IBA36061 Business Law

This introductory course is designed to familiarize the student with the subject matter of the legal environment of business. Particular emphasis will be given to the sources of law; the role of society; the judicial function; and selected areas such as governmental regulation and agencies, crimes and torts, contracts, business organizations, personal property, agency, and employment law. Various approaches to understanding legal issues will be used, including case law analysis and the examination of current legal issues affecting business.

For Quiz 1
- Chapter 1, 9, 10, 11, 12, 13, 14 will be on the quiz

Quiz 2
- Ch 15, 16, 18, 19, 20
Chapter 1 – Legal Heritage

Quote ---
- John Locke --- “Where there is no law, there is no freedom”

What is Law?

Definitions
- Law consists of rules regulating the conduct of individuals, business, and other organizations in a society.
- Intended to protect persons and property against unwanted interferences from others.
- Must be obeyed and followed by people subject to legal sanctions.
- Body of rules issued by a controlling authority to be obeyed and followed.

Function of law
- Keep the peace
- Shape moral stds
- Promote social justice
- Maintain status quo
- Facilitate orderly change
- Facilitate planning
- Provide a basis for compromise
- Maxi individual freedoms

Fairness of the Law
- The US legal system is one of the most comprehensive, fair, and democratic systems ever developed.
- But, oversights exist --- mistakes of law or of fact; abuse of discretion;

Flexibility of the Law
- US law evolves and changes with the norms of society, technology, and expansion of commerce
- “largely vague and variable”
- General set of principles and rules to guide us
- New problems encountered needs a system that is flexible and fluid
- Brown vs Bd of Ed (US 1954), at 5 --- 9-0 decision
  o Equal protection clause was to guarantee equality (14th Amendment, 1968; post civil war A)
  o Plessy vs Ferguson (US 1896) – separate but equal accommodations for African American (then known as Negros, or blacks) on railways was permissible under 14th A
  o Brown holding: Separate but equal has no place in the field of public education
  o Separate educational facilities are inherently unequal.
Schools of Jurisprudence

Natural law school – a moral theory of law based on morality and ethics (locke; Hume)
- US Constitution, Magna Carta, UN Charter influenced by this belief
- But whose morality?

Historical School
- Aggregate of social conditions, traditions, customs developed over the centuries
- Changing norms of society will be eventually reflected in the law
- Evolutionary process

Analytical – law is shaped by logic (Aristotle; some philosophers)

Sociological – law is means of achieving certain goals or desires of society

Command – law is a set of rules by the ruling parties (Marxism)

Critical studies – subjective decisions would be permitted without the use of legal rules
- But again, with whose morality? And to who’s favor?

Law and Economics – This is the Chicago school
- Market efficiency should be the centerpiece of legal decision making
- But market efficiency can be elusive at best, more theoretical than practical

(NOT INCLUDED in text, but very important) Conflict resolution model

History of American Law

English common law
- Common law is judge made law
- Can be done without laws being enacted (critical legal studies school)
- Prior rulings become precedents in future cases

- Law courts
  o Local laws replaced after 1066 by a uniform set of laws (William the Conqueror)
  o Law courts administered this law
  o Emphasis on form of law (legal prudence) rather than the merits of a case
  o Monetary damages only; could be unfair in result, but correct in precedent

- Chancery Courts (exchequer courts, or kings court)
  o Law courts had a limited remedy (money)
  o Goal is to do equity, to do fairness
  o Equitable remedies

- Merchant courts
  o The law merchant was based on common trade practices and customs
Absorbed into law courts by early 1900’s in UK
Much of UCC and commercial law in US is partly based on merchant court heritage

- Common law adopted in US, 49 states
  - Louisiana follows the Napoleonic Code and French law
  - Several SW states also have a Spanish law influence (marital prop rules are different, etc).
  - Another system internationally is Romeo Germanic civil law system dating to 450 bc.
    - Civil code and parliamentary statutes are sole source of law
    - Litigation involves the adjudication of a code or statute

- US law has many trappings of English common law,
  - but is also civil code based (US laws and Const),
  - so amounts to a mixing of all prior legal systems, with common law providing lots of historical development points

Sources of US Law

Constitution of the US
- Supreme law of the land --- all other state or local laws in conflict are unconstitutional
- Broad principles;
- Living, breathing document
- Separate branches of national govt
- Non-enumerated powers are reserved to the states and to the people

Treaties
- A compact with other nations
- Upon ratification by both sides, may supersede even the Constitution

Statutes
- Written documents passed by legisl.
- Fedl or state legislatures; even municipalities (ordinances)
- Codified laws designed to implement different activities of govt and society

Executive orders
- US presidential power
- May be as important as laws
- Example: during war, President may prohibit companies to engage in certain types of business with foreign business, govts

Regulations
- Administrative agencies
- Rules and regulations implementing laws within an agencies area (Dept of Commerce)

Judicial Decisions
- Stare decisis – past decisions become precedential, and then followed
  - Adherence to past precedent is called stare decisis
- Provides stability of law (predictability)

Priority of Laws
  - Treaties; US Constitution; Federal law; federal regulations
  - State const; state laws;
  - muni ord

Case 1.1
  - prohibition on women working more than 10 hours per day
  - Illinois Supreme Court upheld the statute
  - Noting the burdens of motherhood
  - Rearing of children & maternal function
  - Maintenance of home

unfairness in current light; certainly not lawful today
  - equal protection clause; title VIII

For its time, fair in that
  - protective in nature;
  - women had special needs

overall, example of social justice and flexibility in the law
  - should be noted that matter is handled today in terms of overtime (not available in 1909); OSHA regs; sex based discrimination (title VII) and DIB accommodation (pregnancy).
  - Still a notion of protection in the law; we broaden the scope today

Case 1.2
  - draft ended in 1975; Carter wanted to reactivate the draft in 1980 for both sexes; Congress appropriated funds only for men; Several men brought suit.
  - US Supreme court upheld the law
  - Not a case of arbitrarily choosing between two similarly situated groups
  - Congress was proper party to articulate a public policy
  - Marshal dissent: women are excluded from a fundamental civil obligation

