

MEE Great Rule Statements - reddit

Agency & Partnership

- Agency is a fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and both parties agree to the relationship. **ABC**
- An agency relationship exists if there is 1) **assent** (formal or informal agreement), 2) **benefit** (conduct primarily benefits the principal), and 3) **control** (the principal has the right to control the agent; doesn't need to be significant).ex

Actual Authority

- An **agent** has the power to bind the principal to a contract when the agent acts with actual or apparent authority. **Actual authority** exists when the principal makes a manifestation that causes the agent to reasonably believe that the agent is authorized to act on the principal's behalf.
- A principal is subject to liability on a contract if the agent acted with actual or apparent authority to bind the principal. Express actual authority is created by the principal's **manifestation to the agent**, through oral or written words, clear and definite language, or specific instructions, that the agent has authority to act on the principal's behalf. For express actual authority to exist, the principal must communicate this manifestation **directly to the agent**, and the agent must act within the scope of that authority when contracting with a third party.
- Once the third party **discovers the existence of the principal**, the election of remedies doctrine requires the third party to choose to hold liable either the principal or the agent.
- A principal is **partially disclosed** if the third party has notice of the principal's existence but not the principal's identity. Unless the agent and the third party agree otherwise, an agent who enters into a contract on behalf of a partially disclosed principal becomes a party to the contract.

Vicarious Liability

- A form of strict liability in which one person is liable for the tortious actions of another. A person is an **employer** if the person has the right to control the **means and methods** by which another performs a task or achieves a result. The person subject to this right is an employee. Absent a right to control, the person is liable must "cause the agent to believe that the agent is doing what the principal wants, and the agent's belief must be reasonable.
- When an employee's personal errand involves a significant deviation from the path that otherwise would be taken for the purposes of performing work, the errand is a **frolic**. Once a frolic begins, an employee is outside the scope of his employment until he resumes performance of his assigned work. Travel by an employee during the workday that involves a personal errand may be within the scope of employment when the errand is merely a **detour**.

Apparent Authority

- Exists when a 3rd party reasonably relies on manifestations by a principal concerning an agent's authority to act on the principal's behalf. A principal is liable for a tort committed by an agent with apparent authority when the agent's appearance of authority enables him to commit a tort or conceal its commission. For **apparent authority** to exist, a third person must believe that the agent acted with actual authority, and such belief must be reasonable and be traceable to a manifestation by the principal.
- Derives from reasonable reliance of a 3rd party on the agent's authority based on the principal's behavior over a period of time.
- An agent purporting to be acting for a principal gives an **implied warranty of authority** to the third party. If the agent lacks the power to bind the principal, then a breach of the implied warranty has occurred, and the agent is liable to the third party.

Principal Disclosure

- A principal is an **undisclosed principal** if the third party has no notice of the principal's existence. An agent who enters into a contract on behalf of an undisclosed principal becomes a party to the contract. Thus, when the agent does not inform a third party of the identity or the existence of the principal, the agent becomes liable to the third party on the contract. If the agent had the authority to bind the principal to the contract, then both the principal and the agent are likely an independent contractor. An employer is liable for the tortious conduct of an employee that is within the scope of employment. **Conduct within the scope of employment** includes acts that the employee is employed to perform or that were intended to profit or benefit the employer. Careful instructions directed to the employee do not insulate the employer from liability—even when the employee acts counter to the instructions—if the employee is acting within the scope of employment.

Ratification

- If the agent binds the principal to the contract, or if the principal ratifies the contract, then both the principal and agent are parties to the contract with the third party
- If the principal ratifies the agent's action, then the principal is bound just as if the action had been authorized, even if the agent acted without authority. Ratification occurs when a principal affirms a prior act that was done on the principal's behalf. The principal must (i) ratify the **entire contract**, (ii) have **legal capacity** to ratify the transaction, (iii) ratify in a **timely manner**, and (iv) have **knowledge of the material facts involved** in the original act.

Civil Procedure

Jurisdiction

Subject Matter Jurisdiction – power of the federal courts to hear a certain kind of case (43)

- Diversity of citizenship jdx: federal courts can hear cases based on diversity of citizenship, if there's (1) **complete diversity** of citizenship b/w the Ps and Ds; and (2) the **AIC exceeds \$75,000**.
 - A **citizen of a foreign country** who has been admitted to the U.S. as a permanent resident is treated as a citizen of the state in which he is domiciled.
 - If a **class action** is brought under diversity jdx, the named reps must be completely diverse from Ds and at least one P must have a claim over \$75,000
- Federal question jdx: **Ps** can sue in federal court when the claim **arises under federal law**.
- Supplemental jdx: a federal court w/ SMJ over a case can hear additional state law claims if those claims arise from a **common nucleus of operative fact (Claims must arise from Same Trans or Occurrence)**.
 - Ps cannot add claims against non-diverse parties if the sole basis for SMJ is diversity.
 - A **counterclaim** does not have to meet the \$75,000 requirement IF it's compulsory (i.e., it arises out of the same t/o).
 - **Cross claims** must be related to a claim over which the court has SMJ, without regard to the AIC or the citizenship of the parties to the crossclaim.

Personal Jurisdiction – fairness to the defendant (11)a

- Personal jdx can be **general** or **specific**. A federal court has **general** personal jdx over a D, regardless of whether their contacts w/ the forum state are related to the P's cause of action, if the D **consents**, the D is **present** in the forum state, or the forum state is the D's domicile or the D is "at home" in the forum state. To be "at home" in a state, a D's incorporation must be incorporated in the state or have its PPB in the state. In
 - A federal court has **specific** personal jdx in and the exercise of personal jdx is **constitutional**. Personal jdx is constitutional if the D has **sufficient minimum contacts** w/ the jdx such that the exercise of jdx over him would be **fair and reasonable**.

¹⁰Discovery

- Discovery is generally permitted with regard to any **non-privileged matter** relevant to any party's claim or defense in the action. Information within the scope of discovery need not be admissible in evidence to be discoverable. The test is **whether the information sought is relevant to any party's claim or defense**. In general, a party **may not discover** documents and tangible things that are **prepared in anticipation of litigation or for trial by or for another party or its representative**. Such materials **will be subject to discovery**, however, **if the party shows that it has substantial**

- need** for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
- A party may request the other party to produce and permit the inspection of **any discoverable documents** or **electronically stored information**. **Emails are discoverable** if they **relate** to the foundation and may be **relevant to the litigation**. A party may be subject to sanctions for failing to take reasonable steps to preserve electronically stored information that **should have been** preserved in the anticipation or conduct of litigation. **ays**.
 - **Discovery & Inspection of Documents & Land:** Called a request to produce and permit inspection. Applies only to documents, things, and land under the control of the party. The thing to be produced and inspected must be described **with particularity**. **Response is due within 30 days**
 - **Physical & Mental Examinations:** Available only against a party and are only permitted when the parties physical or mental condition is in controversy. Only for good cause shown
 - **Requests for Admission:** Used to streamline litigation, but a failure to respond within 30 days is an admission.

Pretrial Conference

- Pretrial Conference must be attended by attorneys who will conduct the trial. Each side must file a pretrial statement detailing claims and defenses, itemization of damages, requests for stipulations and admissions, list of all witnesses and exhibits, etc. Failure to comply usually means that the attorney pays the costs and the other side's attorney's fees

Preclusion

- The doctrine of **claim preclusion (res judicata)** provides that a **final judgment on the merits** of an action **precludes** the parties from successive litigation of an **identical claim in a subsequent action**. For claim preclusion to apply, the claimant and the defendant must be the same (in the same roles) in both the original action and the subsequently filed action. Claim preclusion is limited to the parties (or successors in interest), similar action by a different party would not be precluded.
- The doctrine of **issue preclusion (collateral estoppel)** precludes the **relitigation of issues of fact or law that have already been necessarily determined by a judge or jury as part of an earlier claim**. Unlike claim preclusion, issue preclusion does not require strict mutuality of parties, but only that the party against whom the issue is to be precluded (or one in privity with that party) must have been a party to the original action. Other elements necessary for issue preclusion to apply are that (i) the issue sought to be precluded must be the same as that involved in the prior action; (ii) the issue must have been actually litigated in the prior action; (iii) the issue must have been determined by a valid and binding final judgment; and (iv) the determination of the issue must have been essential to the prior judgment.
- However, trial courts have broad discretion to determine when issue preclusion should apply. If a plaintiff could easily have joined in the earlier action, a trial judge may not allow use of offensive collateral estoppel (issue preclusion).

Removal Jurisdiction

- The Defendant may remove a case to the Federal Court (in the district where the state court case was originally filed) if, 1) the federal court has SM; 2) All Defendants agree; 2) no Defendants is a resident of the forum state (if removal is based on diversity; and 4) Removal is sought within 30 days of service of summons and complaint.

Venue & Forum Selection

- For the **convenience of the parties** and in the **interests of justice**, a district court may transfer any civil action to **any other district or division where it might have been brought**.
- Venue is proper in a **judicial district in which any defendant resides**, Where a **“substantial part of the events or omissions”** on which the claim is based occurred or where a **“substantial part of the property”** that is the subject of the action is located.
- Generally, if the venue of an action is transferred when **the original venue is proper**, the court to which the action is transferred must apply the law of the state of the **transferor court**, including that state’s rules regarding conflict of law. However, when the venue is transferred based on a **valid forum selection clause**, transferee court **must apply the law**, including the choice-of-law rules, of the **state in which it is located**. The transferee court should not apply the law of the transferor court because the parties have contractually waived their right to the application of that law by agreeing to be subject to the laws of the transferee venue
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- When transfer is sought on the basis of a **forum selection clause in a contract**, the clause is **accorded respect**. If the clause specifies a federal forum, most circuit courts treat the clause as prima facie valid, to be **set aside only upon a strong showing that transfer would be unreasonable and unjust or that the clause was invalid for reasons such as fraud or overreaching**. Furthermore, the Supreme Court held that a forum selection clause should be given **“controlling weight in all but the most exceptional cases,”** even if the clause is unenforceable under applicable state law.

Choice of Law & Erie:

- If there is no Federal Statute or law on point, the court must determine whether to follow state law (i.e., the matter is deemed “substantive”) or to follow federal law (i.e., the matter is deemed “procedural”).
- The general rule is to follow state law for substantive issues that govern conduct (i.e. burdens of proof, statutes of limitations, permissible defenses, etc.) and to follow federal procedural law (i.e., timing requirements)

Intervention & Joinder

- Under Rule 24, a **nonparty** has the right to intervene in an action when, upon
- If a party failed to preserve electronically stored information that **should have been preserved** and **it cannot be restored** or replaced, the court may order **sanctions against the wrongful party**. The court may: (i) upon finding **prejudice to another party**, order measures no greater than necessary to cure the prejudice, or (ii) upon finding that the party acted with **the intent to deprive** another party of the information, may **presume the lost information was unfavorable to the party**, instruct the jury that it may or must presume the information was unfavorable, or **dismiss the action or enter a default judgment**.
- The **general rule** with discovery is relevance, so you can discover anything that **might be admissible at trial** or that might lead to something that might be admissible at trial, so long as it is **proportional to the needs of the case**.
- **Exceptions to discovery** include work product (documents and things prepared in anticipation of litigation or for trial. REMEMBER: you can NEVER discover the mental impressions of an attorney, BUT this rule creates a qualified immunity from discovery that can be overcome only if the party seeking discovery shows a need for the document or things; and that the information cannot be obtained elsewhere.
- **Oral Depositions:** Questions are asked and answered orally and under oath. **Limited to 10 depositions**, unless the court allows more. Each is limited to one day of seven hours, unless the court allows more. can require the deponent to
- **Written Deposition:** Questions asked in writing are delivered to an officer who asks the questions orally and the witness answers orally under oath. Rarely used because they are so inflexible

- **Interrogatories:** Questions asked in writing to be answered under oath in writing that may only be used against a party. **Presumptively limited to 25 interrogatories**, unless the court allows more. Responses required within **30 d timely motion**, (1) the nonparty has an interest in the subject matter of the action; (2) the disposition of the action may impair the nonparty's interests; and (3) the nonparty's interest is not adequately represented by existing parties. The **burden is on the party seeking to intervene**.
- The Rules provide that an answer may state as a cross-claim any claim against a co-defendant, as long as the cross-claim **arises out of the same event that is the subject of the original claim**.
- Allowing someone to join a cross-claim is appropriate because the cross-claim arises **out of the same transaction or occurrence as the original claim**, it involves the **same factual and legal issues**, and it will **likely be relevant** to present the same eyewitness evidence in support of proof of both claims.
- Fed. district cts. have original jurisdiction over *all* civil actions "arising under Constitution, laws, or treaties of the United States."
- When a **federal district court has jurisdiction over a claim**, the **court can assert supplemental jurisdiction over additional claims** over which the court would not independently have subject matter jurisdiction **if they arise out of a "common nucleus of operative fact."**

Injunctions

- A temporary restraining order (TRO) **preserves the status quo of the parties until there is an opportunity to hold a full hearing on whether to grant and why the injunction**. A TRO **has immediate effect and lasts no longer than 14 days** unless a good cause exists. A TRO can be issued without notice to the adverse party if the moving party can show (1) that immediate and irreparable injury will result prior to hearing the adverse party's arguments and (2) the efforts made at giving notice and the reason why notice should not be required. Additionally, the party seeking a TRO must post a **bond to cover the costs** in the event the TRO is **issued wrongfully**.

A **preliminary injunction** can be issued if the opponent is given notice and the court holds a hearing on the issue. A party seeking a preliminary injunction must establish that: (1) the party is likely to succeed on the merits; (2) the party is likely to suffer irreparable harm in the absence of relief; (3) the balance of equities is in his favor; and (4) the injunction is in the best interest of the public. Additionally, the party seeking the preliminary injunction **must provide a bond to cover the costs in the event the preliminary injunction is issued wrongfully**.

Answers & Pre-Answer Motions

- Generally, the Defendant's answer **must state any avoidance or affirmative defense** that the defendant has, or that is deemed *waived*. However, the Rules also provide that **pleadings can and should be amended by leave of the court when justice requires it**. Courts will generally permit the amendment unless it would result in undue prejudice to the opposing party.
- Under Rule 12(h)(1), if a party makes a **pre-answer motion**, the motion must **raise the defense of insufficient service of process in the pre-answer motion, or the defense is waived**. However, courts have generally allowed a party to amend a motion to dismiss to raise an omitted ground if the **party acts promptly and before the court rules on the original motion** and there would be **no undue prejudice to the opposing party**.
- A defendant may file a motion under Federal Rule of Civil Procedure 12(b) to raise several different defenses, including failure to state a claim on which relief can be granted and insufficient service of process. These defenses **must be raised in the first pre-answer motion (or if none, in the answer), or else they are generally waived**. Under the "omnibus motion" rule, when a party makes a **pre-answer motion raising one of these defenses but omitting the others, the party may not make another pre-answer motion raising one of the omitted defenses that was available to the party when the earlier motion was filed**. The party is deemed to have waived the excluded defenses. Rule 12(g)(2), (h)(1)(A). Although not specifically provided for in the Rules, courts have **generally allowed a party to**

amend a motion to dismiss to raise an omitted ground if the party acts promptly and before the court rules on the original motion.

- **L for a judgment** on the pleadings is applied when the pleadings agree entirely on facts and only the law is in dispute. If there's any element of factual dispute, you have a case for summary judgment.
- Motion for a more definite statement asks that the pleading be made more specific, but this is disfavored by judges.
- The **failure to respond constitutes an admission**, so the usual practice is a boilerplate, general denial of everything not specifically admitted.
- An answer must be served within 21 days of the service of the pleading to which it responds

Pleadings

- The **complaint must include**: short and plain statement of the courts subject matter jurisdiction; a short and plain statement showing the claimant is entitled to relief; and a claim for the remedy sought by the pleader
- **Recovery** is not limited by the claim for relief as stated in the complaint except for default judgment. You get what you prove, not what you ask for
- The federal rules typically only require **notice pleading**, in which case all that is required is a short and plain statement of the claim showing that the pleader is entitled to relief.
 - o Under the two-step inquiry, identify allegations that are "conclusory" or "near legal conclusions" Then look at remaining, factual, allegations, and ask whether they add up to a "plausible" case for recovery. "Plausible" falls somewhere between "probable" and merely "conceivable" or "possible."
- A pleading may be amended once as of right within 21 days of service of the pleading or within 21 days of the defendant's response, if there is one. After that, leave to amend must be sought from the ct.

Summary Judgment

- A motion for summary judgment should be granted if the pleadings, discovery, and disclosure materials on file, and any affidavits show that there is **no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law**. A genuine issue of material fact exists when a reasonable jury could return a verdict in favor of the non-moving party. In ruling on a motion for summary judgment, the court is to **construe all evidence in the light most favorable to the non-moving party & resolve all doubts in favor of the non-moving party**.

