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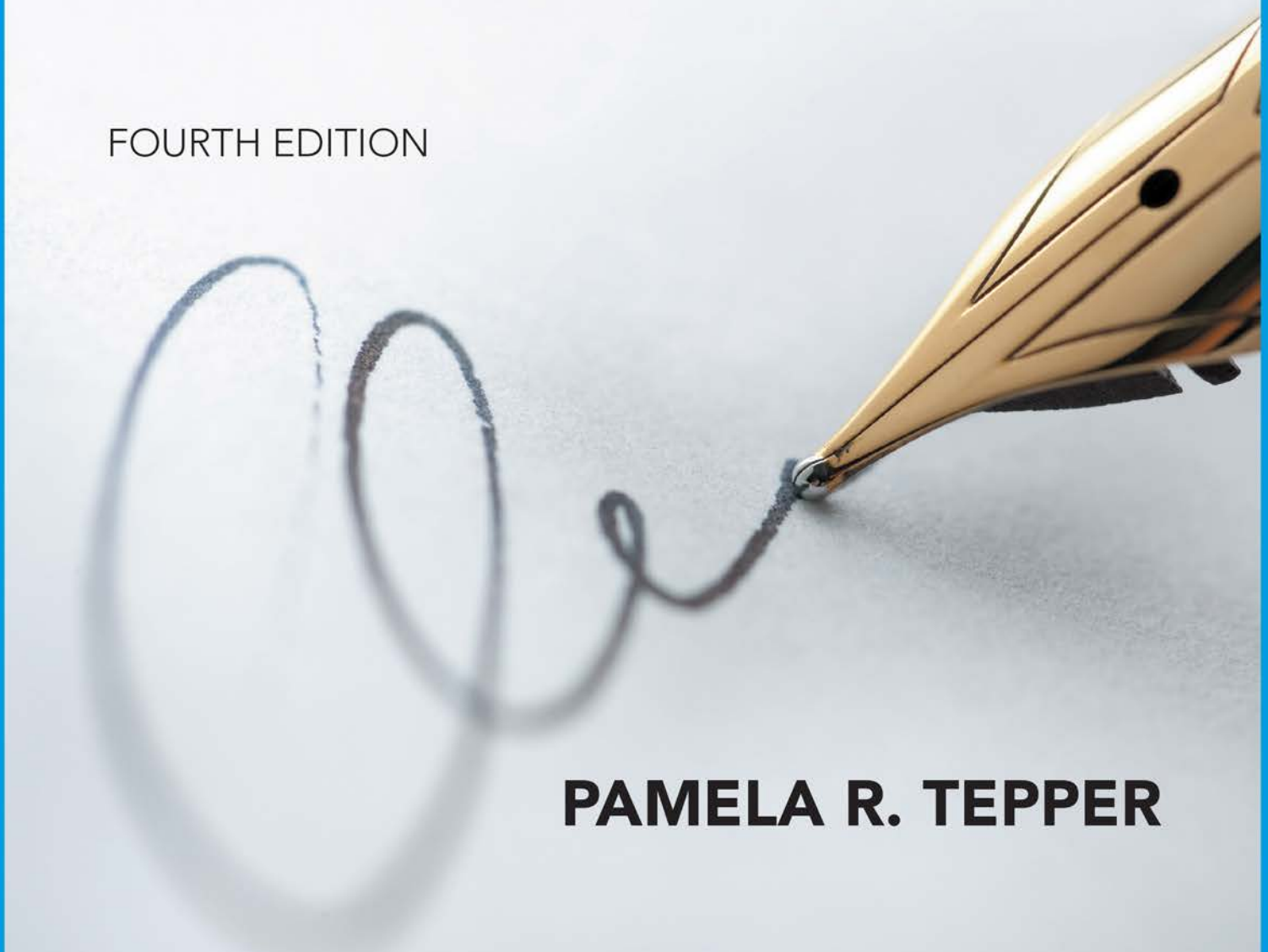
The Law of Contracts

and the Uniform Commercial Code

FOURTH EDITION



PAMELA R. TEPPER

The Law of Contracts and the Uniform Commercial Code

Fourth Edition

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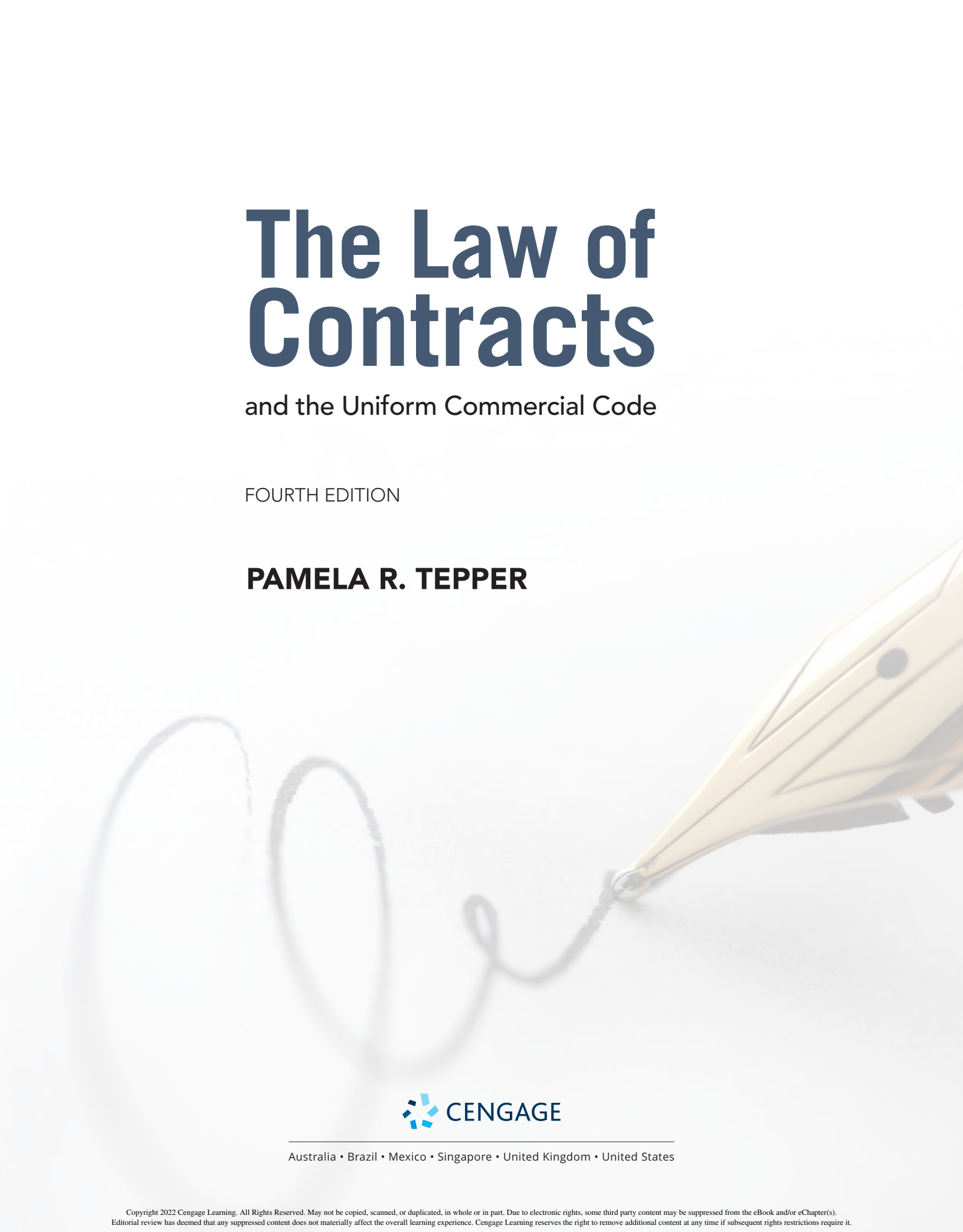

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The Law of Contracts and the Uniform Commercial Code, Fourth Edition
Pamela R. Tepper

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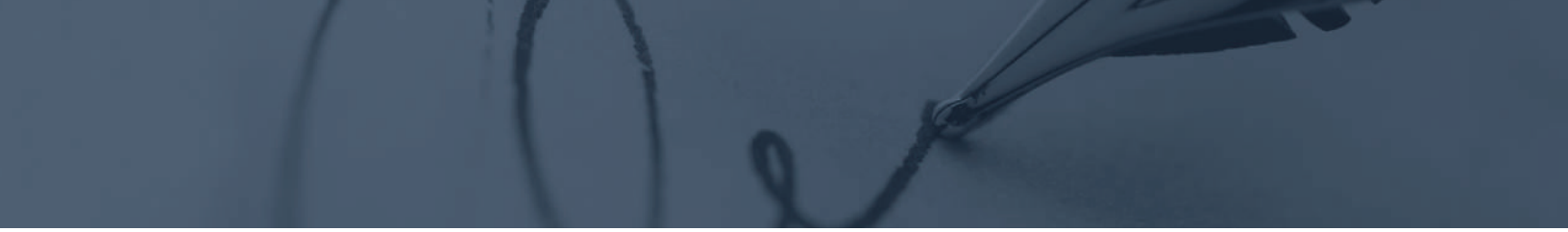

DEDICATION

For my mom, **Irene Tepper**.

I know you are always there for me.

Much love.

CONTENTS

PREFACE

Contracts is one of those subjects that affects our daily lives, but a subject that we all think of as dry, uninteresting, and—should I say it—boring. A yawner! Knowing that, I have attempted to make a supposedly dull subject come to life by finding interesting cases and situations that will make students think and keep their attention. In this fourth edition, updates have been added to keep the topic fresh and current. I have sought out the unusual and the absurd, sometimes, to remind us how important contracts are in what goes on around us. And, hopefully, some of the situations will make you smile, laugh, or shake your head, but most importantly, make you think.

CHANGES TO THE FOURTH EDITION

Keeping it real and interesting was the goal of the previous editions, and the fourth edition of this book is not different. Staying true to my philosophy that contract law can be fun to learn, this book edition focuses on that same philosophy. In this edition, new and updated scenarios have been added to the "Trending Now in Contracts" sections. This section takes "ripped from the headlines" situations and relates them to the subject discussed in the chapter. Trends can range from suing Madonna for starting her concerts too late to Amazon banning customers for too many returns. This section highlights the seemingly banal concepts in the chapter and puts them in a "real" and "current" context—the trends in contract law.

Along with finding new trends in contracts, Learning Objectives always are included at the beginning of each chapter. These will help you focus on what you should be discovering, understanding, and accomplishing in the chapter material. This section acts as a guide to the chapter contents and assists in emphasizing the concepts discussed.

Ethics continues to be a focus in this edition with "Strictly Speaking: Ethics and the Legal Professional" section as well as an exercise devoted to ethics in the practice material at the end of each chapter. The Strictly Speaking section and exercises raise practical issues and concerns that you will face as a paralegal and will, at least, encourage you to think about some of the situations that will face you in the real world.

Critical thinking and practical application are important. That is why new exercises and case assignments have been added to test your knowledge of the chapter concepts as well as your understanding of how to apply those concepts to real fact situations. These exercises reinforce the fact that the legal discussions within the chapter are not isolated, but have practical application that you will face as clients walk through the door or situations develop in your job.

As with any new edition, some general changes, additions, and corrections have occurred: nothing drastic or dramatic that changes the tone or content of the book, but simply changes that make this addition better. All of the changes to the fourth edition are meant to enhance the book and a student's knowledge of contracts and the Uniform Commercial Code.

The third edition of *The Law of Contracts and the Uniform Commercial Code* remains true to the original concept of a practical, understandable, and realistic approach to the law of contracts. The updated features continue the philosophy that learning the law of contracts can be fun, entertaining, and approachable.

CHAPTER FEATURES

For the fourth edition, many features from previous editions remain. There is the introductory fact pattern "*Just Suppose. . .*" often taken from real cases and intended to show the practical application of the concepts in the chapter. The fact pattern is used throughout the chapter to demonstrate how contracts law and its concepts affect our daily lives, often with unusual results.

Certainly, technology plays an important role in contracts. The Cybercise section addresses technology issues in contracts through critical thinking and online research. "Cybercises" will help students find practical applications to the legal concepts discussed in the chapter, but also will assist the student in navigating through online sites to find contract-related information and resources that may help them in their professional life. For those who are not as computer savvy, the Cybercises are there to take some of the mystery out of the Internet and to assist them in gaining a comfort level in navigating through the different search engines and online sites.

"Strictly Speaking: Ethics and the Legal Professional" is still included along with an ethics exercise at the end of each chapter. Regardless of your profession, ethics and professionalism are important—not only to you as a person—but to you as a paralegal. Because

your ethics is your profession, the "Strictly Speaking" and "Ethics Exercise" sections concentrate on many of the ethical issues you may encounter as a paralegal. These sections are important for you professionally and are intended to offer some guidance on the distinction between the role of the attorney and the role of the paralegal in the legal profession. Pay close attention to these areas as you will be encountering many of the issues raised in your work environments.

No legal textbook would be complete without the case law, which is covered in the "Line of Reasoning" section. This section summarizes relevant cases within each chapter and poses thought-provoking questions at the end of each case in the section titled "Questions for Analysis." The cases chosen have relevancy to the chapter concepts and (hopefully) present some fun examples of contract disputes between people with whom you have some familiarity. There are entertainment cases, sports cases, and current events cases sprinkled amidst the "contracts classics."

New legal terminology continues to be identified in bold with margin definitions and is listed in the "Key Terms" section. These sections will help the student identify the new legal vocabulary introduced within the chapter. Of course, the fourth edition retains the summary section, review questions, and exercises. The exercises have been updated and often drawn from real cases or current events to engage the student and to show that the concepts discussed within the chapter have both practical and current application.

Students are always concerned about their futures, especially future jobs. For the new paralegal, it is difficult to show an employer your capabilities when you are just starting in the profession. To alleviate that problem, the "Case Assignments" section continues at the end of each chapter. As in the previous edition, the student will draft, create, and exhibit skills and talents which have been discussed within the chapter. Case Assignments can be used to create a portfolio for the new professional as well to sharpen the skills of the more seasoned paralegal. Additionally, this section shows students what they will be doing in the "real world," as the assignments are intended to be an example of what their attorney or boss could assign them to do—essentially practice in action.

And lastly, each chapter still has a chapter outline, definitions, (with new bolded terms), a summary at the end of each chapter, questions for review, and exercises. The last section of each chapter still has the "Practical Application," which takes the concepts discussed in the chapter and shows how you will use them in practice. Many of the examples have been updated, with some new ones added. In all, the textbook is 19 chapters. Both the common law of contracts and Article 2—Sales—of the Uniform Commercial Code are discussed in detail. The first half of the book focuses on the common law of contracts: from making an offer to assessing the remedy for a breach. The second half of the textbook focuses on the Uniform Commercial Code (U.C.C.), specifically Article 2—which deals with sales—and legal writing with a focus toward drafting. Chapters 12 through 15 introduce the U.C.C. and cite the differences between it and the common law of contracts. Chapter 16 deals with the Internet and Contracts. The remaining chapters illustrate and emphasize drafting skills and critical thinking—the "how to" of contracts. Although not a writing course, the final chapters offer drafting advice and suggestions when students are presented with drafting and writing tasks, including a basic roadmap in the last chapter, which guides students through an analysis of a contracts problem.

