Introduction to Law

(MGMT:2000)

Course Pack

Summer 2023

Student Name _____

Introduction to Law

MGMT 2000

Summer 2023

Professor Name: Kim Petrone, J.D. and Sarah Dobrzykowski, J.D.
Professor Email: kpetrone@uark.edu and sdobrzykowski@walton.uark.edu

Course Description This course surveys a range of laws relevant to U.S. businesses. Comparisons between U.S. and European law will be highlighted. Instructional materials include a course-pack, textbook, in-class Power Points, quizzes on Canvas, and brief videos. Current news stories and actual judicial decisions are discussed to develop students' analytical skills.

Course Objectives

Survey laws affecting business in the U.S.
Improve legal analysis skills, including writing

Course Materials & Resources Upon your arrival on campus, CIMBA will provide you with a course packet and textbook. You must provide your preferred note-taking materials, e.g. paper or laptop.

Grading Plus/minus grading will be used. The final grade distribution is expected to be close to recommendations from the Management and Entrepreneurship Department at the University of Iowa: 25% As, 35% Bs, 30% Cs, and 10% Ds. **No extra credit will be allowed.** Grades will be based on the following work:

Pre-work	50 points
Contract Project	50 points
Daily quizzes	150 points
Mid-Term	120 points
Final	130 points
Total	500 points

Once a graded item has been returned, the student has up to 48 hours to challenge the grade if the student believes an error has occurred in grading. Due dates for work will be announced in class. Any work submitted late will incur a 10% penalty.

Attendance Policy

Attendance at all classes and CIMBA sanctioned activities is MANDATORY. All unexcused absences will have the following consequences:

a. 1st absence will result in a loss of a 1/3 of a letter grade in that class
b. 2nd (cumulative) absence will result in a loss of an entire letter grade in that class
c. 3rd (cumulative) absence will result in a dismissal from the program.

Absences due to illness require a note from the CIMBA Office Staff. If a student is sick and cannot

attend class, he/she must inform the CIMBA Staff immediately. Failure to do so will result in an unexcused absence.

Grievance Policy

Student concerns regarding this course should first be discussed with me, the faculty member teaching this course. If we can't resolve the complaint, you may contact the CIMBA Director, Stephanie Schnicker (319-335-0100, stephanie-schnicker@uiowa.edu). The Director will review the details of the complaint and involve the Associate Dean of the Undergraduate Programs, as needed.

Academic Misconduct

The Tippie College of Business has an Honor Code, and you must abide by it in completion of all assignments. Integrity is a reflection of your character and is critical for creating meaningful and lasting relationships. One part of integrity is abstaining from acts like cheating, so cheating on any assignment in this class will result in an appropriate consequence, usually a zero for the grade in question and, if that penalty does not reduce the grade, a penalty of a full letter grade reduction. In addition, all incidents of cheating will be reported to the appropriate academic offices, and the student may be placed on disciplinary probation, be suspended, or even permanently expelled, depending on the severity of the offense. If a student has been found in violation of this policy, they will first be notified directly, then I will report to the appropriate program office. Faculty and students can report Academic Misconduct via the college website. (https://cm.maxient.com/reportingform.php?UnivofIowa&layout_id=6)

Accommodating Students with Disabilities/Academic Accommodations

A student seeking academic accommodations such as a modification of seating, testing, timing, etc. should first register with their home institution's Student Disability Services, then contact Joelle Petersen (joelle-petersen@uiowa.edu) in the CIMBA Office to make further arrangements. See http://sds.studentlife.uiowa.edu for more information.

Fairness and Freedom of Expression:

Every student is entitled to the same intellectual freedom I have. I will respect that freedom, and I am obliged to protect your freedom to learn, regardless of your religion, race, sex, sexual orientation, gender identity, or political views, or on your agreement or disagreement with my positions pertaining to matters of controversy within the discipline. I will do my best to provide you with a fair and impartial evaluation of your work, consistent with articulated standards for this course.

Sexual Harassment

Sexual harassment subverts the mission of the University and threatens the well-being of students, faculty, and staff. All members of the UI community have a responsibility to uphold this mission and to contribute to a safe environment that enhances learning. Incidents of sexual harassment should be reported immediately. If you feel that you are being or have been harassed or you are not sure what constitutes sexual harassment, we encourage you to visit the University website, www.sexualharassment.uiowa.edu/index.php, and to seek assistance from the CIMBA Director, Stephanie Schnicker, at 319-335-0100 or stephanie-schnicker@uiowa.edu.

Sustainability

The University is committed to demonstrating sustainability practices within all facets of the institution. Student support is critical to our campus wide efforts to reduce waste by consuming as few natural resources as possible and purchasing recycled materials when feasible. Recycling and reuse of all materials is encouraged. Together, let's ensure a better world for us and future generations. Learn more at the Office of Sustainability and the Environment https://sustainability.uiowa.edu.

Mental Health

Students are encouraged to be mindful of their mental health and seek help if they are feeling overwhelmed and/or incapable of meeting course expectations. For assistance with the class, students are encouraged to talk to the faculty member. Find out more about the UCS at http://counseling.uiowa.edu. The CIMBA travel insurance will cover online counseling services. Please reach out to the CIMBA office for more details and support. After hours, we encourage you to call the emergency phone number at CIMBA or the Johnson County Crisis Line at 319.351.0140 if you are having a mental health emergency.

Calendar

In class, the professor will advise you of homework and any adjustments to this calendar.

Week One

Tuesday Sources of Law (Constitution, Treaties, Statutes, Executive Orders, Regulations, Common Law)

Wednesday Contracts

Thursday Contracts

Friday Business Organizations

Week Two

Monday Creditor - Debtor

Tuesday Bankruptcy

Wednesday Criminal

Thursday Ethics

Week Three

Monday Torts

Tuesday Agency

Wednesday Employment

Thursday Anti Discrimination

Week Four

Monday Courts and ADR

Tuesday Constitutional Law

Wednesday Intellectual Property

Thursday Antitrust

Final Exam Thursday or Friday (per CIMBA master schedule)

Objectives for MGMT 20000

Sources of Law

Objective 1A Understand the sources of American Law (federal, state and local) and interactions

1. Constitution
2. Statutes (a.k.a. Code or codified law; understand uniform laws, e.g. U.C.C.)
3. Regulations (a.k.a. administrative law; APA Notice and Comment rule making)
4. Executive orders
5. Common law (precedent, judge-made law, or case law; related to stare decisis)

Objective 1B Federalism/dual sovereignty; Tenth Amendment

Objective 1C Distinguish between Common Law and Civil Law Systems (international)

Contracts

Objective 2A Definition of Contract; law (state common law, UCC, FAR)

Objective 2B Four requirements of a valid contract

Objective 2C Statute of Frauds and Parol Evidence Rule

Objective 2D Types of Contracts (12-1f)

Bilateral and unilateral

Express and implied

Executed and executory

Void and voidable

Objective 2E Offer

Objective 2F Termination of Offer

By parties: revocation, rejection, counter-offer

By operation of law: lapse of time, destruction of subject, death/incompetence

Objective 2G Acceptance: common law mirror-image rule v. UCC

Objective 2H Consideration

Objective 2I Capacity

Objective 2J Legality: criminal statutes, regulatory licenses, exculpatory clauses, gambling, covenants not to compete

Objective 2K Who enforce contract: privity, third-party beneficiary, and assignee

Objective 2L Lack of Voluntary Consent

Fraudulent misrepresentation

Duress

Undue Influence

Adhesion Contracts and Unconscionability

Objective 2M Discharge by performance, tender, or substantial performance

Objective 2N Discharge by condition precedent

Objective 2O Discharge by Agreement of the Parties or Operation of Law

Objective 2P Remedies: Compensatory damages; consequential damages, mitigation doctrine and equitable remedies

Business Organizations

Objective 3A Sole Proprietorship (creation, tax, owner liability, management)

Objective 3B Partnerships (creation, tax, owner liability, management)

Objective 3C Corporations (creation, tax, owner liability, management)

Objective 3D Characteristics of Shareholder, Director, Officer

Objective 3E Close and Publicly Held

Objective 3F Annual shareholder meeting

Objective 3G Sarbanes-Oxley Act

Objective 3H LLC (creation, tax, owner liability, management)

Objective 3I Benefit Corporation

Creditor - Debtor

Objective 4A Creditor-Debtor (secured, unsecured, acceleration clause, self-help repossession, foreclosure)

Bankruptcy

Objective 5A Bankruptcy (Chapter 7, 11, and 13; dischargable and non-dischargable debt, debtor, creditor, trustee, fraudulent transfers, preference)

Objective 5B Bankruptcy procedures (automatic stay, discharge order, repayment plan, crimes)

Criminal

Objective 6A Jurisdiction

Objective 6B U.S. Jurisdiction on acts outside of the U.S.

Objective 6C Corporate criminal liability and responsible corporate officer doctrine

Objective 6D Actus reus and mens rea

Objective 6E White collar crimes, incl. Insider Trading, Bribery, Embezzlement, Wire Fraud and Securities Fraud

Ethics

Objective 7A Ethics: Overconfidence bias

Objective 7B Ethics: Conformity bias

Torts

Objective 8A Intentional Torts: False Imprisonment/Shopkeeper's Privilege,

Objective 8B Intentional Torts: Intentional Infliction of Emotional Distress

Objective 8C Intentional Torts: Invasion of Privacy (appropriation of identity, intrusion into individual's affairs or seclusion, public disclosure of private facts, false light)

Objective 8D Intentional Torts: Defamation and *New York Times v. Sullivan*

Objective 8E Wrongful Interference with a Contract

Objective 8F Negligence: Duty (reasonable person standard), Breach, Causation, Damages

Objective 8G Negligence: Duty (including landowners' duties and negligence per se)

Objective 8H Negligence: Proximate Causation / *Palsgraf*

Objective 8I Damages: compensatory and punitive Objective 8J Affirmative defenses: comparative negligence and assumption of risk

Objective 8K Strict Product Liability: manufacturing defects, design defects, inadequate warnings

Agency

Objective 9A Types of Authority: Express, Implied, Apparent and Ratification

Objective 9B Tort Liability: Master-Servant Relationship and Scope of Work

Employment

Objective 10A Employment At Will

Objective 10B Exceptions to Employment At Will: term contract, public policy, union, anti-discrimination statutes

Objective 10C Classification of Workers: Independent Contractor or Employee

Objective 10D Fair Labor Standards Act (1938)

Objective 10E Social Security (1935)

Objective 10F National Labor Relations Act (1935)

Objective 10G Occupational Health and Safety Act

Objective 10H Family Medical Leave Act

Anti- Discrimination

Objective 10I Anti-Discrimination: Title VII of the Civil Rights Act (1964)

Objective 10J Anti-Discrimination: Disability, Age, Veterans

Dispute Resolution—Courts and ADR

Objective 12A Role of attorney—Rule II and compensation

Objective 12B Role of jury and role of Judge

Objective 12C Characteristics of Criminal and Civil Cases

Objective 12D Classification of courts: trial or appellate

Objective 12E Precedent

Objective 12F Civil Court Jurisdiction / Venue / Standing

Objective 12G Class Action

Objective 12H Complaint / Service of Process / Answer / Discovery / Trial

Objective 12I Spoliation of evidence

Objective 12J Jury selection, Voir dire

Objective 12K Appeals

Constitutional Law

Objective 13A Article I, Congress, esp. §8 commerce clause

Objective 13B Article II, Executive

Objective 13C Article III Judiciary

Objective 13D Article IV full faith and credit clause

Objective 13E State action doctrine

Objective 13F First Amendment: free exercise, establishment, speech

Objective 13G Fourth Amendment: government investigations

Objective 13H Fourteenth Amendment: equal protection (rational basis for age discriminatory actions; strict scrutiny for different treatment based on race or regarding fundamental rights)

Intellectual Property

Objective 6A Intellectual Property Terms: trademark, copyright, patent, license, infringement, public domain

Objective 6B Trademark: how to obtain, TESS, duration, rights of owner, enforcement (infringement, dilution, tarnishment)

Objective 6C Trademark: Distinctiveness of a trademark (classifications)

Objective 6D Common law trademark (prior user, limited territory)

Objective 6E Copyright: how to obtain, duration, rights of owner, enforcement

Objective 6F Fair Use Doctrine

Objective 6G First Sale Doctrine

Objective 6H Patents: how to obtain, duration, rights of owner, enforcement

Internet, Social Media and Privacy

Objective 7A Domain names, ICANN, domain name registrars, WIPO

Objective 7B Liability of Internet Service Providers

Section 230 of Communications Decency Act and content moderation

Digital Millennium Copyright Act and takedown notices

Anti-Trust

Objective 11A Antitrust—Sherman Act § I Horizontal and Vertical Restraints of Trade

Objective 11B Antitrust—Sherman Act § II Monopolization

Sources of Law

U.S. CONSTITUTION **(ellipses […] show where text has been removed)**

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

…

Section. 3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

…

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

…

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4.

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

…

Section. 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

…

Article. II.

Section. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

…No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

…Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

…

Article III.

Section. 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall

be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

…

Article. IV.

Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

…

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; …

Article. VI.

… This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

THE U.S. BILL OF RIGHTS

Note: The following text is a transcription of the first ten amendments to the Constitution in their original form. These amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights."

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

…

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Contracts

Objective A: Definition of Contract, Laws

Contract (definition) - _____

_____

_____

Governing Laws:

1. Goods: _____
2. Services/Real Estate: _____

Objective B: Four Elements of a Valid Contract

Four Elements of a Contract:

1. _____
2. _____
3. _____
4. _____

Objective C: Statute of Frauds & Parol Evidence Rule

Statute of Frauds:

Contracts that must be in writing:

1. _____
2. _____
3. _____
4. _____

Parol Evidence Rule:

Objective D: Offer

1. Mutual Assent (Agreement):

Offer:

Objective E: Termination of Offer

By the Parties:

By Operation of Law:

Objective F: Acceptance

Acceptance:

Mailbox Rule:

Mirror Image Rule v. U.C.C.

Objective G: Consideration

Consideration:

Past Consideration:

Pre-Existing Duty Rule:

Objective H: Capacity

Objective I: Legality

1. Criminal Statutes:

2. Regulatory Licenses:

3. Exculpatory Clauses:

4. Covenants Not to Compete:

Objective J: Types of Contracts

Bilateral and Unilateral:

Express and Implied:

Executed and Executory:

Void and Voidable:

Objective K: Who Can Enforce a Contract: Privity, Third-Party Beneficiary and Assignee

_____
_____
_____
_____
_____

_____
_____
_____
_____
_____
_____

Objective L: Lack of Voluntary Consent

Fraudulent Misrepresentation:

Duress:

Undue Influence:

Adhesion Contracts & Unconscionability:

Objective M: Discharge by Performance, Tender or Substantial Performance

Performance:

Tender:

Substantial Performance:

Objective N: Discharge by Condition Precedent

Objective O: Discharge by Agreement of the Parties or Operation of Law

Agreement of Parties:

Operation of Law:

Objective S: Remedies

1. General Damages (A/K/A Compensatory or Actual Damages):

2. Consequential Damages:

3. Incidental Damages:

4. Mitigation Doctrine:

5. Specific Performance:

What Defines a Contract?

Contract Law 101

A contract is an agreement between two parties that creates an obligation to perform (or not perform) a particular duty.

A legally enforceable contract requires the following elements, all of which are discussed in more detail below.