Discussion—likely that congress harbored the notion that women should simply not fight in combat
  - Not only is the Marshall dissent on point being a fundamental civil obligation,
    o But systematic exclusion of women prevents them from advancing in military positions (which would be a civil right with benefits, ranks, etc)
    o Contrast to Israeli position on women in combat
  - Case might have turned differently had women been the plaintiff making such arguments
    o Underlying tone of the case simply seen as men attacking the draft, using sex-based issues to exert political policy
  - Another example of social justice & changing aspects to the law
Chapter 9 – Nature of Contracts

**Quote ---**
- The movement of progressive societies has hitherto been a movement form status to contract
  - Sir Henry Maine

**Introduction ---**
- Two or more parties VOLUNTARILY enter into an agreement
- Private obligations between the parties
- Legally enforceable agreement

**Definition of a contract ---**
- Restatement of contracts, 2d --- K is a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes a duty
- Parties to a contract – offeror makes an offer; offeree power to accept
  - This is traditional notion; today, both parties are commonly seen as making one or more offers, bi-laterally, especially in more complex dealings; more common to just say party 1, party 2 (can be three, four etc).
- Elements:
  - Analytical process
  - Offer
  - Acceptance
  - Consideration – bargained for consideration
    - Usually an exchange of money ($1 and other valuable consideration)
    - Could simply be a promise for a promise that has been relied upon
  - Contractual capacity (affirm defense?)
  - Lawful object (affirm defense?)
- Defenses
  - Consent must be genuine (weak defense, actually)
  - Written form
    - Only on certain matters
    - Illinois recognizes oral contracts

**Sources of Contract law**
- Common law
- UCC (Illinois has adopted)
- Restatement of contracts
Objective theory of contracts
- Reasonable person standard –
  o intent to enter into a contract is judged by a reasonable person and not by subjective intent of parties
  o more of an issue of offer and acceptance;
  o and intent of the parties is still important as to the meaning and interpretation of the contract

Classification of contracts
- bilateral contracts --- promise for a promise
- unilateral contract – acceptance is done by performance of an action, not a promise
  o painting a shop by July 1, I will pay $3000
- incomplete or partial performance
  o revocation before attempted performance?
    ▪ May be possible at common law
    ▪ Modern contracts typically specify a breach in such instances
- Formal contracts
  o Neg instruments (UCC)
  o Letters of credit
  o Recognizance
  o Contracts under seal
- Informal contracts may be oral or in writing and are still enforceable
- Valid contracts meet all elements
  o Void contract has no legal effect (illegality)
  o Voidable is where one or both parties have the option to avoid the contract
  o Unenforceable K – some legal defense exists
  o Executory K’s have not yet been fully performed

Express and Implied
- Express is in writing or oral, but which is expressly known by the parties
- Implied-in-fact is where the conduct of the parties give evidence of a contract
- Implied-in-law
  o Aka quasi contract
  o Monetary damages even where no contract exists
  o Prevents unjust enrichment or unjust detriment
  o Example with hospital bill and coma patient

Equity
- Judicial decisions made on fairness, natural law, etc
- Equity may save a contract p. 162 example
Chapter 10 – Agreement

Quote
- Where law ends, tyranny begins -- william pitt

Offer
- Willingness to enter into an agreement
- Objectively intend
  - objective theory of a contract – judged by reasonable person standard
- Be reasonably certain
  - can have express or implied terms
  - traditional vs modern case law
  - implied term if it can reasonably be supplied by the court
- Communicated to the other party

Special offers
- Advertisement is an invitation to make an offer
  - Not an offer itself
  - Protects the advertiser;
    - Ads may still be evidence of intent!
- Reward
  - Performance related
  - Offeree must have knowledge of the award and have completed the act
- Auctions
  - With reserve – seller reserves the right of refusal if offer is not sufficient
  - Without reserve – no right of withdrawal of offer at auction

Termination of offer by act
- Revocation of offer should be unequivocally made
  - Problems as to whether the person revoked offer prior to acceptance
- Initial offer can be rejected
  - Expressly or impliedly
  - Problems with implied
- Counteroffer
  - Terminates prior offer and proposes additional or revised terms
  - Contra: labor law —— counter offer must be narrower or same level, and does NOT revoke prior offer, as offers must stand (good faith in labor law vs no good faith requirement in K)

Termination of offer by law
- Destruction of subject matter
- Death or incompetency of the party
  - Prior to acceptance
- Illegality supervening
  - 18% interest rates made illegal as usurious
Lapse of time
  o Either stated or implied by conducts of the party

Acceptance
- Unequivocal acceptance
  o Mirror image rule
  o Must accept same thing as offered; vs counter-offer
- Silence may constitute acceptance
  o Detrimental reliance issues
  o Prior dealings and practice
  o Prevent this issue by putting time limits on offers
- Times of acceptance
  o Mailbox rule --- acceptance occurs when mailed
  o Alter this by specific terms of offer
- Mode ---
  o Express
  o Implied --- is it customary for the industry involved?
Chapter 11 – Consideration

Introduction
- Consideration = 1) something of legal value in exchange for a promise AND 2) bargained for exchange
- “seals the deal”

Gift Promise
- Gratuitous promises are unenforceable bc lacking consideration
  o No bargained for exchange
  o Amounts to a gift

Contracts lacking Consideration
- Illegal consideration (burn your house down)
  o Drugs cannot be something of value
- Illusory promise
  o Either or both parties do not have to perform; they can if they want
  o No obligation to perform
- Moral obligation
  o Sense of honor
  o Minority of states: still amounts to C
- Pre-existing duty
  o Something a person already is under an obligation to do
- Past consideration
  o A prior act will not support a new K
- Business contracts ???
  o Greater flexibility in consideration
    - Bc of sophistication on parties and industry stds
  o Output K – agreement to sell ALL output (variable in nature)
  o Requirement K – all requirements for an item
  o Best effort K – one or both parties use best efforts
    - RE K to have broker use best efforts to find a buyer

Settlement of claims
- Settlement of disputed K claims = accord
- If accord is performed, it is satisfaction
Equity --- promissory estoppels
- Prom estoppel prevents withdrawal of promise if it will adversely affect a position of a party who acted in reliance on the offer
- Detrimental reliance concept is used where there is no Consideration but where a person may have acted on the original offer

Case Assignment
- Case 10.3 – implied terms
- Case 11.1 – consideration

Case 10.3 Implied terms ---


Facts:
- A jeweler, Edmonds signed a lease with MacDonald for mall space
- there shall be no more than two jewelry stores
- 9 years later, MacDonald sent Edmonds notice that it intended to expand the mall and lease to their jewelers
- Lease was silent as to expansion
- Edmonds sued MacDonalds arguing that the lease applied to the expansion
- Economics? adverse impact on tenants vs new rental of mall

Issue: Is the lease restrictions on jewelers applies to the expansion?

