

Chapter 1 Notes

Sources of American Law

- Constitutional law
 - The law as expressed in the U.S. Constitution and the various state constitutions. The U.S. Constitution is the supreme law of the land. State constitutions are supreme within state borders to the extent that they do not violate the U.S. Constitution or a federal law.
- Statutory law
 - Laws or ordinances created by federal, state, and local legislatures and governing bodies. None of these laws can violate the U.S. Constitution or the relevant state constitutions. Uniform laws, when adopted by a state legislature, become statutory law in that state. Administrative law—The rules, orders, and decisions of federal or state government administrative agencies. Federal administrative agencies are created by enabling legislation enacted by the U.S. Congress. Agency functions include rulemaking, investigation and enforcement, and adjudication.
- Case law and common law doctrines
 - Judge-made law, including interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies. The common law—the doctrines and principles embodied in case law—governs all areas not covered by statutory law or administrative law.

Common Law Tradition

- Common law
 - Law that originated in medieval England with the creation of the king's courts, or curiae regis, and the development of a body of rules that were common to (or applied in) all regions of the country.
- Stare decisis
 - A doctrine under which judges “stand on decided cases”—or follow the rule of precedent—in deciding cases. Stare decisis is the cornerstone of the common law tradition.
- Remedies
 - A remedy is the means by which a court enforces a right or compensates for a violation of a right. Courts typically grant legal remedies (monetary damages) but may also grant equitable remedies (specific performance, injunction, or rescission) when the legal remedy is inadequate or unavailable.

Classifications of Law

The law may be broken down according to several classification systems, such as substantive or procedural law, federal or state law, and private or public law. Two broad classifications are civil and criminal law, and national and international law. Cyberlaw is not really a classification of law but a term that refers to the growing body of case and statutory law that applies to Internet transactions.

The Constitutional Powers of Government

The U.S. Constitution established a federal form of government, in which government powers are shared by the national government and the state governments. At the national level, government powers are divided among the legislative, executive, and judicial branches.

- The commerce clause
 - The commerce clause expressly permits Congress to regulate commerce. Over time, courts expansively interpreted this clause, thereby enabling the national government to wield extensive powers over the economic life of the nation.
 - Today, the commerce power authorizes the national government, at least theoretically, to regulate almost every commercial enterprise in the United States. In recent years, the Supreme Court has reined in somewhat the national government's regulatory powers under the commerce clause.
 - The Tenth Amendment reserves to the states all powers not expressly delegated to the national government. Under their police powers, state governments may regulate private activities in order to protect or promote the public order, health, safety, morals, and general welfare.
 - If state regulations substantially interfere with interstate commerce, they will be held to violate the "dormant commerce" clause of the U.S. Constitution. The positive aspect of the commerce clause, which gives the national government the exclusive authority to regulate interstate commerce, implies a "dormant" aspect—that the states do not have this power.
- The supremacy clause
 - The U.S. Constitution provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." Whenever a state law directly conflicts with a federal law, the state law is rendered invalid.

Business and the Bill of Rights

The Bill of Rights, which consists of the first ten amendments to the U.S. Constitution, embodies a series of protections for individuals—and, in some instances, business entities—against various types of interference by the federal government. Today, most of the protections apply against state governments as well. Freedoms guaranteed by the First Amendment that affect businesses include the following:

- Freedom of speech
 - Speech, including symbolic speech, is given the fullest possible protection by the courts. Corporate political speech and commercial speech also receive substantial protection under the First Amendment. Certain types of speech, such as defamatory speech and obscene speech, are not protected under the First Amendment. Government attempts to regulate unprotected forms of speech in the online environment have, to date, met with numerous challenges.
- Freedom of religion
 - Under the First Amendment, the government may neither establish any religion (the establishment clause) nor prohibit the free exercise of religion (the free exercise clause).

Due Process and Equal Protection

- Due process
 - Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived of “life, liberty, or property, without due process of law.” Procedural due process requires that any government decision to take life, liberty, or property must be made fairly, using fair procedures. Substantive due process focuses on the content of legislation. Generally, a law that limits a fundamental right violates substantive due process unless the law promotes a compelling state interest, such as public safety.
- Equal protection
 - Under the Fourteenth Amendment, a law or action that limits the liberty of some persons but not others may violate the equal protection clause. Such a law may be upheld, however, if there is a rational basis for the discriminatory treatment of a given group or if the law substantially relates to an important government objective.

Privacy Rights

- The Constitution does not contain a specific guarantee of a right to privacy, but such a right has been derived from guarantees found in several constitutional amendments. A number of federal statutes protect privacy rights. Privacy rights are also protected by many state constitutions and statutes, as well as under tort law.

Chapter 2 Notes

The Judiciary's Role in American Government

- The role of the judiciary—the courts—in the American governmental system is to interpret and apply the law. Through the process of judicial review—determining the constitutionality of laws—the judicial branch acts as a check on the executive and legislative branches of government.