Service of Process

- FRCP allows service by delivering summons and complaints to the **individual personally** or by "leaving a copy of each at the individual's **dwelling or usual place of abode** with **someone of suitable age and discretion who resides there**," delivery to an authorized agent is also acceptable. For persons in foreign countries, service can be made by registered mail, return receipt requested.
- **For in rem and quasi in rem actions** you must make a diligent effort to locate all claimants to the property (res) and serve them personally. If the claimants cannot be located, then notice by publication is permitted.
- You **cannot rely on notice by publication if you actually know or can readily find out** the names and addresses of the other claimants; they must be served personally

Joinder, Intervention, & Interpleader

- All claims between the same plaintiff and the same defendant may be joined
- **Permissive Joinder**
 - o Any number of plaintiffs may join if they
 - o assert claims arising out of the same transaction or occurrences or series of transactions or occurrences; and there was a common question of law or fact

- o Any number of defendants may be joined in the same action if the claims against them arise out of the same transaction or occurrences (or series); and there is a common question of law or fact. (subject to SMJ)
- **Compulsory Joinder** applies to necessary and indispensable parties. A necessary party is a person whose participation in the lawsuit is necessary for a just adjudication because absent that party, complete relief cannot be accorded to the existing parties; and the necessary party has an interest in the litigation which will be impeded if the litigation goes forward without that party (risk of prejudice to the absentee); or there is a substantial risk of double or inconsistent liability.
- **Necessary parties** must be joined if feasible. Feasible if it will not deprive the court of SMJ (e.g. will not destroy complete diversity) and The court can assert personal jurisdiction over the necessary party.
 - o If a necessary party cannot be joined, the court decides whether to: Continue without the necessary party (typically the case) or Dismiss the suit (rare) (i.e., the party is described as being indispensable)
- **Intervention as of right** may be had when the outsider claims an interest in the subject matter of the lawsuit that, as a practical matter, may be compromised by the disposition of the pending action.
- **Permissive Intervention** may be allowed whenever there is a common question of law or fact between the intervenors claim and the main claim (very relaxed standard). Must ask the courts permission—matter of the courts sound discretion.
- Intervention must be timely and the standard is “**reasonable promptness**” and there is **no supplemental jurisdiction for either kind of intervention when jurisdiction is based on diversity.**
- **Interpleader** is generally used to resolve the problem of competing claims to the same property. It is designed to avoid inconsistent obligations and multiple claims.
- **Rule Interpleader** there must be an independent basis of federal jurisdiction as diversity or a federal question jurisdiction. If the action is based upon diversity jurisdiction, the amount or the value of the assets in question must exceed \$75,000
- **Statutory Interpleader:** The statute allows federal courts to hear cases with (i) minimal diversity among the competing claimants; (ii) where the property in dispute is worth at least \$500 (there are other provisions which we won’t discuss in this post). Minimal diversity means that at least two competing claimants are citizens of different states. The stakeholder’s citizenship does not matter.
- **Impleader** is a device by which the defendant brings into the suit someone who is or may be liable to the defendant for all or part of the plaintiff’s claims against him. It comes with the court’s supplemental jurisdiction, but plaintiff cannot make a claim against the 3rd party unless diversity is met

Class Actions

- **Prerequisites** for a class action are **numerousness** (i.e., too many parties to be joined conventionally); **common** question of law or fact **predominate** over any questions affecting only individual members; **typicality** of claims/defenses of the representative parties must be typical of the class; and **adequacy** of representation must be **fair and adequate** to protect interest of parties..
 - o Burden is on proponent of class certification to establish that these prerequisites are met
- If **class action is brought under diversity jurisdiction** named representatives must be completely diverse from defendants and at least one plaintiff has a claim worth over \$75,000.
- The **Class Action Fairness Act (CAFA)** makes it easier to establish SMJ for very large class actions, involving at least 100 members with more than 5 million at stake for total class(not separate). Only minimal diversity required (i.e. any plaintiff diverse from any defendant)
- any CFA class member can remove to fed ct
- EXCEPTIONS to CAFA jx 1) primary defendants are state officials/govnt entity

- LIMITATION of CAFA jx → cts can decline jx where non diverse members are 1/3 and 2/3 of the class or if primary injuries and def are heavily concentrated in forum state and MUST decline jx if more than 2/3 of Plaintiff's and primary def are citizens of state where case was filed.

“Think of a class action like a **large ship carrying many passengers with a common destination and a shared problem**. The "class representatives" are like the ship's captain and a few key crew members, steering the vessel and representing the interests of all passengers. They need to meet certain qualifications (Numerosity, Commonality, Typicality, Adequacy) to be the official crew. The court's "personal jurisdiction" is its authority over the ship itself (defendants), but the rules for "subject matter jurisdiction" might be different because there are so many passengers, allowing for "minimal diversity" rather than requiring every passenger to be from a different place than the destination. "Notice" is like a mandatory announcement to all passengers, informing them of important decisions and giving them a chance to leave the ship if they don't want to be bound by the collective journey. The final "judgment" means that whatever happens to the ship (the outcome of the lawsuit) binds all the passengers who stayed on board.”

removal

- Includes Judgment on the pleadings; Default judgment (defendant has not shown up);
- ; and Summary judgment
- **Voluntary Dismissal** is without prejudice. Plaintiff a right to voluntary dismissal once at any time prior to the defendant serving an answer or motion for summary judgment. The defendant's motion before filing an answer does not cut off the right to a voluntary dismissal. After a defendant has filed an answer or motion for summary judgment, or if the plaintiff has already voluntarily dismissed once, plaintiff must seek leave of court for dismissal without prejudice. Plaintiff will have to pay the costs if she ends up later filing the same action against the same defendant.
- **Involuntary Dismissal** is typically with prejudice. Involuntary dismissal for lack of jurisdiction, improper venue, or failure to join an indispensable party is without prejudice. In all other cases, involuntary dismissal is with prejudice.
- **Dismissal with prejudice** is an adjudication on the merits, which means that, under federal law, given full res judicata (preclusive) effect, which bars any attempt at re-litigation of same claims. May be imposed for plaintiff's failure to prosecute or for failure to comply with FRCP or any court order. Standard for appellate review is abuse of discretion.

Judgment as a Matter of Law, Renewed Motion for Judgment as a Matter of Law, and Motion for a New Trial

- **Judgment as a Matter of Law** is Essentially a motion for summary judgment after the trial has begun.
 - o Standard: viewing the evidence in the light most favorable to the other party, the evidence cannot support a verdict for that party, and the moving party is therefore entitled to judgment as a matter of law.
 - o **A Renewed Motion for Judgment as a Matter of Law** is made at the close of all of the evidence and denied by the court may be renewed after the jury returns a verdict.
 - o The Standard is the same: the evidence cannot support the jury's verdict and the moving party is therefore entitled to judgment as a matter of law, but a prior motion is required: it is a condition precedent to a post-verdict motion that the motion for JMOL has been made at the close of all evidence
- **A motion for a new trial** is usually made with Renewed Motion for Judgment as a Matter of Law, but it is not restricted in the same way. A new trial can be granted for legal errors, newly discovered evidence, prejudicial misconduct by a lawyer, party, or a juror, or the judge concludes that the verdict is against the great weight of the evidence, either in substance of the verdict or amount of damages awarded.
- If the court determines that a **verdict was seriously excessive**, then it may offer a remittitur to reduce the verdict and Grant a new trial on the condition that the **remittitur** is not accepted. Note: can decrease, but cannot increase award

Appeals

- **Final Judgment Rule** states that Ordinarily, appeals are available only from a final judgment and Judgment becomes final when entered by clerk on the court docket (i.e., not when announced)
 - o A notice of appeal must be filed within 30 days
- **Interlocutory Orders** are immediately appealable as of right, including any order granting or modifying an injunction and any order that changes or affects possession of property
- **Collateral orders** are also immediately appealable. The collateral order doctrine allows immediate appeal if the order conclusively determines the disputed question; resolves an important issue completely separate from the merits of the action; and is effectively unreviewable upon appeal
- **Standards of Review**
 - o **Questions of Law**—Appellate review is **de Novo**
 - Ask: Did the trial court make an error? Was the error prejudicial?
 - o **Findings of Fact** look to determinations of the fact-finder
 - Jury verdict must be *affirmed if* sponsored by **substantial evidence**
 - Judge’s findings of fact must be *affirmed unless* they are **clearly erroneous**.
 - o **Matters of Discretion**
 - Standard of appellate review is **abuse of discretion**.
 - Any **reasonable decision will be upheld**.
 - Admissibility of evidence—**abuse of discretion**
 - Court make an error? Was the error prejudicial?
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 - Standard of appellate review is **abuse of discretion**.
 - Any **reasonable decision will be upheld**.
 - Admissibility of evidence—**abuse of discretion**

Conflicts of Law

Constitutional Limitations

- **Due process**—under the Due Process Clause of the Fourteenth Amendment, a forum state may apply its own law to a particular case only if it has a significant contact or a significant aggregation of contacts with the state such that a choice of its law is neither arbitrary nor fundamentally unfair
- **Full Faith & Credit**—Under the U.S. Constitution, state courts are required to give **full faith and credit to the judgments of other states**. State courts are likewise **required to treat federal judgments as those judgments would be treated by the federal courts**.
- A party against whom enforcement of a judgment is sought may **collaterally challenge the original state judgment based on lack subject matter jurisdiction, *only if* the jurisdictional issues were not litigated or waived in the original action**.

Statutory Limitations

- **State statutes**—a state may have a statute requiring certain Conflict of Law (COL) rules to be applied in a particular case
- **Federal statutes**—certain federal statutes may preempt a state from claiming jurisdiction over certain cases (e.g., patent, antitrust, bankruptcy cases)

Party Controlled Choice of Law Rules

- A valid agreement with effective COL clause;
- Applicable to the lawsuit under the terms of the contract;
- Reasonably related to the lawsuit; and
- Not in violation of the public policy of the forum state or another interested state

Substantive Law

- Federal courts sitting in diversity must apply substantive laws of the state in which it sits, including that state's choice-of-law rules.
- If there is an express **choice-of-law provision** in the contract, then that law will generally govern unless there is no significant basis for the parties' choice or it is contrary to public policy.

Vested Rights Approach

- The **law that controls is the law of the jurisdiction where the parties' rights were vested** (i.e., where the act or relationship that gave rise to the cause of action occurred or was created)
- The forum court would first characterize the issues in the cause of action

Most Significant Relationship Approach

- In determining the enforceability of a premarital agreement, most states apply the law of the state with the most significant relationship to the matter at hand. When determining which state has the most significant relationship, the forum court generally **considers the “connecting facts” or contacts that link each jurisdiction to the case**, as well as the **seven policy principles that are set forth in the Restatement (Second) of Conflict of Laws**.

§145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of that state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§188. Law Governing in Absence of Effective Choice by the Parties republic

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6.

(2) In the absence of an effective choice of law by the parties (*see* §187), the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§189-199 and 203.

The §6 referred to in Sections 145 and 188 provides:

§6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

the needs of the interstate and international systems,

(a) the relevant policies of the forum,

(b) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(c) the protection of justified expectations,

(d) the basic policies underlying the particular field of law,

(e) certainty, predictability and uniformity of result, and

(f) ease in the determination and application of the law to be applied.

There are obvious tensions between sections 145 and 188, on the one hand, and section 6 on the other. Sections 145 and 188 look like a blind, contacts-based jurisdiction-selecting approach (i.e., an approach that picks which state's law to apply without reference to the content of state laws), while section 6 contemplates policy analysis. In addition, sections 145 and 188 state a rule, even if a highly general one, while section 6 states an approach. *See Reese, Choice of Law: Rules or Approach*, 57 Cornell L. Rev. 315 (1972). For these reasons, there is a certain amount of schizophrenia built into the Second Restatement. To make matters more complicated, the Second Restatement also contains more specific sections that provide presumptive rules in discrete substantive contexts. For example, section 154's presumptive choice-of-law rule for interference with marriage relationships provides:

§154. Interference with Marriage Relationship

The local law of the state where the conduct complained of principally occurred determines the liability of one who interferes with a marriage relationship, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Because of the Second Restatement's eclecticism, courts have done many different things under its banner. Sometimes they count contacts; sometimes they apply the law of the place of the injury; sometimes they perform interest analysis;

often they mix several different approaches. As a result, the cases that follow cannot be said to be “typical” applications of the Second Restatement. Excellent general discussions of the methodology of the Second Restatement may be found in Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?* 34 Mercer L. Rev. 645, 655-666 (1983), and Kay, *Theory into Practice: Choice of Law in the Courts*, 34 Mercer L. Rev. 521, 552-562 (1983).

Governmental Interest Approach

- It is presumed that the **forum state will apply its own law**, but parties **may request** that another state’s law be applied because that **state has a greater interest in the outcome**

Wills & Estates

- **Inheritance of Real Property:** Under the Restatement (Second) of Conflict of Laws, the law of the state *where the real property is located* (the situs) governs its disposition under intestacy or under a last will and testament.
 - In a will, a decedent may designate a particular state’s law to be applied for matters of construction, BUT the validity and effect of a will is always determined by the law of the situs state.
- **Inheritance of Personal Property:** The law of the decedent’s *domicile state at the time of death* governs the disposition of decedent’s personal property. Domicile is determined by a person’s: (1) residence (physical presence in the state); AND (2) subjective intent to make the state their *permanent home*.

Constitutional Law

Adequate & Independent State grounds

The Supreme Court can review a state court judgment only if it turned on federal grounds. The Court has **no jurisdiction if the judgment below rested on an adequate and independent state ground.**

- **Adequate:** state ground must control the decision no matter how a federal issue is decided. When does this happen? When a federal claimant (i.e., the party asserting a federal rate) wins anyway under state law.
- **Independent:** the state law does not depend/hinge on an interpretation of federal law. No AISG if the state law adopts or follows federal law.

When a state court decision is unclear as to the basis of the decision (i.e. Whether it is based on the state constitution or the federal Constitution), the Supreme Court **can review the federal issue**

Legislative Power (Article 1)

Anti-Commandeering: Congress cannot force states to adopt or enforce federal regulatory programs. It cannot commandeer state and local agencies to implement federal programs.

The War and Defense Powers

Congress has the power to **declare war** and the power to maintain the army and navy & the power to provide for **military discipline** of US military personnel.

Congress can provide for **military trial** of enemy combatants and enemy civilians, but Congress cannot provide for military trial of US citizens who are civilians

Congress has the power to **tax if rationally related to raising revenue** and has the power to **spend for the general welfare**

13th Amendment: Congress has broad power to legislate against **racial discrimination**, whether public or private and the key is that the 13th can regulate private discrimination; “**vestiges of slavery**”.

14th Amendment: Congress has the power to **remedy violations of individual rights** by the government, but only as those rights have been defined by the courts. To be properly remedial, legislation must have “**congruence**” & “**proportionality**.” (there has to be a reasonable fit between the remedial law enacted by Congress & the constitutional right as defined by SCOTUS)

15th Amendment: Congress has the power to ensure there is no **racial discrimination in voting**

Congress has the power to confirm or deny presidential appointments

Legislative Vetoes are unconstitutional. This situation arises when Congress passes a law in reserving to itself the right to disapprove future executive actions by simple resolution. **If Congress wants to override executive actions, it must change the law** (so that the president has an opportunity to veto the new legislation). Congress cannot evade the president’s guaranteed veto opportunity by passing a law saying that in the future it plans to govern by resolution.

- United States senators and representatives (not state legislators) are protected by the **speech or debate clause** which states that Senators and congressmen and their aides **cannot be prosecuted or punished in relation to their official acts.**

The Executive Branch

- **Pardon Power:** the president can pardon commute punishment for any and all federal offenses. (Governors have a similar power for state crimes.) Cannot be limited by Congress.
- **Veto Power:** president has 10 days to veto legislation. The President can veto for **any reason/no reason** but cannot veto specific provisions and accept others. It is **all or nothing.**
- **Appointment & Removal powers:** only the president (or his appointees) can hire or fire executive officers. Some senior officers (e.g., cabinet officers, ambassadors, federal judges) require the advice and consent of the Senate. The Senate has a power of rejection. The Senate approval power does not translate into a power of appointment.
- **Treaties** are negotiated by the president but require approval by a 2/3 vote of the Senate. Once a treaty is ratified (approved) it has the **same authority as a statute.**
- **Executive agreements:** presidential negotiations not submitted for approval by the Senate. They can be authorized, precluded, or overridden by statute, but they take precedence over conflicting state laws. They **do not have the binding status of a treaty.**

- **The President** has ABSOLUTE IMMUNITY from liability for official acts (broadly construed), but no immunity for acts prior to taking office. There is an executive privilege to not reveal confidential communications with presidential advisers, but that privilege can be outweighed by a specifically demonstrated need in a criminal prosecution

Privileges & Immunities

- Forbids serious discrimination against out-of-state individuals,, absent substantial justification, this does not include corporations.
 - o There can be no legal requirement of residency for private employment. States cannot require that you live or reside in the state to work in the state. However, public employment can require residency requirements.

Procedural Due Process

- Concerned with deprivations of life (i.e., death penalty), Liberty (i.e., physical confinement and parole or restrictions on constitutionally protected rights, etc.), and Property.
 - o You have a property interest in your **government job or benefit** whenever you have a **legitimate entitlement to continued enjoyment** of the job or benefit.
 - o Sometimes, a hearing must occur **before the deprivation**. (terminating welfare benefits; non-emergency revocation of drivers licenses.)
 - o Sometimes, the hearing can occur **after the action**, so long as hearing is **prompt and fair**. (terminating disability benefits; disciplinary suspension from a public secondary school)

Substantive Due Process

- Due process versus equal protection: if a law denies a **fundamental right to everyone**, it violates **due process**, but if a law **denies a fundamental right to only some** it violates **equal protection**
- **Strict scrutiny:** is the law **necessary** for a **compelling government interest**? Implicit in strict scrutiny is the requirement for the **least restrictive means**. When strict scrutiny applies, the **government bears the burden of proof**
 - o Travel, Voting & Ballot Access, Privacy (Marriage, Contraception, Sexual Intimacy—Undue Burden Test, Parental rights, family relations, obscene materials—not child pornography, refusal of medical treatment), Race, Ethnicity, National Origin, Alienage (not undocumented aliens)—Arbitrary and unreasonable, establishment clause violations, content-based speech regulations
- **Intermediate Scrutiny:** Is the law **substantially related** to an **important government interest**?
 - o Legitimacy, gender—exceedingly persuasive, sexual orientation?? (split court), campaign contributions
- **Rational Basis:** Is the law **rationaly related** to a **legitimate interest**? The **challenger bears the burden of proof**.
 - o Everything else, including age, wealth, taxation, economic, weight, etc.

Equal Protection (14th Amendment)

- The Equal Protection Clause of the Fourteenth Amendment provides that “no state shall . . . deny to any person within its jurisdiction the **equal protection of the laws.**” This clause **applies only to states and localities**. Laws classifying on the basis of age are reviewed under the rational basis standard.
- A law passes the **rational basis standard** of review if it is **rationaly related to a legitimate governmental interest**, a test of minimal scrutiny. It is not required that there is actually a link between the means selected and a legitimate objective. However, the **legislature must reasonably believe there is a link**. Laws are *presumed valid* under this standard.
- The federal government **may exercise only those powers specifically enumerated by the Constitution**. The Fourteenth Amendment, **Section Five Enabling Clause** permits Congress to pass legislation to enforce the equal protection and due process rights guaranteed by the amendment, but not to expand those rights or create new ones. In

enforcing such rights, there must be a “**congruence and proportionality**” between the injury to be prevented or remedied and the means adopted to achieve that end. Accordingly, though **Congress may override state government action that infringes upon Fourteenth Amendment** rights if the "congruence and proportionality" test is satisfied, its enforcement power would not stretch to prohibit a law that does not violate the Constitution. In other words, as there would be no constitutional injury to prevent or remedy, the proposed law would be both incongruent and disproportionate.