SUPPLEMENTAL TEACHING AND LEARNING MATERIALS

Instructor Companion Site

Additional instructor resources for this product are available online. Instructor assets include an Instructor's Manual, Educator's Guide, PowerPoint® slides, and a test bank powered by Cognero®. Sign up or sign in at www.cengage.com to search for and access this product and its online resources.

Instructor's Manual

An Instructor's Manual by the author of the text accompanies this edition and has been greatly expanded to incorporate all changes in the text and to provide comprehensive teaching support. It includes the following:

- Complete lists of any objectives, supplements, activities/assessments, and key terms within each chapter
- A list of what is new to this edition from the last for each chapter
- Chapter Outlines for instructors to follow while planning and teaching
- Additional discussion questions to be used in class, as discussion board prompts, or as reflection activities
- Additional "Check It Out" activities. These identify movies that illustrate the concepts in each chapter, helping learners view these movies differently—hopefully, with an eye toward contracts.

PowerPoint Presentations

Customizable Microsoft PowerPoint® Presentations focus on key points for each chapter. The slides allow instructors to tailor the course to meet the needs of the individual class.

Cengage Learning Testing Powered by Cognero is a flexible, online system that allows you to:

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- Cross-compatible capability. Import and export content into other systems such as Blackboard, Canvas, and Moodle.

MindTap for *The Law of Contracts and the Uniform Commercial Code*

MindTap is a personalized teaching experience with relevant assignments that guide students to analyze, apply, and improve thinking, allowing you to measure skills and outcomes with ease.

- *Personalized Teaching*: Becomes your own with a Learning Path that is built with key student objectives. Control what students see and when they see it; match your syllabus exactly by hiding, rearranging, or adding your own content.
- *Guide Students*: Goes beyond the traditional "lift and shift" model by creating a unique learning path of relevant readings, multimedia, and activities that move students up the learning taxonomy from basic knowledge and comprehension to analysis and application.
- *Measure Skills and Outcomes*: Analytics and reports provide a snapshot of class progress, time on task, engagement, and completion rates.

ACKNOWLEDGMENTS

The fourth edition of this textbook, like previous editions, had so much encouragement and help from friends, family, and the Cengage staff. I have to give a special thank you and shout out to Abbie Schultheis, my Product Manager, for getting this project started and off the ground. Appreciate it! But, my biggest thank you go to Emily Olsen, Associate Content Manager, and Mara Vuillaume, Learning Designer, for always being there when I needed guidance. Both of you made the contents of the book better, and I especially appreciated your insight when I needed clarity. Mara, you really fine-tuned the educational components of the book, and for that, I am indebted. I also want to thank the Cengage group of talented staff who met with me early on and shaped the book into its final product. Since I don't always know who all the "behind the scenes" persons are in the "Cengage family," I want to say a special thank you to all of you. Thank you to Cengage for giving me the chance to update *The Law of Contracts and the Uniform Commercial Code* in this fourth edition. This book always is personal for me and remains true to the original concept of a practical, understandable, and realistic approach to the law of contracts. The new additions are meant to enhance the textbook and allow students to still have some fun while learning about contracts.

My family is always supportive of my writing, especially my mom, Irene Tepper, to whom I have dedicated this book. Sometimes I need a little perspective, and they are there when I need it.

With any book, there are several reviewers who critique and evaluate the contents of the book for accuracy. I am always indebted to them for their time and insight. So, thank you to:

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Molloy College Rockville Centre, NY

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Associate Professor, Legal Studies
Clayton State University, GA

Regina C. Graziani
University of Hartford, CT

And to my students—past, present, and future—thank you for putting up with my crazy passion for this unlikely subject. Without all of you, there would not be a book. So, thank you for supporting what I do.

BIOGRAPHY OF AUTHOR

Pamela R. Tepper is presently the Solicitor General of the Virgin Islands. As Solicitor General, she is lead counsel for the Territory in the national tobacco settlement arbitrations, several environmental consent decrees, and special projects. She manages the Solicitor General and Medical Malpractice Divisions within the Virgin Islands Department of Justice. Her divisions focus mainly on federal and territorial appeals to the United States Court of Appeals for the Third Circuit and Virgin Islands Supreme Court. She manages the approval of contracts executed by the Government of the Virgin Islands. Also, her division oversees habeas corpus petitions, public employee relations lawsuits, and administrative proceedings. She formerly was the Deputy Solicitor General of the Virgin Islands Department of Justice. From 2000 to 2008, Ms. Tepper was the Vice President of Legal Affairs and General Counsel at the Governor Juan F. Luis Hospital and Medical Center, St. Croix, Virgin Islands. For over 20 years, Ms. Tepper has taught at a number of paralegal programs, including: the Southeastern Paralegal Institute and Southern Methodist University programs in Dallas, Texas; the University of Texas, Arlington campus; and the University of the Virgin Islands. Along with this textbook, *The Law of Contracts and the Uniform Commercial Code, Fourth Edition*, Ms. Tepper is the author of *Basic Legal Writing for Paralegals, Second Edition, Legal Research and Writing,* and *Texas Legal Research.* She also co-authored *The Litigation Paralegal: A Systems Approach, Sixth Edition.* Ms. Tepper graduated from Hamilton College with a B.A. and earned her J.D. at New England Law in Boston, Massachusetts. She is licensed to practice law in Texas and the Virgin Islands.

PART 1

An Introduction to Contracts

Contract Law: A General Introduction

CHAPTER OUTLINE

CHAPTER OBJECTIVES

After reading this chapter, you should be able to:

- Distinguish between the common law of contracts and the Uniform Commercial Code
- Review a case decision and dissect its contents
- Describe the significance of the Restatement of Contracts
- Identify laws governing electronic transactions
- List legal resources used in researching and drafting contracts

Just Suppose . . .

You receive a letter from a sweepstakes sponsor saying that you have just won $3.5 million. Excitement! Happiness! Retirement! You have been receiving these letters for years, and finally, it's your day. All those magazine subscriptions paid off. You receive telephone calls from the sponsor, encouraging you to respond to the letter. But, when you attempt to claim the prize, the company informs you that you are not the grand prize winner. The fine print actually said, "here's a draft of the letter I'll write should you win our Superprize." In fact, the company informs you that you were never officially entered into the contest after all. You believe you have won the "Superprize" despite what the company maintains. The question is whether the actions of the company created an enforceable contract. This is what the world of contracts is all about—everyday situations experienced by everyday people.

Introduction: Welcome to My World!

For many, mention of the word "contracts" sends chills and fear through their bodies. Most think of contracts as elusive, unapproachable, and even boring. Not so! When approached with an open mind, contracts can be eye-opening and, yes, entertaining, just like our situation at the beginning of the chapter.

Because the law of contracts affects virtually all aspects of daily life, it is important to understand its importance as well as its significance. The simplest task involves contract law. For example, when you purchase groceries at the food market or online, contract law applies; when you purchase an item with your credit card, contract law applies; when you hire someone to cut your lawn, contract law applies; and even when you sell your old textbooks on eBay, contract law applies. As you will learn, the question is what type of contract law applies, which is why it is important to have a working knowledge of contract law. Once you have finished this textbook, you will be amazed at how empowered and more informed you will be. We will build logically on the basic concepts of contract law until you have a working knowledge of the subject. The first half of this book focuses primarily on the common law of contracts and the *Restatement of Contracts*; while the second half of this book focuses on statutory law, such as the Uniform Commercial Code (U.C.C.) and some of its newer cousins developed essentially as a response to e-commerce and the Internet.

In this chapter, you will be introduced to some of the sources of contract law and related concepts; you also will learn where to find information to assist you in understanding contract issues and problems. Later chapters delve into more details with cases and everyday examples. So, forget all those preconceived notions as to what you thought contracts were all about, and let's take a practical approach so that you can actually use what you will learn.

1.1 The Law of Contracts: The Past, the Present, and the Future

Before we delve into the details, an understanding of the laws that govern contract transactions is important. Contract law can be divided into two broad categories: common law contracts and statutory contract law, specifically the U.C.C. Each area is equally significant in contract law. Similarly, with the Internet and new technologies bursting onto the scene (and changing every day), the law still is developing with the courts and legislatures setting standards and passing statutes in an attempt to regulate how we do "our business" in that environment. That is why understanding the basics of contract law and the U.C.C. become increasingly more significant.

THE COMMON LAW OF CONTRACTS: DEVELOPING THE CASE LAW

Prior to the creation of **statutes**, the law developed primarily from behavior and later through judge-made law. Our American system borrows its origins from English law, in which disputes were brought before a tribunal of judges who analyzed traditions, behavior, and the rules of a community to render a decision. Eventually, through the development of a formal American court system, judges handed down decisions creating standards for future judges (and citizens) to follow, called **precedents**. These precedents create the legal concept of **stare decisis**—stand by the thing decided. Through stare decisis, judges review past decisions and apply similar rules to similar situations. In doing so, stare decisis allows for fairness and some level of predictability in the decisions that are made by judges. But this principle is not static. As the world changes, precedents often adjust to the changing needs of society. Think about how the

statutes
Laws passed by a legislature

precedent
Prior decisions of the same court or a higher court that a judge must follow

stare decisis
"Stand by the thing decided"; related to the concept of precedent; rule that a court should apply the same legal principle to the same set of facts and apply it to later cases that are similar

Internet has affected how we do business and how the law has had to adapt to the new technologies. However, we do use the past to guide us into our future.

Setting and following precedents became the foundation of what now is known as the **common law**. The common law of contracts is, therefore, the law based upon English traditions and created by judges to settle disputes arising out of contractual relationships.

common law
Law found in the decisions of the courts rather than statutes; judge-made law

Case Law

Case law is derived from the judge-made decisions interpreting the various types of law that includes the common law (case law), **constitutions**, statutes, **administrative law**, and **procedural rules**, such as the Federal and state rules of civil and criminal procedure and evidence. The case law builds its decisions based upon past precedents upon which judges rely. Precedents are either **mandatory authority**, which must be followed by a court, or **persuasive authority**, which may be considered by a court, but do not have to be followed. Throughout this text, cases will be used to illustrate legal principles relating to the topics discussed in a chapter. Cases are generally structured as follows:

constitutions
Documents that set out the basic principles and general laws of a country, state, or organization

administrative law
Body of laws that are imposed on administrative agencies by the courts or legislatures

procedural rules
Rules established by courts and legislatures that parties must follow

mandatory authority
Legal authority that must be followed by a court

persuasive authority
Legal authority that may be followed by a court; usually from another jurisdiction or secondary source

The Parties: The beginning of a case identifies the persons or entities involved in the case. Usually, the **Plaintiff** files the **complaint** or lawsuit against the **Defendant**. Typically, the plaintiff is the wronged or injured party and the defendant is the one who is responding to the complaint.

Plaintiff
Person or entity that files lawsuit

complaint
Beginning document that commences a lawsuit

Defendant
Person or entity that responds to the lawsuit

The Court: Included in the beginning of the case also is the identification of the court in which the case is filed as well as the **docket number**. The docket number is the administrative number assigned to the case by the court. Along with the general number, the docket number often identifies the court in which a case was filed and the year. Some of the cases you will read originate in a trial court, which is where a lawsuit commences. When a losing party challenges a decision at the trial level, they can appeal to a court of appeals. Depending on the jurisdiction, some states have a three-tiered court system and others a two-tiered system. This is important because you need to understand from which court a decision originates. The highest appeals court has more precedential value than an intermediate court. Of course, in the United States the highest court is the U.S. Supreme Court, whose decisions have precedence in all states. U.S. Supreme Court cases are the "law of the land." This text is beyond a detailed discussion of the U.S. court system, but suffice it to say that understanding the U.S. federal court system and state court systems is important in knowing which case law you will be searching for when presented with assignments from an attorney.

docket number
Administrative number assigned by the court

The Decision: Following the identity of the parties and the court is the decision. The decision encompasses the court's **reasoning** based upon the facts and law of the situation. In the reasoning, the court identifies the issues between the parties and applies the applicable legal principles. Most cases have **dicta or dictum**, which is the part of the court opinion that is not used as the basis for the court's result. Dictum is not part of the reasoning. However, through the reasoning, the court will reach a result known as the **holding**. The holding is the legal principle for which the case stands. The holding sets the precedents for which other courts can and will follow. All these components create the basis of our case law. Exhibit 1-1 is an example of the beginning of a case from the U.S. Supreme Court Internet site. It should be noted that a court Internet site reports the case unannotated as compared to a commercially published annotated case. The annotated case includes such items as a **case summary**, which summarizes the holding and history of the case; **case headnotes**, which summarizes points of law contained within a case; and other aids, which assist in legal research. These aids are not part of the official version of the case and are not part of the court's reasoning or holding.

reasoning
A court's legal basis for deciding a case

dicta (dictum)
Part of a case decision that is not directly related to the reasoning of the court in reaching the result of the case

holding
The legal principle that a case stands for; the result

case summary
Section at the beginning of a case that summarizes general information about the case; it is usually prepared by the publisher of the case and the court

case headnotes
Short case summary at the beginning of a case that identifies a point of law within a case; prepared by the publisher and is not part of the formal court opinion

EXHIBIT 1.1 Example of the introductory information from a U.S. Supreme Court case

1

(Slip Opinion) OCTOBER TERM, 2009

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court, but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES ← Identity of court

Syllabus ← Summary of case not the law or actual opinion

JERMAN *v.* CARLISLE, McNELLIE, RINI, KRAMER & ULRICH LPA ET AL. ← Parties

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ← Appeal information from lower court

No. 08–1200. Argued January 13, 2010—Decided April 21, 2010 ← Date court handed down opinion

Docket number

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 *et seq.*, imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. A debt collector who "fails to comply with any [FDCPA] provision . . . with respect to any person is liable to such person" for "actual damage[s]," costs, "a reasonable attorney's fee as determined by the court," and statutory "additional damages." §1692k(a). In addition, violations of the FDCPA are deemed unfair or deceptive acts or practices under the Federal Trade Commission Act (FTC Act), §41 *et seq.*, which is enforced by the Federal Trade Commission (FTC). See §1692*l*. A debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties enforced by the FTC. §§45(m)(l)(A), (C). A debt collector is not liable in any action brought under the FDCPA, however, if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." §1692k(c).