1. An Offer (I'll mow your lawn this Saturday if you pay me $40)
2. An Acceptance (You've got a deal)
3. Mutual Consideration (the value received and given – the money and the lawn mowed)
4. Legal Parties*
5. Legal Purpose **

** A contract with a minor is not legally enforceable. Because of age and presumable lack of experience, the law considers a minor contractually incapable.*

*** An agreement to purchase marijuana, for example, is not a legal contract. Because the subject matter of the agreement is illegal, the contract is not enforceable and the parties have no legal remedies for breach.*

Does what you Name the Document Determine Whether it's a Contract?

The quick answer is no. As long as all the basic elements of a contract are present, then what you name it has no impact on determining whether it's an enforceable contract. Whether you name a document a Letter of Agreement (LOA), or a Memorandum of Understanding (MOU), or a Letter of Intent (LOI), or any other name, if it contains all the referenced elements, then it's a contract.

Mutual Assent: A "Meeting of the Minds" of Offer & Acceptance

A legally recognized offer and an acceptance create a "meeting of the minds", or mutual assent, between the parties. The law requires the parties to a contract to demonstrate mutual assent to the contracts' terms.

The Offer

The Offer is the key element that defines the relevant issues in the contract. To be a legally valid offer, the offer must be effectively communicated so that the receiving party has the ability to accept or reject the offer. Whether or not the receiving party reads the contract has no bearing in determining the clarity of the offer. The offer must only provide the recipient with a clear opportunity to accept or reject the contract. Someone who signs a contract without reading it does so at his/her own risk.

In addition, a valid offer must contain certain and definite terms. For the terms to be considered definite, a reasonable person must be capable of readily understanding the terms. For example, in determining whether the terms of a procurement contract are definite, courts will often review the clarity within four primary elements:

1. the parties;
2. the length of time for performance (term or service schedule)
3. the price/value; and
4. the subject matter or scope of services;

Examples: A vendor offers to store UTSA's back-up data for $1000 a month, and UTSA accepts. Because of the ambiguity of the service terms, this arrangement might not be considered an enforceable contract. Among other issues, the arrangement contains no storage location, no description of the storage structure, no information related to storage security, and no details on how the data would be transported to storage. Additionally, the arrangement fails to determine the length of time the data would be stored. Because the subject matter of this offer is subject to numerous interpretations, the arrangement might be deemed ambiguous and unenforceable.

Similarly, if two parties agree to the performance of a service for a price to be determined at a later date, an enforceable contract may not exist. Mutual assent typically cannot occur when the value is undetermined.

***Note* that Procurement solicitations such as Bids or Request for Proposals are not considered offers. Among other issues, these solicitations are not communicated to any particular party and can be rescinded at any time. Generally speaking, Purchasing solicitations are considered merely invitations to the public to make an offer.**

The Acceptance

For acceptance of an offer to be valid, the acceptance must be unequivocal and unqualified. In other words, the acceptance must conform to the exact terms of the offer. This is termed the "mirror image" rule. If the acceptance is conditional on another event or stipulation, it creates a counteroffer and the roles of the parties become reversed. The conditional acceptance becomes a new offer.

Note that an exception to the Mirror Image rule is found in the Uniform Commercial Code ("UCC") for contracts between merchants for the sale of goods (the UCC does not apply to services). Under the UCC (in Texas under the Tex. Bus. & Commerce Code), an acceptance with conditional terms will form a part of the contract unless the additional provisions materially change the offer.

Consideration: The Importance of the "Bargained Exchange"

In order to be considered an enforceable contract, the parties to the contract must exchange something of value. If a buyer contracts for lawn service, for example, the buyer receives lawn mowing service, and the seller receives money.

Consideration must be mutual. Both parties must give something of value and receive something of value. If only one party receives value from an arrangement, the arrangement is generally defined as a gift rather than an enforceable contract.

The consideration does **not** need to include money. For instance, an athletic apparel company may provide the Athletics Department with basketball shoes in exchange for the exclusive rights to advertise its logo on sports uniforms. Although no money exchanged hands, this type of arrangement would represent legitimate consideration to both parties.

The market value of the consideration is, for the most part, irrelevant from a legal perspective. The law is concerned with whether the parties desired and assented to the contractual arrangement, not whether the exchange represented a fair market bargain.

What Authority Defines a Contract?

- **Most Business Contracts - Common Law (Court-made case law)**

Most business contracts are defined by *common law* -- a tradition-based but constantly evolving set of laws that derive primarily from past court decisions. Which state's common law prevails can be determined by factors such as where the contract was performed or where it was executed. Typically, the parties will establish the governing state law within the contract itself.

- **Contracts for Goods - Uniform Commercial Code [Tex. Bus. & Comm. Code]**

Contracts for goods & products are typically defined by the *Uniform Commercial Code* (UCC). The UCC is a standardized collection of guidelines governing the law of commerce, particularly with the sale of tangible goods and secured transactions. The UCC does not apply to service contracts. The UCC is a model act created by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Every state has adopted some version of the UCC. Texas has adopted the UCC under the *Texas Business and Commerce Code*. *Note* that courts have generally reviewed software and related technology licenses under Common Law and not the UCC.

- **Specific Statutes**

Many fields, such as utilities and real estate, have specific statutes that impact the contracting process. Government entities, like UTSA, also must abide by various statutory requirements and limitations when entering into contracts. Some of these statutory requirements are explained on the Business Contracts Website under the page "Common Contract Terms Explained." Source: *https://www.utsa.edu/bco/resources/contract-law-101.html*

law.cornell.edu

Arkansas Statute of Frauds

Universal Citation: AR Code § 4-59-101 (2020)

a. (a) Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, or signed by some other person properly authorized by the person sought to be charged, no action shall be brought to charge any:
    1. (1) Executor or administrator, upon any special promise, to answer for any debt or damage out of his or her own estate;
    2. (2) Person, upon any special promise, to answer for the debt, default, or miscarriage of another;
    3. (3) Person upon an agreement made in consideration of marriage;
    4. (4) Person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them;
    5. (5) Person upon any lease of lands, tenements, or hereditaments for a longer term than one (1) year;
    6. (6) Person upon a contract, promise, or agreement that is not to be performed within one (1) year from the making of the contract, promise, or agreement; or
    7. (7) Person upon a contract, promise, or agreement that results in a waiver of a right protected by the Arkansas Constitution or the United States Constitution.
b. (b) No promise to pay a debt or obligation which has been discharged in bankruptcy shall be valid unless the promise is in writing.
c. (c) No action may be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy, unless the promise or ratification is made by some writing signed by the party to be charged with the promise or ratification.
d. (d)
    1. (1) No action may be maintained by or against any person or entity on any agreement to extend credit or to renew or modify existing credit in an amount greater than ten thousand dollars ($10,000) or to make any other accommodation relating to such credit, unless the agreement is in writing and is signed by the party to be charged with the agreement, or the duly authorized agent of such party.
    2. (2) For the purpose of this section:
        A. (A) “Agreement” means any agreement, contract, promise, undertaking, or commitment, or any modification thereof; and
        B. (B) “Credit” means the loaning of money, the right granted to defer payment of a debt, or to incur debt and defer its payment.
    3. (3) However, nothing in this section shall in any way limit recovery of moneys or collateral which represents or relates to credit actually extended.

Source: *https://law.justia.com/codes/arkansas/2020/title-4/subtitle-5/chapter-59/subchapter-1/section-4-59-101/*

Iowa Statute of Frauds

1 EVIDENCE, §622.32
622.32 Statute of frauds.
Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by the party's authorized agent:
1. Those made in consideration of marriage.
2. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of the decedent from their own estate.
3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.
4. Those that are not to be performed within one year from the making thereof.

Source: *https://www.legis.iowa.gov/docs/code/622.32.pdf*

Kan. Stat. § 33-106

Current through 2023 Session Acts Chapter 2

Section 33-106 - Specific cases where writing required

No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any executor or administrator upon any special promise to answer damages out of his own estate; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing.

K.S.A. 33-106

G.S. 1868, ch. 43, § 6; L. 1905, ch. 266, § 1; March 21; R.S. 1923, .

The Parol Evidence Rule

What is the Parol Evidence Rule?

In general, the parol evidence rule prevents the introduction of evidence of prior or contemporaneous negotiations and agreements that contradict, modify, or vary the contractual terms of a written contract when the written contract is intended to be a complete and final expression of the parties' agreement. A merger clause strengthens the presumption that the written document is complete and final by expressly stating that the written document is the final and full expression of the parties' agreement. Thus, even if the parties later agree that they had a conversation creating, for example, a "side agreement" that was not included in the original written contract, and the side agreement contradicts the written contract (e.g., by changing the delivery date or price of a purchase), the additional or different terms included in the side agreement may not be enforced by the court when there is a merger clause in the written contract.

There are some exceptions to the parol evidence rule. Evidence of the following is admissible:

1. Defects in the formation of the contract (such as fraud, duress, mistake or illegality).
2. The parties' intent regarding ambiguous terms in the contract.
3. Problems with the consideration (e.g., the consideration was never paid).
4. A prior valid agreement that is incorrectly reflected in the written instrument in question.
5. A related agreement, if it does not contradict or change the main contract.
6. A condition that had to occur before contract performance was due.
7. Subsequent modification of the contract.

Source: *http://jec.unm.edu/education/online-training/contract-law-tutorial/the-parol-evidence-rule*

Louisa W. Hamer, Appellant,
v
Franklin Sidway, as Executor, etc., Respondent.

Court of Appeals of New York
Argued February 24, 1981
Decided April 14, 1891

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124 NY 538
CITE TITLE AS: Hamer v Sidway

[*544] OPINION OF THE COURT

PARKER, J.

The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that 'on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. [*545] Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed,' and that he 'in all things fully performed his part of said agreement.'

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, profit or

benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him.' (Anson's Prin. of Con. 63.)

'In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' (Parsons on Contracts, 444.)

'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' (Kent, vol. 2, 465, 12th ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, [*546] says: 'The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.'

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In *Shadwell v. Shadwell* (9 C. B. [N. S.] 159), an uncle wrote to his nephew as follows:

'MY DEAR LANCEY—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your

annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

'Your affectionate uncle,

'CHARLES SHADWELL.'

It was held that the promise was binding and made upon good consideration.

[*547] In *Lakota v. Newton,* an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that 'if you (meaning plaintiff) will leave off drinking for a year I will give you $100,' plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In *Talbott v. Stemmons* (a Kentucky case not yet reported), the step- grandmother of the plaintiff made with him the following agreement: 'I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother.' The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that 'the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health, nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise.' Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in *Lindell v. Rokes* (60 Mo. 249).

The cases cited by the defendant on this question are not in point. In *Mallory v. Gillett* (21 N. Y. 412); *Belknap v. Bender* (75 id. 446), and *Berry v. Brown* (107 id. 659), the promise was in contravention of that provision of the Statute of Frauds, which declares void all promises to answer for the debts of third persons unless reduced to writing. In *Beau* [*548] *mont v. Reeve* (Shirley's L. C. 6), and *Porterfield v. Butler* (47 Miss. 165), the

question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In *Duvoll v. Wilson* (9 Barb. 487), and In re *Wilber v. Warren* (104 N. Y. 192), the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In *Vanderbilt v. Schreyer* (91 N. Y. 392), the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guarantee could not be enforced for want of consideration. For in building the house the plaintiff only did that which he had contracted to do. And in *Robinson v. Jewett* (116 N. Y. 40), the court simply held that 'The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract.' It will be observed that the agreement which we have been considering was within the condemnation of the Statute of Frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and, therefore, such defense could not be made available unless set up in the answer. *(Porter v. Wormser,* 94 N. Y. 431, 450.) This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5,000, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

[*549] 'DEAR UNCLE—I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me $5,000. I have lived up to the contract to the letter in every sense of the word.'

A few days later, and on February sixth, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

'DEAR NEPHEW—Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking

care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. * * *

W. E. STORY. 'P. S.—You can consider this money on interest.'The trial court found as a fact that 'said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter.' And further, 'That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of $5,000 to his wife Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action.'

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee [*550] and cestui que trust? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the cestui que trust, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. § 972.) If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. *(Day v. Roth,* 18 N. Y. 448.)

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *(White v. Hoyt,* 73 N. Y. 505, 511.) At the time the uncle wrote the letter he was indebted to his nephew in the sum of $5,000, and payment had been requested. The uncle recognizing the indebtedness, wrote the nephew that he would keep the

money until he deemed him capable of taking care of it. He did not say 'I will pay you at some other time,' or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had 'earned' for him so that when he should be capable of taking care of it he should receive it with interest. He said: 'I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain.' That he had set apart the money is further [*551] evidenced by the next sentence: 'Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it.' Certainly, the uncle must have intended that his nephew should understand that the promise not 'to interfere with this money' referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word 'trust,' or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: 'This money you have earned much easier than I did * * * you are quite welcome to. I had it in the bank the day you were 21 years old and don't intend to interfere with it in any way until I think you are capable of taking care of it and the sooner that time comes the better it will please me.' In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

Source: *https://www.nycourts.gov/reporter/archives/hamer_sidway.htm*

Lucy v. Zehmer

W. O. LUCY AND J. C. LUCY v. A. H. ZEHMER AND IDA S. ZEHMER.

Supreme Court of Virginia. November 22, 1954. **196 Va. 493 (1954)**

A. S. Harrison, Jr. and Emerson D. Baugh, for the appellants.

Morton G. Goode and William Earle White, for the appellees.

Present, Eggleston, Buchanan, Miller, Smith and Whittle, JJ.

1. In suit by Lucy against Zehmer and his wife for specific performance of a contract requiring the latter to convey a farm to Lucy for a stated price, the evidence contradicted Zehmer's contention that he was too drunk to make a valid contract, since he clearly was able to comprehend the nature and consequence of the instrument he executed.

2. There was no merit to defendants' position that the instrument sought to be enforced was signed in jest and was not intended by either party to be a binding contract. The appearance and terms of the contract and the circumstances of its execution indicated clearly that the transaction was one of serious business.

3. Even if defendants entered into the contract in jest, they were bound by it since Lucy believed, and from the acts and statements of the Zehmers was warranted in believing, that the contract represented a serious and good faith sale and purchase. Mental assent is not essential for the formation of a contract; if the words and acts of a party, reasonably interpreted, manifest an intention to agree, his contrary but unexpressed state of mind is immaterial.

4. Specific performance is not a matter of absolute right, but rests in sound judicial discretion. Yet where, as in the instant case, there is no circumstance of fraud, misrepresentation, sharp dealing or other inequity, specific performance should be ordered.

Appeal from a decree of the Circuit Court of Dinwiddie county. Hon J. G. Jefferson, Jr., judge presiding. The opinion states the case.

BUCHANAN

BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other

complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver *495 the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer $20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not. Lucy said, "I bet you wouldn't take $50,000.00 for that place." Zehmer replied, "Yes, I would too; you wouldn't give fifty." Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, "I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him $5 which Zehmer refused, *496 saying, "You don't need to give me any money, you got the agreement there signed by both of us."

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise $50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it "complete, everything there," and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty *497 Lucy was there and he could see that he was "pretty high." He said to Lucy, "Boy, you got some good liquor, drinking, ain't you?" Lucy then offered him a drink. "I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too."

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, "I bet you wouldn't take $50,000.00 for it." Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, "You haven't got $50,000 in cash." Lucy said he did and Zehmer replied that he did not believe it. They argued "pro and con for a long time," mainly about "whether he had $50,000 in cash that he could put up right then and buy that farm."

Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, "you sign that piece of paper here and say you will take $50,000.00 for the farm." He, Zehmer, "just grabbed the back off of a guest check there" and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to "see if I recognize my own handwriting." He examined the paper and exclaimed, "Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine."