Basic Judicial Requirements

- Jurisdiction
 - Before a court can hear a case, it must have jurisdiction over the person against whom the suit is brought or the property involved in the suit, as well as jurisdiction over the subject matter.
 - Limited versus general jurisdiction—Limited jurisdiction exists when a court is limited to a specific subject matter, such as probate or divorce. General jurisdiction exists when a court can hear any kind of case.
 - Original versus appellate jurisdiction—Original jurisdiction exists when courts have authority to hear a case for the first time (trial courts). Appellate jurisdiction is exercised by courts of appeals, or reviewing courts, which generally do not have original jurisdiction.
 - Federal jurisdiction—Arises (1) when a federal question is involved (when the plaintiff's cause of action is based, at least in part, on the U.S. Constitution, a treaty, or a federal law) or (2) when a case involves diversity of citizenship (citizens of different states, for example) and the amount in controversy exceeds \$75,000.
 - Concurrent versus exclusive jurisdiction—Concurrent jurisdiction exists when two different courts have authority to hear the same case. Exclusive jurisdiction exists when only state courts or only federal courts have authority to hear a case.
- Jurisdiction in cyberspace
 - Because the Internet does not have physical boundaries, traditional jurisdictional concepts have been difficult to apply in cases involving activities conducted via the Web. Gradually, the courts are developing standards to use in determining when jurisdiction over a Web site owner or operator located in another state is proper.
- Venue
 - Venue has to do with the most appropriate location for a trial, which is usually the geographic area where the event leading to the dispute took place or where the parties reside.
- Standing to sue
 - A requirement that a party must have a legally protected and tangible interest at stake sufficient to justify seeking relief through the court system. The controversy at issue must also be a justiciable controversy—one that is real and substantial, as opposed to hypothetical or academic.

The State and Federal Court Systems

- Trial courts
 - Courts of original jurisdiction, in which legal actions are initiated.
 - State
 - Courts of general jurisdiction can hear any case. Courts of limited jurisdiction include domestic relations courts, probate courts, traffic courts, and small claims courts.
 - Federal
 - The federal district court is the equivalent of the state trial court. Federal courts of limited jurisdiction include the U.S. Tax Court, the U.S. Bankruptcy Court, and the U.S. Court of Federal Claims.
- Intermediate appellate courts
 - Courts of appeals, or reviewing courts, which generally do not have original jurisdiction. Many states have intermediate appellate courts. In the federal court system, the U.S. circuit courts of appeals are the intermediate appellate courts.
- Supreme (highest) courts
 - Each state has a supreme court, although it may be called by some other name. Appeal from the state supreme court to the United States Supreme Court is possible only if the case involves a federal question. The United States Supreme Court is the highest court in the federal court system and the final arbiter of the U.S. Constitution and federal law.

Following a State Court Case

Rules of procedure prescribe the way in which disputes are handled in the courts. Rules differ from court to court, and separate sets of rules exist for federal and state courts, as well as for criminal and civil cases. A civil court case in a state court would involve the following procedures:

- The pleadings
 - Complaint
 - Filed by the plaintiff with the court to initiate the lawsuit. The complaint is served with a summons on the defendant.
 - Answer
 - A response to the complaint in which the defendant admits or denies the allegations made by the plaintiff. The answer may assert a counterclaim or an affirmative defense.
 - Motion to dismiss
 - A request to the court to dismiss the case for stated reasons, such as the plaintiff's failure to state a claim for which relief can be granted.
- Pretrial motions (in addition to the motion to dismiss)
 - Motion for judgment on the pleadings
 - May be made by either party. It will be granted if the parties agree on the facts and the only question is how the law applies to the facts. The judge bases the decision solely on the pleadings.
 - Motion for summary judgment
 - May be made by either party. It will be granted if the parties agree on the facts and the sole question is a question of law. The judge can consider evidence outside the pleadings when evaluating the motion.

- Discovery
 - The process of gathering evidence concerning the case. Discovery involves depositions (sworn testimony by a party to the lawsuit or any witness), interrogatories (written questions and answers to these questions made by parties to the action with the aid of their attorneys), and various requests (for admissions, documents, and medical examinations, for example). Discovery may also involve electronically recorded information, such as e-mail, voice mail, word-processing documents, and other data compilations. Although electronic discovery has significant advantages over paper discovery, it is also more time consuming and expensive and often requires the parties to hire experts.
- Pretrial conference
 - Either party or the court can request a pretrial conference to identify the matters in dispute after discovery has taken place and to plan the course of the trial.
- Trial
 - Following jury selection (voir dire), the trial begins with opening statements from both parties' attorneys. The following events then occur:
 - The plaintiff's introduction of evidence (including the testimony of witnesses) supporting the plaintiff's position. The defendant's attorney can challenge evidence and cross-examine witnesses.
 - The defendant's introduction of evidence (including the testimony of witnesses) supporting the defendant's position. The plaintiff's attorney can challenge evidence and cross-examine witnesses.
 - Closing arguments by the attorneys in favor of their respective clients, the judge's instructions to the jury, and the jury's verdict.
- Posttrial motions
 - Motion for judgment n.o.v. ("notwithstanding the verdict")
 - Will be granted if the judge is convinced that the jury was in error.
 - Motion for a new trial
 - Will be granted if the judge is convinced that the jury was in error. The motion can also be granted on the grounds of newly discovered evidence, misconduct by the participants during the trial, or error by the judge.
- Appeal
 - Either party can appeal the trial court's judgment to an appropriate court of appeals. After reviewing the record on appeal, the abstracts, and the attorneys' briefs, the appellate court holds a hearing and renders its opinion.