Respondents, a law firm and one of its attorneys (collectively Carlisle), filed a lawsuit in Ohio state court on behalf of a mortgage company to foreclose a mortgage on real property owned by petitioner Jerman. The complaint included a notice that the mortgage debt would be assumed valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt and, when the mortgage company acknowledged that the debt had in fact been paid, Carlisle withdrew the suit. Jerman then filed this action, contending that by sending the notice requiring her to dispute the debt in writing, Carlisle had violated §1692g(a) of the FDCPA, which governs the contents of notices to debtors. The District Court, acknowledging a division of authority on the question, held that Carlisle had violated §1692g(a), but ultimately granted Carlisle summary judgment under §1692k(c)'s "bona fide error" defense. The Sixth Circuit affirmed, holding that the defense in §1692k(c) is not limited to clerical or factual errors, but extends to mistakes of law.

Summary of case

Procedural history

(continued)

Name of case

SYLLABUS

Held: The bona fide error defense in §1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. Pp. 6–30.

(a) A violation resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA cannot be "not intentional" under §1692k(c). It is a common maxim that "ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 7 Pet. 404, 411. When Congress has intended to provide a mistake of law defense to civil liability, it has often done so more explicitly than here. In particular, the administrative penalty provisions of the FTC Act, which are expressly incorporated into the FDCPA, apply only when a debt collector acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that the FDCPA prohibited its action. §§45(m)(l)(A), (C). Given the absence of similar language in §1692k(c), it is fair to infer that Congress permitted injured consumers to recover damages for "intentional" conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving the more onerous administrative penalties for debt collectors whose intentional actions reflected knowledge that the conduct was prohibited. Congress also did not confine FDCPA liability to "willful" violations, a term more often understood in the civil context to exclude mistakes of law. See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125–126. Section 1692k(c)'s requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error" also more naturally evokes procedures to avoid mistakes like clerical or factual errors. Pp. 6–12.

Identifies where discussion of this information is located in the official opinion

(b) Additional support for this reading is found in the statute's context and history. The FDCPA's separate protection from liability for "any act done or omitted in good faith in conformity with any [FTC] advisory opinion," §1692k(e), is more obviously tailored to the concern at issue (excusing civil liability when the FDCPA's prohibitions are uncertain) than the bona fide error defense. Moreover, in enacting the FDCPA in 1977, Congress copied the pertinent portions of the bona fide error defense from the Truth in Lending Act (TILA), §1640(c). At that time, the three Federal Courts of Appeals to have considered the question interpreted the TILA provision as referring to clerical errors, and there is no reason to suppose Congress disagreed with those interpretations when it incorporated TILA's language into the FDCPA. Although in 1980 Congress amended the defense in TILA, but not in the FDCPA, to exclude errors of legal judgment, it is not obvious that amendment changed the scope of the TILA defense in a way material here, given the prior uniform judicial interpretation of that provision. It is also unclear why Congress would have intended the FDCPA's defense to be broader than TILA's, and Congress has not expressly *included* mistakes of law in any of the parallel bona fide error defenses elsewhere in the U.S. Code. Carlisle's reading is not supported by *Heintz v. Jenkins*, 514 U.S. 291, 292, which had no occasion to address the overall scope of the FDCPA bona fide error defense, and which did not depend on the premise that a misinterpretation of the requirements of the FDCPA would fall under that provision. Pp. 13–22.

Holding

(c) Today's decision does not place unmanageable burdens on debt-collecting lawyers. The FDCPA contains several provisions expressly guarding against abusive lawsuits, and gives courts discretion in calculating additional damages and attorney's fees. Lawyers have recourse to the bona fide error defense in §1692k(c) when a violation results from a qualifying factual error. To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is not unique; lawyers have a duty, for instance, to comply with the law and standards of professional conduct. Numerous state consumer protection and debt collection statutes contain bona fide error defenses that are either silent

(continued)

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SYLLABUS

as to, or expressly exclude, legal errors. To the extent lawyers face liability for mistaken interpretations of the FDCPA, Carlisle and its *amici* have not shown that "the result [will be] so absurd as to warrant" disregarding the weight of textual authority. *Heintz*, *supra*, at 295. Absent such a showing, arguments that the FDCPA strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress. Pp. 22–30.

538 F. 3d 469, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, THOMAS, GINSBURG, and BREYER, J., joined. BREYER, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which ALITO, J., joined.

Citation (Page to be determined later)
Holding continued
Lower court citation
Disposition
Justice that authored majority opinion
Justice that filed dissenting opinion
Identifies additional filed opinions with case
Identifies justices that supported majority opinion

Cite as: 559 U.S. ____ (2010) 1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08–1200

Case begins here

KAREN L. JERMAN, PETITIONER *v.* CARLISLE, McNELLIE, RINI, KRAMER & ULRICH LPA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[April 21, 2010]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Beginning of official opinion of the court

The Fair Debt Collection Practices Act (FDCPA or Act) imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. Section 813(c) of the Act, 15 U.S.C. §1692k(c), provides that a debt collector is not liable in an action brought under the Act if she can show "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." This case presents the question whether the "bona fide error" defense in §1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. We conclude it does not.

I

A

Congress enacted the FDCPA in 1977, 91 Stat. 874, to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers. 15 U.S.C. § 1692(e). The Act regulates interactions between consumer debtors . . .

(Opinion continues) For complete opinion, www.supremecourtus.gov/opinions

THE RESTATEMENTS OF CONTRACTS

Restatements
A compilation of general areas of the law by the American Law Institute

As a response to the volume of case law being decided in this country, a group of lawyers, judges, and law professors formed the American Law Institute (ALI) in 1923. The purpose of the ALI was to gather the law to create a guide for legal professionals. One of their publications is called the **Restatements**. The ALI initially produced *Restatements* in nine areas, including torts, property, and contracts. It has grown to include over 14 subjects, including such topics as unfair competition and conflicts of laws.

black letter law
The fundamental and well-established rules of law

Unlike cases, the *Restatements* consist of chapters and subsections, which state generally accepted legal rules and principles known as **black letter law**. Each section is followed by comments by the ALI and illustrations. Although the *Restatements* are acknowledged and used by courts, they have never received formal judicial recognition and do not carry the weight of case law or statutes. They are not mandatory authority and are more often used as persuasive authority by a court. Consequently, among legal professionals, their value is debated, and many have mixed views on their importance. However, when a court needs to set forth a generally accepted legal principle, the *Restatements* often are the chosen source of law. Nevertheless, regardless of the debate, the *Restatements* have played an integral part in the development of contract law.

CYBERCISES

Determine whether your state has adopted, in whole or in part, the *Restatement (Second) of Contracts*. Locate three recent contracts cases from your jurisdiction where the Court has cited the *Restatements* as authority in making their decision.

Presently, the ALI has published a *Restatement (First) of Contracts* and a *Restatement (Second) of Contracts,* which are divided into 16 general chapters. Within each chapter, a general rule of law is stated followed by a commentary and examples of how the rule is applied. Usually these examples have developed from previous cases decided by judges. The *Restatements of Contracts* provide a detailed account of the law of contracts. The *Restatements* are sometimes adopted by state legislatures, making them part of the statutory law, but this is the exception and not the rule. As the Supreme Court of Oregon observed:

> Although this court frequently quotes sections of the *Restatements* of the American Law Institute, it does not literally adopt them in the matter of legislative enacting …. The *restatements* themselves purport to be just that, "*restatements*" of law found in other sources, although at times they candidly report that the law is in flux and offer a formula preferred on policy grounds.
>
> *Brewer v. Erwin,* 600 P.2d 398, 410 (Or. 1979)

Despite the discussion of their place as legal authority, the *Restatements* are a good guide to understanding general principles of law and are an attempt to incorporate the common law principles coming from cases into one place.

THE UNIFORM COMMERCIAL CODE: THE LAW OF COMMERCIAL TRANSACTIONS

As our society became more mobile, difficulties arose in doing business from state to state; there was a need for uniformity in the commercial laws among the states. Often the practices of one area or state differed from another, creating an impediment to resolving contractual problems that arose between merchants, consumers, or both. To deal with this problem, the National Conference

of Commissioners on Uniform State Laws was created. The Conference's task was to develop uniform standards of practice in commercial law.

The earliest acts passed by the Conference were the Negotiable Instruments Act, the Sales Act and the Bill of Lading Act. Unfortunately, these acts did not fulfill the needs of the commercial marketplace. The older acts were the prelude to the Conference's most notable achievement, the **Uniform Commercial Code (U.C.C.).**

Uniform Commercial Code (U.C.C.)
Statutory contract law that has been adopted in a whole or part by all the states

Originally, the U.C.C. consisted of nine articles, but two additional ones have been added—Article 2A Leases and Article 4A Fund Transfers—making the total now eleven articles. The articles are outlined in Exhibit 1-2. Because it has been adopted in whole or in part by all fifty states, including the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, the U.C.C. is considered statutory law. With the adoption of the U.C.C. in the United States, merchants and business people can conduct their contractual arrangements with higher degrees of certainty and reliability. The U.C.C. is an important source of contract law and governs commercial contract law. It is fair to say that the U.C.C. modifies the common law to suit the needs of modern business. Thus, the second half of this book is devoted to the U.C.C.'s Article 2, Sales—the statutory counterpart to the common law of contracts.

Most legal professionals refer to the Uniform Commercial Code as the U.C.C. It is common to use this abbreviated reference. However, be sure if you are preparing a formal document always write the complete proper name, indicate the shorthand reference in a parenthetical, and then use the shorthand terminology. In conversation, any legal professional will understand when you reference the U.C.C.

EXHIBIT 1.2 Articles of the Uniform Commercial Code

ARTICLE	PURPOSE
Article 1 General Provisions	Sets out the general purposes of the U.C.C. and the definitions used in the Code.
Article 2 Sales	Applies to all transactions involving the sale of goods.
Article 2A Leases	Provides framework for the negotiation and enforcement of leases.
Article 3 Negotiable Instruments (formerly known as Commercial Paper)	Governs presentment of checks and transactions relating to banks.
Article 4 Bank Deposits and Collections	Read in conjunction with Article 3, focuses on the rules and regulations of bank deposits and collections of commercial paper.
Article 4A Fund Transfers	Governs electronic methods of payment and rights and obligations associated with those transfers.
Article 5 Letters of Credit	Sets out requirements for commercial transactions involving credit arrangements between banks and their customers.
Article 6 Bulk Sales (formerly known as Bulk Transfers)	Governs the sale and transfer of business assets and notice requirements to creditors. Most states have repealed this section; some have adopted the revision proposed by the Uniform State Law Conference.
Article 7 Warehouse Receipts, Bills of Lading, and Other Documents of Title	Governs transactions regarding documents of title and when title passes to a party.
Article 8 Investment Securities	Sets out requirements for security transactions and investments in registered form.
Article 9 Secured Transactions; Sales of Account and Chattel Paper	Governs any transaction that creates a security interest in personal property or fixtures, chattel paper, or accounts.

THE LAW OF SALES: ARTICLE 2

The law of domestic sales in the United States is usually governed by Article 2 of the U.C.C. When a seller sells goods to a buyer, normally, some form of the U.C.C. will apply to the transaction. A notable exception is the state of Louisiana. However, its Civil Code Law of Sales has been revised to parallel Article 2. As you will learn later in the text, Article 2 is divided into seven parts, consisting of sections usually followed by a commentary about the section. If your jurisdiction has adopted Article 2, the section is generally followed by the respective case law in your state.

WHICH LAW APPLIES: COMMON LAW OR THE U.C.C.?

In most circumstances, determining whether a transaction is governed by the common law of contracts—case law—or the U.C.C. is pretty straightforward. And then there are those times when determining the answer to the question is not so simple. As a general rule, transactions that do not involve a sale of goods use the common law of contracts. These transactions ordinarily involve services or sales between nonmerchants, such as if a paralegal student sells her used textbook to another paralegal student, neither is considered a merchant and the common law of contracts would apply; or if your spouse hires a company to paint your garage, the common law of contracts applies because no sale of goods is involved.

CYBERCISES

Find out when your state adopted the Uniform Commercial Code and whether it has adopted all articles or just some of them. Also, ascertain whether your state has adopted some form of Article 6, Bulk Sales, or has adopted another approach to bulk sales transactions.

The U.C.C., Article 2, applies to transactions involving the sale of goods and merchants. When you purchase a car from a local car dealer, the U.C.C. applies; similarly, the purchase of your new computer from a retailer involves the U.C.C. It seems simple, right? Not so fast. As you might have guessed, the law gets a bit more complicated when a transaction is not as easily identifiable or involves a mix of sales and services. Examine *TK Power, Inc. v. Textron, Inc.* Here the Court had to decide whether to apply the common law of contracts or the U.C.C. to the transaction. Knowing which law applies is never easy. Courts must make such distinctions every day—often with differing results.

LINE OF REASONING

In *TK Power, Inc. v. Textron, Inc.,* 433 F. Supp. 2d 1058 (N.D. Cal. 2006), the court had to determine whether the U.C.C. or the common law of contracts applied to a failed transaction for the creation of prototype battery chargers to be used on battery-operated golf carts. TK Power was supposed to develop a battery prototype for Textron in three phases, with the last phase being the purchase and sale of the custom-made battery. The main issues for the court to decide were (1) whether TK breached its obligations in timely developing the prototype battery; (2) whether a contract existed for the final phase which was the purchase of the prototype battery; and (3) whether the common law of contracts or the U.C.C. applied to the transaction. The Court extensively discussed the attributes of the transaction, carefully distinguishing the characteristics of common law contract transactions for services versus a U.C.C. based transaction in sales. In the end, the Court found that this was a service-oriented contract, and the U.C.C. did not govern. Locate a copy of the case and prepare a case brief focusing specifically on the court's reasoning for its decision.

(continued)

QUESTIONS FOR ANALYSIS

Review *TK Power, Inc. v. Textron, Inc.* What facts did the court rely upon in reaching its result? What issues were distinguishing for the court in finding that the transaction was governed by the common law rather than the U.C.C.? Would the court's decision have been different had TK Power completed the development of the prototype battery and sold it to Textron? Why or why not?

CONSUMER-BASED LAWS: PROTECTING THE PUBLIC

The U.C.C. is not the only statutory law that monitors and enforces commercial and sales transactions. Since Article 2 of the U.C.C. primarily applies to merchants, Congress and the states have passed numerous legislative protections to level the playing field for consumers. The most notable is the federal **Magnuson–Moss Warranty Act** passed by Congress. This act applies to warranties for transactions for products used by "households, families or individuals." Notice that when you purchase a hair dryer, vacuum cleaner, or headphones, there is a warranty prominently attached or displayed on the item. The warranty is either a "full warranty" or a "limited warranty" setting forth your rights as a consumer if the product is defective. Of course, a full warranty is better than a limited one, but with a full warranty, the Magnuson–Moss Act adds more requirements. Because each type of warranty has certain legal requirements, most products we purchase have limited warranties (which is shocking, no doubt!).

Magnuson–Moss Warranty Act
Federal law that applies to warranties for transactions for products used by a household, family, or individuals

States have a myriad of consumer-based laws. These laws are specific to the state that passed the law and consequently are not uniform around the country. Consumer laws in Illinois are different than those found in Iowa, which differ from those in South Carolina. The common thread with any consumer protection law is its intent to protect us—the consumers—from merchants or manufacturers who may act unscrupulously or place in the stream of commerce, defective products that can harm. Probably the most notable and familiar consumer protection laws are state "lemon laws." You know about them. They are the laws that protect consumers from cars that do not meet quality and performance standards. Most states have some form of a lemon law that basically provides recourse to consumers for the purchase of a faulty car, but many states are expanding lemon laws to include such items as motorcycles, RVs, and even computers. Some of these issues will be addressed in more detail in Chapter 5.