After Zehmer had, as he described it, "scribbled this thing off," Lucy said, "Get your wife to sign it." Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he "was just needling him [Lucy], and didn't mean a thing in the world, that I was not selling the farm." Zehmer then "took it back over there * * * and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' * * * I said, 'Hell no, *498 that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'"

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the

Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, "I bet you wouldn't take $50,000 cash for that farm," and Zehmer replied, "You haven't got $50,000 cash." Lucy said, "I can get it." Zehmer said he might form a company and get it, "but you haven't got $50,000.00 cash to pay me tonight." Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, "I agree to sell the Ferguson Place to W. O. Lucy for $50,000.00 cash." Lucy said, "All right, get your wife to sign it." Zehmer came back to where she was standing and said, "You want to put your name to this?" She said "No," but he said in an undertone, "It is nothing but a joke," and she signed it.

She said that only one paper was written and it said: "I hereby agree to sell," but the "I" had been changed to "We". However, she said she read what she signed and was then asked, "When you read 'We hereby agree to sell to W. O. Lucy,' what did you interpret that to mean, that particular phrase?" She said she thought that was a cash sale that night; but she also said that when she read that part about "title satisfactory to buyer" she understood that if the title was good Lucy would pay $50,000 but if the title was bad he would have a right to reject it, and that that was her understanding at the time she signed her name.

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it *499 in his wallet, then said to Zehmer, "Let me give you $5.00," but Zehmer said, "No, this is liquor talking. I don't want to sell the farm, I have told you that I want my son to have it. This is all a joke." Lucy then said at least twice, "Zehmer, you have sold your farm," wheeled around and started for the door. He paused at the door and said, "I will bring you $50,000.00 tomorrow. * * * No, tomorrow is Sunday. I will bring it to you Monday." She said you could tell definitely that he was drinking and she said to her husband, "You should have taken him home," but he said, "Well, I am just about as bad off as he is."

The waitress referred to by Mrs. Zehmer testified that when Lucy first came in "he was mouthy." When Zehmer came in they were laughing and joking and she thought they took a drink or two. She was sweeping and cleaning up for next day. She said she heard Lucy tell Zehmer, "I will give you so much for the farm," and Zehmer said, "You haven't got that much." Lucy answered, "Oh, yes, I will give you that much." Then "they jotted down something on paper * * * and Mr. Lucy reached over and took it, said let me see it." He looked at it, put it in his pocket and in about a minute he left. She was asked whether she saw Lucy offer Zehmer any money and replied, "He had five dollars laying up there, they didn't take it." She said Zehmer told Lucy he didn't want his money "because he didn't have enough money to pay for his property, and wasn't going to sell his farm." Both of them appeared to be drinking right much, she said.

She repeated on cross-examination that she was busy and paying no attention to what was going on. She was some distance away and did not see either of them sign the paper. She was asked whether she saw Zehmer put the agreement down on the table in front of Lucy, and her answer was this: "Time he got through writing whatever it was on the paper, Mr. Lucy reached over and said, 'Let's see it.' He took it and put it in his pocket," before showing it to Mrs. *500 Zehmer. Her version was that Lucy kept raising his offer until it got to $50,000.

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have

$50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, | 133 b., p. 483; Taliaferro Emery, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning "I hereby agree to sell." Zehmer first said he could not remember about that, then that "I don't think I wrote but one out." Mrs. Zehmer said that what he wrote was "I hereby agree," but that the "I" was changed to "We" after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent. *501

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up and said, "Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap." Lucy testified that at that time Zehmer told him that he did not want to "stick" him or hold him to the agreement because he, Lucy, was too tight and didn't know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer's version was that he said to Lucy: "I am not trying to claim it wasn't a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00." A disinterested witness testified that what Zehmer said to Lucy was that "he was going to let him up off the deal, because he thought he was too tight, didn't know what he was doing. Lucy said something to the effect that 'I have been stuck before and I will go through with it.'"

If it be assumed, contrary to what we think the evidence *502 shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'" First Nat. Bank Roanoke Oil Co., 169 Va. 99, 114, 192 S.E. 764, 770.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, *503 followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, | 71, p. 74.

"* * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * *." Clark on Contracts, 4 ed., | 3, p. 4.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, | 32, p. 361; 12 Am. Jur., Contracts, | 19, p. 515.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, 17 C.J.S., Contracts, | 47, p. 390; Clark on Contracts, 4 ed., | 27, at p. 54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties. *504

Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

Specific performance, it is true, is not a matter of absolute or arbitrary right, but is addressed to the reasonable and sound discretion of the court. First Nat. Bank Roanoke Oil Co., supra, 169 Va. at p. 116, 192 S.E. at p. 771. But it is likewise true that the discretion which may be exercised is not an arbitrary or capricious one, but one which is controlled by the established doctrines and settled principles of equity; and, generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. Bond Crawford, 193 Va. 437, 444, 69 S.E.(2d) 470, 475.

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.

Source: *https://law.justia.com/cases/virginia/supreme-court/1954/4272-1.html*

Rental Agreement

1. **Parties:** This agreement (the "Agreement") is made and entered into on August ___, 2023 , between _____ ,("Tenants"), and _____("Owners").

2. **Property:** Subject to the terms and conditions below, Tenants rent from Owners, for residential purposes only, the home and lot at _____, _____, _____ (the "Property").

3. **Term:** The term of the Agreement shall begin at 6 a.m. on_____, 2023 and shall terminate at 6:00 a.m. on _____, 2024. Tenants may terminate this Agreement before_____, 2024 by giving Owners written notice 30-days in advance of termination and paying $1000 as liquidated damages to Owners.

4. **Rent:** Tenants agree to pay Owners monthly rent of $1000 for the full term of this Agreement, payable in advance by the _____day of each month. The monthly rent shall be mailed to Owners at the address on the last page of this Agreement.

A. **Late Charges:** If Tenants fail to pay the rent by the due date, Tenants shall pay Owners a $20 for each day rent is past due. Owners do not waive the right to insist on payment of the rent in full on the day it is due.

B. **Default:** Any rental payment not received by Owners by 10 days after it is due of the month shall conclusively constitute a default by Tenants and may result in Owner initiating actions to evict Tenants, terminate this Agreement, and collect monies owed Owners.

5. **Security Deposit:** Tenants shall pay to Owners the sum of $850 as a security deposit to Owners. The full security deposit is paid upon the signing of this Agreement. Tenants may not, without Owners' prior written consent, apply this security deposit to rent or to any other sum due under this Agreement. Within two weeks after Tenants have vacated the Property, Owners shall give Tenants an itemized written statement of the basis for, and the amount of, any of the security deposit retained by the Owners. Owners may withhold only that portion of Tenants' security deposit necessary (a) to remedy any default by Tenants in the payment of rent or other unpaid charges incurred by Tenants, (b) to repair damages to the Property exclusive of ordinary wear and tear, and/or, (c) to clean the Property, if necessary. If the Property is found in acceptable condition, the entire deposit will be returned within two weeks.

6. **Use and Occupancy:** The Property is to be used only as a private residence for only Tenants and for no other purpose. Guests may stay at the Property for up to two weeks. No persons other than the Tenants may reside at the Property unless (a.) Owners give written consent and (b) rent shall be increased by $100/month for each such person over the age of 18. Any person staying in the Property more than two weeks without Owners' prior written consent, shall be a violation of this Agreement.

7. **No Assignment or Subletting:** Tenants shall not sublet the Property or assign this Agreement.

8. **Owner' Access:** Tenants agree that Owners may enter the Property (a) in the event of an emergency, (b) to make repairs or improvements, (c) to inspect the Property, (d) to supply agreed services, or (e) to exhibit the Property to prospective purchasers or tenants within 30 days of the end of this Agreement. Except in case of emergency, Owners shall give Tenants reasonable notice of intent to enter. To facilitate Owners' right of access, Tenants shall not alter or re-key any locks to the Property.

9. **Quiet Enjoyment:** Tenants agree to maintain the Property in a clean, sanitary, attractive condition, and in a state of good repair at all times. **Smoking is not allowed in the house.**

10. **No Liability of Owners for Losses to Persons or Properties:** This Agreement is made upon the express condition that Owners shall be free from all liabilities and claims for damages and/or suits for or by reason of any injury(ies) to any person(s) or property of any kind whatsoever, from any cause whatsoever while on or about the Property. This paragraph applies to any loss whatsoever that is occasioned or caused by use of the Property or any activity carried on by Tenants in connection with the Property. Tenants understand and agree to indemnify and hold harmless Owners from all liabilities, charges, expenses, including, but not limited to, attorney's fees, and costs on account of, or by reason of, any such injuries, liabilities, claims, suits or losses, however occurring or damages that may occur.

11. **Joint and Several Responsibility and Liability:** Tenants are jointly and severally responsible and liable. Each reference to "Tenants" in this agreement refers to each Tenant as an individual and to the two Tenants together.

12. **Entire Agreement:** This document constitutes the entire agreement between the parties, and no promises or representations, other than those contained herein and those implied in law, have been made by Owners or Tenants.

This Agreement has been signed on August _____, 2023.

Owner's signature: _____

Tenant's Signature: _____

Tenant's Signature: _____

Business Entities

Small Business Administration: Choose a business structure\

https://www.sba.gov/business-guide/launch-your-business/choose-business-structure

The business structure you choose influences everything from day-to-day operations, to taxes and how much of your personal assets are at risk. You should choose a business structure that gives you the right balance of legal protections and benefits.

Your business structure affects how much you pay in taxes, your ability to raise money, the paperwork you need to file, and your personal liability.

You'll need to choose a business structure before you register your business with the state. Most businesses will also need to get a tax ID number and file for the appropriate licenses and permits.

Choose carefully. While you may convert to a different business structure in the future, there may be restrictions based on your location. This could also result in tax consequences and unintended dissolution, among other complications.

Consulting with business counselors, attorneys, and accountants can prove helpful.

Review common business structures

Sole proprietorship

A sole proprietorship is easy to form and gives you complete control of your business. You're automatically considered to be a sole proprietorship if you do business activities but don't register as any other kind of business.

Sole proprietorships do not produce a separate business entity. This means your business assets and liabilities are not separate from your personal assets and liabilities. You can be held personally liable for the debts and obligations of the business. Sole proprietors are still able to get a trade name. It can also be hard to raise money because you can't sell stock, and banks are hesitant to lend to sole proprietorships.

Sole proprietorships can be a good choice for low-risk businesses and owners who want to test their business idea before forming a more formal business.

Partnership

Partnerships are the simplest structure for two or more people to own a business together. There are two common kinds of partnerships: limited partnerships (LP) and limited liability partnerships (LLP).

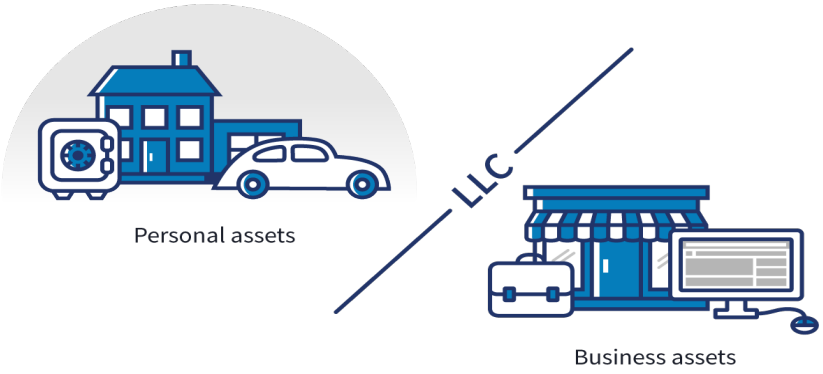
Limited partnerships have only one general partner with unlimited liability, and all other partners have limited liability. The partners with limited liability also tend to have limited control over the company, which is documented in a partnership agreement. Profits are passed through to personal tax returns, and the general partner — the partner without limited liability — must also pay self-employment taxes.

Limited liability partnerships are similar to limited partnerships, but give limited liability to every owner. An LLP protects each partner from debts against the partnership, they won't be responsible for the actions of other partners.

Partnerships can be a good choice for businesses with multiple owners, professional groups (like attorneys), and groups who want to test their business idea before forming a more formal business.

Limited liability company (LLC)

An LLC lets you take advantage of the benefits of both the corporation and partnership business structures. LLCs protect you from personal liability in most instances, your personal assets — like your vehicle, house, and savings accounts — won't be at risk in case your LLC faces bankruptcy or lawsuits.



Profits and losses can get passed through to your personal income without facing corporate taxes. However, members of an LLC are considered self-employed and must pay self-employment tax contributions towards Medicare and Social Security.

LLCs can have a limited life in many states. When a member joins or leaves an LLC, some states may require the LLC to be dissolved and re-formed with new membership — unless there's already an agreement in place within the LLC for buying, selling, and transferring ownership.

LLCs can be a good choice for medium- or higher-risk businesses, owners with significant personal assets they want protected, and owners who want to pay a lower tax rate than they would with a corporation.

Corporation

C corp *A corporation, sometimes called a C corp, is a legal entity that's separate from its owners. Corporations can make a profit, be taxed, and can be held legally liable.*

Corporations offer the strongest protection to its owners from personal liability, but the cost to form a corporation is higher than other structures. Corporations also require more extensive record-keeping, operational processes, and reporting.

Unlike sole proprietors, partnerships, and LLCs, corporations pay income tax on their profits. In some cases, corporate profits are taxed twice — first, when the company makes a profit, and again when dividends are paid to shareholders on their personal tax returns.

Corporations have a completely independent life separate from its shareholders. If a shareholder leaves the company or sells his or her shares, the C corp can continue doing business relatively undisturbed.

Corporations have an advantage when it comes to raising capital because they can raise funds through the sale of stock, which can also be a benefit in attracting employees.

Corporations can be a good choice for medium- or higher-risk businesses, those that need to raise money, and businesses that plan to "go public" or eventually be sold.

S corp *An S corporation, sometimes called an S corp, is a special type of corporation that's designed to avoid the double taxation drawback of regular C corps. S corps allow profits, and some losses, to be passed through directly to owners' personal income without ever being subject to corporate tax rates.*

Not all states tax S corps equally, but most recognize them the same way the federal government does and tax the shareholders accordingly. Some states tax S corps on profits above a specified limit and other states don't recognize the S corp election at all, simply treating the business as a C corp.

S corps must file with the IRS to get S corp status, a different process from registering with their state.

There are special limits on S corps. Check the IRS website for eligibility requirements. You'll still have to follow the strict filing and operational processes of a C corp.

S corps also have an independent life, just like C corps. If a shareholder leaves the company or sells his or her shares, the S corp can continue doing business relatively undisturbed.

S corps can be a good choice for a businesses that would otherwise be a C corp, but meet the criteria to file as an S corp.

B corp

A benefit corporation, sometimes called a B corp, is a for-profit corporation recognized by a majority of U.S. states. B corps are different from C corps in purpose, accountability, and transparency, but aren't different in how they're taxed.

B corps are driven by both mission and profit. Shareholders hold the company accountable to produce some sort of public benefit in addition to a financial profit. Some states require B corps to submit annual benefit reports that demonstrate their contribution to the public good.

There are several third-party B corp certification services, but none are required for a company to be legally considered a B corp in a state where the legal status is available.

Close corporation

Close corporations resemble B corps but have a less traditional corporate structure. These shed many formalities that typically govern corporations and apply to smaller companies. State rules vary, but shares are usually barred from public trading. Close corporations can be run by a small group of shareholders without a board of directors.