Freedom of Religion

- **Establishment Clause**—
 - o It is a violation of the establishment clause for the government to endorse one religion over another and also to endorse religion over non-religion. Examples: Officially sponsored school prayer is unconstitutional; Officially sponsored graduation prayer is unconstitutional; Bible reading is permissible, but cannot be inspirational (e.g., literature or poetry); Display of the 10 Commandments is sometimes OK. It can be displayed for secular purposes (e.g. Historical or promoting morals), but not to inspire religious belief (Can teach the 10 Commandments in school as an example of early legal code’ Cannot post the 10 Commandments in classroom & leave there every day of school year—designed to inspire religious belief; Cannot post 10 Commandments in a courthouse if the context makes plain that the purpose is to endorse religious belief); Laws prohibiting teaching evolution have been struck down; Legislative prayer is OK for historical practices; Nativity scenes are OK on public property if there is something else to dilute the religious message (e.g., Hanukkah symbols, Rudolph the rednosed reindeer).
- **Free Exercise of religion**—**Religious belief is protected absolutely** (entitled to hold any beliefs or none at all), but **religious conduct is protected qualifiedly**
 - o Laws regulating religious conduct **because of its religious significance** are **unconstitutional** (i.e., laws aimed at religion), however, regulation of conduct as far as neutral, generally applicable laws must be obeyed despite religious objections.
- **Ministerial Exception**: First amendment requires a ministerial exception to employment laws. Non-discrimination employment laws cannot be applied to ministers because the federal government cannot regulate employment relations between a religious institution and its ministers
- **Campus access**: a state university that allows student groups to meet on campus must allow student religious groups equal access.

Speech

- The First Amendment is applicable to the states through the Fourteenth Amendment and **protects the freedom of speech** as well as the **freedom not to speak**. For example, the Supreme Court has held that a child in a public school has the right not to recite the Pledge of Allegiance.
- The First Amendment protects freedom of speech. **Protected speech can include written, oral, and visual communication, as well as activities such as picketing and leafleting**. The government’s ability to regulate speech depends on the **forum** in which the speech takes place.
 - o k, such as sidewalks, streets, and parks. In a traditional public forum, the government may only regulate speech if the restrictions: (i) are **content-neutral** as to both subject matter and viewpoint, (ii) are **narrowly tailored** to serve a **significant governmental interest**, and (iii) leave open **ample alternative channels for**

communication. Additional restrictions, such as an **absolute prohibition** of a particular type of expression, are **upheld only if narrowly drawn** to accomplish a **compelling governmental interest**.

- **Content based** regulations of speech trigger **strict scrutiny** and are **usually struck down**.
- **Prior Restraint** (regulating speech before it happens) Especially disfavored and will be struck down even when other forms of regulation might be upheld. Injunctions against speech are almost impossible to get because it regulates speech before it happens.
- **Time, Place, and Manner Restrictions:** A **public forum** is a place **traditionally reserved for speech activities**. These places include streets, parks, and public sidewalks around public buildings (but not airports). **Only time, place, and manner may be regulated in a public forum**. There are three requirements:
 - o **Content neutral:** must be content neutral on its face and as applied. Also, must not allow executive discretion.
 - o **Alternative channels of communication must be left open:** time, place, or manner law must be a guideline for speech, not a flat prohibition of speech.
 - o **Must narrowly serve a significant state interest:** under this test most content neutral time, place, or manner regulations are upheld
 - Does **not** require a compelling interest
- **Non-public forum:** this includes all kinds of government property that is not a public forum (e.g., government offices, jails, power plants, military bases, etc.). DE
 - o **Viewpoint discrimination is invalid:** one clearly unreasonable kind of regulation would be to discriminate based on viewpoint (e.g. Between members of different political parties)
 - o **Disruption of the functions of government:** one should go outside to the public sidewalk surrounding the building since that is a public forum.
- **Limited public forum:** Describes a place that is **not a traditional public forum**, but that the government chooses to open to all comers (e.g., a municipal theater that anyone can rent).
 - o In such areas, only time, place, or manner regulations are allowed, but this is a **narrow category**.
- **Obscenity:** the 4 S's—**Sexy** (must be erotic; appeal to the prurient interest); **Society sick** (must be patently offensive to the average person in society. The society may be the nation as a whole, or a particular state, or a major metropolitan area); **Standards** (must be defined by proper standards for determining what's obscene, not vague and/or overbroad); **Serious value** (the material must lack serious value. If material has serious value (artistic, scientific, educational, or political), it cannot be held legally obscene.)
 - o This determination is made by the court, not the jury, and it must be based on a national standard, not a local one.
 - o a lesser legal standard can be applied to minors, but the **government cannot ban adult speech** simply because it would be **inappropriate for minors**.
 - o **Child pornography** can be prohibited whether or not it is legally obscene, and possession can be punished even when it is in the privacy of your home.
 - o **Land-use restrictions** must be narrowly drawn; can regulate zoning of adult theaters but cannot ban them entirely.
- Speech is not protected if it is an **incitement to immediate violence** and **Fighting words** are words likely to provoke an immediate breach of the peace.
- Most regulations of **commercial speech** are struck down. So long as the advertising is truthful and informational, it must be allowed, but misleading commercial speech may be prohibited.
- The first amendment restrictions **basically do not apply to the government as a speaker**. The government does not have to accept all monuments donated by a private person simply because it accepts one, when the government is controlling the message, it is entitled to say what it wants, but specialty license plates bearing messages requested by

purchasers are still government speech, so the government can refuse to issue plates that would be offensive to other citizens.

- **Corporations** have the same speech rights as individuals, so does the **media**, with the **exception of broadcasters** who are subject to greater regulatory authority than print media or the internet
- Government employees generally cannot be hired or fired based on political party, political philosophy, or any act of expression, but this rule does not apply to confidential advisors or policy making employees.

Expression

- **Expressive conduct** (a.k.a. **Symbolic speech**) laws regulating expressive conduct are upheld if they further an important interest; That interest is **unrelated to the suppression of expression**; and **burden on expression is no greater than necessary**.
- If the government is trying to **suppress a particular message**, then the law will be **struck down**; if the government is trying to pursue an interest unrelated to the suppression of expression, then the law will be upheld.

Campaign Finance:

- **Contributions** to political campaigns/candidates can be regulated provided that the limits are not unreasonably low.
- **Direct expenditures in support of a candidate**, a campaign, or a political issue cannot be regulated.

Commerce Clause

- The Supreme Court of the United States has long held that the Constitution's grant to Congress of the power to regulate interstate commerce also limits, by implication, the right of state or local governments to adopt laws that regulate interstate commerce. This is often referred to as the "Dormant Commerce Clause: A **nondiscriminatory state law that imposes an "incidental" burden on interstate commerce** will nonetheless be **unconstitutional** if the benefits of the state law are grossly outweighed by the burdens on interstate commerce.
- **The Dormant Commerce Clause** is a doctrine that **limits the power of states to legislate in ways that impact interstate commerce**. If Congress has not enacted legislation in a particular area of interstate commerce, then the **states are free to regulate**, so long as the state or local action **does not**: (i) discriminate against out-of-state commerce, (ii) unduly burden interstate commerce, or (iii) regulate extraterritorial (wholly out-of-state) activity.
- A state or local regulation discriminates against out-of-state commerce if it **protects local economic interests at the expense of out-of-state competitors**. However, the mere fact that the entire burden of a state's regulation falls on an out-of-state business is not sufficient to constitute discrimination against interstate commerce. **The Dormant Commerce Clause protects the interstate market**, not particular interstate firms, **from prohibitive or burdensome regulations**.
- A state regulation that is **not discriminatory may still be struck down as unconstitutional if it imposes an undue burden on interstate commerce**. The courts will *balance*, case by case, the objective and purpose of the state law against the burden on interstate commerce and evaluate whether there are less restrictive alternatives.
- If a state or local regulation, on its face or in practice, is discriminatory, then the **regulation may be upheld** if the state or local government can establish that: (i) an important local interest is being served, and (ii) no other nondiscriminatory means are available to achieve that purpose.
- A state **may behave in a discriminatory fashion** if it is **acting as a market participant** (buyer or seller), as opposed to a market regulator. If the state is a market participant, it **may favor local commerce or discriminate against nonresident commerce** as could any private business

State Officials & 11th Amendment

- When a **state official**, rather than the state itself, is named as the **defendant in an action brought in federal court**, the state official may be enjoined from enforcing a state law that violates federal law.
- The Constitution generally protects against **wrongful conduct by the government, not private parties**. A private **person's conduct must constitute state action** in order for these protections to apply. State action is found when a **private person carries on activities that are traditionally performed exclusively by the state**, such as running primary elections or governing a "company town."
- The Eleventh Amendment is a **jurisdictional bar that prohibits the citizens of one state from suing another state in federal court**. It **immunizes the state from suits in federal court for money damages or equitable relief** when the state is a defendant in an action brought by a citizen of another state. There are a few notable exceptions, including when a state waives its immunity under the Eleventh Amendment.

Takings Clause

- Generally, a governmental regulation that **adversely affects a person's property interest is not a taking**. However, it is possible for a regulation to rise to the level of a taking, such as when a **regulation results in a permanent physical occupation of property by the government** or a 3rd party or a regulation results in a **permanent total loss of the property's economic value**.
- Even if the ordinance does not constitute an occupation of the property by either the government or a third party, it is still subject to a **three-factor balancing test** to determine whether the ordinance amounts to a regulatory taking. The following factors are considered: (i) the economic impact of the regulation on the property owner, (ii) the extent to which the regulation interferes with the owner's reasonable, investment-backed expectations regarding use of the property, and (iii) the character of the regulation, including the degree to which it will benefit society, how the regulation distributes the burdens and benefits among property owners, and whether the regulation violates any of the owner's essential attributes of property ownership, such as the right to exclude others from the property.
- A **local government may exact promises from a developer**, such as setting aside a portion of the land being developed for a park in exchange for issuing the necessary construction permits. Such exactions **do not violate the Takings Clause** if there is (i) an essential nexus between legitimate state interests and the conditions imposed on the property owner (i.e., the conditions substantially advance a legitimate state interest), and (ii) a rough proportionality between the burden imposed by the conditions on property owner and the impact of the proposed development.
 - o In determining whether there is **rough proportionality** between the burden and the impact, the government must make an **individualized determination** that the conditions are **related both in nature and extent to the impact**.

Contracts & Sales

Substantial Performance

- The doctrine of substantial performance provides that a party who **substantially performs can recover on the contract even though full performance has not been tendered**. Substantial performance is negated if the incomplete performance amounted to a **material breach of contract**. If the failure of a constructive condition of exchange is minor, however, it will not negate substantial performance.

Installment Contracts

- A divisible or installment contract is one in which the **various units of performance are divisible into distinct parts**. Recovery is limited to the amount promised for the segment of the contract performed.

Unjust Enrichment (Quantum Meruit)

- When a **plaintiff confers a benefit on a defendant and the plaintiff has a reasonable expectation of compensation**, allowing the defendant to receive the benefit without compensating the plaintiff would be unjust. Although this type of action is often characterized as based on an implied-in-law contract or a quasi-contract, **quantum meruit does not depend on the existence of a contract**.

Repudiation

- Parties to a contract are **entitled to expect due performance of contractual obligations** and are permitted to take steps to protect that expectation. **Anticipatory repudiation** occurs when there has been an **unequivocal refusal of the buyer or seller to perform**, or when a party creating **reasonable grounds for insecurity fails to provide adequate assurances within 30 days** of demand for such assurances.
- Repudiation allows the non-repudiating party to **resort to any remedy given by the contract or code**. But until the repudiating party's next performance is due, he may retract the repudiation unless the aggrieved party has since accepted the repudiation, acted in reliance on the repudiation, or brought an action for breach.
 - o **Retraction** must include any assurances of performance

Torts

- o **The Default** rule is that the place of injury controls unless another state has a more significant relationship to the parties or tort

Contracts

- o **Default rules**—generally apply unless another state is found to have a more significant relationship with regard to the issue:
 - Land contracts—controlled by the law of the state of the situs of the land
 - Personalty contracts—controlled by the law of the state where delivery occurs
 - Life-insurance contracts—controlled by the law of the state of the insured's domicile
 - Casualty insurance contracts—controlled by the law of the state where the insured risk is located
 - Loans—controlled by the law of the state where repayment is required
 - Suretyship contracts—controlled by the law of the state governing the principal obligation
 - Transportation contracts (covering both persons and goods)—controlled by the law of the state of departure

Corporations

- o generally governed by **the law of the state of incorporation**
- o other party has justifiably demanded about whether the retracting party will perform. A proper retraction reinstates the repudiating party's contract rights

Damages

- The **baseline damages** in breach-of-contract suits are **expectancy damages**, which are intended to put the injured party in the **same position as he would have had the contract been performed**.
- If the **nonbreaching party avoids specific costs** because a breach has occurred, **those are subtracted** from any damage award.
- Contract damages are **recoverable only if** they were **in the contemplation of the parties at the time of contract formation** or were otherwise **foreseeable**.
- Courts may refuse to enforce an award that is **economically wasteful where the cost of restoration greatly exceeds any diminution in value**. If a court finds that restoration will be wasteful, then the measure of damages may be the **difference in value**. Courts **may refuse** to use the diminution in value measure of damages, however, when the **breach appears to be willful**, and only completion of the contract will enable the nonbreaching party to use the land for its intended purposes.
- Contract damages are **recoverable only if** they can be **proven with reasonable certainty**. To that end, courts are **hesitant to award damages for lost profits**—especially in the case of new businesses—because profits are often speculative.
- A **nonbreaching party** has the **obligation to mitigate damages** by taking steps that do not result in undue risk, expense, or burden. The amount of damages that the nonbreaching party could have mitigated, but **failed to mitigate, should be offset against the total damage award**.
- The mailbox rule with an offer— acceptance only valid upon receipt (different than the normal mailbox rule)

Contract Formation

- Under the **UCC**, a contract is formed if **both parties intend to contract and there is a reasonably certain basis for giving a remedy**. The **only essential term is quantity**, and as long as the parties intend to create a contract, the UCC “fills the gap” if other terms are missing, such as the time or place for delivery. At **Common Law**, **all essential terms** must be covered in the agreement, including the parties, subject, price, & quantity.
 - o Note: Both **Requirements & Output Contracts** are considered **specific enough** under the UCC even though they don't have a specific quantity term
- For acceptance, generally any reasonable method will be allowed, but silence is only allowed if expressly provided in the contract.
- In general, an offer **can be revoked by the offeror at any time prior to acceptance**. A promise to hold an offer open is governed by statute.
- In creating a legal offer, there is an objective test: ask whether an offeror displays **an objectively serious intent to be bound**
- It is possible for an offer to be **irrevocable** if the **offeree reasonably and detrimentally relies** on the offeror's promise prior to acceptance. It must have been **reasonably foreseeable that such detrimental reliance would occur** in order to imply the existence of an option contract.

- An offer is **revoked** when the offeror makes a **manifestation of an intention not to enter into the proposed contract before the offeree accepts**. A revocation may be made in **any reasonable manner** and by **any reasonable means**, and it is **not effective until communicated**. Under the UCC, a person receives notice when: (i) it comes to that person's attention, or (ii) it is duly delivered in a reasonable form at the offeree's place of business.
- An offer is an **objective manifestation** of a **willingness by the offeror to enter into an agreement that creates the power of acceptance in the offeree**. An offer **can only be accepted while it remains open**. One way that an offer terminates is by the offeree's rejection of the offer.
- In general, **an offer can be revoked by the offeror at any time prior to acceptance**. However, an enforceable option will render the offer irrevocable. **An option** is an **independent promise to keep an offer open for a specified period of time**. Such a promise limits the offeror's power to revoke the offer until after the period has expired, while also preserving the offeree's power to accept. Under the common law, if the option is a promise not to revoke an offer to enter a new contract, the **offeree must generally give separate consideration for the option to be enforceable**.
- The UCC provides an **alternative to the common law** option rules if three requirements are met. **Under the UCC**, an offer to buy or sell goods is **irrevocable if**: (i) the offeror is a merchant, (ii) there is an assurance that the offer is to remain open, and (iii) the assurance is contained in a signed writing from the offeror. Unlike the common law, **no separate consideration is required** to keep the offer open under the UCC firm offer rule. **A merchant** is generally described as a person who regularly deals in the type of goods involved in the transaction. Under the firm offer rule, a merchant includes not only a person who regularly deals in the type of goods involved in the transaction, but also any businessperson when the transaction is of a commercial nature.

Statute of Frauds

A contract is outside the UCC Statute of Frauds to the extent that goods are received and accepted, and to the extent that payment has been made and accepted.

- When the price of goods is at least \$500, the UCC requires a memorandum of the sale that must (i) indicate that a contract has been made, (ii) identify the parties, (iii) contain a quantity term, and (iv) be signed by the party to be charged.
 - o A signature includes any authentication that identifies the party to be charged, such as a letterhead on the memorandum.
 - o A mistake in the memorandum or the omission of other terms does not destroy the memorandum's validity. An omitted term can be proved by parol evidence. However, enforcement is limited to the quantity term actually stated in the memorandum.
- Exception:
 - o A contract for the sale of goods is outside the SOF to the extent that goods are received and accepted, and to the extent that payment has been made and accepted. There is an exception for specially manufactured goods for the buyer and are not suitable for sale to others as well.
- Confirmatory memo - If a memorandum sufficient against one party is sent to the other party who has reason to know of its contents, and the receiving party does not object in writing within 10 days, then the contract is enforceable against the receiving party even though he has not signed it.
 - The memo must meet the SOF requirements.
 - Other party must knowingly receive the memo.

UCC 2-207

- A merchant is a person who regularly deals in the type of goods involved in the transaction or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

In contracts of \$500 or more between merchants, if a memorandum sufficient against one party is sent to the other party, who has reason to know its contents, and the receiving party does not object in writing within 10 days, then the contract is enforceable against the receiving party even though he has not signed it.

- At CL, the acceptance must be a mirror image of the offer, so no changes or new terms
- If at least one of the parties is not a merchant, an acceptance with new terms will be a valid acceptance, but the new terms are not going to come back in, but If BOTH parties are merchants, additional terms do come in with the acceptance UNLESS, those additions/changes are material changes, the terms of the original agreement say that no changes can come in, or if the offeror objects before or after receiving the new terms.

