser and Indorsee

Definition of Negotiability

Requirements of Negotiability: A writing (or record), a signature, an unconditional promise or order to pay, a sum certain in money, payable on demand or at a definite time, payable to order or to bearer

Miscellaneous items: Postdating, provisions requiring collateral, words prevail over figures, handwriting prevails over typewritten material and typewritten material prevails over pre-printed items

Transfer of Negotiable Instruments

Negotiation explained

Holder defined, holder in due course defined and distinguished

Order Paper vs. Bearer Paper

Order Paper defined and Bearer Paper defined

Negotiation of Bearer Paper

Negotiation of Order Paper

Kinds of Indorsements: Blank Indorsement, Special Indorsement, Restrictive Indorsement and Qualified Indorsement

Miscellaneous transfer issues: Misspelling of payee name, bank indorsement, multiple payees, agent indorsements, missing indorsement

Forgery issues

Effect of forgery explained

The "imposter rule" differentiated

Lost instruments

Holder vs. Holder in due course

Defined and differentiated in greater detail

Holder in due course requirements: Holder, ordinary course of business, value, good faith and ignorance of any defenses

Holder through a holder in due course

Personal defenses vs. real defenses

Personal defenses (limited defenses) explained and illustrated

Real defenses (universal defenses) explained and illustrated

Federal Trade Commission rule limiting HDC treatment for purchase of consumer goods or services for personal, family or household use

Primary liability vs. secondary liability concepts

Presentment, dishonor and notice of dishonor concepts

Checks and The Banking System

Check defined

Bad check laws explained

Cashier's check, bank check, teller's check, universal draft all explained

Certified checks differentiated

Presentment explained again

Exercise of right of recourse upon dishonor

Bank/customer relationship: Privacy issues

Stale check rule (6 months)

Payment after drawer's death (10 days after D/D)

Stop payment orders: Oral (14 days) vs. written (6 months)

Wrongful dishonor issues: Liability to drawer vs. liability to holder

Bank liability issues:

Premature payment of a post-dated check

Payment over a stop-payment order

Payment over a forged drawer signature

Payment on a forged or missing indorsement

Alteration of a check

Drawer obligation to review monthly bank statements

Wiring Funds: Brief explanation

NEW YORK STATE COURT SYSTEM

VILLAGE COURTS and TOWN COURTS

Sometimes called "Justice Court"

Formerly known as "Justice of the Peace" courts

Tremendous number of traffic offenses

(Based on location of offense, i.e. John Lorenzo: Wtfd./Cohoes)

Limited criminal jurisdiction (misdemeanors) (Explain misd. v. felony)

Limited civil jurisdiction: Monetary limits and defendant residency and/or "doing business" requirements

Summary Proceedings (eviction proceedings) for apts. in town or village ✓

Judges do not need to be attorneys (i.e. Retired cops, teachers...) ✓

CITY COURT

Similar juris. to Vill. & Town Cts. for most part

Practice varies by locality: McVillie is all one court vs.

Albany has Traffic Court, Police Court, City Court

Judges must be attorneys

SMALL CLAIMS COURT

Not really a separate court in most places, just a more informal system available for certain disputes.

No attorney is necessary, although is allowed.

Rules of evidence not strictly applied, but be wary: i.e. B/P req'ts still apply.

\$3,000. or \$5,000. monetary limit and defendant residency requirements ✓

Every locality handles proceds. differently (i.e. Conference vs. trial on first appear)

City Court S.C. juris. is county wide. ✓

Use of mediation at times

i.e. Dog case: "Stud Fee"

COUNTY COURT

One in each County ✓

Criminal juris.: Major felony trials (Usually based on "location" of crime)

Limited Civil juris.: Monetary limit.

Appeals from Village, Town & City Courts. (i.e. Small Claims appeals following transcript)

COURT OF CLAIMS

Claims against the State ✓

"Sovereign immunity" throwback: You can't sue the King!

SURROGATE'S COURT

One in each County. Peaceful setting.

Jurisdiction over Wills and Estates

Primary areas: Probate and Administration (difference explained)

Other areas: Adoption and guardianship

FAMILY COURT

One in each County. Not a fun place to be. Tension packed.

Juris. includes: Custody, visitation, child support, J.D. matters, PINS, Child abuse & neglect, termination of parental rights, family offenses, paternity mtrs., adoption.

Does not have jurisdiction over divorce. ✓

SUPREME COURT

One in each County.

Court of general, unlimited, original juris. (i.e. contracts, negligence mtrs.) ✓

Civil & crim. juris, but almost always civil. Main trial court for lawsuits.

One judge sits.

Jury available in many cases.

APPELLATE DIVISIONS

4 Judicial Depts. (Draw NYS map)

Juris. almost exclusively "appeals."

Sidelights: Licensing of attorneys & disciplinary proceedings vs. attorneys

Multi-judge court: Usually 5 judges sit on each case

Oddity: Can result in different rules of law in different parts of the State

i.e. Dog bite/leash law cases (Law Journal article)

i.e. Hit and run accident: Lost leg, N/F "use or operation of M.V." issue

COURT OF APPEALS

Highest court in NYS system. Sits in Albany. ✓

No original juris. Only hears "appeals."

Almost exclusively "on permission."

Civil juris. and crim. juris.

Juris. limited to questions of law, not questions of fact

Multi-judge court: 7 judges

Rulings become binding law on all lower courts

Draw Albany city map of courthouses



SUPREME COURT

The Supreme Court has broad authority over all categories of cases, including civil and criminal matters. The court generally handles civil matters seeking monetary damages greater than \$25,000. It also hears cases where a party seeks to enjoin or stop certain actions by another party. The Supreme Court is the only court with the authority to address matters related to the termination of a marriage, including separation, annulment and divorce. While the Supreme Court has authority to hear criminal matters involving felonies (offenses punishable by more than one year in prison), generally outside New York City these matters are heard in the County Court.

COUNTY COURT

The County Court is located in each county outside New York City. It is authorized to handle the prosecution of all crimes committed within the county. It has exclusive authority to handle trials in felony matters and shares authority with the local city, and town and village courts to handle tri-

New York Courts

als in misdemeanor cases (offenses punishable by less than one year in prison) and other minor offenses and violations. The County Court also has limited authority to hear civil cases involving monetary awards of ^{Ant.} \$25,000 or less. (?)

CITY COURT

The City Court exists in every city in the State and has authority to hear both criminal and civil matters. On the criminal side, the City Court is responsible for all Penal Law and City Code misdemeanors and minor offenses committed within the court's regional boundaries. It also handles arraignments and preliminary proceedings in felony matters. In addition, the City

Court is responsible for Vehicle and Traffic Law misdemeanors.

On the civil side, the City Court hears civil actions seeking monetary awards in amounts up to \$15,000, small claims proceedings involving claims up to \$5,000 and disputed parking tickets. The court also handles landlord/tenant matters.

FAMILY COURT

The Family Court hears and determines most legal issues involving children and families. There is a Family Court within each county of the State which is authorized to hear matters relating to:

- custody, visitation and guardianship
- monetary support for children, spouses and ex-spouses

- adoption
- paternity
- abuse and neglect of children
- violence among family members
- children accused of committing crimes
- children in need of supervision

The Family Court does not handle proceedings involving separation, annulment or divorce. These matters must be brought in the Supreme Court, which has exclusive authority over such issues.

SURROGATE'S COURT

The Surrogate's Court exists in every county in the State and handles all matters relating to wills, estates and property of deceased persons. The Surrogate's Court also shares authority with the Family



A message from Chief Judge Judith S. Kaye:

Every day, New Yorkers from all walks of life turn to the courts to resolve their legal disputes. When they do, it is crucial that they have basic information about the courts, including the location of the courthouses within their communities and the types of cases handled by particular courts.

The court system has designed this brochure to provide court users with useful information about the State trial courts. It is our hope that this outline will help New Yorkers better understand and better navigate their State courts.

Court to hear adoption proceedings.

COURT OF CLAIMS

The Court of Claims handles all civil cases seeking monetary damages from New York State. It has locations statewide.

1-800-COURT-NY
WWW.COURTS.STATE.NY.US

CONTRACTS

INTRODUCTORY MATERIAL:

DEFINITIONS:

- A legally binding Agreement. (Enforceable in Court)
- An Agreement creating enforceable rights and obligations.