Nonprofit corporation

Nonprofit corporations are organized to do charity, education, religious, literary, or scientific work. Because their work benefits the public, nonprofits can receive tax-exempt status, meaning they don't pay state or federal income taxes on any profits it makes.

Nonprofits must file with the IRS to get tax exemption, a different process from registering with their state. Nonprofit corporations need to follow organizational rules very similar to a regular C corp. They also need to follow special rules about what they do with any profits they earn. For example, they can't distribute profits to members or political campaigns.

Nonprofits are often called 501(c)(3) corporations — a reference to the section of the Internal Revenue Code that is most commonly used to grant tax-exempt status.

	Sole Proprietorship	General Partnership	Corporations	Limited Liability Company (LLC)
Method of Creation				
Legal Status				
Liability of Owners				
Taxation				
Name of Owners				
Notes				

Creditor – Debtor

Unsecured Vs. Secured Debts: What's the Difference?

Mark Henricks, Mitch Strohm

Contributor, Editor

Updated: Aug 12, 2021, 8:26am

There are many different ways to borrow money, from a simple IOU sealed with a handshake to a complex business borrowing instrument like a subordinated convertible debenture. Fortunately, nearly all borrowing can be conveniently divided into two types of debts: secured and unsecured.

The difference between the two types of debt is relatively straightforward. A secured loan has collateral, and an unsecured one does not. Collateral is an item of value that a borrower offers to a lender as security on the loan. If the borrower doesn't repay the loan, the lender can seize the collateral and sell it to recoup all or part of their loss.

Whether a debt is secured or unsecured is important for many reasons. It often has a significant impact on the loan's cost. It can influence whether you can get credit. And the wisest strategy to follow when paying off debt, or the order in which you'll repay your debts, is often determined by whether a debt is secured or unsecured.

Here's more on the differences between secured and unsecured debt.

What Is Unsecured Debt?

Unsecured debt is money that's borrowed without collateral. For example, if you forget your wallet at lunch and ask a colleague to pick up your check with the promise that you'll pay them back when you return to the office, that's generally an unsecured debt. Your promise to repay is the only guarantee your coworker has of getting their money back.

With unsecured debts, lenders can't rely on the presence of collateral as a way to reduce risk and reassure themselves that they'll get paid. Instead, lenders typically look at a borrower's creditworthiness to decide whether to extend an unsecured loan. This generally involves examining a borrower's history of borrowing and paying back money. Lenders may also look at the borrower's income to predict if there is sufficient income to make payments on the loan.
Here are some other examples of unsecured debts:

- Credit cards
- Personal loans
- Medical bills
- Student loans

Some additional kinds of transactions are also similar to unsecured loans. For instance, when you sign a contract to belong to a gym, you promise to pay the monthly membership fee for the length

of the contract. However, the gym doesn't get any collateral. Utility bills and taxes are other examples of unsecured loans.

If you invest in a corporate bond, you are giving the bond's issuer an unsecured loan. Similarly, United States Treasury bills are loans to the federal government that are secured only by the government's promise to pay.

Finally, some financial instruments are not entirely secured but have some security. For instance, a bond is a debt security issued by a corporation that can be converted at the holder's option to shares of stock. The convertible subordinated debenture mentioned at the start of this article is an example of that kind of convertible debt.

What Is Secured Debt?

The key feature of a secured debt is that the borrower has put up collateral. This is an asset that the lender can, if the borrower defaults on the loan, repossess. Loans can be secured by all types of assets, including real estate, vehicles, equipment, securities and cash.
Common examples of secured debts include:

- Mortgages
- Car, motorcycle, boat and RV loans
- Home equity loans and home equity lines of credit

With a mortgage, the loan is secured by real estate. If the borrower fails to make the payments, a home mortgage lender can foreclose on the home and sell it to recoup the loaned money. Vehicle loans work the same way.
Usually, a secured debt is secured by the asset purchased by the proceeds of the loan. A car loan is secured by the car. Sometimes, the proceeds of the loan may be used for some other purpose. For instance, you could use money from a home equity loan or home equity line of credit to pay off an unsecured credit card or medical bill.

Generally, the borrower explicitly agrees to put up the collateral as security. However, there are loans that don't identify any collateral up front that can result in collateral being seized in the event of default. For example, if a homeowner fails to pay property taxes, the taxing authority may obtain a tax lien against the home. If the taxes aren't cleared up, the home may be seized and sold to pay the tax bill.

https://www.forbes.com/advisor/debt-relief/unsecured-vs-secured-debts/

Bankruptcy

Chapter 7 - Bankruptcy Basics

This chapter of the Bankruptcy Code provides for "liquidation" - the sale of a debtor's nonexempt property and the distribution of the proceeds to creditors.

Alternatives to Chapter 7

Debtors should be aware that there are several alternatives to chapter 7 relief. For example, debtors who are engaged in business, including corporations, partnerships, and sole proprietorships, may prefer to remain in business and avoid liquidation. Such debtors should consider filing a petition under chapter 11 of the Bankruptcy Code. Under chapter 11, the debtor may seek an adjustment of debts, either by reducing the debt or by extending the time for repayment, or may seek a more comprehensive reorganization. Sole proprietorships may also be eligible for relief under chapter 13 of the Bankruptcy Code.

In addition, individual debtors who have regular income may seek an adjustment of debts under chapter 13 of the Bankruptcy Code. A particular advantage of chapter 13 is that it provides individual debtors with an opportunity to save their homes from foreclosure by allowing them to "catch up" past due payments through a payment plan. Moreover, the court may dismiss a chapter 7 case filed by an individual whose debts are primarily consumer rather than business debts if the court finds that the granting of relief would be an abuse of chapter 7. 11 U.S.C. § 707(b).

If the debtor's "current monthly income" is more than the state median, the Bankruptcy Code requires application of a "means test" to determine whether the chapter 7 filing is presumptively abusive. Abuse is presumed if the debtor's current monthly income over 5 years, net of certain statutorily allowed expenses and secured debt payments, is not less than the lesser of (i) 25% of the debtor's nonpriority unsecured debt, or $9,075, whichever is greater, or (ii)$15,150. The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses or adjustments of current monthly income.

Debtors should also be aware that out-of-court agreements with creditors or debt counseling services may provide an alternative to a bankruptcy filing.

Background

A chapter 7 bankruptcy case does not involve the filing of a plan of repayment as in chapter 13. Instead, the bankruptcy trustee gathers and sells the debtor's nonexempt assets and uses the proceeds of such assets to pay holders of claims (creditors) in accordance with the provisions of the Bankruptcy Code. Part of the debtor's property may be subject to liens and mortgages that pledge the property to other creditors. In addition, the Bankruptcy Code will allow the debtor to

keep certain "exempt" property; but a trustee will liquidate the debtor's remaining assets. Accordingly, potential debtors should realize that the filing of a petition under chapter 7 may result in the loss of property.

Chapter 7 Eligibility

To qualify for relief under chapter 7 of the Bankruptcy Code, the debtor may be an individual, a partnership, or a corporation or other business entity. 11 U.S.C. §§ 101(41), 109(b). Subject to the means test described above for individual debtors, relief is available under chapter 7 irrespective of the amount of the debtor's debts or whether the debtor is solvent or insolvent. An individual cannot file under chapter 7 or any other chapter, however, if during the preceding 180 days a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court, or the debtor voluntarily dismissed the previous case after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e). In addition, no individual may be a debtor under chapter 7 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

One of the primary purposes of bankruptcy is to discharge certain debts to give an honest individual debtor a "fresh start." The debtor has no liability for discharged debts. In a chapter 7 case, however, a discharge is only available to individual debtors, not to partnerships or corporations. 11 U.S.C. § 727(a)(1). Although an individual chapter 7 case usually results in a discharge of debts, the right to a discharge is not absolute, and some types of debts are not discharged. Moreover, a bankruptcy discharge does not extinguish a lien on property.

How Chapter 7 Works

A chapter 7 case begins with the debtor filing a petition with the bankruptcy court serving the area where the individual lives or where the business debtor is organized or has its principal place of business or principal assets. (3) In addition to the petition, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a statement of financial affairs; and (4) a schedule of executory contracts and unexpired leases. Fed. R. Bankr. P. 1007(b). Debtors must also provide the assigned case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). 11 U.S.C. § 521. Individual debtors with primarily consumer debts have additional document filing requirements. They must file: a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any

anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. Id. A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). Even if filing jointly, a husband and wife are subject to all the document filing requirements of individual debtors. (The Official Forms may be purchased at legal stationery stores or download. They are not available from the court.)

The courts must charge a $245 case filing fee, a $75 miscellaneous administrative fee, and a $15 trustee surcharge. Normally, the fees must be paid to the clerk of the court upon filing. With the court's permission, however, individual debtors may pay in installments. 28 U.S.C. § 1930(a); Fed. R. Bankr. P. 1006(b); Bankruptcy Court Miscellaneous Fee Schedule, Item 8. The number of installments is limited to four, and the debtor must make the final installment no later than 120 days after filing the petition. Fed. R. Bankr. P. 1006. For cause shown, the court may extend the time of any installment, provided that the last installment is paid not later than 180 days after filing the petition. Id. The debtor may also pay the $75 administrative fee and the $15 trustee surcharge in installments. If a joint petition is filed, only one filing fee, one administrative fee, and one trustee surcharge are charged. Debtors should be aware that failure to pay these fees may result in dismissal of the case. 11 U.S.C. § 707(a).

If the debtor's income is less than 150% of the poverty level (as defined in the Bankruptcy Code), and the debtor is unable to pay the chapter 7 fees even in installments, the court may waive the requirement that the fees be paid. 28 U.S.C. § 1930(f).

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must provide the following information:

1. A list of all creditors and the amount and nature of their claims;
2. The source, amount, and frequency of the debtor's income;
3. A list of all of the debtor's property; and
4. A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

Married individuals must gather this information for their spouse regardless of whether they are filing a joint petition, separate individual petitions, or even if only one spouse is filing. In a situation where only one spouse files, the income and expenses of the non-filing spouse are required so that the court, the trustee and creditors can evaluate the household's financial position.

Among the schedules that an individual debtor will file is a schedule of "exempt" property. The Bankruptcy Code allows an individual debtor (4) to protect some property from the claims of creditors because it is exempt under federal bankruptcy law or under the laws of the debtor's home state. 11 U.S.C. § 522(b). Many states have taken advantage of a provision in the Bankruptcy Code that permits each state to adopt its own exemption law in place of the federal exemptions. In other jurisdictions, the individual debtor has the option of choosing between a

federal package of exemptions or the exemptions available under state law. Thus, whether certain property is exempt and may be kept by the debtor is often a question of state law. The debtor should consult an attorney to determine the exemptions available in the state where the debtor lives.

Filing a petition under chapter 7 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. But filing the petition does not stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Between 21 and 40 days after the petition is filed, the case trustee (described below) will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator (5) schedules the meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the order for relief. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee puts the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding the debtor's financial affairs and property. 11 U.S.C. § 343. If a husband and wife have filed a joint petition, they both must attend the creditors' meeting and answer questions. Within 10 days of the creditors' meeting, the U.S. trustee will report to the court whether the case should be presumed to be an abuse under the means test described in 11 U.S.C. § 704(b).

It is important for the debtor to cooperate with the trustee and to provide any financial records or documents that the trustee requests. The Bankruptcy Code requires the trustee to ask the debtor questions at the meeting of creditors to ensure that the debtor is aware of the potential consequences of seeking a discharge in bankruptcy such as the effect on credit history, the ability to file a petition under a different chapter, the effect of receiving a discharge, and the effect of reaffirming a debt. Some trustees provide written information on these topics at or before the meeting to ensure that the debtor is aware of this information. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the meeting of creditors. 11 U.S.C. § 341(c).

In order to accord the debtor complete relief, the Bankruptcy Code allows the debtor to convert a chapter 7 case to a case under chapter 11, 12, or 13 (6) as long as the debtor is eligible to be a debtor under the new chapter. However, a condition of the debtor's voluntary conversion is that the case has not previously been converted to chapter 7 from another chapter. 11 U.S.C. § 706(a). Thus, the debtor will not be permitted to convert the case repeatedly from one chapter to another.

Role of the Case Trustee

When a chapter 7 petition is filed, the U.S. trustee (or the bankruptcy court in Alabama and North Carolina) appoints an impartial case trustee to administer the case and liquidate the debtor's nonexempt assets. 11 U.S.C. §§ 701, 704. If all the debtor's assets are exempt or subject to valid liens, the trustee will normally file a "no asset" report with the court, and there will be no distribution to unsecured creditors. Most chapter 7 cases involving individual debtors are no asset cases. But if the case appears to be an "asset" case at the outset, unsecured creditors (7) must file their claims with the court within 90 days after the first date set for the meeting of creditors. Fed. R. Bankr. P. 3002(c). A governmental unit, however, has 180 days from the date the case is filed to file a claim. 11 U.S.C. § 502(b)(9). In the typical no asset chapter 7 case, there is no need for creditors to file proofs of claim because there will be no distribution. If the trustee later recovers assets for distribution to unsecured creditors, the Bankruptcy Court will provide notice to creditors and will allow additional time to file proofs of claim. Although a secured creditor does not need to file a proof of claim in a chapter 7 case to preserve its security interest or lien, there may be other reasons to file a claim. A creditor in a chapter 7 case who has a lien on the debtor's property should consult an attorney for advice.

Commencement of a bankruptcy case creates an "estate." The estate technically becomes the temporary legal owner of all the debtor's property. It consists of all legal or equitable interests of the debtor in property as of the commencement of the case, including property owned or held by another person if the debtor has an interest in the property. Generally speaking, the debtor's creditors are paid from nonexempt property of the estate.

The primary role of a chapter 7 trustee in an asset case is to liquidate the debtor's nonexempt assets in a manner that maximizes the return to the debtor's unsecured creditors. The trustee accomplishes this by selling the debtor's property if it is free and clear of liens (as long as the property is not exempt) or if it is worth more than any security interest or lien attached to the property and any exemption that the debtor holds in the property. The trustee may also attempt to recover money or property under the trustee's "avoiding powers." The trustee's avoiding powers include the power to: set aside preferential transfers made to creditors within 90 days before the petition; undo security interests and other prepetition transfers of property that were not properly perfected under nonbankruptcy law at the time of the petition; and pursue nonbankruptcy claims such as fraudulent conveyance and bulk transfer remedies available under state law. In addition, if the debtor is a business, the bankruptcy court may authorize the trustee to operate the business for a limited period of time, if such operation will benefit creditors and enhance the liquidation of the estate. 11 U.S.C. § 721.

Section 726 of the Bankruptcy Code governs the distribution of the property of the estate. Under § 726, there are six classes of claims; and each class must be paid in full before the next lower class is paid anything. The debtor is only paid if all other classes of claims have been paid in full. Accordingly, the debtor is not particularly interested in the trustee's disposition of the estate assets, except with respect to the payment of those debts which for some reason are not dischargeable in the bankruptcy case. The individual debtor's primary concerns in a chapter 7

case are to retain exempt property and to receive a discharge that covers as many debts as possible.

The Chapter 7 Discharge

A discharge releases individual debtors from personal liability for most debts and prevents the creditors owed those debts from taking any collection actions against the debtor.

The court may revoke a chapter 7 discharge on the request of the trustee, a creditor, or the U.S. trustee if the discharge was obtained through fraud by the debtor, if the debtor acquired property that is property of the estate and knowingly and fraudulently failed to report the acquisition of such property or to surrender the property to the trustee, or if the debtor (without a satisfactory explanation) makes a material misstatement or fails to provide documents or other information in connection with an audit of the debtor's case. 11 U.S.C. § 727(d).