Holding (case available online)
- Preliminary and then permanent injunction issued against Mall owner was appealed;
- Negotiations on lease conducted through review of site plans (new mall under construction)
- Specific areas of mall exempted from the restriction on other jewelry stores
- 80% of new mall falls within original contours of property owned by Mall
- Testimony from one person that Fresno fair terminology included entire grounds
- Mall owners contended that expansion was not contemplated in the lease and thus, the restriction does not apply to the expansion
- Other provisions of lease included references to expansion
- Holding:
  o Implied terms of contract includes expansion
  o Mall could have specifically excluded after acquired property
- Appellants citation to restrictive covenants being strictly construed
  o “These cases involved suits between successive owners to enforce building or land use restrictions rather than suits to enforce covenants against competition between the original contracting parties as in the instant case.”

Analysis:
- Holding consistent with courts ability to interpret a contract and supply terms where is it reasonable to do so and affirms original intent of parties
- Silence of expansion in the jewelry restriction in this case should be construed in context of several other clauses which noted expansion, as well as initial plans including 80% of expansion areas
If Mall wanted to exclude the expansion, they could have easily done so, especially in light of other specific exclusions of space where jewelry was allowed.

- Restrictive covenant defense more difficult to rebut;
  - Better analysis may have been to state that drafters of the K clause on the restriction was stopped from trying to argue its inapplicability
  - Overall, language should be construed against the primary drafter of the K (Mall)

**Case 11.1 – Consideration ---**

*Penley v Penley, 314 N.C. 1, 332 S.E.2d 51 (NC Supr, 1985);*

**Facts:**
- Clyde and Betty Penley were married;
- Clyde owned auto tire business; Betty owned KFC franchise;
- Betty became ill, and requested Clyde spend more time at the KFC
- Betty agreed that if Clyde was FT at KFC, they would operate the business jointly and have equal ownership interest
- Clyde thereupon terminated his tire business
- Betty 12 years later “abandoned” Clyde and sued to enforce agreement.
- Underlying Economics: can married people engage in K’s between each other?

**Issues:** is the agreement enforceable? Does consideration exist?

**Holding: (none given in text)**

**Analysis:**
- H & W ability to form a contract?
  - Not really a problem in this case, with more of a business transaction atmosphere between them
- Business K have greater flexibility
- Consideration shown by Clyde when he gave up his business
  - Detrimental reliance
  - As well as FT operation of business for several years

There is another case 11.1 on p. 182 and p. 183!

And another 10.3 on p. 175 as well as 10.1 p 178!
Chapter 12 – Capacity

Introduction

Minors (< 18)
- Infancy doctrine – allows minors to cancel or disaffirm K’s
  o Should be protected from unscrupulous adults
  o Minor has choice to void; not the adult -- voidable
- Duty of restoration – when disaffirmed, minor only has duty to return goods or services in the condition they were in at time of disaffirmance
  o Some states have law that requires minor to put the adult into status quo
- Competent person duty of restitution - restores the minor to the same position he would have been in had it not been for the contract
  o Competent must duty to restore consideration to minor upon disaffirmance
- Minor can ratify the contract once > 18
- Parent’s liability terminates at emancipation (when they leave home – could be before 18)
- Minors are required to pay for the necessities of life (clothing, food, etc)
  o Otherwise, adults would not sell anything to the minors
- States also have laws that rescind ability of minor to disaffirm
  o Stocks and bonds, health and life insurance, etc
  o Ed loans
  o Military

Mentally incompetent
- legal insanity
  o presumption of adults to be competent
  o must be incapable of understanding or comprehending the nature of the transaction
  o weakness of intellect is NOT insanity
  o court order on insanity --- all K’s issued are VOID
  o for those not adjudged to be insane, K’s are VOIDABLE by insane person
    ▪ burden of proof shifts, effectively
    ▪ quasi contract --- insane persons still must pay for necessities of life

Intoxicated persons
- under influence of alcohol
- Voidable by intoxicated person
  o Q of incapable of understanding or comprehending the transaction
  o Disaffirmation – return the goods and services – return the C – status quo
- Person can also ratify the contract once sober
- Quasi K also applies for values of necessities
Legality
- K may be contrary to state or federal law
  o Gambling laws
- K may also be void as against public policy (not a specific law)
  o Immoral K’s
  o “sexual favors”
- Usury law
  o Sets the upper limit on loan interest rates
- Contracts to commit crimes generally void as against public policy
- Effect of illegality
- Refuse to enforce an illegal K
  o No C or goods or services returned (drug money is lost)
  o Innocent parties may be able to enforce to some extent

Special Business K
- contracts in restraint of trade
  o unlawful at common law
- licensing statutes
  o person must obtain license to engage in an occupation or activity
  o unlicensed person may not be able to enforce the K
  o revenue raising statutes --- these K’s can be enforced (provides payment to govt)
- Exculpatory clauses
  o Release of liability
  o Cannot relieve willful and wanton conduct
- Covenant not to compete
  o Must be limited in geography and duration
  o Case by case basis
  o Not favored, usually strictly construed against the restriction, but can be enforceable where limited and reasonable
- Unconscionable K’s
  o Manifestly unfair
  o Contracts of adhesion --- pre-printed forms that cannot be negotiated
  o Must show unequal bargaining power, unreasonable use of the bargaining power, and no reasonable alternative exists
Chapter 13 – Assent and Undue Influence