One question you may be asking yourself is, "why should I care about consumer protection laws in a contracts course?" The reason is that most consumer transactions involve contracts of some kind. Often these transactions involve our everyday activities, such as purchasing an item at Walmart or Target. Think about it, most of our daily activities involve contracts, which is why the mention of consumer protection laws is important. Our ever-expanding electronic world presents consumer-based issues that many have not even considered. Laws are being deliberated that address those emergent issues as well. That brings us to our next, and relatively new, area of the law and contracts—e-contracts and e-commerce.

CYBERCISES

Locate your state's "lemon law" and compare it with that of another state. Identify the differences and similarities in the laws. What requirements are placed on the merchant that sold the products? Are there time limits associated with each state you chose, and if so, what are those limits?

TRENDING NOW IN CONTRACTS

Blogs are a way to communicate all types of information. Legal blogs are plentiful and can be a good source of seeing trends and discussions about new cases and statutory law. As courts hand down new cases and legislatures pass new laws, blogs not only report the information but also dissect the impact. Many law firms, professional associations, and academics provide excellent insight into complex areas, especially in the emerging and changing world of global e-commerce. Do not overlook these blogs as a resource for identifying new trends or guidance in some of your contract issues.

A NEW WORLD: E-COMMERCE AND THE LAW

Think back when the Internet was in its infancy, and no one had ever heard of an iPhone or iPads; it is almost impossible. Times change and often, the law cannot keep up. Since the law was lagging behind the technology, Congress and some legal scholars were faced with the task of setting some parameters for e-commerce and transactions arising in this new world. The result was some new statutory laws: the **Uniform Electronic Transactions Act (UETA),** the **Electronic Signatures in Global and National Commerce Act (E-Sign),** and the **Uniform Computer Information Transactions Act (UCITA).**

Uniform Electronic Transaction Act (UETA)
A uniform act passed by most states addressing electronic signatures and records

Electronic Signatures in Global and National Commerce Act (E-SIGN)
Federal law that addresses electronic signatures and records

Uniform Computer Information Transactions Act (UCITA)
Uniform law drafted by the NCCUSL to address electronic and Internet transactions; not widely used or accepted in the commercial world

The Uniform Electronic Transactions Act (UETA)

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) recognized the need to develop laws addressing electronic transactions, specifically electronic signatures and the retention of paper documents. Responding to the need, the NCCUSL prepared a draft uniform law—the Uniform Electronic Transaction Act (UETA). This uniform law was designed to address two specific areas: (1) the retention of paper documents, which could be changed into electronic ones; and (2) the effect of electronic signatures on documents, whether from an original document or an electronic one. The result is that an electronic document is equivalent to the original paper counterpart. Many states, including Puerto Rico and the Virgin Islands, have adopted UETA. By adopting UETA, many merchants and banks only need to retain an electronic version of a document rather than the paper version. The law also validated the use of electronic signatures as an equivalent to an original signature on a paper version of a document. Recall when your bank statements contained all your cancelled checks. Now, you may receive a copy of the original checks which are now stored electronically online. Because of UETA, an electronic version of a check has the same effect as the original paper one. For example, if you need to produce a check that you wrote for a transaction, the bank will not produce the original paper version but an exact replica of the original check, routing stamps included. Had laws like UETA not been drafted and adopted, your bank would be required to maintain the paper version of the check. Chapter 16 will address UETA in more detail.

CYBERCISES

Determine the following: (a) when your jurisdiction passed UETA or some form of e-signature legislation and (b) when the law became effective.

Electronic Signatures in Global and National Commerce Act (E-Sign)

Congress answered the emerging needs of e-commerce by enacting E-Sign on June 30, 2000. This federal law lessened the barriers between the paperless and paper-driven worlds of the past. E-Sign specifically allowed the use of electronic

technologies to form and sign e-contracts and e-transactions. The law also provided a mechanism for collecting and storing e-documents. Companies now can validly contract online in a paperless (electronic) world without the impediments previously associated with e-transactions. In fact, contracts with electronic signatures are legally effective following the trend of more and more electronic-based transactions. Ultimately, the standard in our daily lives will be electronic signatures and not the typical "pen to paper" signatures that we used to complete a transaction.

There are some caveats to the use and implementation of E-Sign. Consent to e-sign is necessary. This consent is a protection for consumers, which the law provides for many e-transactions to be valid. Know your state requirements when using e-sign or e-transactions. Along with UETA, E-Sign is discussed in Chapter 16.

Uniform Computer Information Transactions Act (UCITA)

Of the recently drafted and developed e-commerce laws, UCITA is perhaps the most controversial. UCITA attempts to address, in the broadest of terms, all related e-transactions under one uniform law. Highly criticized for its failure to address many consumer-based issues, the law originally was intended to be as sweeping as the U.C.C., but as of the publication of this text, it has only been adopted by two states—Maryland and Virginia. Whether UCITA or a less controversial version will be adopted remains to be seen. Clearly, as the law of information technology expands, laws will be proposed that address the issues that arise as the informational age continues to expand. Exhibit 1-3 is a summary of the laws that apply to contract transactions.

EXHIBIT 1.3 Applicable laws to contract transactions

Common Law	Judge-Made Law (case law): Applies mainly to non-U.C.C. transactions. Usually for services and not sales.
Uniform Commercial Code (U.C.C.)	Statutory Law: Applies to commercial transactions. Article 2 applies to sales. Often modifies the common law of contracts.
Consumer Protection Laws	Statutory Laws: Protects consumer-based transactions at both the federal and state levels.
Uniform Electronic Transactions Act (UETA) Electronic Signatures in Global and National Commerce Act (E-Sign) Uniform Computer Information Transactions Act (UCITA)	Statutory Laws: Provide legal certainty in many e-transactions, such as e-signatures. Most states have adopted UETA in some form. E-Sign the federal equivalent. UCITA was designed to be the electronic commerce equivalent of the U.C.C. but has only been adopted by two states. Laws policing e-commerce arena in formative stages.

TRENDING NOW IN CONTRACTS

E-signatures and digital signatures are here to stay. It is more common now to sign your name electronically than the old way of putting pen to paper. When we purchase goods at our favorite retailer, we sign electronically. And there is no surprise that the electronic signature is often legally binding. Thus, using a scanned signature, typed signature, and digital signature on a document, for example, may be legally binding. E-signatures have become commonplace, especially in international transactions. Companies, such as DocuSign, SignEasy, Adobe Sign, and HelloSign are just a few of the companies that offer software e-signature programs. Keep abreast of this trend in contracts and the case law that is developing in this area.

There is no doubt that the Internet has transformed the way business is conducted both domestically and internationally. Words such as e-commerce, e-business, and e-transactions are common terms used every day. E-commerce has quickly become the norm because of the global reach of technology. Because of the reach and transformation of the global technologies, including the Internet, the law has not always kept pace with technology. Although legislatures have not overlooked the world's increasing reliance on e-commerce and the emerging e-business, which is a natural outgrowth of the new technologies, the legal impact has not always kept pace. As a result, any legal professional must be cognizant that the law of e-commerce, which encompasses the development of the law of e-contracts, is fluid. Courts will be faced with new challenges as cases are argued, and precedents are set. This, coupled with legislatures enacting new laws to address how business is conducted in the e-world, presents new challenges for us all. It is incumbent upon legal professionals to monitor the legal developments as new laws are passed, and cases are handed down by courts. What is important to keep in mind is that with the changing technology and changing business atmosphere, behavior that is acceptable today may be prohibited tomorrow. Your role, as a paralegal, is to know where to find answers to the inevitable questions that will arise in an atmosphere which changes daily in a virtual world. That is the focus of this text—to give you the tools to do your job and know where to find the information to do your job.

This section of the chapter focused on the different laws that apply in contractual transactions from the common law to statutory laws. The next section will help you learn where to find the information you will need to assist you in performing your job.

1.2 Locating the Law: A Starting Point

Beginning a new journey can be a challenge, especially when starting a course of legal study. Figuring out where to find helpful information, either online or in a library can be daunting. Before we settle into learning some of the basic concepts in a contracts course, knowing about resources that will make the journey easier is important. We have already discussed the common law (case law), statutes, and the *Restatements* as areas devoted to understanding contract law. There are other resources to explore, which will assist you in finding the law and drafting documents for commercial transactions. The next section discusses the main resources in the contracts area and is by no means an exhaustive discussion on the subject.

LEGAL TREATISES

legal treatise
Scholarly legal publication on a specific legal subject

A **legal treatise** is a scholarly legal publication that is devoted to the study and interpretation of an area of law. In contracts, the two most famous legal scholars are Professor Arthur L. Corbin, who taught at Yale University, and Professor Samuel Williston, who taught at Harvard University. Both men established themselves as leading authorities on contracts, creating treatises that are the benchmarks in the area. These two treatises are often cited by judges in cases and are quoted extensively. Knowing these names is important in the study of contract law. Their treatises are:

Arthur L. Corbin, *Corbin on Contracts* (Rev. ed. 1993) (15 volume set) (updated with **pocket parts**)

pocket part
Supplement at the end of hardcover reference book that has updated or corrected law

Samuel Williston, *A Treatise on the Law of Contracts* (4th ed. 1990) (updated with pocket parts)

These treatises also can be found online on LexisNexis (Corbin) and Westlaw (Williston), respectively.

Many other treatises have followed but they are the most notable.

HORNBOOK TREATISES

hornbook
Legal book that summarizes a legal subject; usually used by law students

A **hornbook** is a single-volume treatise. Hornbooks often are used in the law school setting and offer detailed, albeit a more condensed version than a legal treatise, view of an area of the law. The leading hornbook for contracts is *Contracts,* 7th Edition (St. Paul, MN: Thomson Reuters West, 2014), by Joseph M. Perillo. This book provides a scholarly commentary on the law of contracts with cases cited in the text and its extensive footnotes.

The most notable hornbooks on the Uniform Commercial Code and Sales are written by James J. White and Robert S. Summers. They are *White and Summers' Hornbook on the Uniform Commercial Code*, 6th Edition (St. Paul, MN: Thomson Reuters West, 2012–2019). The volume is considered the most complete discussion of the U.C.C. as it covers all eleven articles of the Code. This hornbook is a staple among students desiring more detail in the area of the U.C.C.

A more user-friendly introduction to the law is found in a paperback series known as the "nutshell series" published by Thomson West Publishing. They are what the name suggests, a straightforward quick review of virtually any area of the law in a "nutshell" including contracts and the U.C.C. This series is not to be used in your research of a contract case for a work assignment but simply as a supplement to understanding general legal concepts. Unlike the hornbooks mentioned, a "nutshell" should never be cited to support your legal proposition. A case where the court took an attorney to task for "plagiarizing" a legal treatise is *Kingvision Pay Per View v. Wilson,* 83 F. Supp. 2d 914 (W.D. Tenn. 2000).

LINE OF REASONING

Kingvision Pay Per View v. Wilson involved a number of issues, including theft of intellectual property and statute of limitations issues. For our purposes, the notable portion of the case involves the Court's displeasure with the way that one of the attorneys representing the Plaintiff, Kingvision, used a legal treatise. Apparently, the attorney copied a legal treatise "verbatim" in his response to a pleading. The attorney used the treatise to discuss certain aspects of federal procedure and failed to credit the authors of the treatise. In the response, plaintiff's attorney copied approximately seven paragraphs directly from the legal treatise—Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure*—without providing a legal citation. In effect, the attorney represented the treatise as his own work. The attorney also used the treatise in his footnotes in the document, again without giving credit to the legal source. The court in a footnote warned: "Nowhere in the responsive pleading was any credit given to Wright and Miller, which is copyrighted by West Publishing Company. The court does not condone this practice and finds this practice even more distasteful in a case, such as the present, that is predicated on alleged theft of intellectual property." The court concluded that the attorney's practice may have violated ethical rules involving dishonesty and deceit to the court. No other action appears to have been taken, other than the scathing footnote in the case. The court made its point.

QUESTIONS FOR ANALYSIS

Review *Kingvision Pay Per View v. Wilson.* What are the issues in the case? What was the basis of the challenge to the statute of limitations question? What is the central theme in footnote 4 of the court's opinion? How does the footnote have a bearing on the practice of paralegals in researching projects for their attorneys?

LAW REVIEW JOURNALS AND STATE BAR JOURNALS

law review journals
Scholarly publications published by law schools

Law schools publish scholarly journals known as **law review journals**. These journals can be a good source of the law, especially for citing trends in the law. Law reviews contain articles from noted scholars and professors on a myriad of topics and are extremely well researched. The case note sections are authored by students and also are well researched. The articles offer extensive source material in their footnote sections, which can be an invaluable tool when researching a client's case.

State bar journals provide articles on state-specific issues written by attorneys and professors. They are not as detailed as a law review journal article but do discuss trends and hot topics in the law both nationally and statewide. They can be helpful in current topical issues in your jurisdiction, especially in the technology areas.

ENCYCLOPEDIAS

Legal encyclopedias are a great resource. They are found online and in most law libraries. The leading legal encyclopedias are *American Jurisprudence* (Am. Jur.) and *Corpus Juris Secundum* (C.J.S.). Both encyclopedias now are published by Thomson Reuters West and can be found on Westlaw. American Jurisprudence now can be found on LEXIS as well. Both encyclopedias provide excellent detailed overviews of every area of the law and are a great starting point for any assignment in a law office or legal-related job. The encyclopedias provide the black letter law on a subject, Key Numbers, and cases from both state and federal jurisdictions related to the topics in the respective sections. Many states have state-specific encyclopedias, such as California, Texas, and Illinois. For state-specific contract and sales issues, a state-specific encyclopedia is a good starting point for any assignment.

There also are subject-specific encyclopedias which can be helpful. Remember that information in an encyclopedia is general and can help you locate specific cases on the topic you are researching.

STATE PRACTICE SERIES: FORMBOOKS

formbook
Multivolume set of books that contains examples or templates of legal documents to assist in drafting

Virtually all states have state-specific practice series that focus on drafting documents that apply the legal requirements of that state's laws. These series, both in hard-bound books or online, contain forms to assist in drafting a document and are known as **formbooks**. When asked to draft an employment contract or purchase and sale agreement, you want to draft the document according to the laws of your jurisdiction. The state practice series formbooks provide guidance not only on the law of that state but also on how to prepare documents relating to the transaction you need. These series are an invaluable tool for both the paralegal and the legal practitioner. Most states have practice series which will assist you in understanding your state's contract law and the U.C.C. as well as in drafting documents associated with commercial transactions.