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https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics

Chapter 13 - Bankruptcy Basics

This chapter of the Bankruptcy Code provides for adjustment of debts of an individual with regular income. Chapter 13 allows a debtor to keep property and pay debts over time, usually three to five years.

A chapter 13 bankruptcy is also called a wage earner's plan. It enables individuals with regular income to develop a plan to repay all or part of their debts. Under this chapter, debtors propose a repayment plan to make installments to creditors over three to five years. If the debtor's current monthly income is less than the applicable state median, the plan will be for three years unless the court approves a longer period "for cause." (1) If the debtor's current monthly income is greater than the applicable state median, the plan generally must be for five years. In no case may a plan provide for payments over a period longer than five years. 11 U.S.C. § 1322(d). During this time the law forbids creditors from starting or continuing collection efforts.

This chapter discusses six aspects of a chapter 13 proceeding: the advantages of choosing chapter 13, the chapter 13 eligibility requirements, how a chapter 13 proceeding works, making the plan work, and the special chapter 13 discharge.

Advantages of Chapter 13

Chapter 13 offers individuals a number of advantages over liquidation under chapter 7. Perhaps most significantly, chapter 13 offers individuals an opportunity to save their homes from foreclosure. By filing under this chapter, individuals can stop foreclosure proceedings and may

cure delinquent mortgage payments over time. Nevertheless, they must still make all mortgage payments that come due during the chapter 13 plan on time. Another advantage of chapter 13 is that it allows individuals to reschedule secured debts (other than a mortgage for their primary residence) and extend them over the life of the chapter 13 plan. Doing this may lower the payments. Chapter 13 also has a special provision that protects third parties who are liable with the debtor on "consumer debts." This provision may protect co-signers. Finally, chapter 13 acts like a consolidation loan under which the individual makes the plan payments to a chapter 13 trustee who then distributes payments to creditors. Individuals will have no direct contact with creditors while under chapter 13 protection.

Chapter 13 Eligibility

Any individual, even if self-employed or operating an unincorporated business, is eligible for chapter 13 relief as long as the individual's combined total secured and unsecured debts are less than $2,750,000 as of the date of filing for bankruptcy relief. 11 U.S.C. § 109(e).

An individual cannot file under chapter 13 or any other chapter if, during the preceding 180 days, a prior bankruptcy petition was dismissed due to the debtor's willful failure to appear before the court or comply with orders of the court or was voluntarily dismissed after creditors sought relief from the bankruptcy court to recover property upon which they hold liens. 11 U.S.C. §§ 109(g), 362(d) and (e). In addition, no individual may be a debtor under chapter 13 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing. 11 U.S.C. §§ 109, 111. There are exceptions in emergency situations or where the U.S. trustee (or bankruptcy administrator) has determined that there are insufficient approved agencies to provide the required counseling. If a debt management plan is developed during required credit counseling, it must be filed with the court.

How Chapter 13 Works

A chapter 13 case begins by filing a petition with the bankruptcy court serving the area where the debtor has a domicile or residence. Unless the court orders otherwise, the debtor must also file with the court: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executory contracts and unexpired leases; and (4) a statement of financial affairs. Fed. R. Bankr. P. 1007(b). The debtor must also file a certificate of credit counseling and a copy of any debt repayment plan developed through credit counseling; evidence of payment from employers, if any, received 60 days before filing; a statement of monthly net income and any anticipated increase in income or expenses after filing; and a record of any interest the debtor has in federal or state qualified education or tuition accounts. 11 U.S.C. § 521. The debtor must provide the chapter 13 case trustee with a copy of the tax return or transcripts for the most recent tax year as well as tax returns filed during the case (including tax returns for prior years that had not been filed when the case began). Id. A husband and wife may file a joint petition or individual petitions. 11 U.S.C. § 302(a). (The Official Forms may be

purchased at legal stationery stores or downloaded from the Internet at www.uscourts.gov/bkforms/index.html. They are not available from the court.)

In order to complete the Official Bankruptcy Forms that make up the petition, statement of financial affairs, and schedules, the debtor must compile the following information:

1. A list of all creditors and the amounts and nature of their claims;
2. The source, amount, and frequency of the debtor's income;
3. A list of all of the debtor's property; and
4. A detailed list of the debtor's monthly living expenses, i.e., food, clothing, shelter, utilities, taxes, transportation, medicine, etc.

When an individual files a chapter 13 petition, an impartial trustee is appointed to administer the case. 11 U.S.C. § 1302. In some districts, the U.S. trustee or bankruptcy administrator (2) appoints a standing trustee to serve in all chapter 13 cases. 28 U.S.C. § 586(b). The chapter 13 trustee both evaluates the case and serves as a disbursing agent, collecting payments from the debtor and making distributions to creditors. 11 U.S.C. § 1302(b).

Filing the petition under chapter 13 "automatically stays" (stops) most collection actions against the debtor or the debtor's property. 11 U.S.C. § 362. Filing the petition does not, however, stay certain types of actions listed under 11 U.S.C. § 362(b), and the stay may be effective only for a short time in some situations. The stay arises by operation of law and requires no judicial action. As long as the stay is in effect, creditors generally may not initiate or continue lawsuits, wage garnishments, or even make telephone calls demanding payments. The bankruptcy clerk gives notice of the bankruptcy case to all creditors whose names and addresses are provided by the debtor.

Chapter 13 also contains a special automatic stay provision that protects co-debtors. Unless the bankruptcy court authorizes otherwise, a creditor may not seek to collect a "consumer debt" from any individual who is liable along with the debtor. 11 U.S.C. § 1301(a). Consumer debts are those incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8).

Individuals may use a chapter 13 proceeding to save their home from foreclosure. The automatic stay stops the foreclosure proceeding as soon as the individual files the chapter 13 petition. The individual may then bring the past-due payments current over a reasonable period of time. Nevertheless, the debtor may still lose the home if the mortgage company completes the foreclosure sale under state law before the debtor files the petition. 11 U.S.C. § 1322(c). The debtor may also lose the home if he or she fails to make the regular mortgage payments that come due after the chapter 13 filing.

Between 21 and 50 days after the debtor files the chapter 13 petition, the chapter 13 trustee will hold a meeting of creditors. If the U.S. trustee or bankruptcy administrator schedules the

meeting at a place that does not have regular U.S. trustee or bankruptcy administrator staffing, the meeting may be held no more than 60 days after the debtor files. Fed. R. Bankr. P. 2003(a). During this meeting, the trustee places the debtor under oath, and both the trustee and creditors may ask questions. The debtor must attend the meeting and answer questions regarding his or her financial affairs and the proposed terms of the plan.11 U.S.C. § 343. If a husband and wife file a joint petition, they both must attend the creditors' meeting and answer questions. In order to preserve their independent judgment, bankruptcy judges are prohibited from attending the creditors' meeting. 11 U.S.C. § 341(c). The parties typically resolve problems with the plan either during or shortly after the creditors' meeting. Generally, the debtor can avoid problems by making sure that the petition and plan are complete and accurate, and by consulting with the trustee prior to the meeting.

After the meeting of creditors, the debtor, the chapter 13 trustee, and those creditors who wish to attend will come to court for a hearing on the debtor's chapter 13 repayment plan.

The Chapter 13 Plan and Confirmation Hearing

A plan must be submitted for court approval and must provide for payments of fixed amounts to the trustee on a regular basis, typically biweekly or monthly. The trustee then distributes the funds to creditors according to the terms of the plan, which may offer creditors less than full payment on their claims.

There are three types of claims: priority, secured, and unsecured. Priority claims are those granted special status by the bankruptcy law, such as most taxes and the costs of bankruptcy proceeding. (3) Secured claims are those for which the creditor has the right take back certain property (i.e., the collateral) if the debtor does not pay the underlying debt. In contrast to secured claims, unsecured claims are generally those for which the creditor has no special rights to collect against particular property owned by the debtor.

The plan must pay priority claims in full unless a particular priority creditor agrees to different treatment of the claim or, in the case of a domestic support obligation, unless the debtor contributes all "disposable income" - discussed below - to a five-year plan.11 U.S.C. § 1322(a).

If the debtor wants to keep the collateral securing a particular claim, the plan must provide that the holder of the secured claim receive at least the value of the collateral. If the obligation underlying the secured claim was used to buy the collateral (e.g., a car loan), and the debt was incurred within certain time frames before the bankruptcy filing, the plan must provide for full payment of the debt, not just the value of the collateral (which may be less due to depreciation). Payments to certain secured creditors (i.e., the home mortgage lender), may be made over the original loan repayment schedule (which may be longer than the plan) so long as any arrearage is made up during the plan. The debtor should consult an attorney to determine the proper treatment of secured claims in the plan.

The plan need not pay unsecured claims in full as long it provides that the debtor will pay all projected "disposable income" over an "applicable commitment period," and as long as unsecured creditors receive at least as much under the plan as they would receive if the debtor's assets were liquidated under chapter 7. 11 U.S.C. § 1325. In chapter 13, "disposable income" is income (other than child support payments received by the debtor) less amounts reasonably necessary for the maintenance or support of the debtor or dependents and less charitable contributions up to 15% of the debtor's gross income. The "applicable commitment period" depends on the debtor's current monthly income. The applicable commitment period must be three years if current monthly income is less than the state median for a family of the same size - and five years if the current monthly income is greater than a family of the same size. 11 U.S.C. § 1325(d). The plan may be less than the applicable commitment period (three or five years) only if unsecured debt is paid in full over a shorter period.

Making the Plan Work

The provisions of a confirmed plan bind the debtor and each creditor. 11 U.S.C. § 1327. Once the court confirms the plan, the debtor must make the plan succeed. The debtor must make regular payments to the trustee either directly or through payroll deduction, which will require adjustment to living on a fixed budget for a prolonged period. Furthermore, while confirmation of the plan entitles the debtor to retain property as long as payments are made, the debtor may not incur new debt without consulting the trustee, because additional debt may compromise the debtor's ability to complete the plan. 11 U.S.C. §§ 1305(c), 1322(a)(1), 1327.

The Chapter 13 Discharge

A chapter 13 debtor is entitled to a discharge upon completion of all payments under the chapter 13 plan so long as the debtor: (1) certifies (if applicable) that all domestic support obligations that came due prior to making such certification have been paid; (2) has not received a discharge in a prior case filed within a certain time frame (two years for prior chapter 13 cases and four years for prior chapter 7, 11 and 12 cases); and (3) has completed an approved course in financial management (if the U.S. trustee or bankruptcy administrator for the debtor's district has determined that such courses are available to the debtor). 11 U.S.C. § 1328. The court will not enter the discharge, however, until it determines, after notice and a hearing, that there is no reason to believe there is any pending proceeding that might give rise to a limitation on the debtor's homestead exemption. 11 U.S.C. § 1328(h).

The discharge releases the debtor from all debts provided for by the plan or disallowed (under section 502), with limited exceptions. Creditors provided for in full or in part under the chapter 13 plan may no longer initiate or continue any legal or other action against the debtor to collect the discharged obligations.

As a general rule, the discharge releases the debtor from all debts provided for by the plan or disallowed, with the exception of certain debts referenced in 11 U.S.C. § 1328. Debts not

discharged in chapter 13 include certain long term obligations (such as a home mortgage), debts for alimony or child support, certain taxes, debts for most government funded or guaranteed educational loans or benefit overpayments, debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor's conviction of a crime. To the extent that they are not fully paid under the chapter 13 plan, the debtor will still be responsible for these debts after the bankruptcy case has concluded. Debts for money or property obtained by false pretenses, debts for fraud or defalcation while acting in a fiduciary capacity, and debts for restitution or damages awarded in a civil case for willful or malicious actions by the debtor that cause personal injury or death to a person will be discharged unless a creditor timely files and prevails in an action to have such debts declared nondischargeable. 11 U.S.C. §§ 1328, 523(c); Fed. R. Bankr. P. 4007(c).

https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics

Definitions:

Debtor-

Creditor-

Bankruptcy Trustee-

Bankruptcy Estate-

Secured Debt –

Unsecured Debt –

Collateral -

Bankruptcy Notes:

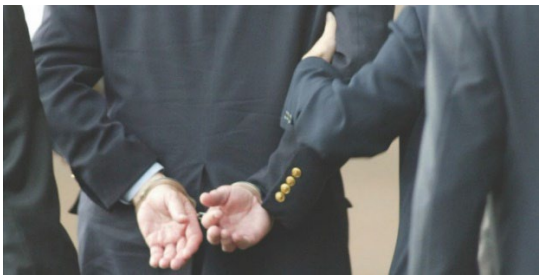
Chapter 7	Chapter 13

Exempt Assets:

Criminal Law

FBI: WHAT WE INVESTIGATE

White-Collar Crime https://www.fbi.gov/investigate/white-collar-crime



Reportedly coined in 1939, the term white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage.

These are not victimless crimes. A single scam can destroy a company, devastate families by wiping out their life savings, or cost investors billions of dollars (or even all three). Today's fraud schemes are more sophisticated than ever, and the FBI is dedicated to using its skills to track down the culprits and stop scams before they start.

The FBI's white-collar crime work integrates the analysis of intelligence with its investigations of criminal activities such as public corruption, money laundering, corporate fraud, securities and commodities fraud, mortgage fraud, financial institution fraud, bank fraud and embezzlement, fraud against the government, election law violations, mass marketing fraud, and health care fraud. The FBI generally focuses on complex investigations—often with a nexus to organized crime activities—that are international, national, or regional in scope and where the FBI can bring to bear unique expertise or capabilities that increase the likelihood of successful investigations.

FBI special agents work closely with partner law enforcement and regulatory agencies such as the Securities and Exchange Commission, the Internal Revenue Service, the U.S. Postal Inspection Service, the Commodity Futures Trading Commission, and the Treasury Department's Financial Crimes Enforcement Network, among others, targeting sophisticated, multi-layered fraud cases that harm the economy.

Major Threats & Programs

Corporate Fraud

Corporate fraud continues to be one of the FBI's highest criminal priorities—in addition to causing significant financial losses to investors, corporate fraud has the potential to cause immeasurable damage

to the U.S. economy and investor confidence. As the lead agency investigating corporate fraud, the Bureau focuses its efforts on cases that involve accounting schemes, self-dealing by corporate executives, and obstruction of justice.

The majority of corporate fraud cases pursued by the FBI involve accounting schemes designed to deceive investors, auditors, and analysts about the true financial condition of a corporation or business entity. Through the manipulation of financial data, the share price, or other valuation measurements of a corporation, financial performance may remain artificially inflated based on fictitious performance indicators provided to the investing public.

The FBI's corporate fraud investigations primarily focus on the following activities:

Falsification of financial information

- False accounting entries and/or misrepresentations of financial condition;
- Fraudulent trades designed to inflate profits or hide losses; and
- Illicit transactions designed to evade regulatory oversight.

Self-dealing by corporate insiders

- Insider trading (trading based on material, non-public information); Kickbacks;
- Misuse of corporate property for personal gain; and
- Individual tax violations related to self-dealing.

Fraud in connection with an otherwise legitimately operated mutual hedge fund

- Late trading;
- Certain market timing schemes; and
- Falsification of net asset values.

Obstruction of justice designed to conceal any of the above-noted types of criminal conduct, particularly when the obstruction impedes the inquiries of the U.S. Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), other regulatory agencies, and/or law enforcement agencies.