Courts Online

- A number of state and federal courts now allow parties to file litigation-related documents with the courts via the Internet or other electronic means. Nearly all of the federal appellate courts and bankruptcy courts and a majority of the federal district courts have implemented electronic filing systems. Almost every court now has a Web page offering information about the court and its procedures, and increasingly courts are publishing their opinions online. In the future, we may see cyber courts, in which all trial proceedings are conducted online.

Alternative Dispute Resolution

- Negotiation
 - The parties come together, with or without attorneys to represent them, and try to reach a settlement without the involvement of a third party.
- Mediation
 - The parties themselves reach an agreement with the help of a neutral third party, called a mediator. The mediator may propose a solution but does not make a decision resolving the matter.
- Arbitration
 - The parties submit their dispute to a neutral third party, the arbitrator, who renders a decision. The decision may or may not be legally binding, depending on the circumstances.
- Other types of ADR
 - These include assisted negotiation, early neutral case evaluation, mini-trials, and summary jury trials (SJTs).
- Providers of ADR services
 - The leading nonprofit provider of ADR services is the American Arbitration Association. Hundreds of for-profit firms also provide ADR services.
- Online dispute resolution
 - A number of organizations and firms are now offering negotiation, mediation, and arbitration services through online forums. These forums have been a practical alternative for the resolution of domain name disputes and e-commerce disputes in which the amount in controversy is relatively small.

Chapter 18 Notes

Sole Proprietorships

- The simplest form of business organization, the sole proprietorship is used by anyone who does business without creating a separate organization. The owner is the business. The owner pays personal income taxes on all profits and is personally liable for all business debts.

Partnerships

- A general partnership is created by agreement of the parties.
- Each partner pays a proportionate share of income taxes on the net profits of the partnership, whether or not they are distributed. The partnership files only an information return with the Internal Revenue Service.
- Each partner has an equal voice in management unless the partnership agreement provides otherwise.
- In the absence of an agreement, partners share profits equally and share losses in the same ratio as they share profits.
- Partners have unlimited liability for partnership debts.
- A partnership can be terminated by agreement or can be dissolved by action of the partners, operation of law, or court decree.

Limited Liability Partnerships (LLPs)

- Formation
 - The appropriate form must be filed with a state agency, usually the secretary of state's office. Typically, an LLP is formed by professionals who work together as partners in a partnership. Under most state LLP statutes, it is relatively easy to convert a traditional partnership into an LLP.
- Liabilities of partners
 - LLP statutes vary, but under the UPA, professionals generally can avoid personal liability for acts committed by other partners. Partners in an LLP continue to be liable for their own wrongful acts and for the wrongful acts of those whom they supervise.

Limited Partnerships (LPs)

- Formation
 - A certificate of limited partnership must be filed with the secretary of state's office or other designated state official. The certificate must include information about the business, similar to the information included in articles of incorporation. The partnership consists of one or more general partners and one or more limited partners.
- Liabilities of partners
 - General partners have unlimited liability for partnership obligations. Limited partners are liable only to the extent of their contributions.

- Limited partners and management
 - Only general partners can participate in management. Limited partners have no voice in management. If they do participate in management, they risk having general-partner liability.
- Dissolution
 - A general partner's voluntary dissociation, bankruptcy, death, or mental incompetence will cause the partnership's dissolution unless all partners agree to continue the business. The death or assignment of the interest of a limited partner does not dissolve the partnership. Bankruptcy of a limited partner also does not dissolve the partnership unless it causes the bankruptcy of the firm.

Limited Liability Companies (LLCs)

- Formation
 - Articles of organization must be filed with the appropriate state office—usually the office of the secretary of state—setting forth the name of the business, its principal address, the names of the owners (called members), and other relevant information.
- Advantages and disadvantages of the LLC
 - Advantages of the LLC include limited liability, the option to be taxed as a partnership or as a corporation, and flexibility in deciding how the business will be managed and operated. The main disadvantage is the absence of uniformity in state LLC statutes.
- LLC operation
 - When an LLC is formed, the members decide, in an operating agreement, how the business will be managed and what rules will apply to the organization.
- LLC management
 - An LLC may be managed by members only, by some members and some nonmembers, or by nonmembers only.
- Dissociation
 - Members of an LLC have the power to dissociate from the LLC at any time, but they may not have the right to dissociate. Dissociation does not always result in the dissolution of an LLC. The remaining members can choose to continue the business. Dissociated members have a right to have their interest purchased by the other members.
- Dissolution
 - If the LLC is dissolved, the business must be wound up and the assets sold. Creditors are paid first, and then members' capital investments are returned. Any remaining proceeds are distributed to members.

Special Business Forms

- Joint venture
 - An organization created by two or more persons in contemplation of a single transaction or project or a related series of transactions or projects. A joint venture is similar to a partnership in many respects.
- Syndicate
 - An investment group that undertakes to finance a particular project. A syndicate may be organized as a corporation or as a general or limited partnership.

- Joint stock company
 - A business form similar to a corporation in some respects (transferable shares of stock, management by directors and officers, perpetual existence) but otherwise resembling a partnership.
- Business trust
 - A business form created by a written trust agreement that sets forth the interests of the beneficiaries and the obligations and powers of the trustees. Beneficiaries are not personally liable for the debts or obligations of the business trust, which is similar to a corporation in many respects.
- Cooperative
 - An association organized to provide an economic service, without profit, to its members. A co-op may or may not be incorporated.