ELEMENTS OF A CONTRACT:

1. An Agreement (Offer + Acceptance = K)
2. Competent parties (Minors, incompetent people)
3. Genuine assent (Mistakes, fraud, duress, undue influence)
4. Consideration (Something for something)
5. Lawful objective (vs. Illegal agreements)
6. Form required by law, if any (Statute of Frauds)

PARTIES: Distinctive names:

Seller & Purchaser (Vendor & Vendee)

Landlord & Tenant (Lessor & Lessee)

Insurer & Insured

Promisor & Promisee

Party of the 1st part & Party of the 2nd part

"Privity of K" concept: Explain, emphasize and illus. (JWS fired/mother sues)

KINDS OF CONTRACTS:

Valid: Binding and enforceable (acknowledge as redundant)

Void: Has no legal effect

(i.e. Hire hitman/mother-in-law...Not enforceable by either party.)

Voidable: On its face perfectly valid and enforceable, but one which the law allows certain kinds of people to disaffirm if they wish (i.e. minor)
Law protects minors & incompetents, etc.

EXPRESS K:

- Parties expressly agree on all fundamental terms.
- Can be oral or written. (Proof is the biggest difference)
- Speeding ticket representation for \$200.00.
- Joe Roofer replace 3 slates for \$150.00.

IMPLIED K:

- Parties make a binding & enforceable Agreement but without expressly agreeing on all fundamental terms.
- Agreement is implied from "acts or conduct" of the parties.

- Retain atty. to represent you on speeding ticket without specific agreement on atty's fee.
- Joe Roofer to replace slates as needed without mention of price.
- Auto mechanic work without estimate or quote
- Obligation to pay "reasonable value"

QUASI K:

- Not really a K at all.
- Figment of law's imagination to prevent "unjust enrichment" ✓
- Roofer on wrong roof (Multiple fact patterns: HO return from vacation)
- Nantucket ex. (Pg. 214) (Old Pg. 252): Painting of wrong house while owner watched
- Dozier text example (Pg. 219, #9) (Old Pg. 258, #9) Illustrates "quantum meruit" concept: Pay what is deserved.
- Tenant cultivated land, then lease expired (C.S. Pg. 213, Old Pg 251)
- Assessment increase on wrong property (prior ed.) (See attached)
- John Sununu/Philippine Airlines case (C.S. Pg 214) (Old Page 252): If "express" K exists, then "quasi" K theory will not be successful.
- New construction contractors use "Written Change Orders" to avoid the Brown University sports facility issue on Pg. 215, Old Pg 253.
- Bottom line: Quasi K requires payment based on "reasonable value" of the benefit (Sometimes called "quantum meruit")

Option Contracts and Right of First Refusal Contracts

- Note that these will be explained by JWS in next chapter Re: Offers. Better fit there.

Contracts on the Internet

- Still developing law, Assume gen. K law principals apply. Beware of "caveat emptor." (Reputation is key!)

prove the assertions in the complaint that Cher was a sophisticated homeowner with previous involvement in residential construction who had legal representation in negotiating the agreement with Arya, and that Cher would be unjustly enriched if she were not required to compensate Arya for the reasonable value of the work already performed.¹⁵

A situation may arise over the mistaken conferrence of a benefit. For Example, Nantucket Island has a few approved colors for houses in its historic district. Using the approved gray color, Martin Kane and his crew began painting Sheldon Adams's house in the historic district as the result of a mistaken address. Adams observed the initiation of the work from his office across the street but did nothing to stop the painters. At the end of the day when the work was done, Adams refused to pay for the work, saying, "I signed no contract and never approved this work." The law deems it inequitable that Adams should have received the benefit of this work, having observed the benefit being conferred and knowing that the painters expected payment. Adams would be unjustly enriched if he were allowed to retain the benefit without payment for the reasonable value of the work. If Adams did not have knowledge that the work was being done and thus that payment was expected, quasi-contractual liability would not be imposed.

Note & distinguish

The mistake that benefits the defendant may be the mistake of a third party.

CASE SUMMARY

Who Pays the Piper?



FACTS: When improvements or buildings are added to real estate, the real estate tax assessment is usually increased to reflect the increased value of the property. Frank Partipilo and Elmer Hallman owned neighboring tracts of land. In 1977 Hallman made improvements to his land, constructing a new building and driveway on the tract. The tax assessor made a mistake about the location of the boundary line between Partipilo's and Hallman's

land and thought the improvements were made on Partipilo's property. Instead of increasing the taxes on Hallman's land, the assessor wrongly increased the taxes on Partipilo's land. Partipilo paid the increased taxes for three years. When he learned why his taxes had been increased, he sued Hallman for the amount of the increase that Partipilo had been paying. Hallman raised the defense that he had not done anything wrong and that the mistake had been the fault of the tax assessor.

DECISION: Judgment for Partipilo. Because the improvements were made to Hallman's land, Hallman should be the one to pay the tax increase. When Partipilo paid it, Hallman received a benefit to which he was not entitled. This was an unjust enrichment. Therefore, Partipilo could recover the amount of the increased taxes without regard to the fact that Hallman was free of any fault and that the only fault in the case was the fault of the tax assessor. [Partipilo v Hallman, 510 NE2d 8 (Ill App 1987)]

Brown University accepted Marshall Contractors, Inc. to build the Pizzitola Sports Providence, Rhode Island, parties intended to execute ten contract. Brown decided \$7,157,051 for the project, sought additional payment and not contemplated in it were unable to agree on it compared to the price Brown never executed the formal theless, in the context of this and price, construction began parties could not resolve the project neared completion sued Brown University, seeking what it deemed "changes." implied-in-fact contract existed \$7,157,051 figure because the with the project knowing the The litigation ended up in the Island, and in 1997, the express or implied-in-fact reached by the parties for project and what costs were stipulated by Brown. The court trial court for a new trial. Affirmed quantum meruit and unjust enrichment Marshall \$1.2 million dollars million less than Marshall

(b) rec an the in pr

¹⁵ Arya Group, Inc. v Cher, 91 Cal Rptr 2d 815 (Cal App 2d 2000). See also Fischer v Flax, 816 A2d 1 (2003).

5(a)

THE AGREEMENT

First element of a K: An Agreement

Usually arises when one party makes a certain Offer and the other party Accepts.

OFFERS

- An offer is really a "Proposed Contract".
- "Offeror" makes an offer to the "Offeree".
- Simply sets forth the terms the Offeror is willing to agree to.
- A contract usually arises when the offer made by the offeror is accepted by the offeree. (OFFER + ACCEPTANCE = K).
- Traditional standard: "Meeting of the minds" - Still solid, black letter law.
i.e. (2) ships called The Peerless
- Modern day standard: "Reasonable person" in shoes of offeree

OFFERS MADE IN JEST: Not really offers, but be careful ... above standard.

- (i.e. "I'd sell my Toyota to the first person who offers me \$500.00!")
- (i.e. Fake invitation to Inaugural Ball...purchase of a tux)
- (i.e. Be careful how you word things...Hilda Conroy celebration of life)

"INVITATIONS TO NEGOTIATE": Newspaper ads, T.V. ads, circulars, price stamped on can of tuna fish

- Emphasize point: These things are not offers.
- Explain rationale for the rule: Sellers do not have an unlimited supply
- Note exception: Very specific wording of ads, i.e. "First come, first served"
(i.e. T.V. sale ad for first 20 customers)
(JWS college days: Sears big suit sale)
- "Price quotes" or "Estimates" are tricky. Sender's intent is key. So is trade custom.

Definiteness requirement: Offer cannot be vague or ambiguous

- Must be definite enough for Court to know what you are asking it to enforce.
- i.e. Legal description in R/E K (Liz Adams farm/survey/acreage issue)
- "Incorporation by reference": Define and illus. (56 Dewey Ave.) ✓
(Very helpful in K matters)

- Attach a copy of deed or survey or tax map
Careful of tax map: Jeff Moore So. Main St. vacant lot pur.
- C.S. Pg. 224, Old Pg. 263: "Damn Good Job" standard for painting of old show car, No B/K if no agreement on quality. Not sufficiently definite to be enforced.
- C.S. attached, Old Pg. 264: R/E Contract, one part or two. Contrast with Cap. Dist. one part K. Explain in 2 part K, the 1st part still has a "binding" nature. Explain "good faith" req't.
- Distinguish "good faith" in negotiations as different than "good faith" in performance. Use Pg 226, Old Pg 264 Thinking Things Through
Illus. With Bucko DeMarco/Frog island/Russian immigrant step-father/step-children inherit statute/JWS good faith quandary
- Exceptions to definiteness requirement: - Req'ts K
- Output K

Communicated requirements:

- Equate with "delivery" requirements of law.
- Until offer communicated to offeree, there is nothing to accept.
- Cannot collect reward without knowledge of it.
(i.e. Pharmacy student finds dog Fifi)

TERMINATION OF OFFERS:("Poof")

1. Revocation (by offeror) = Withdrawal of offer. No particular form or words req'd.
Gen. Rule: Offer can be revoked at any time prior to its acceptance.
(i.e. Geo. Steinbrenner/Billy Martin ex. "Week to think about it")
Only effective upon receipt.
2. Rejection (by offeree). A simple no.
Cannot resurrect offer. (Use walkaway illus.)
3. Counter-offer (by offeree) Any attempted modification.
Any "and, if, or but."
4. Lapse of time: Any specified date or time period is enforceable.
 - A late acceptance is no acceptance. It's too late.
 - Reasonable time if none specified. (R/E v. fresh fruit).
 - Question the reasonableness of Ct. ruling on Pg 231, Old Pg 270
Written lease for 20 yrs., signed agreement 5 days after termination date of offer, restaurant built and occupied for 9 yrs. and then vacated. Why would Ct. not find the late lease signing to be effective as a waiver of the late acceptance?