The FBI has formed partnerships with numerous agencies to capitalize on their experience in specific areas such as securities, taxes, pensions, energy, and commodities. The Bureau has placed greater emphasis on investigating allegations of these frauds by working closely with the SEC, CFTC, Financial Industry Regulatory Authority, Internal Revenue Service, Department of Labor, Federal Energy Regulatory Commission, and the U.S. Postal Inspection Service.

U.S. v. Elizabeth Holmes, et al.

On June, 14, 2018, a grand jury returned an indictment charging Elizabeth Holmes and Ramesh "Sunny" Balwani with crimes in connection with their respective involvement with two multi-million-dollar schemes to promote Theranos, a private health care and life sciences company based in Palo alto, California. The indictment was superseded on July 14, 2020, and again on July 28, 2020.

As alleged in the operative indictment, Holmes and Balwani used advertisements and solicitations to encourage and induce doctors and patients to use Theranos's blood testing laboratory services, even though, according to the government, the defendants knew Theranos was not capable of consistently producing accurate and reliable results for certain blood tests. It is further alleged that the tests performed on Theranos technology were likely to contain inaccurate and unreliable results.

The indictment alleges that Holmes and Balwani defrauded doctors and patients (1) by making false claims concerning Theranos's ability to provide accurate, fast, reliable, and cheap blood tests and test results, and (2) by omitting information concerning the limits of and problems with Theranos's technologies. The defendants knew Theranos was not capable of consistently producing accurate and reliable results for certain blood tests, including the tests for calcium, chloride, potassium, bicarbonate, HIV, Hba1C, hCG, and sodium. The defendants nevertheless used interstate electronic wires to purchase advertisements intended to induce individuals to purchase Theranos blood tests at Walgreens stores in California and Arizona. Through these advertisements, the defendants explicitly represented to individuals that Theranos's blood tests were cheaper than blood tests from conventional laboratories to induce individuals to purchase Theranos's blood tests.

According to the indictment, the defendants also allegedly made numerous misrepresentations to potential investors about Theranos's financial condition and its future prospects. For example, the defendants represented to investors that Theranos conducted its patients' tests using Theranos-manufactured analyzers; when, in truth, Holmes and Balwani knew that Theranos purchased and used for patient testing third party, commercially available analyzers. The defendants also represented to investors that Theranos would generate over $100 million in revenues and break even in 2014 and that Theranos expected to generate approximately $1 billion in revenues in 2015; when, in truth, the defendants knew Theranos would generate only negligible or modest revenues in 2014 and 2015.

The indictment alleges that the defendants used a combination of direct communications, marketing materials, statements to the media, financial statements, models, and other information to defraud potential investors. Specifically, the defendants claimed that Theranos developed a revolutionary and proprietary analyzer that the defendants referred to by various names, including as the TSPU, Edison, or minilab. The defendants claimed the analyzer was able to perform a full range of clinical tests using small blood samples drawn from a finger stick. The

defendants also represented that the analyzer could produce results that were more accurate and reliable than those yielded by conventional methods – all at a faster speed than previously possible. The indictment further alleges that Holmes and Balwani knew that many of their representations about the analyzer were false. For example, it is alleged that Holmes and Balwani knew that the analyzer had accuracy and reliability problems, performed a limited number of tests, was slower than some competing devices, and, in some respects, could not compete with existing, more conventional machines.

The indictment charges each defendant with two counts of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and nine counts of wire fraud, in violation of 18 U.S.C. § 1343.

U.S. v. Ramesh "Sunny" Balwani

Ramesh “Sunny” Balwani was sentenced on Wednesday, December 7, 2022 to 155 months (12 years, 11 months) in federal prison for fraud that risked patient health by misrepresenting the accuracy of Theranos blood analysis technology and that defrauded Theranos investors of millions of dollars.

Balwani was tried separately from Holmes, and in her trial Holmes was not convicted of all counts. On January 3, 2022, a different federal jury convicted Holmes of one count of conspiracy to commit fraud on investors and three counts of committing fraud on individual investors, which involved wire transfers totaling more than $140 million. The jury acquitted Holmes of the patient-related fraud conspiracy count and the three counts of fraud against individual patients. The jury could not reach a unanimous verdict with respect to three individual investor fraud counts against Holmes. An additional count of wire fraud relating to a Theranos patient had been dismissed during trial. On November 18, 2022, U.S. District Judge Davila sentenced Holmes to 135 months (11 years, 3 months) in federal prison. She was ordered to surrender to begin serving her sentence on April 27, 2023.

In addition to the 155 month prison term, U.S. District Judge Davila sentenced Balwani to three years of supervision following release from prison. A hearing to determine the amount of restitution to be paid by Balwani is to be scheduled in the future. Balwani was ordered to surrender on March 15, 2023, to begin serving his prison sentence.

U.S. v. Elizabeth Holmes

Elizabeth A. Holmes was sentenced on Friday, November 18, 2022 to 135 months (11 years, 3 months) in federal prison for defrauding investors in Theranos, Inc. of hundreds of millions of dollars.

In addition to the 135 month prison term, U.S. District Judge Davila sentenced Holmes to three years of supervision following release from prison. The parties were instructed to meet and agree on a future date for a hearing to determine the restitution amount to be paid by Holmes. No fine was assessed. Holmes was ordered to surrender on April 27, 2023, to begin serving her prison sentence.

Ethics: Overconfidence Bias

The Overconfidence Bias is the tendency people have to be more confident in their own abilities, including making moral judgments, than objective facts would justify.

The overconfidence bias is the tendency people have to be more confident in their own abilities, such as driving, teaching, or spelling, than is objectively reasonable. This overconfidence also involves matters of character.

Generally, people believe that they are more ethical than their competitors, co-workers, and peers. For example, a recent study showed that 50% of business people polled believed that they were in the top 10% ethically.

Because of the overconfidence bias, people will often take ethical issues lightly. They simply assume that they have good character and will therefore do the right thing when they encounter ethical challenges. In fact, studies show that the overconfidence bias causes people to overestimate how much, and how often, they will donate money or volunteer their time to charities.

So, overconfidence in our own moral character can cause us to act without proper reflection. And that is when we are most likely to act unethically.

https://ethicsunwrapped.utexas.edu/glossary/overconfidencebias .

Ethics: Framing

A frame of reference, or point of view, refers to the way we look at a given situation. How a person views that situation can affect her understanding of the facts and influence how she determines right from wrong.

Some frames minimize or even omit the ethical aspects of a decision. For example, studies show that if people are prompted to frame a situation only in terms of money or economic interests, they often leave out ethical considerations.

In a famous study, a day care center having difficulty with parents picking up their children on time started charging a fine for being late. Parents then reframed the issue from an ethical one ("It's not nice of me to burden the staff in this way") to a business one ("I can buy the staff's time by paying this fine"). Late pick-ups increased rather than decreased due to this change in the parents' frame of reference.

So, by remembering to consider the ethical implications of any situation, we can keep ethics in our frame of reference when making decisions.

https://ethicsunwrapped.utexas.edu/glossary/framing

Review your notes on Elizabeth Holmes and Theranos. Using those notes answer the following questions.

1. How did Elizabeth Holmes and Theranos demonstrate overconfidence bias? What were the consequences of overconfidence bias for Holmes and Theranos?

2. Is it possible that someone who went to Stanford, who patterned her dress after genius Steve Jobs, and who was constantly praised as the young woman who was going to revolutionize health care in the United States might naturally suffer from the overconfidence bias? If so, how might it affect her judgments and actions?

3. Why do you think investors would back a product that had not been proven? Do you think investors—such as millionaires Rupert Mudoch, Betsy DeVos, and the Walton family—were also susceptible to overconfidence bias in their ability to pick and ride a winning start-up? Why or why not?

4. Why do you think Holmes would continue to push the same narrative of personal and company success when faced with increased scrutiny? Explain.

5. Can you think of an example of another company leader who demonstrated overconfidence bias? How did this leader's approach affect the company?

6. Do you think framing played a role? If so, how? If not, why not?

Torts

Intentional Torts

a. False imprisonment/defense of shopkeeper's privilege

b. Infliction of emotional distress

c. Invasion of privacy

1) appropriation of identity:

2) intrusion into seclusion:

3) public disclosure of private facts:

4) false light:

d. Defamation

a.

b.

c.

d.

New York Times v. Sullivan (U.S. Supreme Court, 1964) holding:

e. Wrongful Interference with a Contract

a.

b.

c.

Torts

Negligence elements

1.

e.g. landowner duties:

2.

Special circumstance: negligence *per se*

3.

a.

b.

Palsgraf v. Long Island Railroad

4.

Damages in tort lawsuits

Compensatory (definitions and which may have limits)

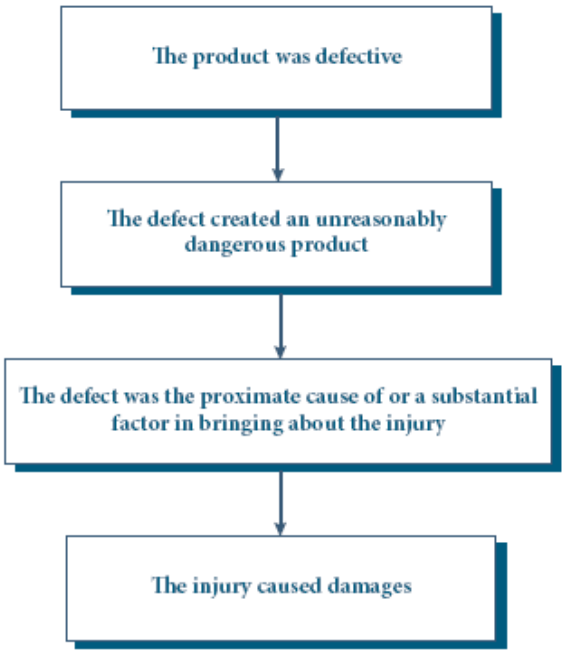
Punitive (definition and limits on punitives)

Defenses to Negligence Claim

1. Assumption of Risk

2. Comparative Negligence (reduces damages award)

Strict Product Liability elements



from Legal Environment of Business, Meiners, Ringleb, Edwards

292 Kan. 749
Supreme Court of Kansas.

Gabriel GAUMER, Appellant,
v.
ROSSVILLE TRUCK AND TRACTOR COMPANY, Inc., A Kansas Corporation; International Truck and Engine Corporation, A Delaware Corporation; and CNH America, LLC, A Limited Liability Company, Appellees.|

Aug. 12, 2011.

The determination of whether sellers of used products are subject to strict liability in Kansas is made under both the state's common law and the Kansas Product Liability Act, K.S.A. 60–3301 *et seq.*

FACTUAL AND PROCEDURAL BACKGROUND

Gaumer's father purchased the used hay baler "as is" on June 3, 2003. The baler was missing a safety shield on its side, which would have been part of the baler when it was originally manufactured and sold.

A week later, the baler malfunctioned while Gaumer was using it. He parked the baler and let its engine idle while he knelt or squatted near its side to investigate the problem. Gaumer placed his right hand on the outside of the baler for support and observed its internal operation through the hole left by the missing safety shield. When he attempted to stand up straight, he slipped, and his left arm entered the same hole in the baler. Gaumer's arm became caught in the baler's internal moving parts, and he suffered an amputation just below his left elbow.

Gaumer claimed Rossville was negligent by failing to warn about the potentially dangerous condition of the baler without the safety shield, negligent by failing to inspect the baler before the sale to Gaumer's father, and strictly liable for selling a product in an unreasonably dangerous condition. …

. . . The Kansas Legislature passed the KPLA in 1981, at least loosely basing it on the Model Uniform Product Liability Act (MUPLA) published by the Department of Commerce in 1979. …

… [Model Uniform Product Liability Act] and the KPLA both state that a "product liability claim" is

> "any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage, or labeling of the relevant product. It includes, but is not limited to, any action previously based on: strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory." 44 Fed. Reg. 62,717; K.S.A. 60–3302(c).

MUPLA further explains that the "purpose of this Act is to consolidate product liability actions that have, at times, been separated under theories of negligence, warranty, and strict liability." ***754** 44 Fed. Reg. 62,719. Moreover, "[w]hile an argument may be made that negligence theory is qualitatively different from strict liability and, therefore, should be preserved, product liability theory and practice have merged into a single entity and can only be stabilized if there is one, and not a multiplicity of, causes of action." 44 Fed. Reg. 62,719. …

… Regarding the precise question before us in this case, MUPLA specifically excludes most sellers of used goods from its definition of product sellers. Its Section 102 states: "The term 'product seller' does not include: ... (3) A commercial seller of used products who resells a product after use by a consumer or other product user, provided the used product is in essentially the same condition as when it was acquired for resale...." 44 Fed. Reg. 62,717.

No such language appears in the KPLA, although the original bill excluded most sellers of used goods from the definition of "product sellers." Upon final amendment, the legislature removed the following:

"The term 'product seller' does not include: …

"(a)(3) a commercial seller of used products who resells a product after use by a consumer or other product user, provided the used product is in essentially the same condition as when it was acquired for resale....

.... In *Brooks v. Dietz*, 218 Kan. 698, Syl. ¶ 1, 545 P.2d 1104 (1976), this court adopted the doctrine of strict liability in tort, as set out in the Restatement (Second) of Torts § 402A (1964), for the sale of a dangerously defective product. Section 402A states:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Brooks is significant because the text of § 402A thus makes no distinction between sellers of used and new products.
… *Policy Considerations*
As discussed previously, the KPLA does not directly address public policy considerations. But Kansas has recognized several policy rationales for its broadly applicable product liability common law, including: (1) "a desire to achieve maximum protection for the injured party"; (2) promotion of "the public interest in discouraging the marketing of products that have defects that are a menace to the public," *Kennedy*, 228 Kan. at 444–46, 618 P.2d 788; and (3) a desire to protect consumer expectations. *Lester*, 230 Kan. 643, 641 P.2d 353. These policy ***766** considerations favor extension of strict product liability to sellers of used goods.

We note that MUPLA also enumerates several policy considerations in its "Criteria for the Act":

"(1) To ensure that persons injured by unreasonably unsafe products receive reasonable compensation for their injuries....

"(2) To ensure the availability of affordable product liability insurance with adequate coverage to product sellers that engage in reasonably safe manufacturing practices....

"(3) To place the incentive for loss prevention on the party or parties who are best able to accomplish that goal....

"(4) To expedite the reparations process from the time of injury to the time the claim is paid....

"(5) To minimize the sum of accident costs, prevention costs, and transaction costs....

"(6) To use language that is comparatively clear and concise." 44 Fed. Reg. 62,714–15. …

... Conclusion
Kansas law permits pursuit of a strict liability action against the seller of a used product. The decision of the district court is therefore reversed. The Court of Appeals is affirmed. The case is remanded to the district court for further proceedings consistent with this opinion.

SHORT TITLE:	CASE NUMBER:

_____ CAUSE OF ACTION—Products Liability Page _____

(number)

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

Plaintiff *(name):*

Prod. L-1. On or about *(date):* plaintiff was injured by the following product:

Prod. L-2. Each of the defendants knew the product would be purchased and used without inspection for defects. The product was defective when it left the control of each defendant. The product at the time of injury was being

☐ used in the manner intended by the defendants.

☐ used in the manner that was reasonably foreseeable by defendants as involving a substantial danger not readily apparent. Adequate warnings of the danger were not given.

Prod. L-3. Plaintiff was a

☐ purchaser of the product. ☐ user of the product.