Assent must be genuine

**Mistake**
- unilateral mistake --- not usually allowed to rescind where only one party makes a mistake of fact
- can enforce unilateral mistakes of fact where ---
  - can rescind if other party knew of mistake
  - clerical error can be voided
  - where mistake is so serious that it would be unconscionable to enforce
- mutual mistakes of fact allows rescission where it is of a material fact
  - where the object of the K is known but there is a mutual; mistake as to value – goes to C

**Fraud**
- fraudulent misrepresentation – induce a party through fraud
- proof ---
  - false representation of material fact
  - wrongdoer intended to deceive
  - reliance by innocent party in a justifiable manner
  - innocent party was injured
- fraud can occur at the inception of the K --- where person does not know what he is signing
  - fraud as to fact (in factum)
- fraud in the inducement
  - when the party knows what he is signing, but is fraudulently induced to sign
- fraud by concealment
  - when a party conceals a material fact form the other party
  - Q of voluntarily disclosing vs not disclosing after a request has been made
    - Silence is not misrepresentation unless non-disclosure causes injury,
    - where there is a fiduciary relationship,
    - OR where a statute requires it
- Misrepresentation of law
  - Not actionable, normally
  - If a professional knowledgeable of the law intentionally misrepresents to a less sophisticated party
- Innocent misrepresentation
  - If a party believes a statement to be true even though it is not, no fraud

**Duress**
- when one party threatens to do a wrongful act unless a K is signed
Undue Influence
- when one person takes advantage of the other party’s mental, emotional, physical weakness and unduly persuades the person
  o needs to show fiduciary
  o one person unduly uses influence over the other
Chapter 14 – Statute of Frauds

Statute of Frauds
- statute that requires certain types of K’s to be in writing
- goes back to 1677 England
- purpose is to suppress fraud
- K that must be in writing
  - Real prop including leases, life estates, easements)
    - UCC – leases > $1,000
  - No performance is scheduled for within 1 year
  - Marriage
  - Sale of goods > $500
    - UCC provision – most recent provision is $5,000
  - Lease > $1000
  - RE agent K
    - Equal Dignity rule – agent K must be in writing since the RE K must be in writing
  - promise to make a will
    - pre-nuptial K
  - guaranty K’s
    - exception – main purpose of an oral K is to provide pecuniary benefit to the guarantor, guaranty K does not need to be in writing
- executory K not in writing is unenforceable
  - if the K is already executed, neither side can then raise the statute of frauds after the fact

Part Performance
- an oral K may be enforceable if there has been part performance
- equitable concept
- at common law, limited to real property situations
  - (some states have expanded this to include all forms of K)

Writing Formality
- signature is required to be valid;
- signed by person whom the enforcement is sought; enforcing party does not need to have signed the K (although it gets to be a Q of O-A-C)
- several writings may be integrated into a K
  - incorporation by reference
- K interpretations
  - Ordinary words – according to the dictionary
  - Technical words
  - Specific terms
- parol evidence rule
  - any oral or written words outside the 4 corners of the K
  - parol evidence is inadmissible
  - exceptions ---
    - but showing of intent as to the 4 corners may be admissible
    - admissible upon showing of K void or voidable
    - explains ambiguous language
    - prior course of dealings of the parties
    - fill in the gaps
    - corrects for obvious type or errors

**Promissory Estoppel**
- allows enforcement of oral K's that should have been in writing to avoid injustice
  - reliance of oral promise was foreseeable
  - injustice avoided only by enforcement

**Case Assignments**

Case 12.2 --- Unconscionability on p. 203

Ethics Spotlight --- Part performance on p. 224
Chapter 15 – Third Party Rights

Make fair agreements and stick to them
- Confucius

Assignment of a Right

Privity of contract – two parties to a contract

Assignment
- transfer of a contractual right
- Party owing a duty is an obligor; other party is an obligee
- Assignor is a party who has a right transferred from an obligee
- Assignee is the party to whom the right is assigned to
- Example, page 232.
  - debtor on K1 is the obligor
  - Creditor on K1 is obligee
  - K2 is the assignment
    ▪ Creditor is the assignor and assigns to someone one (the assignee)
    ▪ Assignee enforces against the debtor
- No formalities of title is necessary (function over form)
- In US most contracts rights are assignable;
  - US favors free flow of commerce

Problem areas for assignment ---

- Personal service K are generally not assignable however,
  - but can be expressly made assignable is agreed to by the parties
- current rights can be assigned into the future
  - possible or expected future rights are not assignable, since they do not currently exist
- where assignment would materially affect risk, no assignment
  - ex: assignment of insurance coverage to another driver
- right to sue for violation of personal rights cannot be assigned
  - right to sue for negligence cannot be assigned
    ▪ but damages paid from the lawsuit can be assigned
  - right to sue in breach of K can be assigned

effect of assignment
- assignee stands in the shoes of original party
- assignee is under duty to notify the obligor of the assignment and the duty of performance to the assignee
- once notice of assignment occurs, the obligor is obligated to the assignee, not the original creditor
  o if payment is made to the original creditor, that creditor owes the payment to the assignee
    bc it is now the assignee’s property and right
- some K’s have anti-assignment clauses in them
- other L’s have an approval clause, where the obligor has to approve of the assignment

Delegation of a duty
- duties or obligation can transfer to other parties
- this is called the duty of delegation
- delegator = one who transfers his duty (debtor)
- delegatee is one to whom the duty has been transferred to (creditor)
- similar box type of flow chart, p. 235

duties that cannot be delegated
- personal service K’s
- K’s whose performance would be materially be altered
  o Inexperienced vs experienced surgeon
  o But K’s with professional firms can usually be delegated to competent people

Effect of delegation
- assumption of duties
- anti-delegation clause
- assignment creates a delegation (modern view)
  o varies in countries with older customs