A good starting point when beginning a drafting assignment is the formbook of that state's practice series. But be warned that these are forms that can, will, and should be modified for the specifics of a client's needs. Do not use them in a vacuum. Think of them as a guide only. This is a warning that should have been heeded by an attorney in *Eschwig v. State Bar of California*, 1 Cal. 3d 8, 459 P.2d 904, 81 Cal. Rptr. 352 (1969). The Court disbarred him from the practice of law.

LINE OF REASONING

Eschwig v. State Bar of California involves an elderly woman who placed her trust in her attorney, who in turn took advantage of his client. It turns out the attorney did not look out for his client's best interest, only his own. Mr. and Mrs. Handel hired Constantine Eschwig to prepare Mr. Handel's will because he was ill and his death imminent. Within a month of executing the will, Mr. Handel died. Mrs. Handel, 80 years old, asked for advice from Eschwig on how best to handle the probate of her husband's estate. The main asset of the estate was a house on an acre of land. The attorney and his wife offered to purchase the house in exchange for providing for Mrs. Handel's care for the remainder of her life and to pay for the expenses related to both the probate of her husband's estate and his funeral. Eschwig prepared a three-page agreement, which was dated May 7, 1960. All parties signed the agreement. Mrs. Handel then executed a deed in favor of Eschwig's wife, but Eschwig did not inform the Court of the transaction. In California, there was a statute that governed life-care contracts as well as procedures, which must be followed when property is sold from a probate proceeding. Eschwig did not follow the law or the required procedures. The problem, claims Eschwig, is that he used a formbook to draft the three-page contract and failed to read the law on "life-care estates" or the procedures in probate proceedings. As a result, the agreement he prepared did not comply with the law in any respect. To make matters worse and for some reason, Eschwig moved away from the area where he and Mrs. Handel had lived. Eschwig's wife was ill, and they moved to Placerville, California. (No more details are provided in the case.) Mrs. Handel had difficulties living by herself, and ultimately Eschwig moved her to the Placerville area. (Now, remember, Eschwig is supposed to provide care for Mrs. Handel for life.) Eschwig kept moving Mrs. Handel from home to home, trying to find "cheap" care for her. Eschwig claimed that he could not find a home that would care for Mrs. Handel because she was incontinent. The reality was that Eschwig simply would not pay for the added care for Mrs. Handel. Somehow word of Mrs. Handel's situation got back to her Pastor, who applied for conservatorship—a form of guardianship to act on behalf of a person who cannot care for him- or herself. When Eschwig heard of the conservatorship, he requested his wife be considered. The court would not have any of it, appointing a public guardian. The public guardian investigated the situation and realized what Eschwig had done; the guardian notified the court, which nullified the initial contract of May 7, 1960, and the sale of her real property. The court also found that Eschwig acted improperly by unduly influencing his elderly client, prompting a disciplinary action. In the present case, the court reviewed all Eschwig's actions and found him to have violated a number of ethical canons, among which were: he failed to act in good faith; he failed to pledge fidelity to his client; he misrepresented and concealed facts to the court; he violated his ethical obligation to seek the highest possible price on the sale of an estate asset; he acted in his own self-interest; and committed acts of moral turpitude. The court disbarred Eschwig for his actions against Mrs. Handel.

QUESTIONS FOR ANALYSIS

Review and carefully analyze the court's actions in *Eschwig v. State Bar of California*. Would the Court's result have been different had Eschwig reviewed the law and disclosed his interests? Why or why not? If Eschwig had reported the sale to the Court initially, would the resulting disbarment still have occurred? From the facts, what importance does the court place on researching the law prior to preparing a contract document? Explain your responses.

As *Eschwig v. State* showed, maintaining the highest ethical standards are the backbone of a good legal professional. Our ethics and reputation are critical to how we practice law. Although this is not the focus of this textbook, practicing in a professional and ethical manner is your compass to becoming a successful paralegal.

STRICTLY SPEAKING

ETHICS AND THE LEGAL PROFESSIONAL

A well-researched case or properly drafted legal document is important in the practice of law. Part of the practice of law for both attorneys and paralegals are professionalism and ethics. You are nothing without your integrity and your professionalism. From the beginning of your career, pay close attention to "doing the right thing" and "doing things right." In the practice of law, whether in contract law or some other discipline, you will be assisting your attorney in preparing court documents, briefs, and legal documents. Many documents are drafted from forms and are adapted to the client's needs. This is a readily acceptable practice, but it should be distinguished from writing a legal brief where cases are cited, and arguments are made from researching and analyzing the law. This distinction is important. Plagiarism is not an accepted practice when preparing a legal brief or memorandum of law. Legal authority must be cited for the propositions of law presented. If you are preparing a brief in a client's case, copying another's work violates the canons of ethics for both attorneys and paralegals. Throughout this text, reference will be made to the ethical standards required of both attorneys and paralegals in the legal profession. Although the standards are different for attorneys, as a paralegal you must be acutely aware that whatever you do is not only a reflection on you but also on the firm or company with whom you work. For a guide to the acceptable ethical and professional practices for paralegals, visit nala.org, which is the Internet site for the National Association of Legal Assistants, or paralegals.org, which is the Internet site for the National Federation of Paralegal Associations. Both assist in setting the parameters for the practice of paralegals. The American Bar Association also sets forth guidelines for paralegals; these can be accessed at www.abanet.org. Also, most states have specific rules and guidelines governing paralegals. Always check with the state in which you are practicing to determine what rules of ethics and professionalism apply to you.

INTERNET SITES

Internet sites are in constant flux. Often they disappear as quickly as they appear. There are, of course, the fee-based legal research sites: Westlaw and LexisNexis. Both sites contain extraordinary databases, and one or the other is usually available in law firms and legal-related jobs. There are some other, less expensive sites that are alternatives to Westlaw and Lexis. Consult fastcase.com, public.casemakerlegal.net, casetext.com, or scholar.google.com, to name a few.

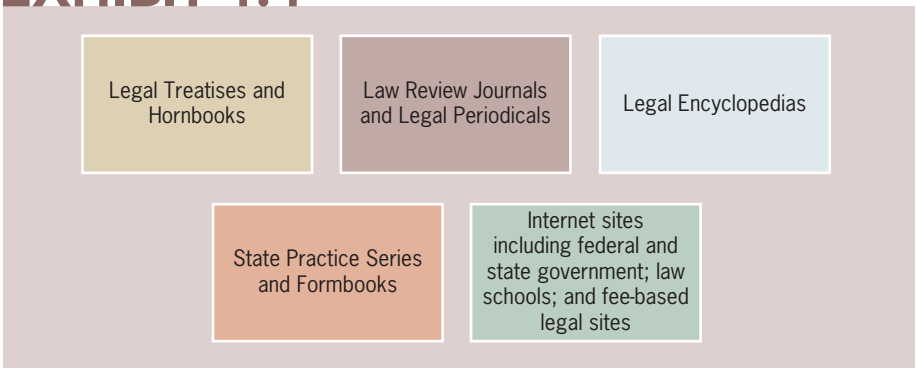
For free sites, findlaw.com and justia.com are two of the more comprehensive. Both provide access to cases and legal articles. Another helpful Internet site is ilrg.com, which provides forms with state-specific provisions. Other sites with general forms are alllaw.com and upcounsel.com. Many law schools provide access to general legal information as well as contract information. One of the most respected sites is law.cornell.edu. Most law schools have comprehensive law libraries online; it is simply a matter of preference. General search engines, such as Google, Yahoo!, Bing, and others, provide access to information without a fee. These search engines will lead you to an online legal library and general information on a subject.

Do not forget government and state Internet sites that provide a wealth of free information from cases to statutes. Federal cases can be accessed from the federal district courts and the federal circuit courts of appeals up to the U.S. Supreme Court. For the general site of the federal courts, use uscourts.gov; this site will lead you to any federal court, including the district courts, bankruptcy courts, and circuit courts of appeals. Cases are posted as soon as they are released and are free. For the U.S. Supreme Court, use www.supremecourtus.gov, which also posts its cases almost immediately after it is released. State courts can be accessed by using courts.state (abbreviation of your state).us. For example, to find cases in Minnesota, use courts.state.mn.us.

Federal statutes can be accessed on congress.gov, house.gov, and govinfo.gov. A wealth of federal statutes and regulations can be found on these sites, including links to related Internet sites. Congress.gov and govinfo.gov are especially helpful. These sites augment your access to information, are reliable, and, better yet, are free.

State governments have sites for their courts, legislatures, and state agencies. The content of state sites varies but usually includes recent postings of cases from the various state courts—especially its highest courts—and statutes, including proposed bills, on the legislative sites. Consequently, if you need an amendment to your state's consumer protection law, for example, and you do not have access to Westlaw or LexisNexis, try your state's legislative Internet site for the information. If you need a copy of a state's regulation on a subject, such as an environmental regulation, go to the state agency's site. Exhibit 1-4 is a summary of contract-related legal resources.

EXHIBIT 1.4 Summary of legal resources for contracts



Although this section dealt with Internet sites for contract law sources, do not forget that most sources also can be found in hard copy or book form. This includes cases, statutes, legal treatises, and formbooks. Be mindful that if you do not have access to the Internet, local libraries should have computer access or provide the information in book form.

1.3 Practical Application

So far, we have reviewed what laws apply to contracts and where to find source material in the contracts area. The question then is, "how does all this information apply in real life?" That is what this section will always be addressing throughout this text—the practical application of the chapter's legal theory. Why do I care what law applies and where to find it? Let's use an example to illustrate the importance of the concepts discussed in this chapter. A client communicates the following during an initial interview where your supervising attorney is determining whether this client has a viable case to pursue.

> **Ms. Hartley:** This is very difficult for me. I purchased a brand new sailboat three months ago, in March, to use at our shore house in Maine. It was a surprise birthday present for my husband. My husband and I were really excited about the boat and couldn't wait to use it. We decided to go up to the house for Memorial Day weekend, where it was our intention to take it out to sea. We had a company assist us in sliding it into the water. We were about 15 minutes into our sail when I noticed that the hull was damp. That was quite unusual, especially since it was a brand new boat.

I just figured it was water spray as the ocean was a bit rough. I didn't think much about it until about an hour later when I saw puddles of water. I was concerned, so I got my husband. We didn't know what was happening but decided to immediately go ashore. When we got back to the dock, we had someone examine the boat. Apparently, the bottom surface of the hull cracked and had we stayed out any longer, the boat would have sunk with us in it. I have contacted the company in Massachusetts, Luxury Boats, Inc., where we purchased the boat, but they won't answer my calls or emails. The boat cost $50,000.00. Because of the cracks in the hull bottom, we decided to have the boat thoroughly inspected. We now have learned that the material used to construct the boat was inferior. I want to return the boat and get my money back. What can I do? Am I stuck with this "lemon" of a sailboat?

Mr. Styler, Esq.: Sounds like you have a good case. We have to check out the law on this and get back to you. Let's set up another appointment for next week where we can discuss our next steps in this matter.

The meeting ends.

Mr. Styler, your supervising attorney, wants clarification on some of the points of the law. He wants you to get copies of all the documents in the case from Ms. Hartley and research the law in Massachusetts and Maine. Does contract law or the U.C.C. apply? Have Ms. Hartley's rights been affected? If so, how and what laws may apply? Where would you begin this project?

In the above fact situation, you can see that it is important to begin to understand what laws may apply and where to find them. As we progress through this text, you will be able to analyze the concepts presented in the Hartley case. What you should take from this exercise is that each chapter's concepts build on the others until you have a complete picture and understanding of the law of contracts.

SUMMARY

1.1 The law of contracts is founded in both the common law and statutory law. The common law is the law created by judges, and statutory law is that which is passed by a legislature. In contracts, the common law has been codified in the *Restatement* Second Contracts. The *Restatements* are the black letter law formulated by legal scholars and often adopted by courts as a basis for their decisions. The Uniform Commercial Code is the most important form of statutory law in the field of contracts consisting of eleven articles with Article 2 focusing on the topic of sales. As the Internet emerges as a means for contracting, laws are being passed by both Congress and state legislatures to address the emerging issues in e-commerce. The two most notable statutory laws relating to e-commerce and transactions are E-Sign and UETA. UCITA, drafted as the equivalent to the U.C.C., has not had the widespread recognition and adoption as anticipated. It is considered controversial and, thus, only two states have adopted it.

1.2 Knowing where to find information relating to contract law is important. Legal treatises provide scholarly interpretation of contract law with the two most notable written by Professors Corbin and Williston. A more user-friendly version of a legal treatise is a hornbook. The most recognized hornbooks in the contract arena are *Perillo on Contracts* and *White and Summers' Uniform Commercial Code*. Law review journals provide excellent sources of analysis of contract and legal topics with extensive information located in footnotes of the articles. Some general sources which provide guidance in understanding the law of contracts and the U.C.C. are legal encyclopedias, specifically *American Jurisprudence* and *Corpus Juris Secundum*. Many states have state-specific encyclopedias as well. States also have practice series which are helpful in drafting documents. Internet sites are an invaluable source of information. Westlaw and LexisNexis are the most comprehensive. Government sites offer extensive amounts of information, such as cases, statutes, and regulations, for free.

KEY TERMS

statutes
precedents
stare decisis
common law
constitutions
administrative law
procedural rules
mandatory authority
persuasive authority
Plaintiff
complaint
Defendant
docket number
reasoning
dicta (dictum)
holding
case summary
case headnotes
Restatements
black letter law
Uniform Commercial Code (U.C.C.)
Magnuson–Moss Warranty Act
Uniform Electronic Transaction Act (UETA)
Electronic Signatures in Global and National Commerce Act (E-Sign)
Uniform Computer Information Transactions Act (UCITA)
legal treatise
hornbook
pocket part
law review journals
formbook

REVIEW QUESTIONS

1. Define the concepts of precedent and stare decisis.
2. What is the common law?
3. Who developed the *Restatements of Contracts* and why?
4. What is the Uniform Commercial Code and what distinguishes it from the common law?
5. How many articles are presently included in the Uniform Commercial Code and which article is devoted to the law of sales?
6. What is one of the federal consumer-based statutes, and why are consumer protection statutes important in the law of contracts?
7. List the technology-based laws that govern e-commerce and what types of changes these statutes brought about that were significant to contracts?
8. What is a legal treatise and which two are the most noteworthy in contract law?
9. Identify resources that will assist in finding the law in both in your jurisdiction and another state. Explain how each resource will assist you in preparing an assignment or project for your supervising attorney.
10. Name three online sources that will assist you in finding federal cases in your jurisdiction and in finding federal statutes.

EXERCISES

1. Determine which law applies to the transaction. Support your response with a detailed explanation.
   a. Arlene wants to remodel her kitchen and hires Kitchen Make-Over, Inc.
   b. Marty buys online a new flat screen television from Electronics World.
   c. Marty buys a flat screen television from his friend John.
   d. Hotels Corporation buys 500 sets of sheets from Linens of the World, Inc.
   e. Hotels Corporation hires Linens of the World to decorate its rooms in its Chicago and Philadelphia locations.
2. Determine whether the following questions are true or false statements.
   a. The common law is the law created by a legislature.
   b. The common law is the law created by judges.
   c. The Uniform Commercial Code governs the law of sales and other commercial transactions.
   d. UCITA has been adopted by every jurisdiction in the United States.
   e. The most significant legal treatises on contracts law are *Perillo on Contracts* and *Williston on Contracts*.
   f. Legal encyclopedias present a general overview of the law.