Franchises

- Types of franchises
 - Distributorship (for example, automobile dealerships).
 - Chain-style operation (for example, fast-food chains).
 - Manufacturing/processing-plant arrangement (for example, soft-drink bottling companies, such as Pepsi-Cola).
- Laws governing franchising
 - Franchises are governed by contract law. They are also governed by federal and state statutory laws, as well as agency regulations.
- The franchise contract
 - The franchise relationship is defined by a contract between the franchisor and the franchisee. The contract normally spells out the following terms:
- Payment for the franchise
 - Ordinarily, the contract requires the franchisee (purchaser) to pay an initial fee or lumpsum price for the franchise license.
- Business premises and location
 - The contract may specify whether the business premises will be leased or purchased by the franchisee and which party will provide the equipment and furnishings. The franchisor typically specifies the territory to be served by the franchisee.
- Quality control
 - The franchisor may require the franchisee to abide by certain standards of quality relating to the product or service offered.
- Franchise termination
 - Usually, the contract provides for the date and/or conditions of termination of the franchise arrangement. Both federal and state statutes attempt to protect franchisees from franchisors who unfairly or arbitrarily terminate franchises.

Chapter 19 Notes

Nature and Classification

A corporation is a legal entity distinct from its owners. Formal statutory requirements, which vary somewhat from state to state, must be followed in forming a corporation.

- Corporate personnel
 - The shareholders own the corporation. They elect a board of directors to govern the corporation. The board of directors hires corporate officers and other employees to run the firm's daily business.
- Corporate taxation
 - The corporation pays income tax on net profits, and shareholders pay income tax on the disbursed dividends that they receive from the corporation (double-taxation feature).
- Torts and criminal acts
 - The corporation is liable for the torts committed by its agents or officers within the course and scope of their employment (under the doctrine of respondeat superior). A corporation can be held liable (and be fined) for the criminal acts of its agents and employees.
- Domestic, foreign, and alien corporations
 - A corporation is referred to as a domestic corporation within its home state (the state in which it incorporates), as a foreign corporation by any state that is not its home state, and as an alien corporation if it originates in another country but does business in the United States.
- Public and private corporations
 - A public corporation is formed by a government. A private corporation is formed wholly or in part for private benefit. Most corporations are private corporations.
- Nonprofit corporations
 - Corporations formed without a profit-making purpose.
- Close corporations
 - Corporations owned by a family or a relatively small number of individuals. Transfer of shares is usually restricted.
- S corporations
 - Small domestic corporations that, under Subchapter S of the Internal Revenue Code, are taxed like partnerships, thereby allowing shareholders to enjoy limited liability while avoiding double taxation.
- Benefit corporations
 - Corporations formed (in some states) to benefit the public as a whole and have a material positive impact on society and the environment.

Formation and Financing

- Incorporation procedures
 - Procedures vary among the states, but the basic steps are as follows:
 - Select a state of incorporation.
 - Secure the corporate name.

- Prepare the articles of incorporation. The articles must include the corporate name, the number of shares of stock the corporation is authorized to issue, the registered office and agent, and the names and addresses of the incorporators.
 - File the articles with the secretary of state. The state's filing of the articles authorizes the corporation to conduct business.
- First organizational meeting
 - The main function of the meeting is to adopt the bylaws, or internal rules of the corporation, but other business, such as election of the board of directors, may also take place.
- Improper incorporation
 - A corporation that has complied with the conditions for incorporation has de jure status. A minor defect in formation generally does not affect this status. If a defect is substantial, courts in some states may hold that the corporation has de facto status and treat it as a corporation despite the defect. If a firm is not incorporated but represents itself to be a corporation and is sued as such by a third party, it may be held to be a corporation by estoppel.
- Securities
 - Corporations normally are financed by the issuance and sale of securities. Bonds are debt securities representing funds borrowed by the firm, and stocks are equity securities representing ownership in the firm.
- Termination
 - Corporations can be dissolved voluntarily by the directors or shareholders and can sometimes be involuntarily terminated by the state.

Corporate Powers

- Express and implied powers
 - The express powers of a corporation are found in its articles of incorporation, in the law of the state of incorporation, and in the state and federal constitutions. Barring express constitutional, statutory, or other prohibitions, the corporation has the implied power to perform all acts reasonably appropriate and necessary to accomplish its corporate purposes.
- Piercing the corporate veil
 - To avoid injustice, courts may "pierce the corporate veil" and hold a shareholder or shareholders personally liable. This usually occurs when the corporate privilege is abused for personal benefit or when the corporate business is treated so carelessly that it is indistinguishable from that of a controlling shareholder.
- Directors and Officers
 - Directors
 - Responsible for all policymaking decisions necessary to the management of corporate affairs.
 - Elected by the shareholders and usually serve a one-year term. Compensation is usually specified in the corporate articles or bylaws. The board conducts business by holding formal meetings with recorded minutes. Directors' rights include the rights of participation, inspection, and indemnification.

- Corporate officers and executives
 - Corporate officers and other executive employees are normally hired by the board of directors and have the rights defined by their employment contracts.
- Duty of care
 - Directors and officers are obligated to act in good faith, to use prudent business judgment in the conduct of corporate affairs, and to act in the corporation's best interests. If a director fails to exercise this duty of care, she or he can be answerable to the corporation and to the shareholders.
- The business judgment rule
 - This rule immunizes directors and officers from liability when they acted in good faith, acted in the best interests of the corporation, and exercised due care. For the rule to apply, the directors and officers must have made an informed, reasonable, and loyal decision.
- Duty of loyalty
 - Directors and officers have a fiduciary duty to subordinate their own interests to those of the corporation in matters relating to the corporation.
- Conflicts of interest
 - To fulfill their duty of loyalty, directors and officers must make a full disclosure of any potential conflicts between their personal interests and those of the corporation.