3rd party beneficiary
- intended 3rd party beneficiary is a person who is not an original party to the K but who has rights of
  enforcement under the K (2nd Restatement of K’s eliminates the following distinctions, making
  everyone into intended beneficiaries)
- done beneficiaries – is a person who has a gift or donation made on behalf of in a K
  o named beneficiary on a life insurance K; flow chart on 237
- creditor beneficiary – debtor signs a K to pay the creditor
  o a new debtor / buyer signs a 2nd K and agrees to pay the original debt to the creditor
  o the creditor is now a beneficiary to the 2nd K; flow chart on 238
  o creditor can enforce against original debtor and the new promisor on the 2nd K
- incidental beneficiary – unintentional benefit on other people’s K’s
  o example of owner of house 2 getting a benefit of paint on house 1; house 2 owner cannot
    sue to enforce paint K

Covenants and conditions
- an unconditional promise to perform = covenant
  o essentially is a K to perform
- nonperformance = breach
  o ex: promise to repay a promissory note = covenant
- **condition** is some kind of verbiage in a K that limits duty of performance to only situations where the conditions applies
  - performance IF something occurs ---
- **condition precedent** – requires an event to occur BEFORE the party has to perform
  - occurrence of an event triggers duty to perform
  - a condition precedent occurs where performance is expected if there has been **personal satisfaction**
    - subjective test applicable if performance requires personal taste and comfort
    - **ex**: interior decorating cloth tailoring
  - reasonable person test: more objective test that is used for most commercial K’s; doe sthe work meet the satisfaction of a 3rd “reasonable person”? Z
- **Condition subsequent** –
  - Where occurrence of an event excuses performance
  - 2 nd restatement of K’s eliminated the difference between precedent and subsequent conditions
- **Concurrent conditions**
  - Duty to perform conditioned upon other party’s duty to do something (like pay)
- **Implied condition**
  - Condition that can be implied by the facts
  - Proper street access is implied in a K to purchase grain from a farmer

**Discharge**

**Discharge by agreement**
- Mutual recession
- Substituted K
- Novation K – a new party is substituted relieving the original party
- Accord and satisfaction – settlement of a disputed K

**Discharge by impossibility**
- Where it is impossible to perform, duties may be excused in some circumstance
  - Death or incapacity of promisor to a personal service K
  - Death or destruction of subject matter of K prior to performance
  - Supervening illegality

**Force majeure**
- Clause in a K where parties specify certain events that will excuse performance
- Natural disasters; acts of god; etc; shortage of raw materials

**Commercial impracticality**
- Unforeseen events make it impractical to perform
- Case by case basis; theory is not fully developed (and is rejected in some instances where there is only evidence of a bad benefit of the bargain)
  - Development of a uranium cartel that limits the supply of uranium with much higher prices
  - Contra: this was a foreseeable event that should not be relieved

**SOL and Bankruptcy**
Chapter 16 – Remedies

Performance and Breach

Breach of contract occurs when a party has an absolute duty to perform and does not

Complete performance discharges contractual duties, and the contract is considered executed

Tender of performance may also discharge a party; this is an unconditional and absolute offer to perform (with obvious ability and intent to perform)

Substantial performance – this occurs where a party has substantially performed but still has generated a minor breach
- other party can recover damages for the non-performing part

Material Breach
- this occurs with inferior performance
- the essence of the K is breached or impaired
  o the non-breaching party may rescind and the K ends
  o or the non-breaching party may collect damages for the breach

Anticipatory breach or repudiation
- occurs when one party informs the other that they will not perform K duties
- can be stated or implied
- non-breaching party’s obligation to pay is immediately terminated and ended
  o no need to wait for breach to occur to end the K
  o or can enforce the K

Monetary Damages

Compensatory damages
- intended to make whole the non-breaching party
- full recovery for the benefit of the bargain
  o for sales of goods (UCC) – difference bw the K price and the price paid for alternative goods
  o construction K – varies with the stage of completion;
    ▪ can recover the increased costs associated with the breach
  o employment – non-breaching party must mitigate

consequential damages
- foreseeable damages arising out of circumstances of a K
- lost profits

Liquidated damages
- agreed to by the parties in K clauses in the event of a breach

nominal damages
- no financial loss;
- this is to prove the point, as it were;
- $1 is often awarded here

**Enforcement**

Judgment occurs in favor of pl.
- Writ of attachment – seizes property to satisfy the judgment
- Writ of garnishment – seizes the wages of the def.

**Recession and Restitution**

*Rescission* – non-breaching party ends a K that has been breached
*Restitution* – return of the goods or services by the breaching party
- Party delivers the goods and services (obtained from another source) or pays $

**Equitable Remedies**

Specific performance
- breaching party is ordered to perform the K
- considered equitable in nature; no money damages
- not granted on personal services k
- available where something is **unique**
  - artwork, RE, antiques, coins, stamps, etc

**Associated Torts**

**Intentional interference with Business K**
- This occurs when a 3rd party induces a contracted party to breach the K
- Elements:
  - must have a valid, enforceable K
  - 3rd party knowledge of the K
  - 3rd party inducement to breach

**Breach of Implied Covenant of Good Faith and Fair Dealing**
- Where parties impliedly hold a duty to act in good faith and deal fairly with each other
- Bad faith = breach
- Evolving tort in the law
  - Example: where insurance companies routinely deny coverage (gallant !)

**Case Assignments ---**

- Case 15.4 – assignment case on p. 244 --- very good facts !
- Ethics spotlight – Bad faith tort – page 258 (O’Neill vs Gallant, Kuehn opinion)
Case 15.4
*Berlinger v Haagen Dazs, 633 F.Supp. 557 (DC Md, 1986)*

**Facts:**
- Oral K to distribute ice cream, lasting for over a decade.
- Pillsbury acquired Haagen –Dazs, who adhered to the oral K.
- Berlinger sold assets to Dreyers, a competitor of Haagen-Dazs.
- Pillsbruy then terminated Berlinger of distributorship of Haagen-Dasz.
- Berlinger then sued.