☐ bystander to the use of the product. ☐ other *(specify):*

PLAINTIFF'S INJURY WAS THE LEGAL (PROXIMATE) RESULT OF THE FOLLOWING:

Prod. L- 4. ☐ **Count One—Strict liability** of the following defendants who

a. ☐ manufactured or assembled the product *(names):*

☐ Does _____ to _____

b. ☐ designed and manufactured component parts supplied to the manufacturer *(names):*

☐ Does _____ to _____

c. ☐ sold the product to the public *(names):*

☐ Does _____ to _____

Prod. L-5. ☐ **Count Two—Negligence** of the following defendants who owed a duty to plaintiff *(names):*

☐ Does _____ to _____

Prod. L-6. ☐ **Count Three—Breach of warranty** by the following defendants *(names):*

☐ Does _____ to _____

a. ☐ who breached an implied warranty

b. ☐ who breached an express warranty which was

☐ written ☐ oral

Principal – Agent / Agency

267 Kan. 685
Supreme Court of Kansas.

Michael LINDSEY, Appellant,
v.
MIAMI COUNTY NATIONAL BANK, Appellee.|

July 9, 1999.

Vehicle owner brought conversion action against bank, which as secured creditor had mistakenly repossessed owner's vehicle rather than debtor's vehicle. The District Court, Douglas County, Jack A. Murphy, J., denied owner's pretrial motion to include a claim for punitive damages and entered judgment on jury's award of $5,500 to owner. Owner appealed. The Supreme Court, Larson, J., held that: (1) bank vice-president's improper actions were not authorized or ratified by the bank, as required for punitive damages claim against an employer for an employee's conduct, and (2) bank's conduct was not wanton, as basis for punitive damages.

Affirmed. …

Opinion LARSON, J.:

Michael Lindsey appeals the trial court's denial of his claim for punitive damages in his suit against the Miami County National Bank (Bank) for conversion after a Bank employee wrongfully took Lindsey's car, believing it to be one in which the Bank had a security interest.

Lindsey was awarded actual damages of $5,500 after a jury trial and now contends (1) a prima facie case is made for punitive damages when a secured creditor, while exercising a self-help repossession, takes property it has no security interest in, (2) the Bank is responsible for punitive damages for the reckless actions of its vice-president, and (3) the trial court abused its discretion in refusing Lindsey's motion to amend his petition to include a punitive damages claim.

The facts as considered by the trial court drove its decision as well as our review on appeal and will be set forth in detail.

In late summer 1996, Todd Norton, a consumer loan officer at the Bank's Paola branch office, asked Steve Beyer, a vice-president and manager of the Bank's DeSoto branch, to repossess Cheryl Johnston's 1983 Datsun 280ZX that was located in Lawrence and was the collateral for a delinquent loan. The repossession was to depend on the condition of the car, and Beyer was asked to visit Johnston, inspect the vehicle, and see if it was worth the cost of repossession and preparation for sale. Beyer was given Johnston's address as well as the make and model of the vehicle. Beyer stated he was not sure if he was told the year or Vehicle Identification Number (VIN) of the Johnston vehicle.

Beyer located Johnston's apartment but not Johnston. However, in a parking lot adjacent to and about 100 feet away, Beyer spotted a faded red Datsun. The vehicle appeared to be abandoned, and ***687** Beyer assumed it to be Johnston's, although contrary to the Bank's standard bank policy, he failed to check the VIN.

The vehicle was actually Lindsey's 1977 Datsun 280Z that was parked in the same corner of the lot each day in order for Lindsey to participate in the State van pool.

Beyer phoned Norton to tell him the vehicle had been located but that a dealer's opinion was needed to ascertain value. After obtaining an opinion from Right Way Motors regarding value and repair costs, Beyer and Norton agreed the Bank should proceed with repossession.

Beyer contacted Leonard Paxton, a tow truck operator in DeSoto who had assisted the bank previously. He gave Paxton the color, make, and model, and described the vehicle which he asked to be towed to Right Way Motors.

Although Beyer usually gave the VIN to those he hired to aid in repossessions, it was not given or asked for on this occasion. The car was towed on August 26, 1996.

When Lindsey returned from work that evening, he found his vehicle missing. He called the police and reported it stolen. He later leased a vehicle.

The Bank gave Johnston notice of the repossession but received no response. Right Way Motors spent $225 in repairs and improvements to prepare the vehicle for sale. The Bank processed the documents necessary to obtain a certificate of title using the vehicle description from the Johnston file.

Right Way Motors found a buyer, and the sale was about to be concluded on October 1 when the buyer discovered the year stamped on the hood was 1977 rather than 1983. When the Bank was notified of the discrepancy, it checked the VIN and found it did not match Johnston's.

Using papers retrieved from the vehicle, Beyer identified Lindsey as the owner and contacted him about the error. Beyer also informed his supervisor, Mary Ellen Gihlcrist, who is the Bank's senior vice president in charge of retail banking and the supervisor for all branch managers. On October 4, 1996, Beyer personally returned the vehicle to Lindsey, explained the mistake, and apologized to him.

…

[Lindsey argues] that an employer is automatically liable for punitive damages under K.S.A. 60–3702 for the reckless actions of a management level employee.

The provisions of K.S.A. 60–3702(d) that are applicable to this case state:

> "(d) In no case shall exemplary or punitive damages be assessed pursuant to this section against:
>
> (1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or
>
> (2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct."

… Nonetheless, Lindsey argues Beyer had full authority over repossessions and the right to conduct them without supervision or direct guidelines, making him more a principal than an employee or agent, resulting in the Bank being directly accountable for his actions.

****724** Although Beyer did have authority to proceed with repossessions without securing the prior approval of Gihlcrist, his supervisor, he did not have carte blanche authority to conduct repossession in any manner he chose or to disregard the Bank's repossession policies, which were well established.

The evidence and affidavits showed the Bank used three methods of repossession: (1) voluntary surrender of the property; (2) utilizing a property recovery agency to locate and repossess the property for the Bank; and (3) repossession by a Bank employee, with a tow truck driver utilized in case of a vehicle.

In each case, the Bank has had a longstanding rule to identify vehicles for repossession using the VIN, make, model, and any ***692** other descriptive information available in the pertinent loan file. The VIN is the most critical piece of information, and the Bank policy required it to be checked both prior to and after the repossession. Where a Bank employee conducted a repossession under method (3), that employee would be the one responsible for verification of the VIN.

… [10] Lindsey also failed to show that the Bank had authorized or ratified Beyer's actions. Authorization and ratification were discussed in *Smith*, 254 Kan. at 342, 866 P.2d 985. Authorization is generally accomplished before or during the employee's questioned conduct and may be based on an express grant of authority or on a course of conduct implying authority. Ratification is more likely accomplished during or after the questioned conduct and may be express or implied.

Employment Law

Chapter 3: The Department [of Labor] in the New Deal and World War II 1933-1945

https://www.dol.gov/general/aboutdol/history/dolchp03

When newly elected President Franklin D. Roosevelt made his appointments to the Cabinet that would help him guide the Nation through its worst ever economic crisis, his Secretary of Labor was said to feel "just a little odd." This was not surprising, since Frances Perkins was the only woman in the Cabinet and the first one ever appointed to such a high federal position. She might also have felt odd because she was the first Secretary of Labor who had not been active in a trade union. The AFL had nominated Dan Tobin, head of the Teamsters, but President Roosevelt was determined to break precedent in more ways than one. He had already decided to place a woman somewhere in his Cabinet. Perkins, who had served brilliantly under him as New York State Commissioner of Labor while he was governor, was the logical choice and Labor was the logical place. She served as Secretary of Labor during the entire Roosevelt Administration, from 1933 to 1945, serving longer than any other Secretary in the Department's history.

By experience and temperament, Frances Perkins was well qualified to lead the Department during this crucial and trying period. Born in 1880 in Boston and raised in New England, Perkins entered social work in New York State after graduating from college. She worked zealously to improve living and working conditions there, coming to state senator Franklin Roosevelt's attention as a representative of the Consumers League lobbying for factory legislation. She served on the state industrial board under Governor Al Smith and eventually became chairwoman. As Commissioner of Labor under Governor Roosevelt she promoted workmen's compensation. When the Depression worsened she developed plans for interstate cooperation to alleviate unemployment.

By the time Perkins came to the Department of Labor in 1933 the economy had virtually collapsed. An estimated 13 million people were unemployed and hundreds of thousands had become homeless wanderers in search of work. The nation's industrial production had fallen by 44 percent since 1929. Millions of farmers faced foreclosure. Banks were failing by the score. Local governments were running out of money for relief programs.

President Roosevelt's approach to the problem was both conservative and innovative. He spurned both the economic orthodoxy of the Hoover Administration and the wishes of many to see drastic, dictatorial action. He surrounded himself with able, creative minds and set out on a flexible and humane program to get the country back on its feet.

Perkins was one of the most creative of FDR's counselors, and she had his ear. Like Roosevelt, she believed that government has a major role to play in regulating the economic order to promote social justice and human freedom. She also believed that in the process the rights of the states and of individuals must be strongly upheld. As Secretary of Labor she successfully promoted many elements that became part of the New Deal, including direct relief of the unemployed, a public works program,

minimum wage legislation, unemployment and old age insurance, abolition of child labor, and the establishment of a true federal employment service.

…

Of all the New Deal reform and relief programs, the most important and durable was Social Security, and without Frances Perkins it might never have been enacted. Long a proponent of public old-age insurance, Perkins had only accepted her post at the Labor Department on the condition that FDR would back her in seeking this goal. She led a campaign to convince the nation that a pension system would both be humanitarian and also help prevent future depressions. By 1935 public opinion was thoroughly in favor of the idea. So was the Congress, goaded by fear of demagogues such as Francis Townsend who were mobilizing millions of despairing elderly citizens with plans for large, guaranteed federal pensions. The **Social Security Act** passed in 1935 and provided direct aid for the destitute elderly and a pension program for many, but far from all, workers. It also provided federal funding for state-operated unemployment insurance programs, as well as aid for the handicapped and for mothers with dependent children. An independent Social Security Board ran the entire system.

…

Finally, after numerous modifications were made and signs of broad public support emerged, the **Fair Labor Standards Act (FLSA)** became law in 1938. Administered by the **Department of Labor**, the Act set a minimum wage of 25 cents per hour and a maximum workweek of 40 hours (to be phased in by 1940) for most workers in manufacturing. The 40-hour week has not changed in 50 years, but the wage level has risen steadily and the coverage has broadened to include most salaried workers.

One of the projects Perkins discussed with Roosevelt before accepting her appointment was to have the Department of Labor help state governments deal with labor problems. In July 1933 she held at the Department a very successful conference of 16 state minimum wage boards (some of the states had minimum wage laws long before the Federal Government). Spurred by this experience, the next year she held a two-day conference on state labor legislation at which 39 states were represented. State officials in attendance were gratified that the U.S. Department of Labor was showing interest in their problems. They called on Perkins to make the labor legislation conferences an annual event. She did so and participated actively in them every year until she left office. The conferences continued under Labor Department auspices for another ten years, by which time they had largely accomplished their goal of improving and standardizing state labor laws and administration.

To institutionalize the work she was trying to accomplish with these conferences, Perkins created the Division of Labor Standards (later redesignated a bureau) in 1934 as a service agency and informational clearinghouse for state governments and other federal agencies. Its goal was to promote, through voluntary means, improved conditions of work. The Division offered many services in addition to helping the states deal with administrative problems. It offered training for factory inspectors. It attracted national attention to the area of workers' health with a series of conferences on silicosis. This wide-spread lung disease had been dramatized by the "Gauley Bridge Disaster" in

which hundreds of tunnel workers died from breathing silica-filled air. The Division also worked with unions, whose support was needed in passing labor legislation in the States.

The unions around the country received a tremendous boost from Washington when the **National Labor Relations Act** of 1935, known as the Wagner Act, gave federal sanction to the right of workers to organize and bargain collectively. It established an independent National Labor Relations Board to oversee representation elections and adjudicate labor disputes. Not an architect of the Act, Perkins sought unsuccessfully to have it administered by the Department. Nevertheless, from the start the Department played an important role in making the law work. The Secretary of Labor has usually been consulted about new appointments to the Board. After the Wagner Act labor union membership swelled from 3.8 million in 1935 to 12.6 million by 1945.

…

Perkins left office shortly after Roosevelt died in May 1945. Although harassed by the Dies committee and others because of alleged communist sympathies and publicly hassled for being a woman in a "man's job," in her 12 years as Secretary of Labor her accomplishments both within and outside of the Department were enormous. She established the competence and reputation of the Department at a higher level than ever before and set a standard for it to aspire to in later years.

Civil Rights Act (1964) https://www.archives.gov/milestone-documents/civil-rights-act

Citation: Civil Rights Act of 1964; 7/2/1964; Enrolled Acts and Resolutions of Congress, 1789 - 2011; General Records of the United States Government, Record Group 11; National Archives Building, Washington, DC.

This act, signed into law by President Lyndon Johnson on July 2, 1964, prohibited discrimination in public places, provided for the integration of schools and other public facilities, and made employment discrimination illegal. It was the most sweeping civil rights legislation since Reconstruction.

In a nationally televised address on June 6, 1963, President John F. Kennedy urged the nation to take action toward guaranteeing equal treatment of every American regardless of race. Soon after, Kennedy proposed that Congress consider civil rights legislation that would address voting rights, public accommodations, school desegregation, nondiscrimination in federally assisted programs, and more.

Despite Kennedy’s assassination in November of 1963, his proposal culminated in the Civil Rights Act of 1964. President Lyndon Johnson signed it into law just a few hours after it was passed by Congress on July 2, 1964.

The act outlawed segregation in businesses such as theaters, restaurants, and hotels. It banned discriminatory practices in employment and ended segregation in public places such as swimming pools, libraries, and public schools.

Passage of the act was not easy, however. Opposition in the House of Representatives bottled up the bill in the House Rules Committee. In the Senate, Southern Democratic opponents attempted to talk the bill to death in a filibuster. In early 1964, House supporters overcame the Rules Committee obstacle by threatening to send the bill to the floor without committee approval. The Senate filibuster was overcome through the floor leadership of Senator Hubert Humphrey of Minnesota, the considerable support of President Lyndon Johnson, and the efforts of Senate Minority Leader Everett Dirksen of Illinois, who convinced enough Republicans to support the bill over Democratic opposition. When the compromise bill was finally put to a vote in the Senate, it passed 73 to 27. It was noted in the Congressional Record that applause broke out in the Senate galleries.

Title VII of the act created the **Equal Employment Opportunity Commission (EEOC)** to implement the law. The EEOC enforces laws that prohibit discrimination based on race, color, religion, sex, national origin, disability, or age in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment.

Employees & Job Applicants https://www.eeoc.gov/employees-job-applicants

The U.S. Equal Employment Opportunity Commission enforces Federal laws prohibiting employment discrimination. These laws protect you against employment discrimination when it involves:

- Unfair treatment because of your **race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age** (40 or older), **disability** or **genetic information**.
- Harassment by managers, co-workers, or others in your workplace, because of your race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.
- Denial of a reasonable workplace accommodation that you need because of your religious beliefs or disability.
- Retaliation because you complained about job discrimination, or assisted with a job discrimination investigation or lawsuit.

If you believe that you have been discriminated against at work, you can file a "Charge of Discrimination." All of the laws enforced by EEOC, except for the Equal Pay Act, require you to file a Charge of Discrimination with us before you can file a job discrimination lawsuit against your employer. In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

Note: Federal employees and job applicants have similar protections, but a different complaint process.

Not all employers are covered by the laws we enforce, and not all employees are protected. This can vary depending on the type of employer, the number of employees it has, and the type of discrimination alleged. Also, there are strict time limits for filing a charge that you should be aware of. Because of this, we strongly urge you to read the following information to help determine your rights and what action you need to take.

