



Weekly Information Sheet 01

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.

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

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.