Consideration

- Gifts are not exchanged for a bargain, so there is NO consideration for gifts and they are thus hard to enforce
- Pre-existing duty rule: if someone already has to do something, there's no new consideration
- Past consideration—CL says it's a no go, the modern trend says that if someone provided a very specific, meaningful benefit to somebody and that person then promises back, that MAY be considered consideration
- Promissory Estoppel: B

Firm Offer Rule

- Under the UCC firm offer rule, an offer to buy or sell goods is irrevocable if: (i) the offeror is a merchant, (ii) there is an assurance that the offer is to remain open, and (iii) the assurance is contained in a signed writing from the offeror. A firm offer in a form prepared by the offeree, however, must be separately authenticated by the offeror to protect against inadvertent signing.

Corporations

Promoter Liability:

- The promoter is individually liable on contracts formed before the corporation came into existence even after the corporation is formed; they can escape by a novation (when the corporation and the 3rd party agree to let the promoter out and take over it) or adoption (if the corp. takes the benefits out of that contract, then the promoter is let out of liability)

Shareholders:

- **Elect the Board of Directors** by a vote
- Shareholders have a right to **inspect & copy the records** during normal business hours as long as they give 5 days notice and state a proper purpose.
- Shareholders have a right to vote on changes in the corporation
- Proxy voting: allows a person to vote on behalf of the shareholder; irrevocable is allowed—cant take it back
- Shareholders have the **power to amend a corporation's bylaws** under state law. A corporation's bylaws for the management of the corporation's business or regulation of its affairs are enforceable, so long as the bylaws do not conflict with state law or the articles of incorporation. The nomination of directors and the procedure for nominating directors are common provisions in the bylaws and are consistent with regular corporate practice.
- **Shareholder agreements** by which shareholders form an agreement to vote their shares together are allowed

Meeting Notice

- Directors are **entitled to notice of a special meeting**. Unless the articles of incorporation or bylaws provide otherwise, notice must be provided **at least two days prior to the meeting** and **should state the date, time, and place** of the meeting. The notice need not describe the purpose of the special meeting.
- Directors are **entitled to notice of a special meeting**, but a **director's attendance waives notice** of that meeting **unless the director promptly objects** to lack of notice.

Formation of a Corporation

- In order to form a corporation, **articles of incorporation must be filed with the state**. The articles **must include certain basic information**, including the **number of shares** the corporation is authorized to issue. Unless a delayed date is specified in the articles, the corporate **existence begins when the articles are filed**.
- When a person **conducts business as a corporation without attempting to comply with the statutory incorporation requirements**, that person is **liable for any obligations incurred** in the name of the nonexistent corporation.
- When **all of the statutory requirements** for incorporation have been **satisfied**, a **de jure corporation** is created. Consequently, the corporation, rather than persons associated with the corporation, is liable for activities undertaken by the corporation. However, **when a corporation has not been created, the entity may be treated as a general partnership**.
- A **partnership** is an association of two or more persons to carry on a for-profit business as co-owners. In a general partnership, **each partner is jointly and severally liable** for all partnership obligations.
- When a person makes an **unsuccessful effort to comply** with the incorporation requirements, that person may be able to escape personal liability under either the **de facto corporation doctrine** or the **corporation by estoppel doctrine**. Under either doctrine, **the owner must make a good-faith effort to comply with the incorporation requirements** and **must operate the business as a corporation without knowing that the requirements have not been met**. If the owner has done so, then the business entity is treated as a de facto corporation, and the owner, as a de facto shareholder, is **not personally liable** for obligations incurred in the purported corporation's name.
- Alternatively, under **corporation by estoppel**, a person who **deals with an entity** as if it were a corporation is **stopped from denying its existence** and is thereby **prevented from seeking the personal liability** of the business owner. This doctrine is limited to contractual agreements.
- If a corporation states in its articles of incorporation that they have a very specific purpose (very uncommon—usually they say they have a broad purpose) and that corporation enters into a contract beyond that specific scope, they have committed an **ultra vires** act and a shareholder can come in and enjoin the action or take action against the officer for that act.

Issuance of Stock (Securities)

- Issuance must be approved by the board of directors and they determine that the value paid for the stock is adequate.
 - o **Par value** stock is when a corporation decides to assign a minimum value for a stock and it cannot be sold for less than that and if it is sold for less, the board can be liable, and if the shareholder who buys it knows they are getting it for less than par value, they can also be liable. Note: stock sold for less than par value is watered stock

Limited Liability Company (LLC) -

- An LLC **can be member-managed** (direct management of the LLC by its members; members can bind the LLC as its agent) or **manager-managed** (centralized management of the LLC by one or more managers who need not be members). Unless the operating agreement or certificate of incorporation provides otherwise, the default management arrangement is member-management.

- While an **operating agreement by an LLC is generally not required**, many LLCs adopt an operating agreement that governs any and all aspects of the entity's affairs. The **operating agreement generally takes precedence over contrary statutory provisions**. Generally, members of an LLC owe each other a duty of loyalty.
- A member of an LLC is **generally not liable personally for the LLC's obligations**. If a plaintiff can **pierce the veil**, however, the members of the LLC may be held personally liable.
- Although members of a **manager-managed LLC** do not have authority to bind the LLC, members of a member-managed LLC have **broad authority to bind the LLC**, similar to that of a partner in a general partnership. **Each member has equal rights** with respect to the **management** of the LLC. However, an **act outside the ordinary course of the activities** of the company may be undertaken only with the **consent of all members**.
- Tax advantages of a partnership and the limited liability of a partnership.
 - o A member of a LLC is not individually liable, but PCV principals apply
- Members of an LLC owe fiduciary duties of care & loyalty to the LLC & one another
 - o Duty of loyalty: members of an LLC may have a duty to bring a derivative action on behalf of the LLC against themselves even as a corporation
 - o Duty of care: act reasonably and subject to the BJR
- Direct actions: one member can bring against LLC or another member for itself
- An LLC **may dissolve upon the occurrence of various events**, including **consent of all members**, passage of **90 days without members**, by **court order**, or by the **happening of a dissolution-causing event per the operating agreement**. Dissociation alone does not cause dissolution. A **member can withdraw or dissociate at any time** and without reason, even if doing so violates the operating agreement, by providing notice to the corporation. Written notice is not required under the ULLCA.
- Dissolution may be mandatory (by the court) by showing that a controlling member is acting in an oppressive way and harming the other member. The abused member will ask for this.

Piercing The Corporate Veil

- There must exist some **circumstances** that would **justify** piercing the veil on equitable grounds, such as **undercapitalization** of the business, **commingling of assets**, **confusion of business affairs**, or **deception of creditors**.
- Courts rely on various theories to pierce the corporate veil, including the **"mere instrumentality" test**, wherein a member has to show that (i) the **members dominated** the entity in such a way that the **Corporation had no will of its own**, (ii) the **members used that domination to commit a fraud** or wrong, and (iii) the **control & wrongful action** proximately **caused the injury**.
- Under the **"unity of interest and ownership"** test, a **petitioner must demonstrate** that there was **such a unity of interest** and ownership between the entity and the members that, in fact, **the company did not have an existence independent of the members** and **that failure to pierce** the veil through to the members would be **unjust or inequitable**.
- If a shareholder is abusing the protections of the corporate status, a court can pierce the corporate veil

Removal

- Shareholders elect the board of directors and the board of directors is actually responsible for the management of the corporation and business affairs.
- Shareholders can remove members of the board for breaches of fiduciary duties and, modernly, without cause.

Dissolution & Winding Up

- When members **agree to voluntarily dissolve an entity**, the entity **must wind up its affairs and liquidate its business**. Only after the entity's **debts and obligations** to creditors have been paid may the **members receive a portion** of the liquidated value of the LLC. Those **responsible for winding up** can be **liable for improper distributions**.
- **Dissociation does not discharge the member's interest or liability** and **does not necessarily trigger dissolution** and winding up. The dissociated member **relinquishes his right to participate in the LLC** and is entitled to **distributions only if the continuing members receive payment**.
- **Order of distributing corporate assets:** 1) pay off any **creditors**, 2) pay off any **shareholders with preferred stock**, 3) pay off any **remaining shareholders**

Business Judgment Rule

- The business judgment rule is a **rebuttable presumption** that a **director reasonably believed that his actions were in the best interests of the corporation**. However, the business judgment rule **does not generally apply to a conflict-of-interest transaction**.
- A **conflict-of-interest** transaction, or "**self-dealing**," is any transaction between a director and his corporation that would **normally require approval of the board of directors** and that is of such **financial significance** to the director that it would reasonably **be expected to influence the director's vote on the transaction**. The interest involved **can be direct or indirect**, but it **must be financial and material**. Majority approval of a conflict-of-interest transaction by fully informed disinterested directors triggers the business judgment rule under a safe harbor provision.
- Will not protect a director who violated their duty of care.

Voting & Meeting Participation

- Typically, the **assent of a majority of the directors present at the time the vote** takes place is **necessary for board approval**. However, the articles of incorporation or bylaws may specify a higher level of approval.
- For the board of directors' acts at a meeting to be valid, **a quorum of directors must be present at the meeting**. A **majority** of all directors in office constitutes a quorum, **unless** the articles of incorporation or bylaws require a higher or lower number. A **director must be present at the time that the vote is taken in order to be counted for quorum purposes**, but presence **includes appearances made through communications equipment** that allows all persons participating in the meeting to hear and speak to one another.

Fiduciary Duties

- A director owes a duty of loyalty and a duty of care to the corporation.
- A controlling shareholder, such as a parent corporation, generally does not owe fiduciary duties to the corporation or other shareholders. However, decisions by a majority shareholder or control group may be reviewable by a court for good faith and fair dealing toward the minority shareholders under the court's inherent equity power. Business dealings between a controlling shareholder and the controlled corporation that do not involve self-dealing are analyzed using the business judgment standard.
- If a parent corporation causes its subsidiary to participate in a business transaction that prefers the parent at the expense of the subsidiary, it can involve self-dealing and a breach of loyalty. With regard to a parent corporation engaged in self-dealing, the main concern **under the fairness test** is whether the benefit is comparable to what might have been obtained in an arm's length transaction.
- The **duty of loyalty** requires a director to act in a manner that the director **reasonably believes** is in the **best interests of the corporation**. A director who engages in a **conflict-of-interest transaction** with his own corporation **has violated** his duty of loyalty ***unless*** the transaction is protected under the safe-harbor rule.

- o A **conflict-of-interest transaction** may enjoy **safe-harbor** protection via (i) a **majority vote** of *informed and disinterested* directors; (ii) a **majority vote** of *informed and disinterested* shareholders; or (iii) **fairness** of the transaction.
- o The fairness test looks at **the substance and procedure of the transaction**. Substantively, the test asks whether the **corporation received something of comparable value in exchange for what it gave to the director**. Procedurally, it looks at whether the **process followed by the directors in reaching their decision was appropriate**. The interested directors have the burden of establishing both the substantive and procedural fairness of the transaction. A conflict-of-interest transaction in violation of the safe-harbor provisions may be enjoined or rescinded, and the corporation may seek damages from the directors.
- The **duty of loyalty** includes the duties to **refrain from dealing** with the company **on behalf of one with an adverse interest** in the company, and to **refrain from competing** with the company. The operating agreement may amend this duty so long as the amendment is **not manifestly unreasonable**.
 - o No **self dealing** unless **safe-harbor provision**:
 - Interested Director who is self dealing **discloses all material facts of the transaction to the board of directors** and receives approval from a majority of the non-interested board of directors for the transaction to occur
 - Interested director **discloses all material facts of the transaction to the shareholders** and receives approval from a majority of the non-interested shareholders
 - Transaction is **fair to the corporation** in substance (terms) & procedure (process was fair)
- With respect to the **duty of care**, directors have a duty to **act with the care that a person in a similar position would reasonably believe appropriate under similar circumstances**. The director is presumed to have the knowledge and skills of an ordinarily prudent person and is required to use any additional knowledge or special skills that he possesses. Normally, the **party alleging** a violation of the duty of care must **rebut the business judgment rule**.
- Duty of loyalty requires no usurping of a corporate opportunity. Must first offer the opportunity to the corporation. In determining whether the opportunity is one that must be first offered to the corporation, courts have applied the “interest of expectancy” test or the “line of business” test.
 - o Interest of expectancy - whether the corporation has an existing interest or an expectancy arising from an existing right in the opportunity. Expectancy can also exist when the corporation is actively seeking a similar opportunity.
 - o Line of business - whether opportunity is within the corporation’s current or prospective line of business.
- **Always talk about duty of care followed by the business rule**

Officers

- Officers are agents of the corporation; follow an agency analysis

Legal Actions

- A shareholder may bring a **direct or a derivative action** against the corporation in which the shareholder owns stock.
- In a **direct action**, the **shareholder is vindicating his own rights** and is not required to make a demand on the board of directors before proceeding with the litigation.
- By contrast, in a **derivative action**, a shareholder **brings suit on behalf of the corporation** and is typically **based on a breach of fiduciary duties by the board of directors**. To bring a derivative action, the shareholder must have standing and must make a written demand upon the board of directors.
 - o To have standing, the **shareholder must have been a shareholder at the time of the wrong and at the time the action was filed and continue to be a shareholder throughout the litigation**. Requirement to make a written demand upon the board of directors *unless the demand would be futile*. Not all jurisdictions recognize

the futility exception, however. In states that do not recognize the futility exception, demand must be made upon the board in all cases.

- o To bring a derivative action you must bring a **demand upon the board** to demand action and then **give 90 days** for them to take that action. If the board does not take action or remedy the action in 90 days, then the suit can be brought on behalf of the corp. This requirement can be waived if irreparable injury would result from waiting the 90 days, then it can be immediate.
 - Futility exception—doesn't have to bring the demand on the board if it would be futile
 - The board can bring a motion to dismiss the derivative action if acting in good faith and in the best interest of the corporation.
- o Any recovery is going to go to the corporation

Bylaws

- The **board of directors** can also **amend bylaws** *unless* the articles of incorporation or a vote by shareholders **limits** this power.
- **Shareholder-approved bylaws** can **amend or repeal existing** bylaw provisions, regardless of whether the bylaw was initially approved by the shareholders or the board of directors. However, a shareholder-approved bylaw dealing with director nominations may not limit the board's power to amend, add, or repeal to ensure an orderly process. Thus, **if shareholders approve a bylaw amendment that limits further board changes**, the board could only **amend or add to the bylaw to safeguard the voting process**; it could not repeal the shareholder-approved bylaw.

Criminal Law

Defenses

- In the majority of jurisdictions, the **defendant has the burden of proving insanity**. Insanity includes mental abnormalities that may affect legal responsibility.
 - o **M'Naghten**: defendant either did **not know the nature** of the act or **did not know that the act was wrong** because of mental disease or defect.
 - o **Irresistible Impulse**: defendant has a mental disease or defect **that prevents the defendant from controlling himself**
 - o **Durham Rule**: defendant **would not have committed** the crime **but for his having a mental disease or defect** (rarely used because so defendant-friendly)
 - o **Model Penal Code**: due to a mental disease or defect, the **defendant did not have substantial capacity to appreciate the wrongfulness** of his actions or to **conform his conduct to the law**.
- Under the common law, one who is **not the aggressor** is justified in using **reasonable force against another person to prevent immediate unlawful harm to herself**. The harm to the defendant **must be imminent**, not a threat of future harm, and the person can **only use as much force as is required to repel** the attack.
- **Involuntary Intoxication** occurs when a person doesn't realize that she received an intoxicating substance (e.g., "date rape" drugs); Is coerced into ingesting a substance; or Has an unexpected or unanticipated reaction to prescription medication.
 - o Can be a **valid defense to general intent, specific intent and malice crimes** when it **negates the mens rea** necessary for the crime
- **Voluntary Intoxication** occurs when a person intentionally ingests the substance, knowing it is an intoxicant.
 - o **defense only to specific intent crimes**, and only if **it prevented the defendant from forming the mens rea**.
 - o Under MPC, voluntary intoxication is only a defense to crimes for which material element requires purpose or knowledge and the intoxication prevents the formulation of that mental state
- **Self Defense**: two kinds—deadly & non-deadly Non-deadly force:
 - o victim entitled to use **non-deadly force any time he reasonably fears imminent unlawful harm**.
 - o A victim is entitled to use deadly force only if he reasonably believes that deadly force will be used against him, or under the MPC, reasonably believes that the crime will result in serious bodily injury.
 - **Majority rule**: retreat is not required even when entitled to use deadly force.
 - **Minority rule**: must retreat rather than using deadly force if safe to do so, but even in minority jurisdictions, retreat is never required when the person is employing deadly force is in his own home
 - o **Defense of Others**: same right to defend other individuals against a criminal that she has to defend herself.
 - o **Defense of Property**: only non-deadly
- **Duress** is when a defendant claims he committed a crime only because he was threatened by a third-party and reasonably believed that the only way to avoid death or injury to himself or others is to commit the crime. **In order to be a defense, there must be a threat of death or serious bodily harm**. Mere Duress is a defense for **all crimes other than intentional murder**
- injury, particularly injury to property, is not sufficient.
- **Necessity**: Available **in response to natural forces**; i.e., it is the lesser of two evils

Theft Crimes:

- **Larceny** is the trespassory taking and carrying away the personal property of another with the intent to permanently deprive that person of the property.