3. (a) Lori wants to start a business selling cookies. She does not have a lot of financial resources, so she begins by baking cookies in her home and selling them to neighbors and friends. She hires Margie to assist her for $10.00 an hour. Margie works for two weeks and quits. Lori never paid her. What law would apply to this transaction and why?

(b) Lori's cookie business is really taking off. She finally gets that big account, Delectable Cookie Delights. They place an order for 50 dozen cookies due in two weeks. Lori panics because she realizes she does not have any help to bake the cookies. She misses her deadline and only supplies thirty dozen cookies. Delectable Cookie Delights is not happy and wants to enforce the agreement. What law would apply to the transaction and why? What if Lori's neighbor Melissa ordered the 50 dozen cookies, would that change your response? Explain your responses.

4. A new client, Delia Johnson, has hired your law firm to represent her in a lawsuit she intends to file against her employer. Answer the following questions.

a. What type of law would apply to the relationship between the law firm and Delia Johnson? Support your response.
b. What type of law would apply to the relationship between Delia Johnson and her former employer? Support your response.

5. Define the following terms.

a. Precedent
b. Common law
c. Uniform Commercial Code
d. *Restatements*
e. Legal treatise

6. Locate the following law review articles.

a. Michael H. Dessent, "Digital Handshakes in Cyberspace Under E-SIGN: There's a New Sheriff in Town!" 35 U. RICH. L.REV. 943 (2002)
b. Stacy-Ann Elvy, "Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond," 44 HOFSTRA.L.REV.839 (2016)
c. Kristen Chiger, "When Tweets Get Real: Applying Traditional Contract Law Theories to the World of Social Media," 3 Ariz.St.Sports & Ent.L.J.1 (October 1, 2013)
d. Juliet M. Moringiello, "Signals, Assent and Internet Contracting," 57 Rutgers L. Rev. 1307 (2005)
e. Rachel S. Conklin, (Student Articles), "Be Careful What You Click For: An Analysis of Online Contracting," 20 Loy. Consumer L. Rev. 325 (2008)

Choose one article and prepare a summary of the legal concepts in the article.

7. (a) For this question, use the facts from the Hartley matter in the Practical Application section of this chapter, determine whether facts support the Hartley's case against the boat company. As part of your assignment, identify the legal resources you used to research the case.

(b) Your attorney wants you to draft a release and settlement agreement between Ms. Hartley and Luxury Boats, Inc. Locate three examples of a Release and Settlement Agreement and prepare a document for your attorney's review.

8. Locate the following legal resources:

a. Section 90 of the *Restatement (Second) of Contracts*: What is the title of this section?
b. Section 207 of the Uniform Commercial Code: What is the title of this section?
c. UCITA: How many articles comprise this model law?
d. Magnuson–Moss Act: What is the citation for this Act? What Congress passed this Act?
e. *Specht v. Netscape Communications Corp* (2d Cir. 2002) What is the citation for this case? What are the main issues in this case?

9. Determine whether your jurisdiction has the following legal resources. For each source note the title and author(s) of the publication:

a. state legal encyclopedia
b. state transactional practice guide
c. state formbook
d. state law review journals
e. state bar association journals
f. state paralegal journals, periodicals or newsletters

10. Locate your state's consumer protection statute and answer the following questions.
    a. When was the legislation passed?
    b. What is the citation for the Act?
    c. What are the penalties for violation of the Act?
    d. Who is covered by the Act?
    e. What are the legal requirements to commence a lawsuit in your state?

    (If your state does not have a consumer protection statute, choose Texas, California, or New York for this question.)

ETHICS EXERCISE

It seems that your attorney forgot she had a brief due in five days in your state's highest court regarding a breach of contract case she is appealing. She is involved in a trial and is really pressed for time. She asks you to draft the brief for her review. You have only written two appellate briefs in your career, so you are a bit nervous about the assignment. Working all day and night, you find this great law review article that has all of the research you need. You quickly cut and paste numerous passages from the article without changing a word. You add in some facts from your client's situation, and the brief is ready for your attorney's review. Impressed with your work, the attorney makes a few edits but leaves the brief intact. Thirty days later, the reply brief hits your desk with a note from your attorney. The note is as follows:

> Sean:
> I just received this reply brief from opposing counsel. He has accused me of plagiarism. He states in his brief that our brief is almost verbatim from a law review article from the New York University law school's law review journal. He is filing a complaint with the bar against me. Please tell me this is not the case.

What responsibility does the supervising attorney have over the paralegal's work? Since the supervising attorney did not know of the paralegal's actions, is the attorney responsible?

Explain your position using statutes, case law, and ethics opinions.

CASE ASSIGNMENTS

1. Your attorney has requested that you research your state's electronic signature requirements. What steps must his client take to sign a legal document electronically? Prepare a detailed memorandum of your findings to your attorney. (Be sure to include the name and citation of your state statute with a copy of the Act attached for reference.)
2. Abby was in the infancy stages of starting her new business. She was opening a catering service that would focus on healthy eating. And best of all, she would purchase all her ingredients from local farmers. Abby researched the different farms and the products they produced. She decided to visit four farms to learn more about their products. After her visits, she decided to hire Vince Barton from Barton Farms and Toby Lindley from Springfield Gardens. Initially, she hired both farms to provide her consulting services to help her plan menus and determine how to incorporate seasonal vegetables into her menus. When the business started, Abby would begin buying the produce from Vince and Toby. Before she had her first customer, Vince moved away. His replacement, Amanda Coates, insisted that Abby only use Barton Farms for consultation. Abby refused. She did not like Amanda's style of doing business and decided to cease using Barton Farms as a consultant and refused to purchase any produce from Barton Farms—ever. Although Vince had never signed a formal document with Abby, Amanda sued Abby for terminating her relationship with Barton Farms. As the paralegal for the firm assisting Abby, you are faced with determining which law applies: the common law or the U.C.C. Present your best arguments as to which law may apply to these facts.

2 Contract Basics: An Overview

CHAPTER OUTLINE

CHAPTER OBJECTIVES

After reading this chapter, you should be able to:

- Master the legal terms used in the contracting process
- Recognize the general elements of a contract
- Describe the different classifications of contracts
- Distinguish the types of quasi contract
- Differentiate between a void, voidable, and unenforceable contract

Just Suppose . . .

You are working for a restaurant chain called "Scooters." Your boss says that whoever sells the most beer this month will earn a "new Toyota" automobile. Um, doesn't that sound great, especially since you need a new car and were actually thinking of quitting; that gives you some incentive to stay on a while longer. This gives you some new hope. During the month, you work long and hard hours. Your boss even mentioned that he didn't know if the Toyota would be a van, an SUV, or a sedan. When the month comes to a close and the tallies are in, you sold the most beer of all the wait staff in the restaurant. Excited about seeing your new "Toyota" your boss blind folds you and walks you to the back parking lot where he unveils a "Toy Yoda." (Yes, *Star Wars* fans, a "Toy Yoda.") Of course, you don't think your boss is funny and want what he promised, a "new Toyota vehicle." He looks at you like you are from another planet and says, "You really didn't think I was going to buy you a

new Toyota for selling beer." You believe that he owes you a new Toyota and ask your brother-in-law for advice, since he's a lawyer. He thinks you have a case and decides to pursue the matter with your boss and Scooters. The big question is whether a contract was created when Scooter's boss made the offer, which you accepted by selling the most beer. This chapter will focus on what basic elements are needed to create a contract and the different kinds of contracts that can be established.

2.1 Defining a Contract: What Is It?

The age-old question is: What is a contract? A *contract* is an agreement between parties for value, which is legally enforceable. Simply stated, a contract is an agreement that the law will enforce—whether you think so or not! That means that when a court analyzes whether a contract is enforceable, they apply an objective viewpoint rather than a subject one. As you will learn throughout the next few chapters, sometimes that objective viewpoint may have unintended consequences. You should always ask yourself a few basic questions:

- Did the parties have an agreement?
- What is the subject of that agreement?
- What rights and obligations were created under that agreement?
- Did the parties perform those rights and obligations under the agreement?
- If yes, they (most likely) have a contract?
- If no, what obligations were not performed by the either one or both of the parties to the agreement?
- If some party failed to perform under the terms of the agreement, what is the measure of damages for the party who properly performed the agreement?

These questions are seemingly straightforward, but as you probably already know, some things are easier said than done. Of course, in many instances the answer is simple, but too often there are more sides to the story, or in our case—the contract—than realized.

LEARNING THE LEGAL JARGON

There is no way around the fact that the law has many unfamiliar sounding words and special terminology it uses in referring to certain concepts and contracts is no different. The law has formal names for the parties to a contract. The person who initiates the contract—namely, the one who makes the promise—is referred to as the **promisor**. The person to whom the promise is made is the **promisee**. Frequently, these terms are used when setting forth the parties' contractual obligations. Knowing and understanding the terminology is half the battle to learning contract law. Take the time to learn it.

promisor
A person who makes a promise

promisee
A person to whom a promise is made

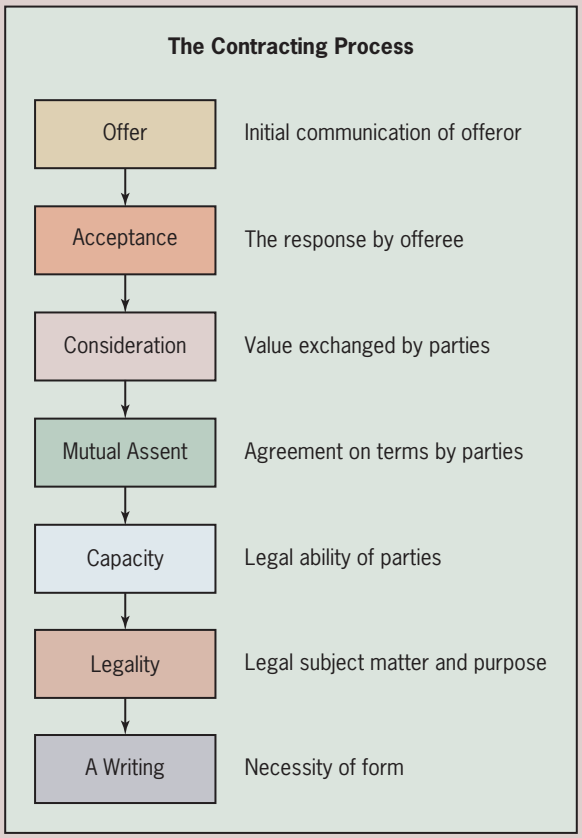
Notice the endings—the suffixes—in the words promis*or* and promis*ee*. You will see these endings used frequently in the law and often in contracts. Usually, the person who is creating the obligation ends in "or" with the person who is responding to the obligation usually has "ee" at the end of the name. So, when you see words such as offer*or*—the one making the offer—or pay*or*—the one creating the financial obligation to pay, these are the parties initiating the transaction whereas the one who responds is the offer*ee*—the one who the offer is directed to or pay*ee*—the one who gets the money.

Another part of the legal jargon is learning its shorthand. For example, the shorthand term for the word contract is "K." This reference is universally recognized by everyone in the legal profession. In contracts as with any legal subject, you will read cases. The plaintiff is the one who brings the lawsuit and the defendant is the one responding to the lawsuit. There are shorthand usages for the terms plaintiff and defendant. Use either P or the Greek sign "π" (pi) for Plaintiff and D or the Greek sign "Δ" (delta) for Defendant. These shorthand terms are common and are recognized by all legal professionals. However, use the shorthand for taking notes and drafting, but do not use it in a formal document. It is simply a convenience.

Now continuing with our discussion of legal terminology, to have a binding contract, there must be two competent parties who intend to be bound by their promises. Critical to the definition of contract is the necessity of intent. The parties must desire to be bound to a contract, or the contract may fail. If the requisite intent is present and the promises are broken, the law may enforce the promise, usually through a lawsuit.

The law goes beyond mere intent, however. It also provides that a contract must have certain elements to be enforceable. Those elements include offer, acceptance, consideration, mutual assent; but, having those elements are not sufficient. The contract must have a legal purpose and the person entering into the contract must have the capacity to contract. If any of these elements are missing, it is likely that a contract has not been created. For a diagram of the contracting process, review Exhibit 2-1.

EXHIBIT 2.1 Contract process



CYBERCISES

Go to Facebook or a similar social networking site and determine the terms of your contract with the Internet site. What are your privacy rights? What rights do you have to the material on your Facebook page?

Another requirement that needs to be considered in determining if a contract exists is whether the contract must be in writing. Although contracts can be either oral or written, in some instances, the law requires that certain types of contracts must be in writing to be enforceable; this suggests that that some contracts may not be binding and enforceable unless written. This area of the law encompasses what is known as the Statute of Frauds. As the name suggests, this requirement was created to prevent fraud in certain categories of contracts. This complex area will be discussed in greater detail in Chapter 8.

Although it would be nice to think that to create a binding contract all you need are the basic elements mentioned and if one is missing, there is no contract. We know that is too easy. In later chapters, we will discuss not only legality and capacity as impediments to creating a contract, but we also will address defenses to a contract, such as mistake, fraud, misrepresentation, and duress. All the elements of the contract may *appear* to be there, but because of some underlying circumstance, the contract may be unenforceable.

Not only have you just learned some of the basic components of a contract, but you are also becoming familiar with some of the legal jargon or **legalese**. Actually, some may simply refer to these terms as legal gobbledygook, but they are terms that cannot be avoided—unfortunately. As a paralegal and legal professional, you must learn these terms and master their definitions. This is an important component in your professional development.

legalese
Legal jargon

COMPONENTS OF A CONTRACT

For all of us, it is important to know that the contracts we enter into will be enforceable. Without reasonable assurances that the promises of parties are enforceable, contract law would be chaotic. An understanding of the general elements needed to bind parties to a contract is necessary. This is merely an overview as each component will be discussed in greater detail in later chapters.

The Offer

An **offer** is a communication to a party of an intent to enter into a contract. The party initiating the offer is the **offeror** and the party to whom the offer is directed is the **offeree**. The offeree has the power to accept the offer, beginning the process of contracting. As we will learn, the offer must be sufficiently definite with terms that the offeree can knowingly accept. This concept is discussed more fully in Chapter 3.