**Issue:** is this a proper assignment? Can the assignment be cancelled?

**Holding:** The assignment can be terminated
- The court treated the contract at issue there as one for personal services, id. at 559
- The court noted, while weighing the factors for and against a preliminary injunction, that “it defies common sense to require a manufacturer to leave the distribution of its products to a distributor under the control of a competitor or potential competitor."
- Question as to ability to perform distribution agreement once a competitor bought the company

**Analysis:**
- likely that an assignment existed
- but nothing restricts parties from terminating assignments, where the assignment is orally based and where no guarantee existed as to continuation of assignment for indefinite time period
- Pillsbury may have had good reasons to terminate due to a competitor purchase, but why even need to discuss a competitor’s buyout something based in personal services?
  - Easier to state that nothing prohibited termination, as the basis of the contract was not based on indefinite time period or upon just cause types of termination
- Should have put the distributership into writing with specific clauses governing conditions of termination, time periods of distr, etc

Ethics Spotlight, p. 258.
*O’Neil Vs Gallant, 769 NE2d 100 (Ill.App, ___).*

**Facts:**
- car accident
- Gallant Insurance Co represented insured
- Medical bills alone wer e105K
- Pl. atty demanded policy limits of 20K;
- VP of gallant refused to settle
- Jury found for pl. 731K.
- Gallant pd the 20K
- Def O’Neill then sued Gallant for bad faith tort of implied contract.
- 2nd jury found Gallant liable for 710K in actual and 2 M in punitive damages

**Issue:** Do the facts rise to the elements of a bad faith tort?

**Holding:** yes.
- not against manifest weight of the evidence
- reprehensible conduct by insurer.
- insurer must give at least equal consideration to the insured’s interests
- Actual and punitive damages upheld

Analysis:
- classic case on bad faith dealing by an insurance company
Chapter 18 – Sale and Lease Contracts

Introduction
- Merchant courts In K
- In US, developed into Uniform Sales Act 1906 and then UCC in 1949
  o Art 2 of UCC is sales; Art 2A is leases
  o Commercial rules apply
    ▪ Supplements and overrides Common law, in some situations
- This chapter is the beginnings of UCC analysis
  o Modifications of Common law K analysis
  o Has to be a sale or lease defined by UCC
  o Use UCC with citation to specific sections of UCC; case law too
    ▪ Like a mini statute
    ▪ And has been codified into statute in 49 states
    ▪ Common law K’s of sales and leases now a statutory basis

What is a sale?
- payment of good in exchange for sale of good, graph at 282
- goods are defined as tangible things that are movable at the time of their ID to a contract
  o money, stocks, bonds and intangibles are not goods
  o RE is not a good bc it is not movable
- Sale can be mixed (service and good)
  o Art 2 applies to only sales
- Merchant is a person who deals in goods of the kind involved in a transactions OR one who holds himself out as having knowledge and skill peculiar to the goods involved
  o Cars dealer, sporting goods sellers are merchants
  o Art 2 sales general applies to non-merchants, but merchants have special rules where some of Art 2 only applies to them., or there is a greater duty placed upon a merchant

What is a Lease ?
- transfer of right to the possession and used of a good for a set term in return for consideration
- schematic of a lease, p. 285
  o leasor transfer the right
  o lessee person who acquires the right
- finance lease is a 3 party transaction, schematic at 285
  o leasor does not supply the goods
  o leasor acquires title to the goods
  o ex: bank owns title to a jet, buying it form boeing
    ▪ user is the lessee
    ▪ place is delivered from Boeing to leasee
    ▪ common with RR trains, planes, very big cost items
Offer ---
- UCC allows open terms (open price, open Q, etc)
  o if there is intent
  o and there is a reasonably certain basis for appropriate remedy
  o gap filling rule
  o for open prices, reasonable price is assumed
  o for open payment term, payment is due at time and place of delivery
  o for open delivery, delivery occurs at seller place of business
  o open time, reasonable time is assumed
  o open assortment of goods, buyer is allowed to choose the goods, good faith and commercial reasonableness

Acceptance ---
- Acceptance occurs when buyer / lessee sends an A to seller / lessor
- Acceptance may be made in any manner and by any reasonable medium of A
- Can require in writing the prompt shipment, for example
- UCC modifies the mirror image rule
  o A CO = Acceptance of original offer unless Acceptance is conditioned upon the new terms
  o If non-merchants are involved in the K, additional terms are proposed additions that do not = CO or extinguish original O
- Nonconforming goods do not = Acceptance if the seller reasonably notifies the buyer that a shipment is offered only as an accomodation of the buyer
  o The accomodation becomes a CO, with the buyer being free to accept or reject the CO

Consideration ---
- BUT, UCC allows modifications of sales K need NO new C
- Modifications must be made in good faith

UCC Statute of Frauds
- All K for sale of goods > $500 or lease K’s > $1000 must be in writing
- Exceptions:
  o Specially mfrd goods cannot have SOF asserted as a defense if
    ▪ if the goods are not suitable for sale to others in normal course of business
    ▪ and seller has made a substantial beginning on mfr or procurement
  o admission in pleadings that a K has been made
  o oral K that has been partially accepted
    ▪ part that has been accepted is a valid K
- If parties are merchants, writing is sufficient to satisfy the SOF if
  o Written confirmation is sent within reasonable time period
  o And no objection by other party within 10 days of confirmation
- Oral modification is not sufficient if parties agree that it must be in writing
  o Oral mods are Ok otherwise between merchants so long as they do not otherwise violate SOF
Parol evidence rule
- 4 corners rule applies to UCC K’s
- Designed to ensure certainty in written sale and lease K’s
- Where the terms of a written K are not clear on its face and must be interpreted. Courts can bring into evidence things that are not inside the K
- Evidence allowed on, in order of priority ---
  - course of performance
  - course of dealing
  - usage of trade

Good summary & comparison of CL K’s and UCC K rules, p. 291.
Chapter 19 – Title to Goods and Risk of Loss

Laws made by common consent must not be trampled by individuals
  - George Washington

Introduction
- At common law, Risk of loss is placed on the party who holds title to the goods
- Art 2, UCC rejects CL.

Title
Identification of title
- seller retains risk of loss until he identifies the goods in a sales or lease K
- title cannot pass to buyer if the goods have not been identified
- ID of goods can be made at any time and in any manner as agreed to by the parties
- Absent agreement, ID of goods occur when a K is made of existing goods
- Goods that are part of a larger mass are identified when they are separated and ID as part of the K

Passage of Title
- title passes in any manner agreed to
- in absence of K, title passes when physical delivery is made

  - for shipment K’s, title passes at time and place of shipment

  - for destination K’s, title passes when delivery occurs to buyer’s place of business or other designated place

  - on goods that are not physically moved, passage of title occurs if seller is required in the K to deliver a document of title (bill of lading) to the buyer

  - free on board (FOB) point of shipment requires seller puts the goods in possession of a common carrier (not an local truck driver); buyer bears shipping expense & risk of loss while goods are in transit

  - free alongside vessel (FAS) --- seller is required to deliver to a ship; buyer has risk of loss and title xfr from that point on.