- **Common-law burglary** is the breaking and entering of the dwelling of another at nighttime with the specific intent to commit a felony therein.
- **Larceny by Trick:** a defendant who commits larceny by trick obtains only possession of the personal property of another, not title of that property. Also, the defendant who commits larceny by trick obtains possession of the property by intentionally making a false statement to the victim.
- **Embezzlement:** occurs where a defendant starts out having the victims consent to have the property but commits embezzlement by converting the property to his own use
- **False Pretenses:** occurs when the defendant obtains title to someone else's property through an act of deception. It requires obtaining title to the property of another person through the reliance of that person on a known false representation of a material past or present fact, and the representation is made with the intent to defraud.
- **Forgery:** The making of a false writing with apparent legal significance and with the intent to defraud
- **Robbery** = larceny + assault (threats/use of force)

Murder

- **Homicide** is the killing of a living human being by another human being.
- If the victim **would not have died but** for the defendant's act, then the defendant's act is the **actual cause** of the killing. When the defendant **sets in motion forces that lead to the death** of the victim, the defendant is the **actual cause** of the victim's death.
- **Proximate cause** exists only when the **defendant is deemed to be legally responsible for the crime**. For the defendant to be legally responsible for the crime, **the death must be foreseeable**. That is, death must be the **natural and probable result** of the conduct. A defendant's conduct is deemed to be **foreseeable if it is not abnormal**. Actions by a force of nature that are not within the defendant's control are generally not foreseeable. However, an **intervening cause will not relieve the defendant of criminal responsibility unless it was so out-of-the-ordinary** that it would be unjust to hold the defendant responsible. Further, an **act that accelerates death is a legal cause of the death**.
- To prove **homicide**, the prosecution must show that the **defendant caused the victim's death**. The prosecution must prove both **actual and proximate** causation.
- **First Degree Murder** is a specific intent crime typically defined as a **deliberate and premeditated** murder or killing that results during the **commission of an inherently dangerous felony (BARRK)** (felony murder is classified as first-degree murder)
- **Common Law (Second Degree) Murder** is the unlawful killing of another human being committed with malice aforethought. To be guilty of **second-degree murder**, Defendant must have acted with the **requisite mens rea of malice aforethought**. Malice aforethought includes the following mental states: the intent to kill, the intent to inflict serious bodily injury, reckless indifference to a known and unjustifiably high risk to human life (depraved heart), or intent to commit certain felonies (BARRK).
 - o **Intent to Kill:** defendant acted with the desire that the victim end up dead; Intent need not be premeditated; it can be formed the moment before the killing.
 - o **Intent to Inflict Serious Bodily Harm:** and then the defendant intended to hurt the victim badly, and the victim died.
 - o **Malignant or abandoned heart or depraved heart:** the defendant acted with a cavalier disregard for human life and death resulted. Here, the defendant must realize that his conduct is really risky but need not have any intent regarding the outcome of his actions.
 - **Majority & MPC:** defendant must actually realize there is a danger; **Minority:** a reasonable person would have recognized the danger.
 - o **Felony murder:** death occurred during commission/attempted commission of a dangerous felony. (BARRK)

- o In most states, a killing that results from **reckless indifference to an unjustifiably high risk to human life** is a **depraved-heart murder**.
- For **Felony Murder**, the dangerous felony must be **independent of killing itself**. This can involve Felony murder can involve:
 - o Someone who resists the felony; When a bystander is killed during a felony; Third person killed by the resistor or police officers (minority rule; Majority: **agency theory**: a defendant is only responsible for crimes of the defendant's "agents." Because the victim, police, or third-party or not the defendant's agents, the defendant is not responsible for their conduct.
 - o If a **co-felon is killed by a resistor or a police officer**, then the defendant is **not guilty of a felony murder**.

Manslaughter

- **Involuntary manslaughter** is an **unintentional homicide** committed with **criminal negligence** or during an **unlawful act**.
 - o Criminal negligence is **grossly negligent action** that puts another person at a **significant risk of serious bodily injury or death**. It requires more than ordinary tort negligence, but less than the conduct required for depraved-heart murder. May also be IM if it is a criminally negligent killing or killing of someone while committing a crime other than those covered by felony murder (i.e., misdemeanor manslaughter)
 - o Under the **Model Penal Code**, the defendant must have acted **recklessly**, which is a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation," and must have been actually aware of the risk his conduct posed.
- **Voluntary manslaughter** occurs when a defendant intends to kill the victim, but the state of mind is less blameworthy than murder. i.e., acted in the **"heat of passion"** or "under extreme emotional disturbance"
 - o **Test**: situation in which most people would act without thinking & without time to cool off? Words alone are not adequate provocation no matter how provocative.

Mens Rea

- Acting **recklessly** requires the defendant to act with a conscious disregard of a substantial and unjustifiable risk that a material element of a crime will result from his conduct.

Other Crimes

- To be guilty of **receiving stolen property**, the defendant must (i) receive control of stolen property, (ii) have the knowledge that the property is stolen, and (iii) have the intent to permanently deprive the owner of the property. Property that is **unlawfully obtained** through larceny, embezzlement, or false pretense (**theft crimes**) is **stolen property**.
 - o **Knowledge** that the property is **stolen must coincide with the act of receiving the property**.
 - Some jurisdictions require that the defendant have actual subjective knowledge that the property has been stolen.
 - Other jurisdictions permit the defendant's knowledge to be inferred from facts that would alert a reasonable person to unlawful acquisition of the property.
- **Battery**: Unlawful Application of force
 - o general intent crime so **voluntary intoxication an unreasonable mistake of fact are not available defenses**. Does not require actual physical contact between the defendant and the victim (e.g. throwing a rock that hit someone)
- **Assault** (2 forms): attempted battery (FIAT Crime) & fear of harm

- **Rape** is unlawful Sexual intercourse with a female (modernly gender-neutral) against her will by force or threat of force (modern statutes require showing a lack of consent rather than the force requirement)
- **Statutory rape** is a regulatory morals offense that involves consensual sexual intercourse with a person under the age of consent.
 - o Statutory rape is a strict liability offense; So long as the defendant knows that he is having sex, he cannot claim ignorance or mistake about the victim's age
- **Arson:** the malicious burning of the dwelling (or another structure of another person)
 - o At common law, there had to be burning (fire) as opposed to an explosion or smoke damage. It also requires damage to the structure, not just the contents inside, but under Modern statutes: arson even if there's no damage to the structure of the building or if the fire was caused by an explosion.
 - o At common law, had to be a dwelling, not another structure, but modernly: burning down a commercial building is arson
 - o At common law: you could not torch your own house, but under Modern statutes: burning your own home is arson.
- **Kidnapping** is the unlawful confinement of another person against that person's will, either by moving or hiding the victim and must hide the victim for a substantial period of time
- Perjury: willful act of falsely promising to tell the truth, verbally or in writing, about material matters
- **Bribery** is the corrupt payment of something of value for purposes of influencing an official in the discharge of his official duties

Accomplice Liability

- Under the majority and MPC rule, generally, a person is an **accomplice** in the commission of an offense if he **intentionally assists** with the crime and acts with the purpose of **promoting or facilitating the commission of the offense**. **Mere knowledge** that another person intends to commit a crime is **not enough** to make a person an accomplice.
- The accomplice **must intend that his acts will assist or encourage the criminal aim**. However, when the crime committed by the principal only requires the principal to act recklessly or negligently (e.g., involuntary manslaughter), a person may be an accomplice to that crime under the majority rule if the person merely acts recklessly or negligently with regard the principal's commission of the crime, rather than purposefully or intentionally.
- **Accessories after the fact** are people who assist the defendant after the crime has been committed
- In addition to accomplice liability for the substantive crime, individuals who **aid or abet a defendant to commit a crime** may also be guilty of the **separate crime of conspiracy** if there was an **agreement to commit the crime and an overt act** taken in furtherance of that agreement

Inchoate Crimes:

Attempt

- At **common law**, once the defendant has taken a **substantial step toward the commission of a crime**, the crime of **attempt** is completed; there can be no abandonment or withdrawal.
- An **attempt crime** requires a **specific intent** to commit a criminal act coupled with a **substantial step** taken toward the commission of the intended crime.
- Under the "**substantial step**" test (a subjective test), the act must be one that **tends to affect the commission of a crime**. Conduct does not constitute a substantial step if it is **in mere preparation**. Some states apply the "**dangerous proximity**" test, however, which requires that the **defendant's acts result in a dangerous proximity to completion of the crime**.

- Some jurisdictions do recognize **voluntary abandonment** as a defense to **attempt**. Abandonment is **not voluntary**, however, if it is **motivated by a desire to avoid detection**, a decision to delay commission of the crime until a more favorable time, or the selection of another similar objective or victim.
- Remember: attempt merges into a completed offense

Conspiracy

- **Agreement** (can be explicit or implicit) to **commit an unlawful act** (If what the conspirators agreed to do is not a crime, there is no conspiracy even if they think what they are doing is wrong) accompanied by an **overt act in furtherance of the conspiracy**
- **Chain Conspiracy**: co-conspirators are engaged in an enterprise consisting of many steps; each participant is liable for the substantive crimes of his co-conspirators.
 - o The conspirators need not know each other, but they have all agreed to participate in the same conspiracy and each can be held liable for the conspiracy and for the substantive offense is committed along the way
- **Spoke-Hub Conspiracy**: involves many people dealing with a central hub; participants are not liable for this option of crimes of the co-conspirators because each spoke is treated as a separate agreement rather than one larger general agreement
- **Withdrawal**: at **common law**, it's impossible to withdraw from a conspiracy, because the crime is completed the moment the agreement is made. At **Federal level and MPC**, a co-conspirator can withdraw prior to the commission of any overt act by communicating her intention to withdraw to all other conspirators or by informing law enforcement.
 - o But **After overt act**: a conspirator can withdraw by helping to **thwart the success of the conspiracy**

Solicitation

- Occurs when an individual **intentionally invites, requests, or commands another person to commit a crime**. If the person agrees it is conspiracy instead. If the person commits the offense, the solicitation charge will merge into the completed offense

Lesser Include Offenses

- A lesser included offense is one that **does not require proof of an element beyond those required by the greater offense**.

Criminal Procedure

4th Amendment—Unreasonable Search & Seizure

- A **warrantless search** is valid if it is reasonable in scope and if it is made incident to a lawful arrest.
- Under the **plain view doctrine**, if an item is in public view it may be seized without a warrant since there is no reasonable expectation of privacy for such an item.
- The Fourth Amendment does not require police to obtain a warrant to search a vehicle if they have probable cause to believe it contains contraband or evidence of a criminal activity.
- A **proper arrest** is one that is based on probable cause. Facts supporting probable cause may come from a number of different sources including a police officer's personal observations.
- To have standing to **challenge the admission of illegally seized evidence**, the defendant's Fourth Amendment rights must have been violated. A defendant cannot successfully challenge governmental conduct as a violation of the Fourth Amendment protection against unreasonable searches and seizures unless the defendant himself has been seized or he has a reasonable expectation of privacy with regard to the place searched or the item seized. It is not enough that the introduction as evidence of an item seized may incriminate the defendant.

5th Amendment—Due Process (Grand jury, double jeopardy, self-incrimination, *Miranda*)

- **Custodial interrogation** is questioning initiated by law enforcement officers after a person has been taken into custody. A person under arrest is, by definition, in custody and any police questioning of the person under arrest would thus be custodial interrogation. Questioning of a suspect by a police officer subsequent to an arrest must be preceded by *Miranda* warnings and a waiver or the suspect's *Miranda* rights are violated.
- The Fifth Amendment protection against double jeopardy applies to the states through the Due Process Clause of the Fourteenth Amendment and protects against multiple punishments for the same offense. If a defendant's conduct may be prosecuted as two or more crimes, then the **Blockburger test** is applied to determine whether the crimes constitute the same offense for double jeopardy purposes. Under this test, each crime must require the proof of an element that the other does not in order for each to be considered as a separate offense. The double jeopardy clause generally bars successive prosecutions for greater and lesser included offenses.
- **Limited interrogation w/out *Miranda* warnings**, when intended to protect public safety, fits *Miranda* public safety exception.
- The Supreme Court has indicated that violations of *Miranda* do not necessarily support the "fruit-of-the-poisonous-tree" doctrine, at least with respect to subsequent statements by the defendant. Isolated negligence by law enforcement personnel will not trigger the exclusionary rule.
- **The exclusionary rule** would only be triggered if the conduct of the police was shown to be sufficiently deliberate and a pattern of conduct that exclusion would deter.
- **The Fifth Amendment**, as applied to the states through the Fourteenth Amendment, provides the accused with the right not to be compelled to make incriminating statements during custodial interrogation (the right to remain silent). As with the Fifth Amendment right to counsel, the defendant must make a specific, unambiguous statement asserting his right to remain silent. **Merely remaining silent does not invoke the privilege.** If a defendant invokes his right to remain silent, the interrogator must honor that request. Once the right is invoked, a defendant may knowingly and voluntarily waive his right to remain silent. **The burden is on the government** to show that waiver was both knowing and voluntary based on the totality of the circumstances. A statement is involuntary only if the police act to coerce the defendant into making the statement. A suspect waives his right to remain silent by making an uncoerced statement to the police. Once the right to remain silent has been waived, the police have no obligation to inform the defendant that counsel is trying to reach him.

- For *Miranda* purposes, **custody is established if a reasonable person under similar circumstances would believe she was not free to leave**, and an interrogation is either express questioning or its functional equivalent by the police.
- *Miranda* protections **apply only to testimonial or compelled communicative evidence** by a suspect who is **in custody and under interrogation**.
- If a **custodial suspect initiates communication** with the police **after invoking his right to counsel**, the suspect's subsequent statements **may be admissible**. Although comments relating to routine incidents of custody are not considered as initiating communication, statements that **clearly indicate a willingness to speak about matters** relating to the investigation are treated as initiating communication.

6th Amendment—Due Process (Lawyers, delays, impartial jury, confrontation clause)

- The Due Process Clause requires that the prosecution **prove all of the elements of the case beyond a reasonable doubt**. A **mandatory presumption regarding an element** of an offense **violates the due-process requirement**. This could include either a **conclusive presumption** that cannot be rebutted (which would relieve the prosecution of having to prove an element of their case) **or a rebuttable mandatory presumption** (which shifts the burden of proof regarding the element of the offense).
- **Any fact, other than a prior conviction**, that can be **used to increase a sentence** beyond the statutorily prescribed maximum **must be charged in an indictment, submitted to a jury, and established beyond a reasonable doubt**. The failure to abide by this is a violation of the defendant's due-process rights under the Fifth Amendment and Sixth Amendment rights to notice and a jury trial, both of which are incorporated against the states through the Fourteenth Amendment.
- A fact is an **element of a crime**, as opposed to a sentencing enhancement, when it **increases the max. sentence imposed**.
- A court should **only grant a judgment of acquittal** if it finds that there is **insufficient evidence for a jury reasonably to find the defendant guilty**. In a criminal trial, the **prosecution bears the burden of producing sufficient evidence of the alleged crime**.

Confrontation Clause

- The Confrontation Clause requires that, to admit a **testimonial hearsay statement** against a criminal defendant the **declarant must be unavailable** and the defendant must have had a **prior opportunity to cross-examine** the declarant. In determining whether a statement is testimonial, an objective analysis of the circumstances, rather than the subjective purpose of the participants, is key. A statement that has the **primary purpose of ascertaining past criminal conduct is testimonial** while a statement with the **primary purpose of enabling police to provide assistance** to meet an ongoing emergency is not testimonial.
- To be testimonial, the communication **must relate to a factual assertion or disclose information**.

Character Evidence

- In a criminal case, the prosecution is **not permitted to introduce evidence of a defendant's bad character** to prove that the defendant has a **propensity to commit crimes** and therefore is likely to have committed the crime in question.
- Evidence of a defendant's crimes or other wrongful acts are **admissible for a non-propensity** purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident (MIMIC Evidence)
- If the defendant **makes their character an issue** in the case by offering **evidence of their good character** or the **victim's bad character**, the defendant **opens the door** to allow the prosecution to rebut that evidence.

Relevance

- As a rule, **evidence must be relevant to be admissible**, and all relevant evidence is admissible unless excluded by a specific rule, law, or constitutional provision. Evidence is relevant if: (i) it has any tendency to **make a fact more or less probable**, and (ii) the **fact is of consequence** in determining the action.

Witness Testimony

- **A lay witness** is generally **not permitted to testify as to his opinion**, except with respect to common-sense impressions. To be admissible, the opinion must be (i) **rationally based** on the witness's **perception**, and (ii) **helpful to a clear understanding** of the witness's testimony or a fact in issue.
- **An expert witness may testify as to his opinion**, provided: (i) the witness is **as**
- **an expert** by knowledge, skill, experience, training, or education; (ii) the testimony is **based on sufficient facts** or data; (iii) the testimony is the **product of reliable principles and methods**; and (iv) the witness **applied the principles and methods reliably** to the facts of the case.

Impeachment

- Any witness **can be impeached** by evidence that they have been **convicted of a crime that involved dishonesty** or false statement, regardless of the punishment imposed or the prejudicial effect of the evidence. However, conviction for **a crime not involving fraud or dishonesty is admissible to impeach only if the crime is punishable by death or imprisonment for more than one year**. A crime involves dishonesty or false statement if establishing the elements of the crime requires proof or admission of an act of dishonesty or false statement.
- Because a witness may be **influenced by his relationship to a party**, his interest in testifying, or his interest in the outcome of the case, a witness's **bias or interest is always relevant to the credibility of his testimony**. Although the Federal Rules do not expressly require that a party ask the witness about an alleged bias before introducing extrinsic

evidence of that bias, many courts require that such a foundation be laid before extrinsic evidence of bias can be introduced.

Policy Exclusions

- When a party takes **remedial measures** that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is **not admissible to prove negligence or culpable conduct**. However, a court **may admit** such evidence **for another purpose**, such as (i) **impeachment**, or (ii) if disputed, to prove **ownership, control, or the feasibility of precautionary measures**.
- **Compromise offers** made by any party are **not admissible to prove the validity of a disputed claim**, nor are they admissible for **impeachment by prior inconsistent statement or contradiction**.
- Evidence of the **payment, offer to pay, or promise to pay medical or similar expenses** resulting from an injury is **not admissible to prove liability** for the injury. Unlike compromise offers, the validity or amount of a claim need not be in dispute.
- Generally, pursuant to the “**rape shield**” rule, evidence to **prove the sexual behavior or predisposition** of an alleged victim of **sexual assault is not admissible in either civil or criminal proceedings**. However, in a **civil case**, evidence offered to prove an alleged victim’s sexual behavior or predisposition is **admissible if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party**.

Family Law

- GETTING MARRIED
 - A marriage requires consent of parties, a marriage license, and a ceremony.
 - Under CL, a marriage requires 2 people to live together for a specific time, be legally able to be married, presently agree to that they are married, and hold themselves out to be married.