Courts and ADR

Federal Court Role and Structure

https://www.uscourts.gov/about-federal-courts/court-role-and-structure

Federal courts hear cases involving the constitutionality of a law, cases involving the laws and treaties of the U.S. ambassadors and public ministers, disputes between two or more states, admiralty law, also known as maritime law, and bankruptcy cases.

The federal judiciary operates separately from the executive and legislative branches, but often works with them as the Constitution requires. Federal laws are passed by Congress and signed by the President. The judicial branch decides the constitutionality of federal laws and resolves other disputes about federal laws. However, judges depend on our government's executive branch to enforce court decisions.

Courts decide what really happened and what should be done about it. They decide whether a person committed a crime and what the punishment should be. They also provide a peaceful way to decide private disputes that people can't resolve themselves. Depending on the dispute or crime, some cases end up in the federal courts and some end up in state courts. Learn more about the different types of federal courts.

Supreme Court

The Supreme Court is the highest court in the United States. Article III of the U.S. Constitution created the Supreme Court and authorized Congress to pass laws establishing a system of lower courts. In the federal court system's present form, 94 district level trial courts and 13 courts of appeals sit below the Supreme Court. Learn more about the Supreme Court.

Courts of Appeals

There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. The appellate court's task is to determine whether or not the law was applied correctly in the trial court. Appeals courts consist of three judges and do not use a jury.

A court of appeals hears challenges to district court decisions from courts located within its circuit, as well as appeals from decisions of federal administrative agencies.

In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws, and cases decided by the U.S. Court of International Trade and the U.S. Court of Federal Claims.

District Courts

The nation's 94 district or trial courts are called U.S. District Courts. District courts resolve disputes by determining the facts and applying legal principles to decide who is right.

Trial courts include the district judge who tries the case and a jury that decides the case. Magistrate judges assist district judges in preparing cases for trial. They may also conduct trials in misdemeanor cases.

There is at least one district court in each state, and the District of Columbia. Each district includes a U.S. bankruptcy court as a unit of the district court. Four territories of the United States have U.S. district courts that hear federal cases, including bankruptcy cases: Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

There are also two special trial courts. The Court of International Trade addresses cases involving international trade and customs laws. The U.S. Court of Federal Claims deals with most claims for money damages against the U.S. government.

Bankruptcy Courts

Federal courts have exclusive jurisdiction over bankruptcy cases involving personal, business, or farm bankruptcy. This means a bankruptcy case cannot be filed in state court. Through the bankruptcy process, individuals or businesses that can no longer pay their creditors may either seek a court-supervised liquidation of their assets, or they may reorganize their financial affairs and work out a plan to pay their debts.

Comparing Federal & State Courts

https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts

The U.S. Constitution is the supreme law of the land in the United States. It creates a federal system of government in which power is shared between the federal government and the state governments. Due to federalism, both the federal government and each of the state governments have their own court systems. Discover the differences in structure, judicial selection, and cases heard in both systems.

Court Structure

The Federal Court System	**The State Court System**
Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts.	The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts. Some are referred to as Circuit or District Courts.
Congress has used this power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.	States also usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc.
Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade may appeal to a U.S. Court of Appeals.	Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals.
A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.	Parties have the option to ask the highest state court to hear the case.
	Only certain cases are eligible for review by the U.S. Supreme Court.

Selection of Judges

The Federal Court System	**The State Court System**
The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate. They hold office during good behavior, typically, for life. Through Congressional impeachment proceedings, federal judges may be removed from office for misbehavior.	State court judges are selected in a variety of ways, including • election, • appointment for a given number of years, • appointment for life, and • combinations of these methods, e.g., appointment followed by election.

Types of Cases Heard

The Federal Court System	**The State Court System**
• Cases that deal with the constitutionality of a law; • Cases involving the laws and treaties of the U.S.; • Cases involving ambassadors and public ministers; • Disputes between two or more states; • Admiralty law; • Bankruptcy; and • Habeas corpus issues.	• Most criminal cases, probate (involving wills and estates) • Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), etc. State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.

Judicial Ethics:

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities

(A) *Respect for Law*. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

(C) *Nondiscriminatory Membership*. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased. The judge should adhere to the following standards:

(A) *Adjudicative Responsibilities*.

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

…..

6 F.4th 1021
United States Court of Appeals, Ninth Circuit.

NATIONAL PORK PRODUCERS COUNCIL; American Farm Bureau Federation, Plaintiffs-Appellants,
v.
Karen **ROSS**, in her official capacity as Secretary of the California Department of Food & Agriculture; Tomás J. Aragón, in his official capacity as Director of the California Department of Public Health; Rob Bonta,* in his official capacity as Attorney General of California, Defendants-Appellees,
and
The Humane Society of the United States; Animal Legal Defense Fund; Animal Equality; The Humane League; Farm Sanctuary; Compassion Inworld Farming USA; Compassion Over Killing, Intervenor-Defendants-Appellees.

No. 20-55631
|
Argued and Submitted April 14, 2021 Pasadena, California
|
Filed July 28, 2021

OPINION

IKUTA, Circuit Judge:

***1025** In 2018, California voters passed Proposition 12, which bans the sale of whole **pork** meat (no matter where produced) from animals confined in a manner inconsistent with California standards. The **National Pork Producers** Council and the American Farm Bureau Federation (collectively referred to as "the Council") filed an action for declaratory and injunctive relief on the ground that Proposition 12 violates the dormant Commerce Clause. Under our precedent, a state law violates the dormant Commerce Clause only in narrow circumstances. Because the complaint here does not plausibly allege that such narrow circumstances apply to Proposition 12, we conclude that the district court did not err in dismissing the Council's complaint for failure to state a claim.

I

Proposition 12 amended sections 25990–25993 of the California Health and Safety Code to "prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." Cal. Prop. 12, § 2 (2018). The relevant portion of Proposition 12 precludes a business owner or operator from knowingly engaging in a sale within California of various products, including the sale of "[w]hole **pork** meat" unless the meat was produced in compliance with specified sow confinement restrictions. Cal. Prop. 12, § 3(b) (2018); *see* Cal. Health & Safety Code §§ 25990(b)(1)–(2), 25991(e)(1)–(4).

On December 5, 2019, the Council filed a complaint against California officials (referred to collectively as the California defendants) challenging Proposition 12 and seeking, among other things, a declaratory judgment that Proposition 12 is unconstitutional under the dormant Commerce Clause, and a permanent injunction enjoining the implementation and enforcement of Proposition 12.[1] The complaint alleged that Proposition 12 violates the dormant Commerce Clause in two ways. First, it impermissibly regulates extraterritorial conduct outside of California's borders by compelling out-of-state **producers** to change their operations to meet California standards. Second, it imposes

excessive burdens on interstate commerce without advancing any legitimate local interest because it significantly increases operation costs, but is not justified by any animal-welfare interest ***1026** and "has no connection to human health or foodborne illness."

On April 27, 2020, the district court granted the California defendants' motion to dismiss and the intervenors' motion for judgment on the pleadings. The district court held that Proposition 12 did not impermissibly control extraterritorial conduct and did not impose a substantial burden on interstate commerce. Although the district court had granted the Council leave to amend, the Council instead moved for entry of judgment, and the district court dismissed the complaint with prejudice. The Council timely appealed. …

…The Constitution grants Congress the power to "regulate Commerce ... among the several States." U.S. Const. art. I., § 8, cl. 3. The Commerce Clause does not, on its face, impose any restrictions on state law in the absence of congressional action. Nonetheless, "[f]rom early in its history," the Supreme Court has interpreted the Commerce Clause as implicitly preempting state laws that regulate commerce in a manner that is disruptive to economic activities in the **nation** as a whole. …

…[18]For dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce. "The mere fact that a firm engaged in interstate commerce will face increased costs as a result of complying with state regulations does not, on its own, suffice to establish a substantial burden on interstate commerce." *Ward*, 986 F.3d at 1241–42. … "[I]f the statute caused the loss [to some sellers] and therefore caused harm to the consuming public, such a result would be related to the wisdom of the statute, not to a burden on interstate commerce." *Id.* (citing *Exxon*, 437 U.S. at 127–28, 98 S.Ct. 2207)).
…III
While the dormant Commerce Clause is not yet a dead letter, it is moving in that direction. Indeed, some justices have criticized dormant Commerce Clause jurisprudence as being "unmoored from any constitutional text" and resulting in "policy-laden judgments that [courts] are ill equipped and arguably unauthorized to make," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610, 618, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Thomas, J., dissenting). Under our precedent, unless a state law facially discriminates against out-of-state activities, directly regulates transactions that are conducted entirely out of state, substantially impedes the flow of interstate commerce, or interferes with a **national** regime, a plaintiff's complaint is unlikely to survive a motion to dismiss. Even though the Council has plausibly alleged that Proposition 12 will have dramatic upstream effects and require pervasive changes to the **pork** production industry nationwide, it has not stated a violation of ***1034** the dormant Commerce Clause under our existing precedent.

AFFIRMED.

Intellectual Property

What is a trademark? *https://www.uspto.gov/trademarks/basics/what-trademark*

A trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It's how customers recognize you in the marketplace and distinguish you from your competitors.

The word "trademark" can refer to both trademarks and service marks. A trademark is used for goods, while a **service mark** is used for services.

A trademark:

- Identifies the source of your goods or services.
- Provides legal protection for your brand.
- Helps you guard against counterfeiting and fraud.

A common misconception is that having a trademark means you legally own a particular word or phrase and can prevent others from using it. However, you don't have rights to the word or phrase in general, only to how that word or phrase is used with your specific goods or services.

For example, let's say you use a logo as a trademark for your small woodworking business to identify and distinguish your goods or services from others in the woodworking field. This doesn't mean you can stop others from using a similar logo for non-woodworking related goods or services.

Another common misconception is believing that choosing a trademark that merely describes your goods or services is effective. Creative and unique trademarks are more effective and easier to protect. Read more about **strong trademarks**.

Owning a trademark vs. having a registered trademark

You become a **trademark owner** as soon as you start using your trademark with your goods or services. You establish rights in your trademark by using it, but those rights are limited, and they only apply to the geographic area in which you're providing your goods or services. If you want stronger, nationwide rights, you'll need to apply to register your trademark with us.

You're not required to register your trademark. However, a registered trademark provides broader rights and protections than an unregistered one.

For example, you use a logo as a trademark for the handmade jewelry you sell at a local farmer's market. As your business grows and you expand online, you might want more protection for your trademark and decide to apply for **federal registration**. Registering your trademark with us means that you create nationwide rights in your trademark.

Using the trademark symbols TM, SM, and ®

Every time you use your trademark, you can use a symbol with it. The symbol lets consumers and competitors know you're claiming the trademark as yours. You can use "TM" for goods or "SM" for services even if you haven't filed an application to register your trademark.
Once you register your trademark with us, use an ® with the trademark. You may use the registration symbol anywhere around the trademark, although most trademark owners use the symbol in a superscript or subscript manner to the right of the trademark. You may only use the registration symbol with the trademark for the goods or services listed in the federal trademark registration.

Trademark, patent, or copyright

Trademarks, **patents**, and **copyrights** are different types of **intellectual property**. The USPTO grants patents and registers trademarks. The U.S. Copyright Office at the Library of Congress registers copyrights.

	Trademark	**Patent**	**Copyright**
What's legally protected?	A **word, phrase, design**, or a combination that identifies your goods or services, distinguishes them from the goods or services of others, and indicates the source of your goods or services.	Technical **inventions**, such as chemical compositions like pharmaceutical drugs, mechanical processes like complex machinery, or machine designs that are new, unique, and usable in some type of industry.	Artistic, literary, or intellectually **created works**, such as novels, music, movies, software code, photographs, and paintings that are original and exist in a tangible medium, such as paper, canvas, film, or digital format.
What's an example?	Coca-Cola® for soft drinks	A new type of hybrid engine	Song lyrics to "Let It Go" from "Frozen"

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith

HIGHLIGHTS https://ballotpedia.org/Supreme_Court_cases,_October_term_2022-2023

- **The case:** Artist Andy Warhol created the Prince Series in the 1980s, based on a photograph taken by Lynn Goldsmith of the musician, Prince. After Prince died in 2016, Goldsmith sued the Andy Warhol Foundation for the Visual Arts (AWF) for copyright infringement. The district court held AWF had not violated copyright law. The circuit court reversed the district court's opinion. AWF petitioned the U.S. Supreme Court for review. Click here to learn more about the case's background.
- **The issue:** The case concerns copyright law, specifically the Copyright Act's fair use defense.
- **The questions presented:** What does it mean for a work of art to be "transformative" as a matter of law under the Copyright Act?[1]
- **The outcome:** The appeal is pending adjudication before the U.S. Supreme Court.

The case came on a *writ* of *certiorari* to the United States Court of Appeals for the 2nd Circuit. T...

Background

In 1984, *Vanity Fair* commissioned artist Andy Warhol to create an image of the musician, Prince, for a magazine article. The magazine licensed a photograph taken by respondent Lynn Goldsmith. Using Goldsmith's photograph as a base, Warhol then produced the Prince Series—a set of 15 images of Prince based on Goldsmith's preexisting photo. Prince died in 2016 and *Condé Nast* magazine published an issue with one of the images from the Prince Series on the cover. After seeing the issue, Goldsmith threatened to sue the Andy Warhol Foundation (AWF), which held the rights to the Prince Series, alleging copyright infringement. AWF sued Goldsmith for a declaration of non-infringement and Goldsmith countersued for copyright infringement under the Copyright Act.[2]

The U.S. District Court for the Southern District of New York granted summary judgment to AWF, ruling the Prince Series was "transformative" as a matter of law. According to the court, the Prince Series relied on a different meaning and message from Goldsmith's original photograph. On appeal, the U.S. Court of Appeals for the 2nd Circuit reversed the Southern District of New York's ruling. Ten days after the 2nd Circuit's ruling, the U.S. Supreme Court issued a decision considering the fair use doctrine in *Google LLC v. Oracle America Inc.* AWF petitioned the 2nd Circuit for an *en banc* rehearing. The 2nd Circuit granted the request and issued an amended opinion.[2]

In their petition for review before the U.S. Supreme Court, AWF argued that the fair use defense "ensures that the Copyright Act does not stymie legitimate creative expression."[2]

The petitioner asked the U.S. Supreme Court to grant review to resolve a conflict of opinion among the U.S. Circuit Courts of Appeal.

Fair Use and the Copyright Act

The Copyright Act (917 U.S. Code § 107) authorizes the public to make *fair use* of copyrighted content. The law outlines four factors for determining whether the use of a work is fair use:

1. the purpose and the character of the use;
2. the nature of the copyrighted work;
3. the amount and significance of the portion of the original work used; and
4. the effect of the use upon the potential market for the value of the original work.

Questions presented

The petitioner presented the following questions to the court:[3]

Questions presented:

> Whether a work of art is "transformative" when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it "recognizably deriv[es] from" its source material (as the Second Circuit has held).[4]

Antitrust

https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

Here is an overview of the three core federal antitrust laws.

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit *every* restraint of trade, only those that are *unreasonable*. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "*per se*" violations of the Sherman Act; in other words, no defense or justification is allowed.

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the

government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

The Sherman Antitrust Act

Fifty-first Congress of the United States of America, At the First Session,

Begun and held at the City of Washington on Monday, the second day of December, one thousand eight hundred and eighty-nine.

An act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
Sec. 1. Every contract, combination in the form of trust or other- wise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such

violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be-forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without. respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or " persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.