CASE SUMMARY

Offer to Purchase Is Controlling Legal Document

FACTS: John McCarthy executed an offer to purchase (OTP) real estate on a preprinted form generated by the Greater Boston Real Estate Board. The OTP contained a description of the property, the price to be paid, deposit requirements, limited title requirements, and the time and place for closing. The OTP required the parties to execute the applicable Standard Form Purchase and Sale Agreement recommended by the Greater Boston Real Estate Board that, when executed, was to be the agreement between the parties. An unnumbered paragraph immediately above the signature line stated: "NOTICE: This is a legal document that creates binding obligations. If not understood, consult an attorney." The seller, Ann Tobin, signed the OTP. While lawyers for the parties exchanged drafts of a purchase and sale agreement (PSA), a much higher offer for the property was made to Tobin by the Diminicos. Because she had not yet signed the purchase and sale agreement, Tobin accepted the Diminicos's offer and executed a purchase and sales agreement with them. Before that deal closed, McCarthy filed an action for specific performance of the OTP. McCarthy contended he and Tobin intended to be bound by the OTP and that the execution of a PSA was merely a formality. Tobin contended the OTP language contemplated the execution of a final written document, thus clearly indicating that the parties had not agreed to all material aspects of the transaction, and thus the parties did not intend to be bound until the PSA was signed. From a judgment for Tobin and the Diminicos, McCarthy appealed.

DECISION: Judgment for McCarthy. Although the provisions of the purchase and sale agreement can be the subject of negotiation, norms exist for their customary resolution. The inference that the OTP was legally binding is bolstered by the notice printed on the form. McCarthy and Tobin were alerted to the fact that the OTP "creates binding obligations." The OTP employed familiar contractual language. It stated that McCarthy "hereby offers to buy" the property, and Tobin's signature indicates that "this Offer is hereby accepted." The OTP also details the amount to be paid and when, describes the property bought, and specifies for how long the offer was open. This was a firm offer, the acceptance of which bound Tobin to sell and McCarthy to buy the subject property. [*McCarthy v. Tobin*, 706 N.E.2d 629 (Mass. 1999)]

1st form

2nd form

Key language

Binding nature & explained... "good faith" is implied a req. if.

Thinking Things Through



The Rules of Negotiations

Business agreements are often reached after much discussion, study, and posturing by both sides. Many statements may be made by both sides about the price or value placed on the subject of the transaction. Withholding information or presenting selective, self-serving information may be perceived by a party to the negotiations as protective self-interest. Does the law of contracts apply a duty of good faith and fair dealing in the negotiation of contracts? Does the Uniform Commercial Code provide for a general duty of good faith in the negotiation of contracts? Are lawyers under an ethical obligation to inform opposing counsel of relevant facts? The answer to all of these questions is no.

The Restatement (Second) of Contracts applies the duty of good faith and fair dealing to the performance and enforcement of contracts,

not their negotiation*; so also does the UCC.** The American Bar Association's Model Rules of Professional Conduct, Rule 4.1 Comment 1 requires a lawyer to be "truthful" when dealing with others on a client's behalf, but it also states that generally a lawyer has "no affirmative duty to inform an opposing party of relevant facts."*** Comment 2 to Rule 4.1 contains an example of a "nonmaterial" statement of a lawyer as "estimates of price or value placed on the subject of a transaction."

The legal rules of negotiations state that—in the absence of fraud, special relationships, or statutory or contractual duties—negotiators are

*Restatement (Second) of Contracts §105, comment (c).

**Uniform Commercial Code §1-203.

***American Bar Association-Model Rule of Professional Conduct 4.1(a) Comment 1.

7a

5. Death or disability of either party: Differentiate offer from K.
(Careful: Jay, Larry & Smokey ex.) (Yogi Berra dies thinking about offer....)

6. Subsequent illegality: i.e. Change in drinking age, sell kegs to JWS @ Cornell.

Option K: Method of protection vs. revocation of offer by offeror.

- Key element: Payment of "consideration" for keeping offer open for a certain specified period or until a specified date.
- i.e. R/E purchase of adjacent parcels. (i.e. Water park International Drive)
- i.e. Ed Johnson R/E contract

Right of First Refusal: Careful on wording. Proced. technicalities. How to sign off to CYA.

Lease with Option to Buy: Careful on wording

(i.e. Ben Murphy/Landry house: Lender refused to recognize partial rent toward lender's downpayment req't)

ACCEPTANCES

No particular form or words are necessary. In some cases signing of a written offer, maybe a hand shake, a simple O.K., that's a deal partner, maybe even a nod and a wink followed by the required performance.

"Mirror Image" rule: Must be "absolute and unconditional".

An attempted acceptance with any variation is a counter-offer.

Who may accept?

- Only the person to whom the offer is directed. (Indiv., group, public, etc.) (Illus.)
(Not anyone who becomes aware of it...i.e. Eddie Haskell)

Method of acceptance

The offer can dictate manner of acceptance required.

Generally strictly enforced. If offer says written, then acceptance must be in writing.

If offer does not dictate method of acc., then any reas. method will be effective.

Timing of Acceptance

If offer specifies date or deadline, then a late acceptance is ineffective.

"A late acceptance is no acceptance." ✓

Offeror can choose to waive the lateness, but can't be required to. (*Rest. Lease again)

Silence as Acceptance

Gen. Rule: Offeror cannot frame the offer in such a way as to make the offeree's silence or failure to act constitute an acceptance. (i.e. Whopper Chopper in mail)

Exception: Record club, book of the month club. Distinguish K agreement from offer. ✓
(*Address change issue re: club/Address change issue @ DMV)

i.e. Pg 234, Old Pg 273: Civil engineer hired to design hotel...hourly rate with \$7,200. cap on total...Unable to get consent for extra hrs. when owner would not return phone calls...Ct. equated lack of ret. calls to silence and would not approve extra charges above agreed cap.

Postal Reorgan. Act.: Unsolicited goods rec'd. in mail are deemed to be unconditional gifts.

(But don't be clever: Don't accept delivery of someone else's new refrigerator.)

"Mailbox Rule": Re: Communication of acceptance

Gen. Rule: Acceptance not effective until communicated.

Mailbox Rule: A mailed acceptance is deemed effective when mailed. (Or when given to UPS or Fed Ex). ✓

"Postmark date" is not crucial, rather placement into mailbox itself.
("Golden light" of K)

Hint: CYA: Use "Certified mail, RRR"

Avoid credibility issue. Explain certif. mail. vs. regis. mail.

(Rule applies even if letter is never received by offeror.)

Best method of CYA: Call first & followup with letter confirming earlier call.

E-mail mailbox rule? Not aware of any definitive case yet, but likely that Courts will apply similar theory.

* Contrast with Revocation timing: Revocation effective only when rec'd.

No mailbox rule for revocations.

i.e. June 1st: Offer mailed (-) ✓
June 2nd: Revoc. mailed (-)
June 3rd: Offer rec'd (Offer)
June 4th: Accep. mailed (K)
June 5th: Revoc. rec'd (-)
June 6th: Accep. rec'd (-)

Crab House case re: lease termination illus. similar timing issues Pg 237, Old Pg 276.

(If acceptance is eff. prior to revoc. of offer, then K is formed.)

Case examples: Revoc./acceptance timing. P. 239 #3, Old Pg. #279 #3)
T.V. Newspaper ad mistake: P. 240 #6, Old Pg. 279 #6.

Auction Sales:

A buyer's "bid" is the offer. Fall of auctioneer's hammer is usually acceptance.

Auctioneer can withdraw any item before acceptance unless advertised auction as "without reserve."

CONTRACTUAL CAPACITY

Definition: Ability to understand a K is being made and to understand its general nature.

MINORS: 18 as age of majority for K purposes. Notre Dame drinking age story.

Gen. Rule: K's made by a minor are voidable at the option of the minor.

Main point: The rule is meant to protect the minor.

Note: "Adult" who dealt with the minor is not given that option.