  - Cost insurance freight (CIF) has pricing including the cost of insurance and freight, such that seller pays for CIF and transport to a carrier; buyer bears risk once seller put the goods in hands of a carrier

  - FOB point of destination – requires seller bears cost of and risk of loss until goods are tendered at place of destination
- Ex-ship --- seller to bear the expense and risk of loss until goods are unloaded from the ship as it
destination port

- No arrival, no sale --- seller bears costs and risk of loss during shipment, but bears no responsibility
for replacement goods if the goods are lost or damaged in transit

**Risk of Loss**

**No breach of sales K**
- CL has risk of loss on party with title
- UCC rejects this notion, and allows the parties to contract otherwise
- In absence of K, UCC regulates risk of loss

**Carrier cases**
- Absent any K language, sales K are shipment K rather than destination K
  - Risk of loss passes to buyer when seller delivers to a common carrier
- If a destination K is specified however in K, risk of loss passes only at delivery of destination, and risk
of loss does not pass until delivery at destination occurs

**Non-carrier cases**
- for merchant sellers, risk of loss does not pass to buyer until goods are received
- for non-merchant sellers, risk of loss occurs to buyer upon tender of delivery of goods
  - this occurs when seller places or holds goods for buyer ANDS notifies buyer of this

**Bailee possession**
- goods are sometimes held by a bailee (warehouse)
- risk of losses passes to buyer when either
  - buyer receives a NEG doc of title;
  - or when bailee acknowledges buyers right of possession
  - or when buyer receives a non-neg doc of title or other writing and has a reas time to
demand the goods

**Conditional Sales**
- for sales on approval, no sale occurs until buyer approves
  - risk of loss remains with the seller until acceptance
  - acceptance occurs when
    - buyer expressly indicates acceptance
    - buyer fails to reject within agreed to trial period or a reas time
    - or goods are used inconsistently with purpose of the trial

- for sales or return, buyer can return them within a reasonable time or stated time
  - risk of loss and title passing occurs at sale point

- for consignment, this is where a seller delivers goods to a consignee to sell to someone else
  - consignee is paid a fee is he sells to someone else
  - treated as a sale or return under UCC
  - risk of loss and title passes to consignee when consignee takes possession
breach of sales K
- if seller tenders non-conforming goods, breach occurs
- risk of loss remains with the seller until defect if cured or defect is accepted by buyer

- for buyer breach who refuses to take delivery of conforming goods, repudiates a valid K, or otherwise breaches,
  - buyer then bears risk of loss

Lease K's
- for ordinary leases, if lessor (person who leases goods to others) is a merchant, risk of loss passes to lessee on receipt of goods
- for finance leases, where supplier is a merchant, risk of loss passes on receipt of goods
- in cases of nonconforming goods, risk of loss remains with lessor until cure or acceptance

Sale by non-owners
- where a buyer has purchased goods form someone who has no title (thief) no title passes and real owner can reclaim title.
  - This is a void title

- if buyer purchases thru fraud of another, this is voidable title
  - person with voidable title can xfr to a person who is a good faith purchaser for value
  - the real owner cannot reclaim against good faith purchaser for value

- if an owner entrusts goods to a merchant dealing in those goods, the merchant can xfr the goods to a buyer in the ordinary course of business
  - owner cannot reclaim as to the buyer in ordinary course
  - of course, owner can still file breach of entrustment action against merchant

Summary of passage of title – p. 304

Case assignments (not assigned)
Case 18.2, p. 292, goods and services
Case 19.8 risk of loss, p. 307
Chapter 20 – Remedies for UCC Art. 2 Breaches

A legal decision depends not on the teacher’s age, but on the force of the argument
- the Talmud

Seller’s performance
- duty to perform
- failure of performance = breach
- tender of delivery is sellers basic obligation
  - requires seller to put goods at buyer’s disposition
  - give buyer any reasonable notification for delivery to occur
  - goods must be tendered in a single delivery, unless agreed to otherwise
  - payment is due on delivery (unless otherwise agreed to)

place of delivery
- if not stated in the K, UCC default rules apply
- noncarrier cases
  - place of delivery is SELLER’s place of business or residence (if seller has no place of bus)
  - if both parties have knowledge at time of K of location of goods in another place, the other place is place of business
    - ex: grain in a silo
  - for bailments, delivery occurs
    - 1) when the seller tenders a neg instrument
    - OR 2) seller acknowledges from the bailee the buyer’s right to possess;
    - OR 3) tenders a non-neg doc of title or written direction to bailee to deliver goods to buyer

for carrier cases, if delivery of goods is to be made to carrier, then ----
- for shipment Ks, seller must
  - 1) put the goods in carrier’s possession and K for safe transport of goods
  - 2) obtain delivery or tender of delivery in proper form to enable buyer to obtain possession
  - 3) AND promptly notify buyer of shipment

- Buyer may reject where there has been a material delay or loss occurs by sellers failure to make proper K for shipment of goods or promptly notify the buyer of shipment
- For destination K’s, delivery is tendered at buyer’s place of business or other location specified in the K
  - Delivery occurs at a reas time and manner and with notice to buyer

Perfect tender rule
- if the goods or tender of delivery fail in any way to conform to the K, buyer may opt to
  - 1) reject the whole shipment;
  - 2) accept the whole shipment;
  - 3) reject part and accept part
- Seller can cure the non-conforming goods by replacement of defective goods
  - But must occur within the time to perform
- Exceptions to perfect tender rule:
  o Agreement of the parties
  o Substitution of carriers by seller if agreed to manner of delivery fails or the agreed to type of carrier is unavailable