Shareholders

- Shareholders' powers
 - Shareholders' must approve all fundamental changes affecting the corporation and elect the board of directors.
- Shareholders' meetings
 - Shareholders' meetings must occur at least annually. Special meetings can be called when necessary. Notice of the date, time, and place of the meeting (and its purpose, if it is specially called) must be sent to shareholders. Shareholders may vote by proxy and may submit proposals to be included in the proxy materials sent to shareholders before meetings.
- Shareholder voting
 - Shareholder voting requirements and procedures are as follows:
 - A minimum number of shareholders (a quorum) must be present at a meeting for business to be conducted. Resolutions are passed (usually) by simple majority vote.
 - Cumulative voting may be required or permitted. Cumulative voting gives minority shareholders a better chance to be represented on the board of directors.
 - A shareholder voting agreement (an agreement of shareholders to vote their shares together) is usually held to be valid and enforceable.
- Rights of shareholders
 - Shareholders have numerous rights, which may include preemptive rights, the right to dividends, inspection rights, the right to transfer shares, and the right to sue on behalf of the corporation (bring a shareholder's derivative suit).

Chapter 20 Notes

The Securities Act of 1933

Prohibits fraud and stabilizes the securities industry by requiring disclosure of all essential information relating to the issuance of securities to the investing public.

- Registration requirements
 - Securities, unless exempt, must be registered with the SEC before being offered to the public. The registration statement must include detailed financial information about the issuing corporation; the intended use of the proceeds of the securities being issued; and certain disclosures, such as interests of directors or officers and pending lawsuits.
- Prospectus
 - The issuer must provide investors with a prospectus that describes the security being sold, the issuing corporation, and the risk attaching to the security.
- Exemptions
 - The SEC has exempted certain offerings from the requirements of the Securities Act of 1933. Exemptions may be determined on the basis of the size of the issue, whether the offering is private or public, and whether advertising is involved. Exemptions are summarized in Exhibit 21–1.

Securities Exchange Act of 1934

Provides for the regulation and registration of securities exchanges, brokers, dealers, and national securities associations. Maintains a continuous disclosure system for all corporations with securities on the securities exchanges and for companies that have assets in excess of \$10 million and five hundred or more shareholders (Section 12 companies).

- SEC Rule 10b-5 [under Section 10(b) of the 1934 act]
 - Applies to almost all trading of securities
 - a firm's securities do not have to be registered under the 1933 act for the 1934 act to apply.
 - Applies to insider trading by corporate officers, directors, majority shareholders, and any persons receiving inside information (information not available to the public) who base their trading on this information.
 - Liability for insider trading may be based on the tipper/tippee or the misappropriation theory.
 - May be violated by failing to disclose “material facts” that must be disclosed under this rule.
 - Liability for violations can be civil or criminal.
- Insider trading [under Section 16(b) of the 1934 act]
 - To prevent corporate insiders from taking advantage of inside information, the 1934 act requires officers, directors, and shareholders owning 10 percent or more of the issued stock of a corporation to turn over to the corporation all short-term profits (called short-swing profits) realized from the purchase and sale or sale and purchase of corporate stock within any six-month period.

- Regulation of proxies
 - The SEC regulates the content of proxy statements sent to shareholders of Section 12 companies. Section 14(a) is essentially a disclosure law, with provisions similar to the antifraud provisions of SEC Rule 10b-5.

State Securities Laws

All states have corporate securities laws (blue sky laws) that regulate the offer and sale of securities within state borders. These laws are designed to prevent “speculative schemes which have no more basis than so many feet of ‘blue sky.’” States regulate securities concurrently with the federal government. The Uniform Securities Act is designed to promote coordination and reduce duplication between state and federal securities regulation.

Corporate Governance

- Definition
 - Corporate governance involves a set of policies specifying the rights and responsibilities of the various participants in a corporation and spelling out the rules and procedures for making decisions on corporate affairs.
- The need for corporate governance
 - Corporate governance is necessary in large corporations because corporate ownership (by the shareholders) is separated from corporate control (by officers and managers). This separation of corporate ownership and control can often result in conflicting interests. Corporate governance standards address such issues.
- Sarbanes-Oxley Act
 - This act attempts to increase corporate accountability by imposing strict disclosure requirements and harsh penalties for violations of securities laws.

Chapter 8 Notes

An Overview of Contract Law

- Sources of contract law
 - The common law governs all contracts except when it has been modified or replaced by statutory law, such as the Uniform Commercial Code (UCC), or by administrative agency regulations. The UCC governs contracts for the sale or lease of goods.
- The function of contracts
 - Contract law establishes what kinds of promises will be legally binding and supplies procedures for enforcing legally binding promises, or agreements.
- Definition of a contract
 - A contract is an agreement that can be enforced in court. It is formed by two or more competent parties who agree to perform or to refrain from performing some act now or in the future.
- The objective theory of contracts
 - In contract law, intent is determined by objective facts, not by the personal or subjective intent, or belief, of a party.
- Requirements of a valid contract
 - The four requirements of a valid contract are agreement, consideration, contractual capacity, and legality.
- Defenses to the enforceability of a contract
 - Even if the four requirements of a valid contract are met, a contract may be unenforceable if it lacks voluntary consent or is not in the required form.