Using our example from the beginning of the chapter, who was the offeror from our Scooter's scenario? The Boss, of course. The offerees from our Scooters scenario were the wait staff at the restaurant. As we will learn in later chapters, an offer may be made to more than one person with multiple possibilities of who can accept.

offer
A proposal made with the purpose of obtaining an acceptance, thereby creating a contract

offeror
A person who makes an offer

offeree
A person to whom an offer is made

The Acceptance

The **acceptance** is the response by the offeree to the offeror of an intent to contract—to be bound by the terms and conditions set forth in the offer. Unless an acceptance occurs, the contracting process ends. The offer and acceptance are basic prerequisites if a contract is to evolve. Chapter 3 also delves into this area.

acceptance
The assent by the person to whom an offer is made. Acceptance is a fundamental element of a binding contract

Now, in our Scooters scenario, did our waitress accept? Let's review the facts. Our boss offered a "new Toyota" for selling the most beer in a month at Scooters. Our waitress remained at her job selling beer all month determined to be the highest seller of beer at the restaurant. Her actions indicated that she accepted her Boss' offer. As we will explore in the next chapter, acceptance of an offer may be through actions not just words or in writing.

Consideration

consideration
That which is given in exchange for performance or the promise to perform; the price bargained and paid; the inducement. Essential element of a valid and enforceable contract

Every contract must have **consideration**, which is the value paid for the promise. There must be an exchange of value between the contracting parties, such as money, property, or services. All contracts must have consideration to be enforceable. Look to Chapter 4 for a detailed discussion.

From our definition above, consideration can be more than just money; it can be services as well. Our waitress from our example performed services in exchange for earning the car for being the highest seller of beer in the restaurant. She also had additional value by continuing to remain employed at Scooters when she intended to quit. It looks like we have consideration.

Mutual Assent

mutual assent
A meeting of the minds; consent; agreement

Critical to contracting is the element of **mutual assent**. Each party must have the same understanding of the terms and conditions of the contract. Was there a "meeting of the minds" regarding the contract? If one party withholds vital information which induces a party to contract, then mutual assent does not exist and there is no contract. This area of law is discussed in Chapter 5.

Determining mutual assent may be a little trickier. From our introductory example, we do have some facts that indicate mutual assent. First, we have the boss announcing the offer to the staff. During the month, he also stated whether the "new Toyota" would be a van, an SUV, or sedan. Our waitress heard the offer and acted on it by selling more beer than any of her peers during that month. The facts indicate that both parties knew of the basis of the offer and our waitress acted on that offer or promise. Therefore, we have a case for mutual assent between the parties.

Capacity

capacity
1. Competency in the law. 2. A person's ability to understand the nature and effect of the act in which he or she is engaged

For a contract to be created and binding, both parties to the contract must have the legal ability to enter into a contract. Under the law, **capacity** constitutes being over the age of 18 and of sound mind. Persons who are under 18 (minors), drunkards, or mentally incompetent or infirmed generally do not have the capacity to contract. Incapacity is difficult to show and presents unique problems in contract law. Chapter 6 focuses on capacity as an issue in contracts.

Continuing with our example, although our facts do not state whether our waitress was over the legal drinking age, for our purposes, we will assume that if she was working in a restaurant that sold beer, she was of legal age and thus had capacity to contract.

Legality

legality
The condition of conformity with the law; lawfulness

All contracts must have a legal purpose to be enforceable. They must have not only a legal purpose, but also legal subject matter. Although the element of **legality** seems clear, under society's changing needs and mores, new issues are analyzed every day. Is a surrogate motherhood contract legal? Can you contract to have your body frozen after you die, or can you enter into a contract with a physician for an assisted suicide? Can you purchase marijuana for recreational use? What is illegal today may be legal tomorrow—think of same-sex unions, for example. Issues like these are addressed in Chapter 7.

Our final element in our example is whether there was a legal purpose. In this scenario, earning a "new Toyota" for selling the most beer in a month is a legal purpose. It appears that all the elements of a contract are present. Our waitress seems to have a good case and is on her way to driving away in that new Toyota and not with the "Toy Yoda."

The Legal Form

Although the law states that there are six general components necessary to create a binding contract, one additional element *may* exist: the need for writing. The statute that guides parties in making this determination is the **Statute of Frauds**, which suggests that certain contracts must be in writing to be enforceable. Sometimes, parties may think they have a contract, but unless it is in a suitable written form, it may not be enforceable. This element is critical to the contracting process and is further discussed in Chapter 8.

Statute of Frauds
A statute, existing in one or another form in every state, that requires certain classes of contracts to be in writing and signed by the parties. Its purpose is to prevent fraud or reduce the opportunities for fraud

For our purposes, we can assume that the offer by the boss at Scooters to the wait staff did not have to be in writing. We do not have a Statute of Frauds issue here.

Therefore, all the components must be present for a contract to be binding and the contracting process to work. Miss one element and the contract may be unenforceable. Consequently, when you begin analyzing the process as to whether a contract exists, ask yourself:

- Was there a sufficiently definite offer by the offeror for which the offeree can accept?
- Was something of value exchanged between the parties—consideration?
- Did the parties understand the terms and conditions creating mutual assent?
- Was there an impediment to the contract's formation, such as capacity?
- Did the contract have a legal purpose?
- Were the terms of the contract communicated orally or in writing?

These questions are only some of the preliminary ones to get you started thinking about the process. As we progress, you will begin to refine your analysis as you build your legal knowledge. One aid in helping refine your analytical skills is learning how contracts are classified.

TRENDING NOW IN CONTRACTS

More than ever, social media has overtaken the Internet. Sites such as Facebook, Twitter, Instagram, YouTube, and Pinterest are part of everyday life. Contracts are formed using unconventional methods with courts applying established precedents to these new types of media. These sites advance new ways to create contracts with interesting results and ones that are often unintended. Our new age is ever-changing with the Courts and statutory laws attempting to keep pace with the issues presented in social media. Stay current with social media and the trends. What is communicated through Twitter, for example, may have legal implications that far outweigh a simple announcement of an event.

2.2 Contract Classifications: What's in a Word?

Contracts are classified in a variety of ways. Some classifications focus on the method of contract formation and others focus on the contract's legal effect. The classifications discussed in this section are not mutually exclusive.

Contracts may be classified as: (1) bilateral and unilateral; (2) express and implied; (3) executed and executory; (4) void, voidable, and unenforceable; and (5) formal and informal. A contract can belong to more than one of these classifications; for instance, a contract can be bilateral, express, and executed.

BILATERAL AND UNILATERAL CONTRACTS

bilateral contract
A contract in which each party promises performance to the other, the promise by the one furnishing the consideration for the promise from the other

A **bilateral contract** is perhaps the most common type of contract in which each party exchanges a promise for a promise, binding the parties to a contract. This usually occurs when someone makes an offer and an acceptance follows.

EXAMPLE 1: Ms. Matthews asks Mr. Dayle, "Will you come paint my garage tomorrow for $200?" Mr. Dayle replies, "Yes, I will paint your garage tomorrow for $200."

EXAMPLE 2: Greenleaf Company offers Recycling R Us $1,000 to pick up its empty plastic bottles every Monday. Recycling R Us agrees to pick up the plastic bottles every Monday for the fee of $1,000.

Both examples create bilateral contracts. Each party has made a promise to the other. Through the exchange of mutual promises, a bilateral contract is created. If one of the parties does not fulfill its promise, then the harmed party can enforce the contract through a breach of contract action, as discussed in Chapter 9.

unilateral contract
A contract in which there is a promise on one side only; a unilateral contract is an offer that is accepted not by another promise but by performance

In contrast, a **unilateral contract** does not involve an exchange of promises. Only one party makes a promise, with the other party required to do some act in return. In a unilateral contract, the act of performing is the acceptance. There is no exchange of promises or an exchange of communications. Let's modify the examples:

EXAMPLE 1: Ms. Matthews promises to pay Mr. Dayle $200 if he paints her garage. No more communication occurs between the parties. The next day, Mr. Dayle shows up and paints Ms. Matthew's garage. A unilateral contract has been formed.

EXAMPLE 2: Greenleaf offers to pay $1,000 to Recycling R Us if the plastic bottles it accumulates are picked up every Monday. Recycling R Us picks up the plastic bottles on Monday and every subsequent Monday after that.

A distinguishing characteristic between bilateral and unilateral contracts is timing. In a bilateral contract, the exchange of promises binds the parties almost immediately. The offeror cannot take back the offer (revoke it), as the acceptance has already occurred. However, with a unilateral contract, the acceptance does not take effect until performance begins. The only way to accept the offer is to actually perform the requested act. Until performance commences, the offeror can revoke the initial offer.

EXPRESS AND IMPLIED CONTRACTS

express contract
A contract whose terms are stated by the parties

An **express contract** is one that is specifically stated. Each party knows the terms and conditions of the contract, whether oral or written. It is prudent to reduce an oral express contract to writing, lest Statute of Frauds issues arise (see Chapter 8). Using our previous examples, Ms. Matthews and Mr. Dayle had an oral communication between them to paint the garage for $200 creating an oral express contract; the example involving Greenleaf and Recycling R Us also created an oral express contract. Had Greenleaf and Recycling R Us reduced their agreement to writing, the contract would be an express written contract. Each contract is an express contract with a difference in form.

Implied contracts are different. An implied contract is created by the acts of the parties involved. It is inferred from the facts and circumstances surrounding the transaction. Behavior dictates the terms of the contract. Assume you go into

a restaurant whose rules require you to pay after you have eaten. The restaurant has given you the food that you ate and it is implied that you will pay. This type of contract is also referred to as an **implied in fact contract**. Each party to the contract expects something from the exchange, even though no formal agreement was expressed. Both express and implied contracts are enforceable. An interesting test of the enforceability of an attempt at creating a contract through Twitter is *Alexander v. MGM Studios, Inc.* 2017 U.S. Dist. LEXIS 214497 (C.D. Cal.2017). The District Court had to determine whether a "tweet" to pitch an idea for a "Rocky" sequel created a contract.

implied in fact contract
A contract in which the law infers from the circumstances, conduct, acts, or relationship of the parties rather than from their spoken words

LINE OF REASONING

Jarrett Alexander filed a lawsuit against MGM Studios and claimed he conceived the idea for the movie "Creed." Creed is the story of Rocky's rival Apollo Creed's son and his rise in the boxing world under the tutelage of former fighter Rocky Balboa. Alexander claims that he created the idea behind the movie Creed, drafted the screenplay, and pitched the idea through an online site Vimeo and other means. Using Twitter, Alexander tried to promote his idea and sent the idea to some prominent people associated with the previous Rocky projects between 2012 and 2013. No one acknowledged receiving the tweets or any communications from Alexander. Ultimately, MGM announced its intention to develop Creed. Alexander claims it was his idea.

The Court discussed several procedural issues and the concept of misappropriation of an idea, but the focus is the contract issue. Under California law, the Court discussed the circumstances under which an implied-in-fact contract arises between a writer and producer. When does a writer expect to be paid for work submitted to a producer for his or her concept? The Court stated Alexander must show "the plaintiff prepared the work, disclosed the work to the offeree for sale, and did so under circumstances from which it could be concluded that the offeree voluntarily accepted the disclosure knowing the condition on which it was tendered and reasonable value of the work." *Id.* Alexander claims that the tweeted the idea to Sylvester Stallone and sent the screenplay to industry people. But, the court found that Alexander never offered the work for sale. What Alexander did was make a gratuitous idea through Twitter—nothing more. Alexander tried to argue that everyone, the Defendants, knew that it was custom to be paid for the idea, even though there was no evidence that MGM or the other Defendants knew about Alexander and his idea. As the Court stated: "Plaintiff invites the Court to premise a claim for breach of implied contract on a "tweet" that was never responded to." *Id.* And the Court further stated that Plaintiff expected a contractual relationship from a unilateral tweet. The Court did not find that an implied contract existed and concluded by observing that "[t]he idea man who blurts out his idea without having first made his bargain has not one but himself to blame for the loss of this bargaining power." *Id.*

The other contract issue that was discussed was Alexander's unjust enrichment claim. Citing to many of the same arguments raised in the implied contract analysis, the Court found that there was no valid claim for unjust enrichment when there was no evidence that MGM or Stallone even knew about Alexander's idea.

QUESTIONS FOR ANALYSIS

Review *Alexander v. MGM.* What facts were the death knell for Alexander's arguments? What elements constitutes an implied contract? What are the legal elements for unjust enrichment? What was the Court's reasoning that Alexander was not entitled to any compensation and that the Defendants were not unjustly enriched?

Another type of implied contract is an **implied in law contract** or **quasi contract.** This kind of contract focuses on the need for fairness.

implied in law contracts
Quasi contracts are those imposed by the law, usually to prevent unjust enrichment

quasi contract
An obligation imposed by law to achieve equity, usually to prevent unjust enrichment

Quasi Contracts

A contract that is created by a court is an *implied in law contract* or a *quasi contract*. It is a type of contract that promises fairness and prevents injustice. A quasi contract is based upon the premise that although the parties may not have intended a contract, if one party benefits unjustly to the detriment of the other party, the court will compensate the party who did not benefit, to avoid unjust enrichment. **Unjust enrichment** occurs when the circumstances surrounding a situation create a benefit to a party, even though no formal contract was created. If the benefiting party does not pay for what was received, another party will be harmed. To prevent this unfairness, courts compensate for the reasonable value of the benefit so that no one will be "unjustly enriched." An example of a quasi contract is when someone renders emergency aid, such as a physician, or when someone performs work under an unenforceable contract. A court will award a reasonable value for the services performed preventing unjust enrichment of one of the parties.

unjust enrichment
The equitable doctrine that a person who unjustly receives property, money, or other benefits may not retain them without some compensation to the other party

Now, let's use our earlier example with Ms. Matthews and Mr. Dayle and change it slightly.

EXAMPLE: Ms. Matthews left Mr. Dayle a note requesting that her garage be painted tomorrow and stated, "Let me know by 8:00 pm. I have bought the paint, which is in the garage." Mr. Dayle never contacted Ms. Matthews, but simply showed up and painted half the garage by 9:00 am when Ms. Matthew woke and yelled, "No, I've hired someone else to paint it starting tomorrow." Ms. Matthews has received a benefit from Mr. Dayle, and a court would probably award Mr. Dayle a reasonable amount of money for his services. This is a quasi contract.

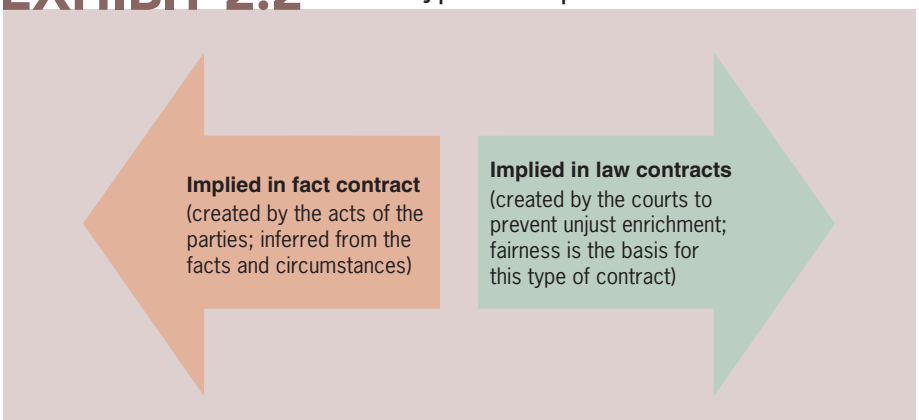
Care should be taken not to confuse an implied in fact contract and an implied in law contract. The former is a contract created by the acts and intentions of the parties, whereas the latter is one created by the courts. That distinction is critical to any analysis as to type of contract.