Exception: If minor misrepresented his age to the adult, then adult can also avoid K.

"Avoid, disaffirm, back out of K" all mean same thing.

Gen. Rule: Misrep. of Age: Minor still allowed to avoid such K's in NY.

Case Example:

Minor seeks to disaffirm used car pur. Minor claims defects. Dealer claims defects "trivial." Makes no diff. if trivial. Minor can still avoid.

Gen. Rule: Time for Avoidance: Anytime during minority or a reasonable time thereafter. Question why? Party plans?

i.e. Continuing to make payments after attaining majority = "ratification."

Gen. Rule: Ratification: Attempted ratif. by minor is only effective if made after having attained majority.

Any earlier attempted ratif. is deemed voidable, as was orig. K. Explain rationale. Illus. with Paulie Walnuts inducing ratif. by minor on used car pur. from Tony Soprano.

Gen. Rule: Restitution Required upon Avoidance: Minor must return goods no matter what condition.

Minor can recoup full value given, less deprec. & wear and tear.

Gen. Rule: K's For Necessaries: Minor can still ratify, but must pay "reasonable value."

Originally meant food, clothing, shelter.

Now expanded sometimes to health care and education expenses:

C.S. Pg. 246, Old Pg. 286 re: teenager concussion. Child held respons. for reas. value. Similar teenager tort respons. Use Wayne Harp, Judge Doran car example

Gen. Rule: Statutory Exceptions: Minor cannot avoid Student Loans, K's involving Bank Accts, Insur. Pols., Corp. Stock, K's involved in running a business. ✓

Gen. Rule: Parental Non-Liability: Distinguish agency theory. (Perrotta's store, cigarettes)
Distinguish "Co-signer." (Co-signer bound independently.)
*(Dealer will insist on adult co-signer for car.) ✓
Distinguish from tort liability (Vandalism statute).

INSANE PERSON: Lack contractual capacity. K's usually voidable at option of the insane person or his representative.

Idiocy, senile dementia, lunacy, imbecility, other mental illnesses are often sufficient to disaffirm, but mere mental illness is not enough.

No labels on foreheads.

Lucid interval rule.

If "guardian" appointed, K's thereafter made by the insane person himself are "void."

Current trend: Enforce K if terms and circums. reasonable and no ability to return to original status quo.

INTOXICATED PERSONS: Gen. Rule: Intoxication is not a valid defense in a K action as long as party knew a K was being made.

Litigation floodgates would open otherwise:

No Breathalyzer at restaurant/tavern exits.

Exceptions: 1). You were so intoxicated, you didn't even know a K was being made or
2). The other party to the K induced your intox. state in order to get the K.

In either event, the intox. person must act w/i reason time upon becoming sober and aware of the K in order to avoid it.

Drug Impairment: Treated same as alcohol

GENUINENESS OF ASSENT

Unilateral mistakes, mutual mistakes, innocent misrepresentation, fraud, undue influence, and duress.

UNILATERAL MISTAKE OF FACT: Usually has no effect on a K. The K stands.

i.e. Purchase of lot next to supposedly approved Esplanade project
(Exception: If the other party knew of the mistake or should have known.)

UNI. MISTAKE OF LAW has no effect either: "Ignor. of the law is no excuse" is correct.

Mistake as to Releases: Insur. claimant bound by Gen. Release form. Claims for injuries not fully known at time of signing Release will be barred.

MUTUAL MISTAKE OF FACT: When both parties make the same mistake of fact, the K is void.

- i. e.- 2 ships "The Peerless": No meeting of the minds, so no K, so no B/K.
- Destroyed car example (unknown to both parties at time of K)
- Larry/Jay: Dead horse Smokey
- Barren cow ex. Pg. 249 Old Pg. 290 (void K if discovered pre-delivery)

MUTUAL MISTAKE OF LAW: K might later become voidable

i.e. Zoning belief: Old YMCA example.... Be wary!

MUTUAL MISTAKE IN JUDGEMENT: K stands.

i.e. "Non-competitive" racehorse sold, later wins Preakness Pg. 249, Old pg. 290. Can't undo the deal.

INNOCENT MISREP OR NEGLIGENT MISREP: K is voidable by misled party.

i.e. Connie's husband Len: Sale of used Corvette. "Ever been in a wreck?"

Disclosure Rules: Gen. Rule: "No duty to volunteer" rule. ✓

- Tony Cocozzo negot. style
- Watergate: "Any tape recordings?" (Alexander Butterfield)

Exceptions: 1) Unknown defect or condition:

i.e. Edna Church snakes in the basement
i.e. P. 260, #14 Old 302: Sewer construction K, quicksand subsoil. City is liable.

2) Active concealment:

- i.e. BR/ New Garage wall vapor barrier ✓
- i.e. Larry Wertz: Water...basement...rocking chair
- i.e Structural inspec.: Stacked boxes in basement blocking cracked foundation

14. CONTRACTS

3. Promises to Pay Legal Obligations Barred by Law

If a legal obligation is not enforceable under law (e.g., a debt barred by the statute of limitations), a new promise to fulfill the legal obligation is enforceable if in *writing*. However, it will be enforceable only according to **the new terms**, not the terms of the original legal obligation.

4. Seal In many states and under the U.C.C., a seal is **no longer a substitute** for consideration.

IV. REQUIREMENT THAT NO DEFENSES EXIST

A. DEFENSES TO FORMATION

1. Absence of Mutual Assent

a. Mutual Mistake

A mistake by *both parties* is a defense if:

- (i) The mistake concerns a *basic assumption* on which the contract was made;
- (ii) The mistake has a *material adverse effect* on the agreed-upon exchange; and
- (iii) The adversely affected party **did not assume the risk** of the mistake.

1) Assumption of Risk

Note that when the parties know that their assumption is doubtful (so-called conscious ignorance), mutual mistake is not a defense—the parties will be deemed to have assumed the risk that their assumption was wrong.

2) Mistake in Value Generally No Defense

A mistake in value generally goes unremedied, as courts presume parties assume the risk of determining value. *But note*: There are exceptions (such as when the parties rely on a third party to establish value).

b. Unilateral Mistake

Whether it be of identity, subject matter, or computation, a mistake by one party is generally *insufficient* to make a contract voidable. However, if the nonmistaken party knew or should - have known of the mistake, the contract is voidable by the mistaken party.

c. Mistake by Intermediary (Transmission)

Where there is a mistake by an intermediary (e.g., a telegraph company makes a mistake), the message usually will be operative *as transmitted* unless the party receiving the message should have been aware of the mistake.

d. Latent Ambiguity Mistakes

If the contract includes an ambiguous term, the result depends on the parties' awareness of the ambiguity:

- (i) Neither party aware—no contract unless both parties intended the same meaning;
- (ii) Both parties aware—no contract unless both parties intended the same meaning;

FRAUD: Elements of fraud:

1. False statement of fact
2. Knowledge of falsity or reckless indifference to truth ✓
3. Intent listener rely
4. Listener does rely
5. Harm results (damage)

i.e. Auto dealer, car in a wreck... Pg. 258 #1, Old Pg 300 #1, McIntosh Motors

i.e. Similar auto dealer case with Carfax availability Pg 251, Old Pg 292.

"Clean hands" doctrine: K is voidable at option of victim.

Distinguish "dealer puffery": (Smooth as silk...Girlfriend will love it...) ✓

"Meaningless superlatives that no reas. person would take seriously"

Misstatement of value ≠ fraud:

But be wary re: Ken Lay/Enron speech... pattern of deception might be key...

Also: Misstatement of law ≠ fraud. Not entitled to rely upon other party's understanding of law: Hire an attorney.

"Assumed Name" ≠ fraud: Free to use any name you choose as long as not intended to avoid arrest, evade creditors, or substantially confuse the public. i.e. Big Al:(Bella Roma Pizzeria.)

UNDUE INFLUENCE: "Confidential relationship" and "deprivation of free will" are the key terms.

One person's wishes dominate... "Puppet" relationship

Results in voidable K if proven. (See Pg 256, Old Pg. 297 C. S.: Nursing home patient.)

Mere speculation not enough. (Beware of this ex. Money brings out the worst in people.)

Persuasion and argument ≠ undue influence. (McVilie Italian family dinners) Always a difficult question.

DURESS: "Violence or threat of violence."

Results in a K voidable at option of the victim, not a void K. ✓

i.e. Godfather example.

"Economic" duress: Not generally considered duress by JWS. Extremely difficult to prove.

Undue influence and Duress are not the same thing. ✓

Same result (voidable at option of victim), but not interchangeable concepts

CONSIDERATION

Definition: Something for something, rather than something for nothing.

The bargained for benefit.
The price for the promise.