Premarital Agreements

- To **prevent enforcement of a premarital agreement**, the UPAA (Uniform Premarital Agreement Act) requires that the **party against whom enforcement is sought prove** (i) **involuntariness**, or (ii) that the agreement was **unconscionable when it was executed**, that she did **not receive or waive fair and reasonable disclosure**, and she “**did not have, or reasonably could not have had, an adequate knowledge**” of the other’s **assets and obligations**. The agreement **must be in writing and signed by the party to be charged**. Premarital agreements must provide **full disclosure of financial status**, including **income**, **assets**, and **liabilities** of all parties. **Absent full disclosure**, a court will generally **refuse to enforce the agreement**. Most courts **evaluate fairness at the time of the execution** of the contract. The current trend is for courts to enforce contractual agreements that may not be fair as long as there has been fair disclosure. To be voluntary, the **parties must enter in the contract free of fraud, duress, or misrepresentation**. A party’s **insistence on the agreement as a condition to marriage is not considered duress on its own**. Entering into a contract voluntarily generally means there was no fraud, duress, or misrepresentation. Courts consider factors such as time-pressure, the parties’ previous business experience, and the opportunity to be represented by independent counsel.
- A court may **always modify child support or custody provisions in a marital agreement**, even if the agreement states that modification is not permitted. Thus, the majority of jurisdictions find that **clauses relating to child custody and support are unenforceable**. Instead, the court will make an **independent decision** based on the **best interests of the child**.

Marriage

- A marriage that is **valid under the law of the place in which it was contracted** will be **valid elsewhere unless it violates a strong public policy** of the state that has the most significant relationship to the spouses and the marriage.
- Almost all states recognize **common-law marriages** that were entered into in a jurisdiction that does recognize such relationships if the parties were domiciled in that state and their conduct meets the requirements of the state's law for establishing such a marriage
- Common-law marriages are defined as marriage when the parties: (i) agree they are married; (ii) cohabit as husband and wife; and (iii) hold themselves out in the public as married. The court may look to cohabitation or reputation to determine if the couple holds or held themselves out as husband and wife.
- If either party is **still part of a valid marriage, a subsequent marriage is void**. There is a presumption that the **most recent marriage is valid**. However, this presumption is rebuttable by cogent evidence of the existence of a prior valid marriage at the time that the latest marriage was entered into. A valid marriage, including common law marriage, can be terminated only by annulment, divorce, or death.
- Most states have adopted a version of the **putative spouse doctrine**. Under the doctrine, a party who participated in a ceremonial marriage and believes in good faith that the marriage is valid may use a state's divorce provisions if the marriage is later found **void due to an impediment**. Although this claim does not result in a divorce, it does provide equitable relief through maintenance and property distribution.

Separation Agreements

- **Separation agreements can be invalidated**, in whole or in part, if the court makes a finding of **fraud or unconscionability**. A contract is unconscionable when it is so unfair to one party that no reasonable person in the position of the parties would have agreed to it. The contract or part of the contract at issue **must have been offensive at the time it was made**. Unconscionability may also be applied to prevent unfair surprise.

Divorce

- Most jurisdictions recognize both fault and no-fault grounds for divorce. In most states, the fact that a divorce is granted on a fault ground, such as adultery, is not a factor in the distribution of property.

Mediated Settlement

- When a mediator participates in the creation of a settlement agreement, **misconduct by the mediator** can give rise to grounds for **setting aside the agreement**. There are several standards a mediator must comply with in the mediation process.
 - o A mediator must conduct the mediation process in an **impartial manner and disclose all potential grounds of bias and conflicts of interest**.
 - o A mediator is also required to **facilitate the participants' understanding of what mediation is**.
 - o Additionally, a mediator is required to **recognize a family situation involving domestic abuse and take appropriate steps and shape the mediation process accordingly**.
 - o Finally, a mediator is required to **structure the mediation process so that the participants make decisions based on sufficient information and knowledge**.

Marital vs. Separate Property

- In most states, **all property acquired during the marriage is marital property and subject to equitable distribution**. Property acquired by one spouse **between filing and granting a divorce** can be treated as **marital property until a divorce decree has been entered**. However, **some jurisdictions** treat property acquired after permanently separating from the other spouse as **separate property**. Still **other states draw the line** between marital and separate property on the **date that the divorce action is filed**.
- Whether the **appreciation in nonmarital property** will be subject to equitable distribution will depend on whether the appreciation can be **attributable to spousal labor**.
- The majority of jurisdictions **do not treat a professional license** or degree as a **distributable property interest**.
 - o A court may use its equity power to **award a spouse reimbursement** for his **actual contribution** toward the **other spouse's educational** and related living expenses.
 - o A court may, however, view an advanced degree or license as increased earning capacity, which may have an effect on the determination of alimony.

Equitable Distribution:

- The objective of the **equitable-distribution system** is to order a **fair distribution of all marital property**, taking into consideration **all of the circumstances between the parties**. In most states, all property acquired during the marriage is marital property and subject to equitable distribution.
- Courts consider a number of factors in determining the equitable distribution of marital property. Some of the relevant factors in this case include the **length of the marriage**, the **age, health, earning potential, and needs** of both spouses, the **value of separate property**, the spouses' **standard of living**, and **economic circumstances** of each spouse at the time of divorce.
- Equitable distribution is **not necessarily an equal division of marital assets**. Courts consider a number of factors, including the length of the marriage, contributions to the marital estate, and custodianship of children.

Spousal Support

- Spousal support may be a lump sum, permanent, limited duration, rehabilitative, or reimbursement.
- **Permanent spousal support is** typically awarded only when the marriage was one of **long duration**. Although jurisdictions differ on the definition of "long-term," it typically refers to a **marriage of 15 years or more**.
- **Rehabilitative support** is for a **limited period of time**, such as until the spouse receives education or employment. The purpose of this type of support is **to enhance and improve the earning capacity of the economically dependent spouse**. The court would consider other factors including the couple's standard of living during the marriage, the time it will take for a spouse to complete any education or training, the length of the marriage, and the parties' age and health.
- Spousal support is generally awarded in a divorce **if one spouse cannot provide for his own needs with employment**. Most jurisdictions consider factors such as the financial resources and needs of each party, length of the marriage, contributions by one spouse to the marriage, and age and health. Some states consider marital misconduct as a factor.
- The spousal support obligation is limited by the common law doctrine of nonintervention, which disallows judicial intervention in an intact family. Courts have relied on the nonintervention policy to refuse a support petition when the couple is still married.

Modification of Support & Awards

- Though a **support award can be modified** subsequent to a divorce decree, the **property division award cannot be modified**. Unlike support awards, which are subject to changing circumstances, the division of the marital assets was determined based upon known facts and circumstances as they existed at the time of divorce.
- **Modification of child support orders** is governed by the **Uniform Interstate Family Support Act (UIFSA)**. Under UIFSA, a state court does not have jurisdiction to modify an order of child support rendered by a court of another

- state if the original state has continuing, exclusive jurisdiction. This rule applies **unless the parties**, including the child, **no longer reside in that state** or the **parties expressly agree** to another state's jurisdiction.
- **State courts** have subject matter jurisdiction over **domestic relations issues**. A petition to **modify a property settlement** related to divorce is a domestic relations issue. Unlike child support, UIFSA does not apply to divorce related property disputes so those jurisdictional rules do not limit the state's jurisdiction. The court may exercise personal jurisdiction over an individual if that person is voluntarily present in the state and served with process while there.
 - **Spousal support** is an obligation of **one party to provide financial support to the other after a divorce**. Courts **can modify** a spousal support order **based on a significant change in circumstances**.

Modification of the Parent-Child Relationship

- Traditionally, courts have been **loath to modify an established parent-child relationship**, citing the child's best interest as reason to deny admission of evidence of non-paternity or to deny a motion to disestablish paternity.
- Under the **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)**, which has been widely adopted, a court has subject matter jurisdiction to preside over custody hearings and either enter or modify custody or visitation orders if the state is: (i) the **child's home state** and has been the home state for a period of six months; or (ii) was the **child's home state in the past six months** and the child is absent from the state, but one of the parents (or guardians) continues to live in the state.
- In such a situation, when there is **no home-state jurisdiction**, the UCCJEA permits a court to enter or modify an order if (i) the **child and at least one parent have a significant connection with the state**, and (ii) there is **substantial evidence** in the state concerning the **child's care, protection, training and personal relationships**.
- The **standard for determining child custody is the best interests of the child**. Most courts will consider **the wishes of the child** if the court can determine that the child has a **sufficient maturity to express a preference**. Although age is not the sole factor in determining whether a child should be consulted, it is considered by the court. If children are consulted, the court **evaluates the reasons behind the preference**.
- The Supreme Court has held that a **fit parent** has a **fundamental right to the care, custody, and control of his children** and state courts must give **"special weight" to a fit parent's decisions** on care, custody, and control.
- **A fit parent has a fundamental right to the care, custody, and control of her children**. As such, state courts must give special weight to a fit parent's decision to deny nonparent visitation, unless **denying visitation would be detrimental to the child**. In some situations, the courts will grant visitation to a third party, such as a stepparent. However, this is typically limited to those cases in which the third party **lived with the child for an extended period of time and acted as a de facto parent prior to the divorce**.
- Generally, a parent is in the best position to care for a minor child, unless the parent is deemed unfit. Legal parents are presumptively entitled to custody of their children in cases against third parties unless it can be established that the legal parent is unfit or that awarding custody to the parent would be detrimental to the child. If a natural parent has had little or no contact with a child, or if the child has lived with the third party for an extended period of time, then courts have employed the terms "parent by estoppel" and "de facto parent" to get around the presumption.
- Parent's authority over a child is not absolute. If a parent's decision will jeopardize the health or safety of the child or have the potential for significant social burdens then a parent's power is limited.

Adoption

- The right of an **unwed father to object to an adoption** may be denied if the **father does not demonstrate a commitment to the responsibilities of parenthood**, but cannot be denied if such a commitment has been made.

- Some jurisdictions have created adoption registries for the purpose of determining the identity and location of putative fathers and providing notice in the event of adoption. A putative father's failure to register within a statutorily prescribed period of time constitutes a waiver of his right to notice of the adoption and irrevocably implies his consent to the adoption. However, termination in this fashion typically applies only to cases in which the father and child never developed a relationship.

Partnerships

General Partnership Formation

- When two or more persons carry on as co-owners of a business for profit, it is presumed that they are partners, whether or not the persons specifically intend to form a partnership. However, a partnership does not exist between persons when one person receives profits in payment of a debt.
- A general partnership is an association of two or more persons to carry on a for-profit business as co-owners. In order to form a general partnership, at least two persons must intend to carry on a business for profit as co-owners but it is not necessary that they have the specific intent to form a general partnership. Individuals can inadvertently form a general partnership notwithstanding their expressed intention to do something else.
- A partnership is an association of two or more persons to carry on a for-profit business as co-owners. A partner is jointly and severally liable for all partnership obligations. Because a partner is an agent of the partnership, the partnership is liable for a partner's tortious acts, including fraud, committed in the ordinary course of the partnership's business or with the
- partnership's authority, whether actual or apparent. Unless there is also a judgment against the partner, a judgment against a partnership cannot be satisfied from a partner's assets, only from the partnership's assets. Even though a partner is personally liable for a partnership obligation, a partnership creditor generally must exhaust the partnership's assets before levying on the partners' personal assets.

Liability

- A partner is jointly and severally liable for all partnership obligations. A judgment against a partnership is not a judgment against its partners. To collect from a partner personally, a party must first obtain a judgment against the partner individually and against the partnership. These judgments can be sought in the same action. Unless there is a judgment against the partner, a judgment against a partnership cannot be satisfied from a partner's assets, only the partnership's assets. If a claimant first obtains a judgment against the partner individually and the partnership, the claimant generally must exhaust the partnership's assets before levying on the partner's personal assets.
- A person admitted as a partner into an existing partnership is not personally liable for any prior partnership obligations. However, any capital contribution made by an incoming partner to the partnership is at risk for the satisfaction of such partnership obligations.

Withdrawal/Dissociation

- A partner can withdraw or dissociate from a partnership at any time, even if the dissociation is wrongful, such as when it violates an express provision of the partnership agreement. A partner who wrongfully dissociates is liable to the partnership and the other partners for damages caused by the dissociation. In addition, a dissociated partner generally does not have the right to participate in the management or conduct of the partnership business and cannot participate in winding up the business.
- Dissociation may, but does not necessarily, result in dissolution of the partnership and the winding up of its business. Wrongful dissociation creates a possibility of dissolution, if, within 90 days of dissociation, a majority of the remaining partners express a will to wind up the business. If dissolution results, the dissociated partner is not entitled to any payout until the end of the original term unless the partner can prove to the court that earlier payment would not cause undue hardship to the business.
- Dissociation that complies with the provisions of the partnership agreement may also trigger dissolution, such as when it is an at-will partnership agreement with no definite term or when the partnership agreement so provides. If the dissociating partner's withdrawal is not wrongful, the partner is not liable for damages and would retain the right to participate in the dissolution and winding up the partnership.
- Once a partnership has been dissolved, but before the winding up of its business is complete, the partnership may choose to resume carrying on its business as if dissociation had never occurred. To do so, all partners (including any rightfully dissociated partners) must agree to waive the right to terminate the partnership within 90 days of dissociation.

A person winding up the partnership business may preserve the business or property as a going concern for a reasonable time to maximize its value.

- The partnership is not terminated until the partnership business is wound up. After dissolution, the partnership is bound by a partner's act that is appropriate for winding up the partnership. Each partner is liable to the other partners for his share of partnership liability incurred by such post-dissolution acts. Further, although a dissociated partner loses any right to participate in the business, his apparent authority to bind the partnership lingers after dissociation for up to two years.

Transfer

- A partner has a transferable partnership interest, i.e., a partner may transfer the right to share in the profits and losses of the partnership and to receive distributions. The transfer of that partnership interest creates in the transferee a right to receive distributions to which the transferor would otherwise be entitled.

Partners Rights

- A partnership must provide its partners and their agents with access to all its records but a transferee is not entitled to participate in the management or conduct of the partnership business or access partnership records. A transfer of a partner's partnership interest does not make the transferee a partner unless the other partner or partners consent to making the transferee a partner.

Partnership Property

- Property is partnership property if it is acquired in the name of the partnership. It is property of the partnership and not of the partners individually. A partner may use or possess partnership property only on behalf of the partnership.

Limited Liability Partnership (LLP) The filing of a statement of qualification, which transforms a partnership into an LLP, does not create a new partnership. A limited liability partnership ("LLP") is a partnership in which a partner's personal liability for obligations of the partnership is eliminated. In other respects, an LLP is governed by the same rules as a partnership.

- A partner is jointly and severally liable for all partnership obligations. Though a limited partner in an LLP is not personally liable for an obligation of an LLP, limited liability partnership status is generally only effective on the date that the statement of qualification is filed with the state and not before
- A partnership may be converted into a limited liability partnership. Unless the partnership agreement specifies otherwise, the conversion must be approved by all of the partners of the general partnership. Once the conversion is approved, the partnership must file the articles of qualification with the state. A general partner who becomes a limited partner as a consequence of a conversion remains liable for any obligation incurred by the partnership before the conversion.
- A limited liability partnership (LLP) is a partnership in which a partner's personal liability for obligations of the partnership is eliminated. A limited partner in an LLP is not personally liable for an obligation of an LLP, but can be personally liable for his own personal misconduct including negligence.

Limited Partnership (LP)

- A limited partnership is a partnership formed by two or more persons that has at least one general partner and at least one limited partner. To form a limited partnership, a certificate of limited partnership must be filed with the state and must include the name and address of each general partner. In addition, all of the general partners must sign the certificate. The limited partnership comes into existence upon the filing of the certificate of limited partnership. If a certificate is not filed, the limited partnership is not formed.

Real Property

Statute of Frauds

- The Statute of Frauds requires a lease of more than one year to be in writing. A lease subject to the Statute of Frauds is voidable until the tenant takes possession and the landlord accepts rent from the tenant.

Leasehold Estates

- If the tenant takes possession and the landlord accepts rent, then a periodic tenancy or tenancy at will is created because there has been partial performance. A tenancy at will may be terminated by either party without notice. A periodic tenancy requires notice of termination before the beginning of the intended last period of the periodic tenancy. If a Tenant takes possession and Landlord accepts the rent, either a periodic tenancy or a tenancy at will is created. It is a periodic tenancy if payment is made over a significant amount of time, and the arrangement creates expectations that justify notice of termination.
- In a periodic tenancy, notice of termination must be given before the beginning of the intended last period of the periodic tenancy. Thus, a periodic month-to-month tenancy can be terminated by either party with a one-month notice of termination. Notice that is given late is generally treated as effective to terminate the tenancy as of the end of the following period.
- A tenancy for years is an estate measured by a fixed and ascertainable amount of time. Termination of a tenancy for years may occur before the expiration of the term, such as when the tenant surrenders the leasehold. A tenant surrenders a lease by transferring the lease back to the landlord with the landlord accepting the return. Many courts require the surrender to be in writing if the original lease was so required. If the landlord accepts surrender, the tenant is not obligated for future rent.

Concurrent Estates

- The majority view is that a survivorship contingency applies at the termination of the interests that precede distribution of the remainder. Another approach interprets a survivorship contingency to require surviving only the testator and not the life tenant
- A tenancy in common is any tenancy with two or more grantees with equal rights to possess or use the property, but no right of survivorship. On the other hand, a joint tenancy exists when two or more persons own property with the right of survivorship. The joint tenancy must be created with each joint tenant having the equal right to possess or use the property, with each interest equal to the others, at the same time, and in the same instrument. In most states, there is presumption that a conveyance to two or more persons creates a tenancy in common rather than a joint tenancy. To determine if a joint tenancy was created, modern law calls for a clear expression of intent and survivorship language.
- A joint tenant may grant a mortgage interest in the joint tenancy property to a creditor. Most states apply the lien theory, which states that the mortgage is only a lien on the property and does not sever the joint tenancy absent a default and foreclosure sale. In this case, Jessie's mortgage on her interest in the farm did not sever the joint tenancy. A minority of

states apply the title theory, which states that the mortgage severs title and the tenancy would be converted into a tenancy in common.

- Joint tenants can convey all or part of their individual interests during their lifetimes to a third party, thereby severing the joint tenancy. A joint tenancy is severed when one of the joint tenants contracts to sell her interest in the property.

Assignment & Sublease

- Absent any language to the contrary, a lease can be freely assigned or sublet. The assignee of a month-to-month tenant takes a month-to-month tenancy. When a tenant assigns his interest in a lease, privity of estate arises between the assignee and the landlord. Assignee tenants are liable to the landlord for rent. However, privity of contract continues to exist between the landlord and the tenant. If the assignee fails to pay the rent, then the tenant is liable to the landlord.
- When a lease prohibits the tenant from assigning the lease, the tenant may nevertheless assign; however, the landlord generally can then terminate the lease for breach of one of its covenants and recover any damages. When a lease prevents assignment without the permission of the landlord, and the lease is silent as to a standard for exercising that permission, the modern trend imposes a requirement that the landlord may withhold permission only on a reasonable ground in relation to the property being leased and not on a whim or personal prejudice. The traditional rule is that the landlord may withhold permission at his discretion.