Types of Contracts

- Bilateral
 - A promise for a promise.
- Unilateral
 - A promise for an act (acceptance is the completed or substantial performance of the contract by the offeree).
- Formal
 - Requires a special form for contract formation.
- Informal
 - Requires no special form for contract formation.
- Express
 - Formed by words (oral, written, or a combination).
- Implied
 - Formed at least in part by the conduct of the parties.
- Executed
 - A fully performed contract.
- Executory
 - A contract not yet fully performed.
- Valid
 - A contract that has the four necessary contractual elements of agreement, consideration, capacity, and legality.

- Voidable
 - A contract in which a party has the option of avoiding or enforcing the contractual obligation.
- Unenforceable
 - A valid contract that cannot be enforced because of a legal defense.
- Void
 - No contract exists, or there is a contract without legal obligations.
- Quasi contract
 - A contract that is imposed by law to prevent unjust enrichment.

Agreement: Requirements of the Offer

- By action of the parties
 - Revocation
 - Unless the offer is irrevocable, it can be revoked at any time before acceptance without liability. Revocation is not effective until received by the offeree or the offeree's agent. Some offers, such as a merchant's firm offer and option contracts, are irrevocable.
 - Rejection
 - Accomplished by words or actions that demonstrate a clear intent not to accept the offer. A rejection is not effective until it is received by the offeror or the offeror's agent. Counteroffer—A rejection of the original offer and the making of a new offer.
- By operation of law
 - Lapse of time
 - The offer terminates (1) at the end of the time period specified in the offer or (2) if no time period is stated in the offer, at the end of a reasonable time period.
 - Destruction of the specific subject matter of the offer
 - Automatically terminates the offer.
 - Death or incompetence of the offeror or offeree
 - Terminates the offer unless the offer is irrevocable.
 - Illegality
 - Supervening illegality terminates the offer.

Agreement and Acceptance

- Acceptance can be made only by the offeree or the offeree's agent.
- Must be unequivocal. Under the common law (mirror image rule), if new terms or conditions are added to the acceptance, it will be considered a counteroffer.
- Acceptance of a unilateral offer is effective on full performance of the requested act.
- Except in a few situations, an offeree's silence does not constitute an acceptance.
- Acceptance of a bilateral offer can be communicated by the offeree by any authorized mode of communication and is effective on dispatch. If the offeror does not specify the mode of communication, acceptance can be made by any reasonable means. Usually, the same means used by the offeror or a faster means can be used.

E-Contracts

- Online offers
 - The terms of contract offers presented via the Internet should be as inclusive as the terms in an offer made in a written (paper) document. The offer should be displayed in an easily readable format and should include some mechanism, such as an “I agree” or “I accept” box, by which the customer may accept the offer.
- Click-on agreement
 - An agreement created when a buyer, completing a transaction on a computer, is required to indicate her or his assent to be bound by the terms of an offer by clicking on a box that says, for example, “I agree.” The courts have enforced click-on agreements, holding that by clicking on “I agree,” the offeree has indicated acceptance by conduct.
- Shrink-wrap agreement
 - An agreement whose terms are expressed inside a box in which goods are packaged. The party who opens the box is informed that, by keeping the goods, he or she agrees to the terms of the shrink-wrap agreement.
- Laws on e-signatures and e-documents
 - The Electronic Signatures in Global and National Commerce Act (E-SIGN Act) gave validity to e-signatures by providing that no contract, record, or signature may be “denied legal effect” solely because it is in an electronic form. The Uniform Electronic Transactions Act (UETA) defines an e-signature as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” This act has been adopted by most states to create rules to support the enforcement of e-contracts. Under the UETA, contracts entered into online, as well as other documents, are presumed to be valid.

Consideration

- Elements of consideration
 - Consideration consists of something of legally sufficient value being given in exchange for a promise and a bargained-for exchange.
- Adequacy of consideration
 - Adequacy relates to how much consideration is given and whether a fair bargain was reached.
- Contracts that lack consideration
 - Consideration is lacking in the following situations:
- Preexisting duty
 - A promise to do what one already has a legal duty to do is not legally sufficient consideration for a new contract.
- Past consideration
 - Actions or events that have already taken place do not constitute legally sufficient consideration.
- Illusory promises
 - When the nature or extent of performance is too uncertain, the promise is rendered illusory.

- Settlement of claims
 - Disputes may be settled by the following, which are enforceable provided there is consideration:
- Accord and satisfaction
 - An accord is an agreement in which a debtor offers to pay a lesser amount than the creditor claims is owed. Satisfaction takes place when the accord is executed.
- Release
 - An agreement in which, for consideration, a party forfeits the right to seek further recovery beyond the terms specified.
- Covenant not to sue
 - An agreement not to sue on a present, valid claim.
- Promissory estoppel
 - The equitable doctrine of promissory estoppel applies when a promisor should have expected a promise to induce definite and substantial action or forbearance by the promisee, and the promisee does act in reliance on the promise. Such a promise is binding, even though there is no consideration, if injustice can be avoided only by enforcement of the promise.