Gift promises: Not enforceable. Promises based on a "moral obligation" are not binding.

The absence of consideration makes a promise not binding.

No Indian giving, however: Completed gift. (Est. distrib.: Gr'father clock)
Aunt Mary example.

Old Pg 307 ex. Attached: Drilled well is consid. (Even if no water produced)

Adequacy of consideration: How much consid. is enough? ✓

"Peppercorn theory" applies: Courts do not weigh consid. Even something as small as a peppercorn is sufficient. Key question is: Was there any consideration at all, rather than how much consid. was there?

- Nolan Ryan/Jim Fregosi ex.

Note exception: Extent of consideration will be considered if "fraud" is being alleged.

Forbearance as consideration: Old uncle, young nephew: No smoke, drink till 21.

"Pre-existing duty rule": A promise to do what one is already under a legal obligation to do is not consideration.

i.e. "On-duty" cop case: Pg. 266, Old Pg 310 Rowdy neighbors.

i.e. "On duty" cop cannot collect reward. ("Off duty" cop could)

Also: Promise not to commit crime cannot be valid consid. either.

i.e. Jim Kelly/Tiny Kelly ex.

Reas. "Good faith adjustment" is allowed in extraordinary unforeseen circums. ✓

i.e. Pg 267, Old Pg 311: Trash collector K/400 new dwellings.

Part payment checks: "Paid in full" memo notation. Distinguish liquidated v. unliquidated debts. Be wary!

Past Consideration is no consideration. ✓

Illustrate by showing no bargain was made.

i.e. Odessa: House on fire, Pg. 272, #1/Old Pg. 317 #1

i.e. Reggie Jackson/Chico Esquela exam?

i.e. Don Pratt "years of dedicated service."

Exceptions to Consideration Requirement:

1.) Pledges to charity: Public policy decision, nothing more.

2.) Certain UCC rules i.e. Merchants on certain sales of goods

3.) "Promissory Estoppel" doctrine:

"Detrimental Reliance" and "substantial loss" are the key factors.

Applied to prevent the "no consideration" rule from working a seemingly unjust result. Intended to prevent unjust enrichment.

i.e. Red Owl grocery store franchise, Pg 274, #15/ Old Pg 319.

3. Adequacy of Consideration

Ordinarily, courts do not consider the adequacy of the consideration given for a promise. The fact that the consideration supplied by one party is slight when compared with the burden undertaken by the other party is immaterial. It is a matter for the parties to decide when they make their contract whether each is getting a fair return. In the absence of fraud or other misconduct, courts usually will not interfere to make sure that each side is getting a fair return. ✓

CASE SUMMARY

Who's to Say?

FACTS: On the death of their aunt, a brother and sister became the owners of shares of stock of several corporations. They made an agreement to divide these shares equally between them, although the sister's shares had a value approximately seven times those of the brother. The brother died before the shares were divided. The sister then claimed that the agreement to divide was not binding because the consideration for her promise was not adequate.

DECISION: The value of stock cannot be determined precisely. It may change with time. In addition, the value that one person may see can be different than that seen by another. The court therefore will not make a comparison of the value that each party was to receive under the agreement. It was sufficient that a promise was exchanged for a promise. The adequacy of the consideration would not be examined. This sister was therefore bound by her promise to divide the shares. [*Emberson v. Hartley*, 762 P.2d 364 (Wash. App. 1988)]

Because the adequacy of consideration is ignored, it is immaterial that consideration is so slight that the transaction is in part a "gift." However, the Internal Revenue Service may view a given transaction as part consideration, part gift, and assess a gift tax as appropriate.

The fact that the consideration turns out to be disappointing does not affect the binding character of the contract. Thus, the fact that a business purchased by a group of investors proves unprofitable does not constitute a failure of consideration that releases the buyers from their obligation to the seller.

CASE SUMMARY

Expectations versus Consideration

FACTS: Aqua Drilling Company made a contract to drill a well for the Atlas Construction Company. It was expected that this would supply water for a home being constructed by Atlas. Aqua did not make any guarantee or warranty that water would be produced. Aqua drilled the well exactly as required by the contract, but no water was produced. Atlas refused to pay. It asserted that the contract was not binding on the theory that there had been a failure of consideration because the well did not produce water.

DECISION: The contract was binding. Atlas obtained the exact performance required by the contract. While Atlas had expected that water would be obtained, Aqua did not make any guarantee or warranty that this would be so. Hence, there was no failure of consideration. [*Atlas Construction Co., Inc. v. Aqua Drilling Co.*, 559 P.2d 39 (Wyo. 1977)]

"Drilled well
is consideration
even if no
water found."

LEGALITY AND PUBLIC POLICY

Legality Concept: K's must not only satisfy the laws of K's but also certain rules which society imposes. An agreement will not be a valid K if it is illegal or contrary to public policy.

Gen. Rule: Illegal K's are void. Neither party can enforce K in Court. K's to commit a crime are not enforceable.

i.e. Hit man to knock off your mother-in-law. Neither can enforce.

i.e. Rocky Balboa: Collector for bookie "broke thumbs". Original gambling K is illegal and unenforceable, so bookies resorted to breaking thumbs.

Partial illegality rule: Court has option to void entire agreement if the illegal part goes to the heart of the agreement or only the illegal part if it can be removed by itself and enforce the rest. (Ct. must decide how important illegal part is!) (i.e. Lease paragraph re: broken glass... LL throws ice ball...)

(i.e. Tenant car fire S.C. case: "Tenant respons. for all damage to premises...")

Implied Covenant of Good Faith: All K's are subject to.

Be wary of mtg. broker suggested games to avoid pur. oblig. in order to buy a diff. house.

Unconscionable K's: Not enforceable. So harsh, so oppressive: Against public policy. "Shock the conscience."

i.e. Parking garage: "Not responsible for damage caused by negl. of Ees."
(Quite diff. from "Not responsible for lost or stolen items.")

Bad bargain not equal to unconscionable. Be careful.

i.e.. Furniture store: Title not transferred while any remaining bal. was due 5 yr. period, \$1,800. worth of goods, with \$164. bal. when stopped payments while supporting self & 7 kids on \$218./mo gov't check. Terms of K not enforceable re: title.

Public Policy Issues: Societal role in private K's

i.e. Min. Wage Laws: Societal interest supercedes parties right to contract at a negotiated wage amt (Dem. v. Repub. philos.)

i.e. The "n" factor: Not one in a million, but one of a million
Insur. laws: N/F insur as example in N.Y.

i.e. Witness fee: Illegal to pay more than statute allows.

i.e. Gambling, Wagers and Lotteries: Betting is illegal as gen. rule.
State sponsored games are exception.
Lottery: 3 elements: Consideration, Chance, Prize = Illegal

i.e. Raffles are lotteries: Illegal.

McDonald game pieces are not illegal lotteries: "No purchase necessary".

Doubleday Barbers softball league raffle example:
Cannot force participation in illegal lottery.
Bingo games are legalized by statute., usually limited for charity purposes

Regulation of Business:

- DBA Certificate requirements explained
- "3 Day Right to Cancel" issues. (Very few Ks!) ✓
 - 1.) In-home sales (Kirby Vacuum)
 - 2.) Mtg. refi or HE loan
- Fed. Truth in Lending req't for mtgs. (Lot of good that did!)
- License req't: Distinguish "revenue raising" measures from "protection of public" kinds. If license req't is motivated by protection of the public, lack of license means lack of ability to enforce K's with patients or clients.
Easy ex: Quack Dr. cannot collect fee.

Tough ex: Saratoga County Family Ct. psychiatrist (licensed counselor, but not PhD.)

Anti Trust Laws

- Contracts "in restraint of trade": Generally re: Monopolies, price fixing schemes.
- Agreements Not to Compete (Covenants not to compete)

Allowable if:

- 1.) Sale of Business or
 - 2.) Employment K
- and if reasonable as to both time limit and geographic limit

How much protection is req'd in the circums?

i.e. Old Man Smith's Pharmacy

i.e. Dr. hired by clinic: 1 yr and 50 mile radius deemed reasonable ✓

i.e. One more illus.: Darla D'Ambro... mtg processor mass exodus to competitor...

Result: Written employment K with covenant not to compete provision.

Absent such restrictive covenants, sellers of a business or former Ees are allowed to compete!

Some states are now limiting covs. not to compete in employ Ks to spur innovation (Pg 329).

-Usury laws: "Loans of Money"

FORM OF CONTRACT

- Why have K's in writing?
1. Proof of actual agreement
 2. Proof of agreed terms from outset
 3. Less chance of disagreement in future

Gen. Rule: Oral K is just as enforceable as written K. Primary difference is proof. Credibility issue, etc. (*Show me works better than tell me!)