Easements

- An easement is terminated if the owner of the dominant or servient estate acquires fee title to the other estate. The easement is said to “merge” into the title. The merger of property interests results in the extinguishment of the property right.
- If the owner of two parcels of land previously used one parcel to benefit the other, then the court may find that, upon the transfer of one parcel, the parties intended the use to continue if that use was continuous, apparent or known, and reasonably necessary to the dominant land’s use and enjoyment (as distinguished from an easement by necessity, which requires strict necessity).
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Mortgages

- When multiple interests must be paid out of the proceeds of a foreclosure sale, generally, the earliest mortgage placed on the property has priority over the other interests. Further, obligatory payments under a senior future-advances mortgage paid out after a junior lender remits its loan amount and records its lien have priority over amounts loaned by the junior lender.

Landlord/Tenant

- When a landlord substantially interferes with the tenant’s use and enjoyment of the property by breaching a duty to the tenant, the tenant’s obligation to pay rent may be excused
- under the theory of constructive eviction. In order to end a lease before the end of its term by constructive eviction, the landlord must have breached a duty, which caused the loss of the substantial use and enjoyment of the premises, the tenant must give the landlord notice of the problem and reasonable opportunity to cure, and the tenant must vacate the property within a reasonable period of time. Not every interference with the use and enjoyment of the premises amounts to a constructive eviction. Temporary or de minimis acts which do not amount to a permanent expulsion generally do not amount to constructive eviction.
- Under the common law, there was no implied duty on the part of the landlord to repair leased premises. However, the majority of jurisdictions today enforce an implied duty upon the landlord to repair under a residential lease, even when the lease attempts to place the burden on the tenant, except for damages caused by the tenant. In contrast, courts are reluctant to imply a landlord’s duty to repair in commercial leases because the implied warranty of habitability does not

apply in commercial leases. Here, it is not clear what language was in the lease regarding repairs, but absent any specific duty in the lease to fix the air conditioner, the landlord was likely not required to make any such repairs. Moreover, the covenant of quiet enjoyment is breached only when the landlord, someone claiming through the landlord, or someone with superior title disrupts the possession of the tenant. Accordingly, there is no duty to repair implicit in the covenant.

- Termination of a lease occurs automatically upon the expiration of the term. Termination may also occur before the expiration of the term when the tenant surrenders the leasehold, and the landlord accepts the return of the leasehold. When a tenant abandons the leasehold without justification, the landlord may treat the abandonment as an offer of surrender and could accept that surrender by retaking the premises
- When a tenant abandons the leasehold, the landlord may treat the abandonment as an offer of surrender and accept such surrender, or the landlord may attempt to re-rent the premises on the tenant's behalf and hold the tenant liable for any deficiency. The majority of jurisdictions now require a landlord to mitigate damages by attempting to re-rent the premises in the event that the tenant abandons the property and breaches of the lease.
- Furthermore, the doctrine of anticipatory breach does not apply to leases. While the landlord may sue the tenant for rent as it becomes due, a landlord may not sue for future rent under the lease.
- Many states impose on the landlord a duty to make reasonable efforts to mitigate damages when a tenant abandons a lease. What constitutes a reasonable effort depends on the circumstances; however, an owner of multiple vacant apartments is typically required only to treat the premises as one of his vacant stock.

Defeasible Fees

- A fee simple determinable is limited by specific durational language (e.g. "so long as" "until"). It terminates automatically upon the happening of a stated condition and full ownership of the property is returned to the grantor (or his successor in interest). The grantor retains a possibility of reverter.
- A fee simple subject to condition subsequent is limited in duration by specific conditional language ("provided that" "but if"). Upon occurrence of the stated condition, the present fee simple will terminate if the grantor affirmatively demonstrates an intent to terminate. The grantor **must explicitly** retain the right to terminate the fee simple subject to condition subsequent in the conveyance.

Notice

- A bona fide purchaser is a person who paid value for an interest and did not have notice of the prior-in-time interest. Notice can be actual, by inquiry, or constructive. Grantees are held to have constructive notice of all prior conveyances that were properly recorded.

Equitable conversion

- Under the doctrine of equitable conversion, when one of the contracting parties dies prior to the performance date of the contract, the seller's interest may be treated as personal property and the buyer's interest may be treated as a real property interest for purposes of distributing in the property pursuant to either's will. When the seller has devised his real property interests, the proceeds from the sale of the property under contract are treated as personal property that passes to the devisee of the seller's personal property

Secured Transactions

Scope of Article 9

- UCC Article 9 applies if the substance of a transaction creates a security interest. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer is limited in effect to a reservation of a security interest.
- While generally UCC Art. 9 does not apply to a sale, there is an exception for the sale of rights to payment, such as accounts, chattel paper, payment intangibles, and promissory notes. The sale is treated as creating a security interest in the rights to payment with the purchaser of the rights being the secured party. An account includes the right to payment for property sold, leased, licensed, or for services rendered (such as a company's accounts receivable).
- Since UCC Art. 9 treats a sale of accounts as creating a security interest in the purchaser, the seller (debtor) is deemed to retain rights in the accounts for attachment purposes until the purchaser perfects its security interest.

- A transaction in the form of a lease is treated as a security interest if the lessee must pay consideration to the lessor for the right to possess and use the goods for the term of the lease, the payment obligation cannot be terminated by the lessee, and the lessee has an option to become the owner of the goods upon completion of the lease agreement.

Types of Collateral

- Intangible collateral
 - o Accounts
 - o Deposit Account (savings)
- Goods (tangible collateral)
 - o moveable
 - o immovable
 - fixtures
 - standing timber
 - unborn animals
 - growing or unharvested crops
 - manufactured homes
 - o sub category: C, F, I, E “Crazy Farmers Inspect Equipment”
 - Consumer Goods (e.g., gold chain, baby crib, washer machine)
 - Farm Products: livestock / supplies / eggs / feed / chicken and the littles, lol
 - Inventory: includes not only goods, other than farm products, that are held for sale or lease, but also raw materials, works in process, or materials used or consumed in a business.
 - Equipment: The catchall “equipment” class of goods, includes goods or machinery used in the business.
- Intangible collateral (9 total, but Accounts and Deposit Account are most frequently tested intangible property)
 - o “Accounts”
 - Include the right to payment for goods sold, property licensed, or services rendered.
 - o Payment intangible / Deposit Account (savings)
 - *A right to be repaid a loan of money that does not itself qualify as an instrument or chattel paper is a payment intangible. (“Accounts” does not include rights to be repaid loans of money.)*
 - o Instrument (Article 3): e.g., checks, promissory notes
 - o Chattel Paper
 - 1. monetary obligation AND
 - 2. Security interest / lease

Attachment

- Under Article 9, for a security interest to be enforceable against a debtor, the interest must attach to the collateral. For attachment, three conditions must be met: (i) value must be given by the secured party; (ii) the debtor has rights in the collateral; and (iii) the debtor authenticated a security agreement that describes the collateral (or the secured party has possession or control of the collateral pursuant to a security agreement). A debtor may also give a security interest in future rights. Generally, this type of interest is created by including an “after-acquired property clause” in the security agreement. The security interest for after-acquired property attaches as soon as the debtor obtains an interest in the property.
- If the secured party has possession or control of the collateral pursuant to a security agreement, then a security agreement in the form of a record is not required; an oral agreement suffices.

- A security interest in collateral automatically attaches to identifiable proceeds. Proceeds include that which is acquired upon the sale, exchange, or other disposition of collateral.

Perfection

- Perfection of an attached security interest is generally necessary for the secured party to have superior rights over third parties that have security interests in the same collateral. A secured party can perfect a security interest by (i) filing a financing statement; (ii) possessing the collateral; (iii) controlling the collateral; or (iv) perfecting automatically. A security interest in accounts may be perfected only by filing.
- Perfection of a security interest is generally necessary for the secured party to have rights in the collateral that are superior to any rights claimed by third parties. A security interest is perfected upon attachment of that interest and compliance with one of the methods of perfection. A security interest in any collateral, except a deposit account, money, or letter-of-credit rights that are not a supporting obligation, may be perfected by filing a financing statement. The financing statement must contain the debtor's name, the name of the secured party, and the collateral covered by the financing statement. Typically, a security interest attaches and is then perfected. But, if the necessary steps for perfection are taken prior to attachment, then the security interest is perfected upon attachment.
- Under the same office rule, a perfected security interest in proceeds may continue indefinitely when: (i) the filed financing statement covers the original collateral, (ii) the proceeds are collateral in which a security interest may be perfected by filing in the same office as the financing statement, and (iii) the proceeds are not acquired with cash proceeds.

Priority

- When there are two or more perfected secured parties with rights in the same collateral, the first to file or perfect has priority. If only one security interest is perfected, and the other is not, then the perfected interest takes priority over the unperfected one.
- While, generally, a PMSI has priority over other security interests in the same goods, a PMSI in inventory has priority only if: (i) the PMSI is perfected by the time the debtor receives possession of the collateral; and (ii) the purchase-money secured party sends an authenticated notification of the PMSI to the holder of any conflicting security interest before the debtor receives possession of the collateral.
- In a contest between a perfected security interest and a judicial lien, a judicial lien creditor takes the collateral subject to an existing perfected security interest but generally has priority over an unperfected security interest.

Judicial Lien Creditor

- A judicial lien creditor is a creditor who acquires a lien on the collateral by a judicial process, rather than by operation of law. A judicial lien creditor takes the property subject to a perfected security interest but generally has priority over an unperfected security interest. A security interest is perfected upon attachment of that interest and compliance with one of the methods of perfection.

PMSI

- A PMSI is a security interest in goods that has priority over other security interests in the same goods. It arises when a creditor sells goods to a debtor on credit and retains a security interest in those goods, or the creditor advances funds, which are then used to purchase the goods and the creditor reserves a security interest in those goods.
- A PMSI in goods other than inventory or livestock prevails over all other security interests in the collateral, even if they were previously perfected, if the secured party perfects before or within 20 days after the debtor receives possession of the collateral

- While, generally, a PMSI has priority over other security interests in the same goods, a PMSI in inventory has priority only if: (i) the PMSI is perfected by the time the debtor receives possession of the collateral; and (ii) the purchase-money secured party sends an authenticated notification of the PMSI to the holder of any conflicting security interest before the debtor receives possession of the collateral.

BIOCB

- A buyer in the ordinary course of business (BOCB) takes free of a security interest created by the seller.
- A buyer of collateral subject to a perfected security interest generally takes the collateral subject to that interest, unless the secured party has authorized its sale free of the security interest. There is an exception for a buyer in the ordinary course of business (BOCB). A buyer is a BOCB if he: (i) buys goods, (ii) in the ordinary course of business, (iii) from a merchant who is in the business of selling goods of that kind, (iv) in good faith, and (v) without knowledge that the sale violates the rights of another in the same goods.

Defaultie

- Upon default, a secured party may notify an account debtor (the person obligated on an account) to make payment to the secured party. In addition, the secured party may exercise any rights of the debtor with respect to the obligation of the account debtor. In a commercially reasonable manner, the secured party may collect from the account debtor, and, if the account debtor does not pay, the secured party may enforce the obligation of the account debtor.
- Upon default, one of the alternatives generally available to a secured party once in possession of collateral is to dispose of the collateral at a sale, which may be public or private, in order to satisfy the obligor's outstanding obligation. In addition to conducting the sale in a commercially reasonable manner, the secured party is generally required to send an authenticated notification of disposition to, among others, the debtor. This notice must be given sufficiently far enough in advance of the disposition (e.g., at least 10 days) to allow the notified party to act on the notification. A secured party is not required to send a notice of disposition when the collateral.
- First, look to see if a debtor seeks financing for something, and has personal property to put up as security. This could be a general loan secured by various rights that the debtor has in items, or a loan to buy something that will be the collateral (with the possible addition of other items of collateral as well), or sale on credit. Take stock of where the rights of the collateral will be – will they be in the debtor, only taken away by seizure and sale in case of a default on the underlying obligation? Be wary of “leases” and of “consignments” that are really intended as sales of items – where the intent is really a sale, and the "lender/consigner" wants to keep rights in the collateral until full payment, then the right of the “lender/consigner” to retake is an Art. 9-based rule subject to the attachment and perfection requirements. Verify that the question is dealing with the right kind of personal property (§9-102(a), and not excluded pursuant to the rules in §9-109 (general exceptions for other systems that serve the same purpose such as a real estate or motor vehicle registry (Subsection (a)) or some specific category (Subsection (b))).
- Identification/Introduction
- Once an Art. 9-based set of issues is identified, open with this fact and recount a few basics, such as why it is good for creditors, which in turn makes it good for borrowers, and the mechanics intended to notify others of such rights. Note that a state's adoption of Art. 9 is the law to be applied, not the Code directly (it is a “model”). Then identify briefly into which category the main issue(s) involve(s) from the below.

- Formation

- Is there a “formation” issue? Is a security agreement needed for the property at issue? Does it meet the requirements of §9-203(b)(attachment)? Does it have the necessary information, properly identified, such as description of the collateral and right to seize and sell the parties’ names? If satisfied, is it perfected automatically? By turn-over of possession (*pledge*)? By notifying a special “holder” such as a bank or a stock brokerage (*control*), or the most commonly tested, by filing with the state’s registry (*perfection by filing*)? Does it properly name the debtor? Does it sufficiently describe the property that is being used as collateral? (Note: the order of necessary information for these two documents was presented in a different order: description of collateral and parties’ names, or vice-versa – there is an important distinction to know, and in one case, may involve the “safe harbor” rule). This identifies what is protected (secured) and what is not (unsecured).
- This may be a major issue. If it is a minor issue, address quickly and get to the more important issue(s).

- Priority

- Next, identify which creditors are jockeying for position over the right to be the party to seize and sell an item in case of default. (Default, by the way, is typically presumed in questions of this nature). Who is first in line, by possession, by filing? (Primarily §9-322). Are there any exceptions where later-in-time creditors may jump to the front of the line, such as for a *purchase money security interest*? (Primarily §9-334). By filing an agreement in the right place so as to have *control*? (For example, §9-104) Was there a sale to a buyer in the ordinary course of business? (§9-320(a) & (b)). It is dangerous to anticipate, but this set of issues is one of the more testable.

- Post-Default Seizure and Sale Mechanics

- Once you identify the winner having the highest priority in an asset after a default, may that winner seize the item(s) and sell? What is required/how may it be done? Was the asset properly cared for after seizure but before sale?
- the sale conducted in a commercially reasonable manner? Is there a deficiency after sale, which may include reasonable costs of seizure and of sale? What may an unsatisfied creditor do? Is there a surplus? What must a satisfied creditor do – turn over to the defaulting debtor? Provide to any junior creditors?
-

Torts

Intentional Torts

- In a **battery** action, a plaintiff must show that the defendant caused a harmful or offensive contact with the plaintiff's person with the **intent to cause such contact** or the apprehension of such contact. A defendant's contact is intentional if he acts with the desire to bring about the contact or engages in an action knowing that contact is substantially certain to occur. In most jurisdictions, the defendant need only intend to cause contact, not that the contact be harmful or offensive (often called the single-intent rule).
- **False imprisonment** requires that a person acts with **intent to confine or restrain** another person to a **bounded area** and those actions directly or indirectly result in such confinement. The **plaintiff must be aware** of the confinement or must suffer actual harm. The confinement may be physical, may be accomplished through use of threats, by failure to provide a means of escape, or by invalid use of legal authority. A plaintiff is not imprisoned if he submitted willingly to confinement. An area is **not bounded** if there are reasonable **means of safe escape**.

Negligence

- In a negligence action, a plaintiff must show that the defendant owed a duty to the plaintiff, that the defendant breached that duty, that the defendant caused the plaintiff's injuries, and that damages exist. Generally, the standard of care imposed on a defendant is that of a reasonably prudent person under similar circumstances. A person is required to exercise the care that a reasonable person under the same circumstances would recognize as necessary to avoid or

prevent an unreasonable risk of harm to another person. In determining whether a specific precaution was warranted, a jury must weigh the probability and gravity of the injury against the burden of taking such precautions.

Liability

- Vicarious liability is a form of strict liability in which one person is liable for the negligent actions of another. An employer is liable for the tortious conduct of an employee that is within the scope of employment.
- The defendant is liable for the full extent of the plaintiff's injuries due to the plaintiff's preexisting physical or mental condition or vulnerability, even if the extent is unusual or unforeseeable.
- Those who engage an independent contractor (one hired to accomplish a task or result but not subject to a right of control by the employer) are generally not vicariously liable for the torts of the independent contractor. The person who hires an independent contractor remains vicariously liable for certain conduct, including inherently dangerous activities and non-delegable duties (i.e., activities that are inherently risky or that affect the public at large).
- Liability typically extends only to foreseeable plaintiffs and hazards. A person who comes to the aid of another is a foreseeable plaintiff. If the defendant negligently puts either the rescued party or the rescuer in danger, then he is liable for the rescuer's injuries.
- An employer is liable for an employee's torts if the employer has the right to control the employee's acts and the tortious conduct is committed within the scope of employment.

Standard of Care

- a person is required to exercise the care that a reasonable person under the same circumstances would recognize as necessary to avoid or prevent an unreasonable risk of harm to another person. In determining whether a specific precaution was warranted, a jury must weigh the probability and gravity of the injury against the burden of taking such precautions. Evidence of custom in an industry may be offered to establish the standard of care, but such evidence is not conclusive.
- The standard of care imposed upon a child is that of a reasonable child of similar age, intelligence, education, and experience. The standard applicable to minors is more subjective in nature because children are unable to appreciate the same risks as adults.
- In determining whether conduct lacks reasonable care, courts consider (i) the foreseeable likelihood that the person's conduct will result in harm, (ii) the foreseeable severity of any harm that may result, and (iii) the burden of precautions to eliminate or reduce the risk of harm.
- In most jurisdictions, the standard of care owed to land entrants depends upon whether he is a licensee or a trespasser. A licensee enters the land of another with the permission of the land possessor (LP) and includes those whose presence is tolerated by the LP. The LP has a duty to either correct or warn licensees of concealed dangers that are either known to the LP or that should be obvious. A trespasser is someone who enters or remains upon the land of another without consent or privilege to do so. Traditionally, an LP is obligated only to refrain from willful, wanton, reckless, or intentional misconduct toward trespassers.
- Although the standard of care imposed in most cases is that of a reasonably prudent person under the circumstances, the standard imposed upon a child is that of a reasonable child of similar age, intelligence, and experience. However, a child engaged in a high-risk activity that is characteristically undertaken by adults is held to the same standard as an adult.