Chapter 9 Notes

CAPACITY

An Overview of Contract Law

- Sources of contract law
 - The common law governs all contracts except when it has been modified or replaced by s

Minors

- General rule
 - Contracts with minors are voidable at the option of the minor.
- Disaffirmance
 - The legal avoidance of a contractual obligation.
 - Disaffirmance can take place (in most states) at any time during minority and within a reasonable time after the minor has reached the age of majority.
 - The minor must disaffirm the entire contract, not just part of it.
 - When disaffirming executed contracts, the minor has a duty to return the received goods if they are still in the minor's control or (in some states) to pay their reasonable value.
 - A minor who has misrepresented her or his age will be denied the right to disaffirm by some courts.
 - A minor may disaffirm a contract for necessities but remains liable for the reasonable value of the goods.
- Ratification
 - The acceptance, or affirmation, of a legal obligation.
 - Express ratification
 - Occurs when the minor, in writing or orally, explicitly assumes the obligations imposed by the contract.
 - Implied ratification
 - Occurs when the conduct of the minor is inconsistent with disaffirmance or when the minor fails to disaffirm an executed contract within a reasonable time after reaching the age of majority.
- Parents' liability
 - Generally, except for contracts for necessities, parents are not liable for the contracts made by minor children acting on their own.
- Emancipation
 - Occurs when a child's parent or legal guardian relinquishes the legal right to exercise control over the child. Normally, minors who leave home to support themselves are considered emancipated. In some jurisdictions, minors are permitted to petition a court for emancipation.

Intoxicated Persons

- A contract entered into by an intoxicated person is voidable at the option of the intoxicated person if the person was sufficiently intoxicated to lack mental capacity, even if the intoxication was voluntary.
- A contract with an intoxicated person is enforceable if, despite being intoxicated, the person understood the legal consequences of entering into the contract.

Mentally Incompetent Persons

- A contract made by a person previously judged by a court to be mentally incompetent is void.
- A contract made by a person who is mentally incompetent, but has not been previously declared incompetent by a court, is voidable at the option of that person.

LEGALITY

Contracts Contrary to Statute

- Usury
 - Usury occurs when a lender makes a loan at an interest rate above the lawful maximum, which varies from state to state.
- Gambling
 - Gambling contracts that violate state statutes are deemed illegal and thus void.
- Licensing statutes
 - Contracts entered into by persons who do not have a license, when one is required by statute, will not be enforceable unless the underlying purpose of the statute is to raise government revenues (and not to protect the public from unauthorized practitioners).

Contracts Contrary to Public Policy

- Contracts in restraint of trade
 - Contracts to restrain free competition are illegal and prohibited by statutes. An exception is a covenant not to compete. Such covenants usually are enforced by the courts if the terms are secondary to a contract (such as a contract for the sale of a business or an employment contract) and are reasonable as to time and area of restraint. Courts tend to scrutinize covenants not to compete closely and, at times, may reform them if they are overly broad rather than declaring the entire covenant unenforceable.
- Unconscionable contracts and clauses
 - When a contract or contract clause is so unfair that it is oppressive to one party, it may be deemed unconscionable. As such, it is illegal and cannot be enforced.
- Exculpatory clauses
 - An exculpatory clause releases a party from liability in the event of monetary or physical injury, no matter who is at fault. In certain situations, exculpatory clauses may be contrary to public policy and thus unenforceable.

Effect of Illegality

In general, an illegal contract is void, and the courts will not aid either party when both parties are considered to be equally at fault (in pari delicto). If the contract is executory, neither party can enforce it. If the contract is executed, neither party can recover damages.

ENFORCEABILITY — VOLUNTARY CONSENT

Mistakes

- Unilateral
 - Generally, the mistaken party is bound by the contract unless:
 - the other party knows or should have known of the mistake; or
 - the mistake is an inadvertent mathematical error—such as an error in addition or subtraction—committed without gross negligence.
- Bilateral (mutual)
 - When both parties are mistaken about the same material fact, such as identity, either party can avoid the contract.

Fraudulent Misrepresentation

When fraud occurs, usually the innocent party can enforce or avoid the contract. The following elements are necessary to establish fraud:

- Misrepresentation of a material fact must occur.
- There must be an intent to deceive.
- The innocent party must justifiably rely on the misrepresentation.

Undue Influence

- Undue influence arises from special relationships, such as fiduciary relationships, in which one party's free will has been overcome by the undue influence exerted by the other party. Usually, the contract is voidable.

Duress Duress

- is the tactic of forcing a party to enter a contract under the fear of a threat—for example, the threat of violence or serious economic loss. The party forced to enter the contract can rescind the contract.

Enforceability—FORM

The Writing Requirement

- Applicability
 - The following types of contracts fall under the Statute of Frauds and must be in writing to be enforceable:
 - Contracts involving interests in land, such as sales, leases, or mortgages.
 - Contracts that cannot by their terms be fully performed within one year from (the day after) the contract's formation.

- Collateral promises, such as contracts made between a guarantor and a creditor whose terms make the guarantor secondarily liable. Exception: the “main purpose” rule.
- Promises made in consideration of marriage, including promises to make a monetary payment or give property in consideration of a promise to marry and prenuptial agreements made in consideration of marriage.
- Contracts for the sale of goods priced at \$500 or more under the Statute of Frauds provision in Section 2–201 of the Uniform Commercial Code.
- Exceptions
 - Partial performance
 - Admissions
 - Promissory estoppel.