Statute of Frauds:

Main Point: Certain K's must be evidenced by a signed writing to be enforceable.

Definition: Some kinds of transactions are deemed so damn different or so damn important that the law requires agreements about them to have something in writing setting forth all the material terms and signed by the party you're attempting to bind in order to make it enforceable. Designed to prevent Ct. from having to decide certain kinds of disputes purely on "credibility" issue.

S/F covers:

- 1.) R/E Contracts: Classic example: Hand shake deal not enforceable. ✓
One reason for realtor pressure to sign the offer etc.
i.e. John Gags parents deal
- 2.) Agreement More than 1 year to Complete performance:
Key issue: Timing starts from date of K, not date performance begins.
i.e. Agreement Feb. 1st to begin work April 1st for 1 full year of employ.
must be in writing to be enforceable.
- 3.) Promise to a Third Party to Pay the Debt of Another: Uncle's promise to car dealer to pay nephew's debt. Contrast with promise made by uncle directly to nephew.
- 4.) Promise by Exec. or Admin. to pay Estate Debt from Personal Funds.
- 5.) Sale of Goods \$500. or more.
*Exception: "Custom made" goods (i.e. Peller window shades)

S/F Requirements

- Terms "evidenced in writing"; Clarify does not actually equate with "Written K"
- Signed by the party to be charged: Signature, initials, x mark, pen, pencil etc.
- All material terms required.
- Only way to assure all this is a fully signed written K!
- Effect of non-compliance: Voidable agreement. S/F is an "affirm. defense."
Used by a defendant once sued in order to claim no enforceable agreement.
Be wary: Court might enforce an oblig. to pay based on "quasi K" theory.
("Quantum meruit" theory)

Parol Evidence Rule:

Definition: Parol evid. = Oral evid. (spoken words)

- General Rule explained. (First req't: K which appears complete on its face)
 - Highlight "before or at same time as written K"
 - Great example:/Text pg 300, Old Pg 349: Store lease with exclusive right to sell soft drinks.
 - Incomplete K, ambiguity, fraud, accident or mistake are exceptions.
 - i.e. JWS \$300. credit card slip, gas for van
 - * But emphasize exception very difficult to prove: Pedro Guerraro quote.
- Distinguish timing as crucial .. Oral agr. before or at time of written K is different from modif. of written K by later oral agr. (Exclusionary clause/merger clause would likely prevent testimony as to that later change.)

INTERPRETATION OF CONTRACTS

Concept: Certain general rules of construction to assist Courts

Intention of the parties controls: "Incorp. by Reference" concept very useful. Explain.

Role of Court: Interpret K's, not write or rewrite K's.

i.e. Lease renewal: Cert. mail vs. Regis. mail (Sen. Sam Irvin "plain English" v. proof of mailing intent.)

Whole K: K must be construed as a whole. Clauses and phrases are read in context of the entire agreement. Court can enforce part or all depending on circums.

(i.e. S.C. case of Apt. Lease: Car fire damaged parking lot)

(i.e. "Redecorating fee" in Lease?)

Contradictions or Ambiguities:

Sometimes so inconsistent as to render entire agreement void.

i.e. Per acre figure which differs from flat pur. price in R/E K.

Handwriting > Typed material > Printed form material

Written amounts > numerals (i.e. Contradiction on a pers. check)

Strict construction against the drafting party (i.e. Insur. K) (i.e. Fiorino mob. hm. ord.)

Rule used as a last resort on interpretation issues.

"Good faith" is an implied oblig. Do not sabotage your mtg loan or beware! Good faith effort to get mtg. financing req'd.

Conduct of the Parties: "Past practice" given significant weight. Critical factor.

i.e. Insurance claim paid in Canadian dollars, Pg. 304, Old Pg. 354.

"Trade usage" of certain terms often controlling too.

i.e. "Turn-key construction" means move in condition, not doors with locks.

Avoidance of hardship: Judges not in a vacuum. Decide preference, then rationalize. "Equity abhors a forfeiture". (i.e. S. C. Case: "Trucks are funner to drive than cars.")

THIRD PERSONS AND CONTRACTS

Issue: When can a 3rd person assert rights on a K made by others?

Distinguish "Privity of K" concept.
(i.e. S.C. by buyer of house against Seller's roof repair man...)

THIRD PARTY BENEFICIARY K's

Gen. Rule: A 3rd person who would be benefited by the performance of a K may enforce it against the promisor when such was the intention of the parties to the K.

"Donee beneficiary": Life insur. K as classic ex.

Parties are the insured & the insur. co.

Rule: The beneficiary is not a party to the K, but is allowed to enforce it upon insured's death.

Change of beneficiary form explained. (Timing issue: Cathy Lynch neighbor)

"Creditor beneficiary":

i.e. Promise in sales agr. of Yankees to pay the outstanding Steinbrenner debt to Rawlings for baseballs.

Sale of business ex. Max and Harry monthly payments on machine.
i.e. Pg. 312, Old pg. 362

"Incidental beneficiary" distinguished:

i.e. Humane Society K, p. 325 #9, Old pg. 376 #9
i.e. Spider bite motel customer, Pg. 313, Old pg. 363.

ASSIGNMENTS:

Transfer of rights. Generally includes transfer of obligs. as well.

"Assignor & Assignee"

Examples: 1.) Assignment of Mtg. (Borrower's consent not req'd)

2.) Subrogation of insur. claim: i.e. Collision coverage

3.) Danielle Osterhout apt. Lease terms continue for new LL on sale of apt. complex

Some K's are not assignable:

1. Cannot assign right to perform if will materially alter other party's burden.
i.e. Right to delivery of new office furniture to diff. office. (i.e. JWS desk to Boston)
2. Personal satis. K's not assignable. (Pres. Reagan portrait)

Lease Agreement

Made the 22nd day of June in the year 2011

Between Glenmont Manor LLC Of the first part
PO Box 182
East Greenbush, N.Y. 12064

& Danielle Osterhout, James Sutton and Zachary J. Spaulding Of the second Part

Witnesseth, That the said party of the first part has agreed to LET, and hereby does Let to the said party of the second part, and the said party of the second part has agreed to TAKE, and hereby does TAKE from the said party of the first part, the following premises, viz: 15 Glenwood Drive Apt 6 Glenmont, NY 12077

With the privileges and appurtenances for and during the term of 1 year
From 07/01 to 06/30

And the said party of the second part covenants that they will pay to party of the first part for use of said premises, the monthly rent of Dollars (\$ 900.00), to be paid on the first day of the month.

Rent Schedule:

Year 1 \$900.00 per month

Year 2 _____ per month

Plus Utilities

Plus \$40.00 Washer/dryer Rental
Per month

General Conditions:

1. If the rent is not paid, eviction will follow.
2. All parties to the lease are responsible for the full lease term, rent cannot be divided.
3. If tenants are deemed undesirable due to excess noise, uncleanliness or violations of other rules or terms, Landlord may cancel the lease with thirty days notice and tenant must vacate.
Each year, unless tenant notifies Landlord, in writing, on or before 5/31 (month & day) intention to cancel lease, this lease will automatically renew for another year, namely: 7/1 (month & day) to 06/30 (month & day), of each year.
4. Tenant may sublet apartment with Landlord approved tenant.
5. Landlord may raise rent by notifying tenant sixty days prior to lease anniversary date, namely 04/30 of each year.
6. Tenant must secure renter's insurance policy as Landlord is not responsible for any loss incurred by resident regarding his or her personal property.
7. Tenants default
 - A. Landlord may give 5 days written notice to tenant to correct any of the following defaults: Failure to pay rent or added rent on time. Improper assignment of the lease, improper subletting all or part of premises, or allowing another to use the premises. Improper conduct by tenant or other occupant of the premises. Failure to fully perform any other term in the lease.
 - B. If tenant fails to correct the defaults in section A within the 5 days, Landlord may cancel the lease by giving tenant a written 3 day notice stating the date the term will end. On that date, the term and tenant's rights in this lease automatically end, and tenant must leave the premises and give Landlord the keys. Tenant continues to be responsible for rent, expenses, damages, and losses.
 - C. If the lease is cancelled, or rent or added rent is not paid on time, or tenant vacates the premises, Landlord may, in addition to other remedies, take any of the following steps: Enter the premises and remove tenant and any person or property; Use disposses, eviction, or other lawsuit method to take back the premises.
 - D. If the lease is ended or Landlord takes back the premises, rent and added rent for the unexpired term becomes due and payable. Landlord may re-rent the premises and anything in it for any term. Landlord may re-rent for a lower rent and give allowances to the new tenant. Tenant shall be responsible for Landlord's cost of re-renting. Landlord's cost shall include the cost of repairs, decorations, broker's fee, attorney's fees, advertising, and preparation for renting. Tenant shall continue to be responsible for rent, expenses, damages, and losses. Any rent received from the re-renting shall be applied to the reduction of money tenant owes. Tenant waives all rights to return to the premises after possession is given to the Landlord by a Court.