Duties Owed

- A tenant owes a licensee the duty to warn of concealed dangers and is required to exercise reasonable care in conducting activities on her land.
- When a statute or administrative regulation imposes a specific duty for the protection of others, and a defendant breaches that duty, the defendant is liable to anyone in the class of people intended to be protected by the statute for

harm of the type the statute was intended to protect against. Generally, such a violation of a regulation or ordinance establishes either negligence as a matter of law or a rebuttable presumption of negligence.

- In general, a duty of care is owed to all foreseeable persons who may foreseeably be injured by the defendant's failure to act as a reasonable person of ordinary prudence under the circumstances.
- A person who voluntarily aids another has a duty to act with reasonable ordinary care. However, there is generally no duty to come to the aid of another.

Causation

- A factual cause exists then proximate cause also exists, unless there are intervening acts.
- An intervening cause is a factual cause of the plaintiff's harm that contributes to his harm after the defendant's tortious act has been completed. Original tortfeasors remain liable for an intervening cause unless the result was unforeseeable or the harm was unforeseeable. A superseding cause is any intervening cause that breaks the chain of proximate causation between the defendant's tortious act and the plaintiff's harm, thereby preventing the original defendant from being liable to the plaintiff. However, when both the intervening cause and the harm are unforeseeable, the intervening cause becomes a superseding cause, and the defendant's liability is cut off by that superseding cause.

Proximate Cause

- The majority rule for proximate cause requires that the plaintiff suffer a foreseeable harm that is not too remote and is within the risk created by the defendant's conduct. An intervening cause is a factual cause of the plaintiff's harm that contributes to her harm after the defendant's tortious act is completed. A superseding cause is any intervening cause that breaks the chain of proximate causation between the defendant's tortious act and the plaintiff's harm, thereby preventing the original defendant from being liable to the plaintiff. Most courts hold that an unforeseeable intervening cause is a superseding cause that therefore breaks the chain of causation between the defendant and the plaintiff. Examples of unforeseeable intervening causes include extraordinary acts of nature, criminal acts of third parties, and intentional torts of third parties.

Comparative Negligence

- Contributory negligence occurs when a plaintiff fails to exercise reasonable care for his own safety and so contributes to his own injury. In a few states, contributory negligence is a complete bar to recovery. Most states, however, have opted for comparative negligence. In jurisdictions that have adopted the doctrine of pure comparative negligence, a plaintiff's contributory negligence is not a complete bar to recovery. The plaintiff's full damages are calculated by the trier of fact and then reduced by the proportion that her fault bears to the total harm. In modified or "partial" comparative negligence jurisdictions, recovery is barred if the plaintiff is more at fault than the defendant. If the plaintiff is less at fault than the defendant, the recovery is reduced by the plaintiff's percentage of fault.

Strict Liability

- Defendants engaged in abnormally dangerous activities may be held strictly liable for damages caused by that activity, even in the absence of negligence. Activities are considered abnormally dangerous if they create a foreseeable and highly significant risk of physical harm even in the exercise of reasonable care, and the activity is not commonly engaged in.

Negligence Per Se

- Although the unexcused violation of a statutory standard of care is negligence per se, the converse is not true: an actor who has complied with all statutory standards may still be found negligent if his conduct is not reasonable under the circumstances. In the absence of any special rule to the contrary, the actions of the fireworks company would be subject

to a typical negligence analysis. A prima facie case of negligence consists of four elements: duty, breach, causation, and damages.

Infliction of Emotional Distress (Negligent & Intentional)

- A plaintiff can recover for **negligent infliction of emotional distress (NIED)** from a defendant whose tortious conduct placed the plaintiff in harm's way if the plaintiff can demonstrate that she was within the zone of danger and the threat of physical impact caused emotional distress. Generally, the distress must exhibit some physical symptoms. In virtually all jurisdictions, emotional distress must result from sensory and contemporaneous observance of the accident itself, not the receipt of news relating to the accident. To recover a bystander, the plaintiff must be closely related to a person injured by the defendant, be present at the scene of the injury, and personally observe or perceive the injury

Attractive Nuisance

- There is an exception in the case of trespassing children. Under the “attractive nuisance” doctrine, an LP may be liable for injuries to children trespassing on the land if (i) an artificial condition exists where the LP knows or has reason to know children are likely to trespass; (ii) the LP knows or has reason to know the condition poses an unreasonable risk of death or serious bodily injury; (iii) the children, because of their youth, do not discover or cannot appreciate the danger presented by the condition; (iv) the condition’s utility to the LP and the burden of eliminating the danger are slight compared to the risk to children; and (v) the LP fails to exercise reasonable care to protect children.

Trusts

Trust Basics

- A trust is a fiduciary relationship wherein the trustee is called upon to manage, protect, and invest certain property and any income generated therefrom for the benefit of one or more named beneficiaries. The trustee holds the legal interest or title to the trust property. Should the trust be terminated, the title would merge and would vest in the beneficiaries.
- If a trustee is given complete discretion regarding whether to apply payments of income or principal to the beneficiary, a discretionary trust exists. In a discretionary trust, if the trustee exercises their discretion to pay, then the beneficiary's creditors have the same rights as the beneficiary, unless a spendthrift restriction exists.
- A **spendthrift trust** expressly restricts the beneficiary's power to voluntarily or involuntarily transfer their equitable interest. The spendthrift restriction applies only as long as the property remains in the trust, and it is inapplicable after it has been paid out to the beneficiary. A beneficiary's creditors usually cannot reach the beneficiary's trust interest in satisfaction of their claims if the governing instrument contains a spendthrift clause. Most states allow certain classes of creditors to reach the beneficiary's interest despite the spendthrift clause. Some states also recognize exceptions for creditors seeking spousal support, providing basic necessities to the beneficiary, and holders of federal or state tax liens.
- If a trustee is to make payments to the beneficiaries of the trust as is necessary for their support, then a **support trust** exists. Necessary is not limited to bare essentials, but rather includes maintaining the standard of living to which the beneficiary is accustomed, as well as support for the beneficiary's spouse and children.

Allocation of Assets

- All assets received by a trustee must be allocated to either income or principal. The allocation must be balanced so as to treat present and future trust beneficiaries fairly, unless a different treatment is authorized by the trust instrument. The **traditional approach** assumed that any money generated by trust property was income and that any money generated in connection with a conveyance of trust property was principal. The traditional approach serves as the starting point for the modern approach. Under the **UPAIA (modern approach)**, a trustee is empowered to re-characterize items and reallocate investment returns as he deems necessary to fulfill the trust purposes, as long as his allocations are reasonable and are in keeping with the trust instrument. A distribution of stock is treated as a distribution of principal under the UPAIA.

Class Gifts

- A gift to a group of individuals with an automatic right of survivorship is a class gift. A class remains open and may admit new members until at least one class member is entitled to obtain possession of the gift. A vested remainder accelerates into possession as soon as the preceding estate ends for any reason, such as the disclaiming of the estate by its holder.
- However, under the UPC, if a class gift is limited in favor of a class of children, only those children alive at the time of distribution are entitled to possession of the property. If a child who survives the settlor but then predeceases the time of distribution has surviving issue, that issue would have a right to the parent's share of the gift.
- A class remains open and may admit new members until (i) at least one class member is entitled to obtain possession of the gift, or (ii) the preceding interest terminates (such as when the holder of the present life interest dies).

Disclaimer

- If the income beneficiary of a trust disclaims her interest, then the trust principal becomes immediately distributable to the presumptive remainder beneficiaries of the trust, provided no one would be harmed by making a distribution to them

earlier than it would have been made had the income beneficiary not disclaimed. Almost all states have enacted statutes that permit beneficiaries of trusts to disclaim their interest in the trust property. If the disclaimer is effective, the disclaiming party is treated as predeceasing the testator.

Trust Instrument

- Subject to the trust instrument, it is the beneficiary's right to receive income or principal from the trust. The trustee of a mandatory trust has no discretion regarding payments; instead, the trust document explains specifically and in detail how and when the trust property is to be distributed.

Trust Modification

- A court may modify a trust under the doctrine of equitable deviation if events that were unanticipated by the settlor have occurred and the changes would further the purposes of the trust. To the extent possible, the modification must be made in accordance with the settlor's probable intention, and the court need not seek beneficiary consent to make the modification.
- Even if circumstances have not changed in an unanticipated manner, a court may modify the terms of a trust that relate to the management of trust property if continuing the trust on its existing terms would be impracticable, wasteful, or would impair the trust's administration.

Charitable Trusts

- If the original charitable purpose of a charitable trust becomes illegal, impracticable, or impossible to perform, a court may modify a charitable trust to provide an alternative charitable purpose that approximates the settlor's intent in creating the trust. The settlor's intent controls. If it appears that the settlor would not have wished that an alternative charitable purpose be selected, the trust property may instead be subject to a resulting trust for the benefit of the settlor's estate. The Uniform Trust Code and the Restatement (Third) both presume a general charitable purpose and authorize applying cy pres even if the settlor's intent is not known.

Termination

- A trust may terminate by consent if all beneficiaries and the trustee consent to the termination. Under the Clafin doctrine, a trustee can block a premature trust termination—even one to which all beneficiaries have consented—if the trust is shown to have an unfulfilled material purpose. Most courts allow the trustee to block the termination if it can be shown that termination would violate the settlor's intent.

Failure

- When a trust fails, a court may create a resulting trust requiring the holder of the property to return it to the settlor's estate.

Lapse

- Unless the governing instrument provides otherwise, the common law general rule is that the gift is expressly limited to the transferor's surviving children, so that the surviving issue of a deceased child does not take.

Trust Basics

- A trust is a fiduciary relationship wherein the trustee is called upon to manage, protect, and invest certain property and any income generated therefrom for the benefit of one or more named beneficiaries. The trustee holds the legal interest or title to the trust property. Should the trust be terminated, title would merge and would vest in the beneficiaries.

Trustee Duties

- A trustee has a duty to administer the trust in good faith, in accordance with its terms and purposes, and in the interest of the beneficiaries.
- A trustee has a duty to be impartial in dealing with the beneficiaries of a trust, including not to be influenced by the trustee's personal favoritism or animosity.

Private Express Trusts

- A private express trust clearly states the intention of the settlor to transfer property to a trustee for the benefit of one or more ascertainable beneficiaries. Traditionally, and in a minority of jurisdictions, a trust is presumed to be irrevocable unless the settlor expressly reserves the right to modify or terminate the trust. Under the UTC and majority rule, however, a trust is presumed revocable unless it expressly states otherwise. If the trust is revocable, the settlor's power to revoke naturally includes the power to amend or modify the trust. A settlor may amend or revoke a revocable trust by substantial compliance with a method provided in the terms of the trust.

Holders Abilities

- A power of appointment enables the holder to direct a trustee to distribute some or all of the trust property without regard to the provisions of the trust. A special power of appointment allows the donor to specify certain individuals as the objects of the power, to the exclusion of others.
- When an appointment exceeds the grant of power, the property or interest that was invalidly appointed passes to the taker in default—the party who would have received the interest had there been no appointment.

Wills

- The probate estate includes all assets that pass by will or intestacy upon a decedent's death. A trust is generally considered a will substitute because the distribution of property placed in trust during a decedent's lifetime passes outside of probate according to the terms of the trust.

Wills & Decedent's Estates

Holographic Wills

- A holographic will is handwritten, in the testator's handwriting, and signed by the testator, and need not be witnessed. To be valid, a will must be acknowledged by the testator and signed in the presence of at least two attesting witnesses, who also sign the will within 30 days. Holographic wills are recognized under both the UPC and common law statutes, but are not recognized by all states.

Elective Shares

- An elective share gives the surviving spouse a fraction of the decedent's estate if the surviving spouse decides to elect that share, rather than a gift in the will.

Inter Vivos Transfers

- In some jurisdictions, the surviving spouse can set aside inter vivos transfers made by the decedent during marriage, without spousal consent, if the decedent initiated the transfer within one year of her death, retained an interest in the property, or received less than adequate consideration.

Life Insurance Policies

- A beneficiary of a life insurance policy takes by virtue of the insurance contract. The proceeds are not part of the decedent's estate, unless they are payable to the estate as beneficiary. Life insurance policies typically provide that proceeds will only be paid to a beneficiary named on an appropriate form filed with the insurance company; other possible methods of changing a beneficiary are thus viewed as being excluded by the insurance contract. However, some courts have upheld a beneficiary change by will if the insurance company does not object.

Incorporation

- A will may incorporate by reference another writing not executed with testamentary formalities, provided the other writing meets three requirements: (i) it existed at the time the will was executed; (ii) the testator intended the writing to be incorporated; and (iii) the writing is described in the will with sufficient certainty so as to permit its identification.

Lapse & Anti-Lapse

- Under common law, if a beneficiary died before the testator or before a point in time by which he was required to survive under the will, the gift failed and went to the residue unless the will provided for an alternate disposition. Today, almost all states have anti-lapse statutes that provide for the alternate disposition of lapsed gifts. Typically, an anti-lapse statute will save the gift if: (i) the gift was made to a beneficiary related to the Testator by blood within a certain degree of relationship, and (ii) that beneficiary is survived by issue.

Abatement

- Gifts by will are abated, i.e. reduced, when the assets of the estate are insufficient to pay all debts and legacies. If not otherwise specified in the will, gifts are abated in the following order: (i) intestate property; (ii) residuary bequests; (iii) general bequests; and then (iv) specific bequests. Abatement within each category is pro rata.

Rule of Construction

- Because of the rule of construction that a will "speaks" at the time of death, a bequest of generically described property applies to property that meets the generic description at the testator's death. The doctrine of ademption applies only to specific bequests.

Intestate Succession

- Intestacy is the default statutory distribution scheme. It applies when, as here, an individual dies without disposing of his property through a valid will. Intestacy statutes generally favor the decedent's surviving spouse and issue, followed by the decedent's other relations.

Slayer Statute

- A party cannot take property from a decedent when the party was responsible for the decedent's death.

Children

- A parent-child relationship must be established for an individual to be classified as issue of another. Under the UPC and the majority of jurisdictions, adoption establishes a parent-child relationship between the stepparent and child, including full inheritance rights in both directions.
- The common-law rule was that if a child was born out of wedlock, he could not inherit from his natural father. Most jurisdictions provide that an out-of-wedlock child can inherit from his natural father if (i) the father subsequently married the natural mother, (ii) the father held the child out as his own and either received the child into his home or provided support, (iii) paternity was proven by clear and convincing evidence after the father's death, or (iv) paternity was adjudicated during the lifetime of the father by a preponderance of the evidence. Further, the Supreme Court has

held that a statute is unconstitutional if it denies inheritance rights to a nonmarital child when paternity has been established during the father's lifetime.

- In a majority of states, adoption curtails all statutory inheritance rights between the natural parents and the child.

Revocation

- A will may be revoked wholly or partially in three ways: by subsequent writings, by physical destruction of the will, or by operation of law. Physical destruction may take the form of burning any portion of the will or canceling, tearing, obliterating, or destroying a material portion of the will with the intent to revoke it. Both the act and a simultaneous intent to revoke must be proven to yield a valid revocation.
- In most jurisdictions, divorce revokes all will provisions in favor of the former spouse unless it can be shown that the testator intended for the will to survive. Spouses who are separated, or are in the process of obtaining a divorce, remain spouses until the issuance of a final decree of dissolution of the marriage, unless a complete property settlement is in place.
- A spouse may waive in whole or in part, before or during the marriage, the right to receive property that would pass by intestate succession or by testamentary disposition in a will that was executed before the waiver. However, the waiver does not apply to subsequent gifts or bequests made voluntarily by the other spouse.

Pretermitted Heir Statutes

- Pretermitted heir statutes permit children of a testator under certain circumstances to claim a share of the estate even though they were omitted from the testator's will. While the birth or adoption of a child after the execution of a will does not invalidate the will, such children are typically not provided for in the will. If the testator then dies without revising the will, a presumption is created that the omission of the child was accidental. An omitted child statute does not apply if: (i) it appears that the omission of the child was intentional; (ii) the testator had other children at the time the will was executed and left substantially all of his estate to the other parent of the pretermitted child; or (iii) the testator provided for the child outside of the will and intended this to be in lieu of a provision in the will.

Valid Will Requirements

- A valid will must be in writing and signed with present testamentary intent by the testator in the joint presence of two witnesses.

Codicils

- A codicil is a supplement to a will that alters, amends, or modifies it. A codicil must be executed with the same formalities as a will. A validly executed codicil republishes the will as of the date of the codicil.
- A validly executed codicil may validate an invalid will if the codicil refers to the will with sufficient certainty to identify and incorporate it, or if the codicil is on the same paper as the invalid will. A will may incorporate by reference another writing provided the other writing existed at the time the will was executed, is intended to be incorporated, and is described in the will with sufficient certainty so as to permit its identification.

Stock Dividends

- At common law, a stock dividend is a property interest distinct from stock given by a specific bequest. A bequest of stock owned by a testator when the testator's will is signed excludes subsequently acquired shares of the same stock. A bequest of a certain number of shares is deemed to include any additional shares of that security acquired by reason of a stock split, reinvestment, or merger initiated by the original security. However, the beneficiary is not entitled to any pre-death cash dividends or distributions.
- Under common law, a bequest of stock owned by a testator when the testator's will was signed excluded subsequently acquired shares of the same stock. Many states held that a stock dividend is a property interest distinct from stock given

by the specific bequest. Under the modern UPC approach, a stock dividend is treated like a stock split instead of a cash dividend.

Replacement Gifts

· If the testator DID NOT intend for a specific gift to fail, the beneficiary is entitled to: **(a)** any real property or tangible personal property (owned by the testator at death) which the testator *acquired as a replacement* for the specific gift; **OR** **(b)** a *monetary devise* equal to the value of the specific gift. Additionally, if the specific gift was destroyed or damaged, the beneficiary is entitled to any unpaid insurance proceeds or other recovery for injury to the property. If a beneficiary is entitled to insurance proceeds for a destroyed/damaged specific gift, the beneficiary is also entitled to the damaged item itself.