A difficult question to answer under the quasi contract theory is "How much compensation is just?" Generally, courts look at the reasonable value of the benefit and the cost of the benefit. That does not mean, however, that the reasonable amount is that which is ordinarily charged. The courts normally look to the prices charged in a community to determine a fair value. Consequently, under quasi contract, a benefit received may not be paid under a party's usual fee, as the court will determine what is reasonable and just. See Exhibit 2-2.

Since we are focused on legal terminology as we begin building our contracts vocabulary, courts often use the Latin term **quantum meruit** when dealing with a quasi contracts and unjust enrichment. The term literally means "as much as he has deserved." This concept focuses on the reasonable compensation that a party should receive based upon the benefits or services received by the other party.

quantum meruit
Reasonable compensation that a party should receive based upon the benefits or services received by the other party

EXHIBIT 2.2 Two types of implied contracts



LINE OF REASONING

The distinction between an implied in fact contract and an implied in law contract was discussed in *Slick v. Reinecker,* 514 Md. App. 312, 839 A. 2d 784 (2003). In this case, an attorney's neighbor was in an automobile accident. The neighbor asked for the attorney's assistance in processing and pursing the claim with the insurance company. The attorney moved away but continued to help his former neighbor. The attorney did not establish a formal contractual relationship with his neighbor. When the claim was concluded, the attorney sought his portion of the settlement, which his neighbor denied. The attorney sued for his fees based upon the theory that he either had an implied in fact contract or an implied in law contract. In its opinion, the court distinguished the two types of contracts. An implied in fact contract is "implied from the circumstances or acts of the parties" to the contract. On the other hand, an implied in law contract is "not a contract at all," does not involve "mutual assent" or "a meeting of the minds" between the parties. They involve reasons of justice so that one party does not improperly benefit from the acts of another. The court found that there was not an implied in fact contract but rather an implied in law or quasi contract.

QUESTIONS FOR ANALYSIS

Review *Slick v. Reinecker*. Pay attention to the court's analysis. (Notice that the case was not completely as it seemed.) What facts did the court find supported an implied in law contract rather than an implied in fact contract? What was the basis of the court's award of attorney's fees? What facts would have changed the Court's result between the parties?

EXECUTED AND EXECUTORY CONTRACTS

executed contract
A contract whose terms have been fully performed

Executed contracts are fully performed contracts. No further performance is necessary by the parties, as there is a completed contract. In our garage painting example, when Mr. Dayle completes painting the garage and Ms. Matthews pays him, you have a fully executed contract.

Note that the term *executed* has another meaning in contracts. It also means "to sign an agreement." For example, Ms. Waters and Mr. Springer executed (signed) their contract for the purchase and sale of Ms. Waters' beach house. In this context, the term executed does not mean that the parties have fully performed their contractual obligations. In fact, this is exactly opposite of the parties intentions. None of the parties' obligations have been performed. The contract is an executory contract.

executory contract
A contract yet to be performed

When parties sign a contract, there often are future obligations to perform. When nothing has been done as in the above example, or the duties have been only partially performed, the contract is said to be *executory.* An **executory contract** is a contract under which a condition or promise has not been performed by one or all parties to the contract. This does not suggest that the contract is not binding on the parties as promises have been exchanged. This simply means that the performance has not commenced. The example between Ms. Waters and Mr. Springer has obligations that must be performed before the contract is fully executed. Assume that Mr. Springer, the buyer, must qualify for financing. At the time the contract is signed, the contract is executory. When the Mr. Springer, gains the financing, the seller, Ms. Waters, will tender the deed and other documents to complete the sale. After this occurs, then the contract will be executed. Be careful with terminology, as a word may have several meanings and have different effects depending upon the context in which it is used.

STRICTLY SPEAKING

ETHICS AND THE LEGAL PROFESSIONAL

Ethics plays an important role for the paralegal not only in contracts but also in every aspect of your professional career. You must be mindful of your position and how you interact with the attorneys with whom you work, as well as the clients the firm represents. Key to understanding that role is that you do not represent the client—the attorney does. This becomes particularly sensitive when you, for instance, work in a practice when a lawyer may play a duel role, such as in a real estate transaction. A client may not necessarily need an attorney to represent them in the purchase of a piece of property or a home, but if the client chooses to hire an attorney, the lines must be drawn as to what you can and cannot do for that client. You do not represent them when they are seeking legal advice for the transaction. Can you be a real estate agent and a paralegal? The answer is "yes." But, when the client relies on you for legal advice, you will be skirting the line of the unauthorized practice of law. Know your role in the transaction and be clear to the client on that role.

VOID, VOIDABLE, AND UNENFORCEABLE CONTRACTS

To have a valid contract, all the elements of a contract must be present, making it legally binding and enforceable. Not all contacts are valid, however.

void contract
A contract that has no legal effect

A **void contract** is one that never has any legal effect. Even at the contract's attempted inception, it can never come into existence. For example, George hires Vincent "The Pro" Marshal to kill his business partner, Sam. George refuses to pay "The Pro" because he failed to dispose of the body as promised. "The Pro" cannot file a lawsuit in court and request a court to enforce the contract because the subject matter of the contract is illegal. The contract between the parties is void. Even if "The Pro" is entitled to the money, under the law the contract does not exist.

voidable contract
A contract that may be avoided or cancelled by one of the parties

A **voidable contract** is one that may be avoided or cancelled by one of the parties. Usually voidable contracts arise with minors, intoxicated, or mentally incapacitated persons. A contract also may be voidable when one party to the contract fails to act honestly, such as by committing fraud or misrepresentation. The person who has been harmed has the right to cancel the contract. Unless a party attempts to avoid the contract, the contract is presumed valid. Unlike void contracts, which are automatically invalid, in a voidable contract, someone must disaffirm or reject the contract. Until the act of **disaffirmance** happens, the contract may be valid.

disaffirmance
the act of rejecting a contract

An example seen in both real life and movies is when two people go to Las Vegas, drink too much, and wake up the next morning married. Neither party often remembers getting married, but yet a legal marriage exists. The question is whether the marriage is valid or voidable. The marriage is valid unless when one of the two parties awakens and decides it was not the intention to get married (think of the movie *What Happens in Vegas*), then the marriage can be avoided. Because the parties were drunk when the marriage ceremony was performed, the contract of marriage is voidable. Drunkenness is a legal means to avoid a contract. It only takes one party to avoid the contract, thus making it voidable.

Unenforceable contracts are different. Because of some intervening factor, a contact that appears to have all the necessary elements may not be enforceable. This occurs when a statute, such as the Statute of Frauds, dictates the necessity for a contract to be in writing, or a law is passed which make a contract unenforceable.

EXAMPLE: Marvin has a terminal illness and contracts Dr. Appleby to assist him to commit suicide. If after the contract is consummated, but prior to the suicide, a law is passed that outlaws assisted suicide, the contract would be unenforceable by a court.

FORMAL AND INFORMAL CONTRACTS

In earlier days, the common law required the parties to engage in certain formalities when contracting. For example, the law required that certain contracts be under **seal.** This formality required persons to affix a wax imprint or insignia to the document. For the contract to be valid, this formality had to be followed, therefore creating **formal contracts**. Additionally, formal contracts had to be in writing, signed, and often witnessed.

seal
An imprint made upon an instrument by a device such as an engraved metallic plate, or upon wax affixed to the instrument. The seal symbolizes authority or authenticity

formal contract
1. A signed, written contract, as opposed to an oral contract
2. A contract that must be in a certain form to be valid

Many of these formalities have been eliminated, but one notable exception is in the real estate area. Contracts for the transfer of real estate require adherence to certain formalities. A general warranty deed requires, for example, the identity of all parties, a description of the real property, signatures of the parties, notarization, delivery, and filing. These requirements often are dictated by statute and failure to comply with the statutory requirements could cause the document to be invalid.

Informal contracts have become the standard today. With less formality, the focus is on the parties' intent. No special language is required. All that is required is that the parties' obligations be expressed in the agreement. Most standardized forms will do, and even a handwritten document signed by the parties will suffice. The key to an informal contract is the expression of the parties' intent. Thus, informal contracts may be oral or written or implied from the parties' actions. They regulate many of our daily activities, which illustrates the importance of contract law to our lives.

informal contracts
A contract not in the customary form, often an oral contrac

The case of *Domingo v. Mitchell,* 257 S.W. 3d 34 (Tex. App. Amarillo, 2008) has all the elements of a drama gone bad, but more importantly, it broadly discusses the elements of a contract. How many of us have joined lottery pools, hoping to strike it rich. Well, that was the case for *Domingo v. Mitchell*.

LINE OF REASONING

Betty Domingo and Brenda Mitchell were friends and coworkers who participated in a lottery pool at work—the Texas Lottery. They began this practice sometime in early 2004 where Betty and Brenda pooled their money to purchase tickets and would split all the winnings equally. Sometimes Brenda would advance Betty's portion, where Betty would promptly repay her. Brenda received an email from a coworker, Cindy, on March 9, 2006, asking whether she wanted to join a lottery group. Brenda agreed. With other coworkers, Cindy created LGroup, a Texas Limited Partnership. Later that month, Cindy called a meeting and advised the group that if they knew of other interested parties, they could invite them to the meeting. Betty did not participate in the March meeting or March lottery. However, she claims that Brenda invited her to participate in the April lottery drawing. Betty agreed to participate and asked Brenda how much money she needed to contribute. Brenda offered to cover her share and be reimbursed. On March 30, 2006, a meeting took place where the group determined the current members, the contributions, and the numbers for the next lottery. It was determined that each member would contribute $17.00. Brenda contributed her amount, but did not have enough to cover Betty's amount. Of course, on April 29, 2006, one of the tickets from the group won totaling over $20 million—the cash value option. Betty wanted her share of the winnings. Brenda refused. After consulting an attorney, Betty filed a breach of contract action against the Limited Partnership and Brenda. Brenda responded by basically stating that she never made an offer; there was no valid acceptance; there was no meeting of the minds; and there was no consideration. In her lawsuit, Betty contended just the opposite. To avoid a trial, Brenda filed a motion for summary judgment, which the trial court granted. Betty appealed. The Court of

(continued)

Appeals analyzed the elements required for a valid contract. As the court stated, for a contract to exist, there must be an offer, acceptance, and consideration. The contract could be oral. In determining whether a contract existed, the court looked to how the parties interacted and communicated, using an objective standard of review. The court then analyzed what constituted an offer, acceptance, and consideration. The court also focused on whether there was a "meeting of the minds," which can be implied from the facts and circumstances of the transaction (as opposed to express). Brenda argued that they never reached a price or agreed on the numbers to submit. The court stated that the price could be reasonably implied. After witness testimony was presented in the lower court, the Court of Appeals agreed with Betty that "her friend" Brenda had agreed to advance her share of the lottery pool, that their past conduct confirmed this and as such, the court found that sufficient evidence of a contract existed between Betty and Brenda and reversed the lower court's decision.

QUESTIONS FOR ANALYSIS

Locate a copy of the *Domingo* case and review the court's reasoning. Would the court's result have changed had Brenda told Betty that she would have had to advance her own share to participate? Why or why not? What if the Limited Partnership had not offered to invite other members to participate, would Brenda have been responsible for Betty's share? Explain your answer.

CYBERCISES

Locate some examples of contract online, such user agreements, retail agreements, and employment agreements. Identify the elements of a contract within the documents; then classify the type of contracts you have found.

As we have examined, contracts are classified in many ways. Knowing these classifications is important to having a solid foundation for understanding the law of contracts. Exhibit 2-3 is a summary of the different types of classifications of contracts.

EXHIBIT 2.3 Contract classifications

Bilateral and unilateral contracts	Express and implied contracts	Executed and executory contracts	Void, voidable, and enforceable contract	Formal and informal contracts
• Promise for a promise • Promise for an act	• Specifically stated • Created by actions of parties: implied in law and implied in fact	• Fully performed contract • Conditions or terms in contract unperformed: incomplete contracts	• No contract exits • Contract can be avoided by a party: 1. Minor; 2. Drunkenness; 3. Mentally incompetent; 4. Fraud; 5. Other defenses • Intervening event, such as passage of law, renders contract unenforceable or requires writing (Statute of Frauds)	• Contracts under seal or in writing with specific formalities, such witnesses • May be written; lacks formality; expresses obligations of the parties

TRENDING NOW IN CONTRACTS

The Internet has presented many challenging issues in contracts. How do you know when a contract is created when the parties are in cyberspace? The difficulties and how the rules of the game apply have not escaped both the courts and legislators. Courts now are being faced with determining when, how, and if a contract has been consummated and what terms are binding on the parties. For example, when a someone clicks "accept" the terms and conditions of use on a site, is a contracted created? Do you know anyone who actually reads the terms and conditions when "accept" is clicked? When problems arise, how should they be resolved? Should they be resolved in a court of law or through arbitration? This is an issue that the courts have been faced with throughout the country with differing results. So, when "accept" is clicked on a dating site, for example, know that there are terms and conditions tucked away in the fine print that may be enforceable. If the experience on the dating site is not what is anticipated or expected, your rights are established through a "click" whether realized or not.

2.3 Practical Application

Under the law, contracts take on many different forms. When drafting a contract, keep in mind the concepts discussed in this chapter. One of the best examples is a real estate contract. Review Exhibit 2-4 for practical application of the legal issues in this chapter.

EXHIBIT 2.4 Contract form with elements annotated

REAL ESTATE SALES AGREEMENT

This Agreement is entered into, by, and between Robert Wynn ("*Seller*"), and Dennis Barclay ("Buyer").

In consideration of the mutual covenants contained herein and other valuable consideration received, and with the intent to be legally bound, Seller and Buyer agree as follows:

1. SALE OF PREMISES. Seller agrees to sell and convey to Buyer, and Buyer agrees to purchase from Seller, the following Premises:

[Identify the complete property description including the address]

The sale shall include all improvements and fixtures attached to the Premises. The sale shall also include the following:

[Identify any personal property that may be included in the sale]

These are the only items to be included in the sale of the property. For any personal property sold, the Seller will deliver to Buyer on the closing a bill of sale for any personal property sold to Buyer.

2. PURCHASE PRICE. The purchase price for the property and any items of personal property are *$350,000* payable on the closing as follows: "*150,000.00 in cash, and 200,000.00 in mortgage to seller.*" All payments must be with cash or certified funds. Seller acknowledges receipt from Buyer of a deposit in the sum of $35,000 to be held in escrow pending the closing. The deposit will be applied to the purchase price at the closing.

Legal Form Agreement in Writing-Satisfies Statute of Frauds
Parties/Capacity
Bilateral contract
Express contract
Indicates mutual assent
Offer & acceptance of parties
Subject matter of contract (legality)
Consideration

(continued)