3. Personal services K's not assignable (i.e. JWS City Atty: Mayors Fascia and Rathbun)

4. Credit rights not assignable. (Distinguish daughter's use of father's Shell credit card.)

(i.e. Cannot assign your credit card to your deadbeat brother.) ✓

Delegation of duties: i.e. Subcontracting as classic ex. (Nixon/Liddy exam?) ✓

OK if the perf. is standardized and nonpersonal. (HO claim is vs. Gen. K'er)

Whether a K duty is so personal that it cannot be delegated? Intention of the parties.
(i.e. Hiring law firm does not guarantee a partic. atty.)

Continuity liability of assignor: i.e. Assumable mtg. ex. Seller remains sec. liable.

Advice: Seek Release, not just consent.

Defenses & setoffs remain. Assignee's rights are no greater than Assignor's.

i.e. Tamzie "freezer burn" meat & freezer deal. Reason: Too much chance of collusion.

Assign. of Mtg.: Who to pay? Once notified of the assignment, be sure to get confirmation from both parties.

Beware of scam.

DISCHARGE OF CONTRACTS

Performance, Agreement, Impossibility, Operation of Law.

By Performance:

Conditions affecting performance:

- "Condition precedent": Event must occur before any oblig. to perform.
(Mtg. contingency, zoning contingency)
- * Note: protection of clause can be lost if req'd Notice not given (R/E K illus.)
- "Condition subsequent": Oblig. to perform is relieved by certain events
(i.e. News anchor failed drug test, Pg. 329, Old Pg. 380)
(i.e. Endorsement Ks: Morals clause)

"Tender of Performance": Offer to perform (ready, willing & able)

"Legal tender": Lawful money. Check is not legal tender. ✓
Even a cert. check is not legal tender.

Need not accept anyone's check in payment of a debt. (Unless K requires it: R/E K.)
Offer to work off a debt is not valid tender.

Payment by check: Check suspends the underlying debt till presented for payment. Timing issue: Debt not paid unless rec'd by due date. (*Forget contrary text ex.)
Distinguish tax return mailing.
Suggest Cert. Mail RRR to get proof of receipt

"Time for Performance": If none specified, "reasonable time" is implied.
Reas. depends on circumstance. Distinguish perishable fruit v. R/E.
(Advice: If loaning money, get prom. note with specific due date to avoid collection issue.)

"Time is of the essence": Statement in K saying so is not controlling. Nature of subject matter and surrounding circumstances control.

Ordinarily time is not deemed "of the essence" and reas. time is implied.

Adequacy of Performance: Substantial perf. is generally sufficient. Perfect perf. not required. If good faith, substantial perf. will suffice. ✓
(i.e. New construction complete except shed)
(i.e. Peller window blinds: 1/8" short?)

By Agreement: Anything parties agree to, they can agree to change.

Suggestion: Sign "Mutual Releases" to terminate K. Use R/E K Release to illus. return of deposit and note that Release language cancels future obligs. under K. Be careful in wording so can sell to new buyer without concern. ✓

By Impossibility: "Being broke" is not impossibility.

Death discharges personal services K (JWS UAlbany K.)

Death does not discharge K's requiring payments of money
(i.e., Mtg. debt, JWS favorite T.V. commercial re: Mtg insur.)

Careful: "More expensive" perf. is not impossibility: McMullen contractors
(Prior ed. attached)

"Destruction of subject matter" examples: Jimmy Carter/Peter Pan illus. re: partic.
source of crop to be delivered.

Shortage of materials does not equal impossibility, but routine new construction K will
specifically recite same to protect builder.

"Commercial impracticability": Don't assume this theory will be a winnable argument.
i.e. Pg 339, Old Pg 389: Skanky motel inspec. failure not tied to bridge closure!
i.e. Pgs. 339/389 again: Apt. complex construc. loan oblig. not affected by econ.
downturn resulting in fewer apt. seekers!

"Temporary impossibility" (i.e. Weather) Does not discharge oblig. to perf, but generally
suspends same per delay caused. (i.e. New construction contractor form letter language).

One party will be deemed to have assumed the risk of bad weather if no K provision
on it. (i.e. 911 trip cancellation penalty waived, Pg. 340, Old pg. 392)

By Operation of Law:

- 1.) Bankruptcy: Debts discharged, but security interests are not. ✓
"Reaffirmation of debt" explained to avoid repo.
- 2.) Statute of Limitations: Claim barred if delayed beyond specified time period. ✓
i.e. Contract S/L = 6 yrs. in NY
i.e. Negligence S/L = 3 years
i.e. Med. Malpractice = 2 1/2 years with exceptions (See Law Digest art.)
- 3.) Discuss "Notice of Claim" similarities to S/L
i.e. 90 days Gen. Muni. Law
i.e. John Sadowski late N/C vs. City on Fire... RR crossing opened
i.e. Ralph Tortoricci UAlbany LC hostage case
- 4.) Contractual limitations ✓
i.e. Insur. Pol. Prompt Notice req'ts: i.e. JWS cattle rustling case ✓
i.e. "Stolen truck" S.C. insur. case ("Trucks are funner to drive than cars") ✓

KEY TERMS

accord and satisfaction	operation of law	tender
bankruptcy	rescission	waiver
condition precedent	statute of limitations	
condition subsequent	substantial performance	
condition	substitution	

QUESTIONS AND CASE PROBLEMS

1. McMullen Contractors made a contract with Richardson to build an apartment house for a specific price. A number of serious apartment house fires broke out in the city, and the city council adopted an ordinance increasing the fire precautions that had to be taken in the construction of a new building. Compliance with these new requirements would make the construction of the apartment house for Richardson more expensive than McMullen had originally contemplated. Is McMullen discharged from the contract to build the apartment house? No
2. Lymon Mitchell operated a Badcock Home Furnishings dealership, under which as dealer he was paid a commission on sales and Badcock retained title to merchandise on display. Mitchell sold his dealership to another and to facilitate the sale, Badcock prepared a summary of commissions owed with certain itemized offsets it claimed that Mitchell owed Badcock. Mitchell disagreed with the calculations, but he accepted them and signed the transfer documents closing the sale on the basis of the terms set forth in the summary and was paid accordingly. After pondering the offsets taken by Badcock and verifying the correctness of his position, he brought suit for the additional funds owed. What defense would you expect Badcock to raise? How would you decide the case? Explain fully. [*Mitchell v Badcock Corp.*, 496 SE2d 502 (Ga App)]
3. American Bank loaned Koplik \$50,000 to buy equipment for a restaurant about to be opened by Casual Citchen Corp. The loan was not repaid, and Fast Foods, Inc., bought out the interest of Casual Citchen. As part of the transaction, Fast Foods agreed to pay the debt owed to American Bank, and the parties agreed to a new schedule of payments to be made by Fast Foods. Fast Foods did not make the payments, and American Bank sued Koplik. He contended that his obligation to repay \$50,000 had been discharged by the execution of the agreement providing for the payment of the debt by Fast Foods. Was this defense valid? [*American Bank & Trust Co. v Koplik*, 451 NYS2d 426 (App Div)]
4. Metalcrafters made a contract to design a new earth-moving vehicle for Lamar Highway Construction Co. Metalcrafters was depending on the genius of Samet, the head of its research department, to design a new product. Shortly after the contract

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Reporting on
Significant Court of
Appeals Opinions
and Developments
in New York Practice



S// Med. Mal

CASE LAW DEVELOPMENTS

CPLR 214-a Foreign Object Rule Focuses on Purpose of Surgical Equipment

Rule Applies to Catheter Intentionally Left in Body for a Few Days After Surgery

CPLR 214-a establishes a two-and-a-half-year statute of limitation for medical, dental or podiatric malpractice actions. The period runs from the "act, omission or failure complained of." The statute also contains two extending provisions: the continuous treatment doctrine and the foreign object rule. The latter provides for a one-year limitation period after discovery of the foreign object. The statute itself expressly states that a foreign object does not include a chemical compound, fixation device, or prosthetic aid or device.