Installment K's – delivery of goods in separate lots
- Buyer can reject the entire K IFF the non-conformity of any installment materially alters the value of the entire K
- Otherwise, the buyer can reject any installment of non-conforming goods

Destruction of Goods
- K is void if goods are destroyed Before risk of loss passes AND where both parties are without fault
- If goods are partially destroyed, buyer may inspect and then choose to void the K or accept

Good faith & Reasonableness
- Every K imposes a good faith duty on performance
- Non-merchants are held to objective std of good faith of honesty in fact
- Merchants are held to objective std of fair dealing in the trade
- NOTE the difference with Common law K where no good faith is required
- Parties must generally act reasonably (reas time)
- Commercial reasonableness is required of merchants

Buyers Performance

Inspection
- Buyer has right to inspect goods that are tendered, delivered, prior to acceptance
- If non-conforming, buyer can reject without payment, and cost of inspection can be recovered from the seller
- Inspection occurs at a reasonable time and place and in a reas manner
  o Reasonableness depends on circumstances of case
- If COD, buyer must pay before inspection

Payment
- Payment is due when and where goods are delivered
- Goods can be paid in any form that is reasonably and commercially acceptable ie (check, cc, etc) unless K specifies otherwise

Acceptance
- Where buyer signifies to seller in words or conduct that goods are conforming or buyer will take regardless of nonconformity
- Or where buyer effectively fails to reject within a reas time after delivery or tender
- OR where buyer acts inconsistent with seller’s ownership rights
- Or where buyer resells the goods delivered by seller
- Acceptance of a part of any commercial unit is A of the entire unit

Revocation of Acceptance
- Buyer can revoke A where
  o A)goods are non-conforming
- B) and the nonconformity substantially impairs the value of the goods and
- C) seller’s promise to cure is not met
  - OR where goods accepted prior to non-conforming being discovered
  - Or where A occurred before nonconformity was discovered and where buyer assured they were conforming
- Revocation is not effective until seller is notified
- Revocation must occur within a reasonable time after buyer discovers the non-conformity
- Revocation must occur before there is a substantial change in condition of goods

**Seller’s Remedies**

**Right to withhold delivery**
- Seller may withhold delivery when buyer breaches
  - Breach could occur if buyer wrongfully reject or revokes A, fails to pay, etc
  - Where seller discovers buyer is insolvent before delivery, seller can withhold delivery until buyer pays cash
    - Insolvency test in UCC – ceases to pay in ord course of bus; OR cannot pay debts as they become due; OR insolvent as per bankruptcy rules

**Right to Stop Delivery of Goods in Transit**
- Seller can stop goods if
  - he learns of buyer insolvency,
  - if buyer repudiates,
  - fails to make payment when due,
  - gives the seller some other right to withhold eth goods

**Right to Reclaim Goods**
- seller can demand return of goods in possession of buyer where
  - seller discovers buyer is insolvent, seller has 10 days after discovery to demand the goods OR
  - seller can reclaim at any time if payment bounces or if buyer misrepresents solvency to seller
- seller can recover damages (difference between disposition price and original price)
- seller can also recover incidental damages (reas expenses incurred to stop delivery, storage, etc)
- disposition must be made in a reason commercial manner and in good faith

**Unfinished goods**
- where buyer breaches before goods are completed, seller can stop manufacture and sell items for scrap, or complete manufacture and resell

**right to recover purchase price**
- where the buyer
  - buyer accepts delivery but fails to pay
  - buyer breaches after goods are ID and seller cannot resell them
  - goods are damaged or lost after risk of loss passes

**right to recover damages for Breach**
amount of damages = difference between K price and market price of goods at time and place goods are to be delivered + incidental damages
may also recover lost profits if seller would not have been in as good a position as performance of K would have

right to cancel a K
- can cancel if buyer rejects or revokes A, fails to pay, or repudiates K
- seller still has right to recover damages

Summary of seller remedies, box at 318

Buyer’s Remedies

Right to reject non-conforming goods
- if seller fails to delivery or send conforming goods in any way,
  o buyer can reject in whole,
  o accept in while,
  o accept a commercial unit and reject the rest
- rejection within a reasonable time after delivery
- buyer must notify seller of rejection
- buyer must holds and received goods in reasonable care for a reasonable time
- buyer must ID defects within reasonable time
  o failure to do so prevents buyer from relying on defects for the rejection
- if buyer is a merchant, merchant buyer must follow any reasonable instructions from seller
  o if no instructions come from seller, buyer must resell if goods are perishable or will quickly decline in value
- buyer is entitled to reimbursement for any reasonable expenses incurred in holding, reselling, shipping

right to recover against insolvent seller
- buyer has right to recover goods where buyer makes a payment and seller is insolvent
- this is called capture

Right to specific performance
- usually used for works of art, antiques, coins, and other unique items
- where money damages are insufficient

Right to cover
- buyer has right to cover by purchasing substitute goods
  o must be made in GF and with reasonable delay
  o can then sue for difference between orig price and cover price
  o and can recover incidental damages and consequential

Right to replevin
- this is recovery of goods from a seller who wrongfully is holding the goods
- buyer must show inability to cover
- goods must be scarce
- replevy occurs only with goods that are ID
Right to cancel
- buyer can cancel K for wrongful rejection by Seller
- buyer then does not have to perform and can sue for damages

Right to recover damages for non-delivery
- damage = difference bw orig K price and market price at time of breach
- incidental and consequential damages also are recoverable

Right to recover for Accepted non-conforming goods
- even with acceptable of non-conforming goods, buyer can recover
- buyer must notify seller of non-conforming goods within reas time

Summary of buyers remedies, box at 320

Additional Issues

Assurance of performance
- adequate assurance can be demanded if one party has reas grounds to believe the other party will not or cannot perform
- assurance may be demanded in writing
- party may suspend performance until assurance is provided, if this is commercially reas to do so

Anticipatory repudiation
- this is the repudiation of K prior to date of performance
- repudiation may be retracted in some instances

UCC SOL
- breach of K within 4 years
- can reduce that to 1 year but not extend it > 4 years

Agreements can be made t o limit or affect available remedies
- liquidated damages can be specified in the K, and act as a substitute for actual damages

Reference to unconscionable K’s