In *Walton v. Strong Mem'l Hosp.*, 2015 N.Y. Slip Op. 04786 (June 10, 2015), the N.Y. Court of Appeals provides a valuable history and discussion of the origins and basis for the foreign object rule. In *Walton*, a catheter was intentionally placed in the plaintiff's heart during surgery when he was three years old in 1986. A few days later, the catheter was removed, but a fragment was inadvertently left behind. More than 20 years later, following the insertion of a pacemaker, replacement of a damaged heart valve, and the plaintiff suffering an embolic stroke and a transient ischemic attack, the catheter fragment was discovered during a procedure to replace the battery in the plaintiff's pacemaker. The plaintiff filed this action for medical malpractice arising out of the alleged negligence in leaving the catheter fragment as a foreign body in his heart. The defendants moved to dismiss, contending that the limitation period expired in 1996, 10 years – the cap on commencement of an infant's medical malpractice claim – after the defendants allegedly failed to remove the catheter. In addition, the defendants argued that the catheter was not a foreign object.

The critical issue was whether the catheter was a foreign object or a fixation device. Traditionally, a foreign object has been defined as one "negligently 'left' in the patient's body without any intended continuing treatment purpose." See *Rockefeller v. Moront*, 81 N.Y.2d 560, 566 (1993).

The lower court granted the defendants' motion. Although the court found that the catheter was not a fixation device, it also concluded that, based on the Court of Appeals' decision in *LaBarbera v. N.Y. Eye & Ear Infirmary*, 91 N.Y.2d 207 (1998), the catheter was not a foreign object because it was initially left in the plaintiff's body intentionally with a continuing medical purpose. The Appellate Division affirmed, but on the ground that the catheter was a fixation device, expressly excluded by CPLR 214-a, since it was deliberately inserted into the plaintiff's heart for the purpose of monitoring atrial pressure.

The Court of Appeals reversed, finding that although the catheter was intentionally left in the plaintiff's body for a few days after surgery and a fragment remained after it was removed, the catheter was not inserted for "postsurgery healing purposes" and, therefore, was not a fixation device. "Instead, the catheter served a monitoring function. . . . [T]he fragment, of course, served no purpose whatsoever; it certainly was not a fixation device, however defined. Fundamentally, if the facts are as alleged, plaintiff . . . left the hospital after an operation with therapeutically useless and potentially dangerous surgical paraphernalia lodged in his body." *Walton*, 2015 N.Y. Slip Op. 04786 at *12.

The Court acknowledged that a doctor's deliberate implantation of a fixation device in the wrong place is negligent medical treatment, not covered by the foreign object rule. In that circumstance, the fixation device is not transformed into a foreign object. However, in this case, the catheter was analogous to clamps that are placed into the body purely to carry out or facilitate surgery. And, leaving the catheter in the plaintiff's body "did not convert a surgical device into a fixation device."

IN THIS ISSUE

Foreign Object Rule Focuses on Surgical Equipment
It Is Not Your Choice!

Accrual of Statute of Limitations for Breach of
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Defenses to CPLR 3213 Summary Judgment in Lieu
of Complaint

Provider's Burden of Proof on No-Fault Insurance Action
Nothing Standing Between the Plaintiff and the Note

25(6)

BREACH OF CONTRACT AND REMEDIES

B/K abbrev. B/K - Violation of K

Remedies: Money Damages, Specific Performance, Rescission.

"Anticipatory Breach": When one party declares in adv. of time for req'd perf. that the perf. will not be rendered. Other party's options:

- 1.) Ignore renun. & insist on perf.
- 2.) Accept as anticipatory breach & sue for damages
- 3.) Accept the renun. & rescind the K
- 4.) Negotiate further (i.e. Friends T.V. show renegot.)

Money Damages: Classic B/K remedy.

Must be proven inadequate to entitle victim to any other remedy. ✓

"Compensatory damages" compensate the victim for the actual loss. ✓
Make the victim "whole."

"Punitive damages" intended to punish the breaching party. Generally not available in B/K actions. Occasionally avail, in tort, libel, slander. Carol Burnett/Nat'l Enquirer ex. Also McDonald's "hot coffee" case... ✓

"Duty to Mitigate Damages": Duty to keep damages at a minimum. ✓

If fail to do so, you only collect the minimum.

i.e. New truck not delivered in time for hauling job/rental truck to mitigate.

i.e. Boston Garden season tix ex. (Old Pg. 407 attached.)

Rescission upon breach:

Theory: Return parties to orig. positions.

i.e.: Victim of B/K can rescind K and recover money paid or reas. value of services rendered to prevent unjust enrichment.

Specific Performance: (S/P): Request to Ct. to order party to perform per terms of the K.

Only available when money damages are proven inadequate. ✓

Rarely available (i.e. Avail. in R/E purchase, works of art, antiques).

* Not available in pers. services K. (involuntary servitude).

Injunction instead. i.e. NFL/AFL Okla. running back K's. Also illus. w/ ✓

Covent. Not to Compete breach

Reformation: Ct. Authority to rewrite mistake in written .

i.e. Car insurance policy Mike Pratt 510 vs. 512 Park Ave.

i.e. Use JWS gas credit card @ Getty: \$300. vs. \$30.

"Liquidated Damages" provision: Stipulates in K an amt. of damages agreed to in advance in event of B/K. Used generally where damages difficult to determine Generally enforceable if not deemed excessive or seen as a penalty.

i.e. Completion date in Luther Forest construc. K's. ✓

If valid, need not prove actual damages

"Attorney's Fees": Not generally avail. unless K has specific language re: same (i.e. Lease) ✓

"Limitation of liability" clauses:

i.e. Sporting event Releases.....vs. Barnsider/Ralph's bailments distinguished.

i.e. Sporting event Releases generally enforceable (Roy LaFrances)... absent proof of "gross negligence." ✓

(B) **MITIGATION OF DAMAGES.** The injured party is under the duty to mitigate damages if reasonably possible.¹² In other words, damages must not be permitted to increase if an increase can be prevented by reasonable efforts. This means that the injured party must generally stop any performance under the contract to avoid running up a larger bill. The duty to mitigate damages may require an injured party to buy or rent elsewhere the goods that the wrongdoer was obligated to deliver under the contract. In the case of breach of an employment contract by the employer, the employee is required to seek other similar employment. The wages earned from other employment must be deducted from the damages claimed. The discharged employee, however, is not required to take employment of less-than-comparable work.

(1) Effect of Failure to Mitigate Damages.

The effect of the requirement of mitigating damages is to limit recovery by the nonbreaching party to the damages that would have been sustained had this party mitigated the damages where it was possible to do so. **For Example**, self-described "sports nut" Gary Baker signed up for a three-year club-seat "package" that entitled him and a companion to tickets for 41 Boston Bruins hockey games and 41 Boston Celtics basketball games at the New Boston Garden Corporation's Fleet Center for approximately \$18,000 per year. After one year, Baker stopped paying for the tickets, thinking that he would simply lose his \$5,000 security deposit. Baker, a CPA, tried to work out a compromise settlement to no avail. New Boston sued Baker for breach of contract, seeking the balance due on the tickets of \$34,866. At trial, Baker argued to the jury that although he had breached his contract, New Boston had an obligation to mitigate damages, for example, by treating his empty seats and those of others in the same situation as "rush seats" shortly before game time and selling them at a discount. New Boston argued that just as a used luxury car cannot be returned for a refund, a season ticket cannot be canceled without consequences. The jury accepted Baker's position on mitigation and reduced the amount owed New Boston by \$21,176 to \$13,690.¹³

9. Rescission

When one party commits a material breach of the contract, the other party may rescind the contract; if the party in default objects, the aggrieved party may bring an action for rescission. A breach is *material* when it is so substantial that it defeats the object of the parties in making the contract.¹⁴

An injured party who rescinds a contract after having performed services may recover the reasonable value of the performance rendered under restitutionary or quasi-contractual damages. Money paid by the injured party may also be recovered. **For Example**, the Sharabianlous signed a purchase agreement to buy a building owned by Berenstein Associates for \$2 million. Thereafter the parties learned of environmental contamination on the property. Faced with uncertainty about the scope of the problem and the cost of the cleanup, the deal fell through and litigation ensued. The trial court rescinded the agreement based on mutual

¹² *West Pinal Family Health Center, Inc. v. McBride*, 785 P.2d 66 (Ariz. 1989).

¹³ Sacha Pfeiffer, "Disenchanted Fan Scores Win in Ticket Fight," *Boston Globe*, August 28, 1999, at B4.

¹⁴ *Greentree Properties, Inc. v. Kisse*, 92 S.W.3d 289 (Mo. App. 2003).

1/19/12
Pay to the order of Rocky Balboa \$100.00
- One Hundred Dollars and no/cents-----
Bank of America
Joseph W. Sheehan

Pay to the order of
Apollo Creed
Rocky Balboa
Apollo Creed

Drawer: JWS
Drawee: Bank of America
Payee: Rocky Balboa
Indorser: Rocky Balboa
Indorsee: Apollo Creed
Indorser: Apollo Creed