Sufficiency of the Writing or Electronic Record

To constitute an enforceable contract under the Statute of Frauds, a writing must be signed by the party against whom enforcement is sought, name the parties, identify the subject matter, and state with reasonable certainty the essential terms of the contract. Under the UCC, a contract for a sale of goods is not enforceable beyond the quantity of goods shown in the contract.

Chapter 10 Notes

Assignment and Delegation

- Assignments
 - An assignment is the transfer of rights under a contract to a third party. The third party to whom the rights are assigned has a right to demand performance from the other original party to the contract. Generally, all rights can be assigned, but there are a few exceptions, such as when a statute prohibits assignment or when the contract calls for personal services.
- Delegations
 - A delegation is the transfer of duties under a contract to a third party, who then assumes the obligation of performing the contractual duties previously held by the one making the delegation. As a general rule, any duty can be delegated, except in a few situations, such as when the contract expressly prohibits delegation or when performance depends on the personal skills of the original party.

Third Party Beneficiaries

A third party beneficiary is one who benefits from a contract between two other parties. If the party was an intended beneficiary, then the third party has legal rights and can sue the promisor directly to enforce the contract. If the contract benefits the third party unintentionally, then the third party cannot sue to enforce the contract.

Contract Discharge

- Conditions of performance
 - Contract obligations are sometimes subject to conditions. A condition is a possible future event, the occurrence or nonoccurrence of which will trigger the performance of a contract obligation or terminate an existing obligation. A condition that must be fulfilled before a party's promise becomes absolute is called a condition precedent.
- Discharge by performance
 - A contract may be discharged by complete (strict) performance or by substantial performance. In some instances, performance must be to the satisfaction of another. Totally inadequate performance constitutes a material breach of contract. An anticipatory repudiation of a contract allows the other party to sue immediately for breach of contract.
- Discharge by agreement
 - Parties may agree to discharge their contractual obligations in several ways:
 - By rescission
 - The parties mutually agree to rescind (cancel) the contract.
 - By novation
 - A new party is substituted for one of the primary parties to a contract.
 - By settlement agreement
 - The parties agree to a new contract that replaces the old contract as a means of settling a dispute.

- By accord and satisfaction
 - The parties agree to render and accept performance different from that on which they originally agreed.
 - By release
 - One party forfeits the right to pursue a legal claim against the other, barring further recovery.
 - By covenant not to sue
 - The parties substitute a contractual obligation for some other type of legal action.
- Discharge by operation of law
 - Parties' obligations under contracts may be discharged by operation of law owing to one of the following:
 - contract alteration
 - statutes of limitations
 - Bankruptcy
 - impossibility or impracticability of performance, including frustration of purpose

Damages

Damages are the legal remedy designed to compensate the nonbreaching party for the loss of the bargain. By awarding monetary damages, the court tries to place the parties in the positions that they would have occupied had the contract been fully performed.

- Compensatory damages
 - Damages that compensate the nonbreaching party for injuries actually sustained and proved to have arisen directly from the loss of the bargain resulting from the breach of contract.
 - In breached contracts for the sale of goods, the usual measure of compensatory damages is the difference between the contract price and the market price.
 - In breached contracts for the sale of land, the measure of damages is ordinarily the same as in contracts for the sale of goods.
- Consequential damages
 - Damages resulting from special circumstances beyond the contract itself—the damages flow only from the consequences of a breach. For a party to recover consequential damages, the damages must be the foreseeable result of a breach of contract, and the breaching party must have known at the time the contract was formed that special circumstances existed that would cause the nonbreaching party to incur additional loss on breach of the contract.
- Mitigation of damages
 - The nonbreaching party frequently has a duty to mitigate (lessen or reduce) the damages incurred as a result of the contract's breach.
- Liquidated damages
 - Damages that may be specified in a contract as the amount to be paid to the nonbreaching party in the event the contract is breached in the future. Clauses providing for liquidated damages are enforced if the damages were difficult to estimate at the time the contract was formed and if the amount stipulated is

reasonable. If the amount is construed to be a penalty, the clause will not be enforced.

Equitable Remedies

- Rescission
 - A remedy whereby a contract is canceled and the parties are restored to the positions that they occupied prior to the transaction. Available when fraud, a mistake, duress, or failure of consideration is present. The rescinding party must give prompt notice of the rescission to the breaching party.
- Restitution
 - When a contract is rescinded, both parties must make restitution to each other by returning the goods, property, or funds previously conveyed. Restitution prevents the unjust enrichment of the parties.
- Specific performance
 - An equitable remedy calling for the performance of the act promised in the contract. This remedy is available only in special situations—such as those involving contracts for the sale of unique goods or land— in which monetary damages would be an inadequate remedy. Specific performance is not available as a remedy in breached contracts for personal services.
- Reformation
 - An equitable remedy allowing a contract to be “reformed,” or rewritten, to reflect the parties’ true intentions. Available when an agreement is imperfectly expressed in writing.

Contract Provisions Limiting Remedies

A contract may provide that no damages (or only a limited amount of damages) can be recovered in the event the contract is breached. Clauses excluding liability for fraudulent or intentional injury or for illegal acts cannot be enforced. Clauses excluding liability for negligence may be enforced if both parties hold roughly equal bargaining power

Chapter 11 Notes

The Scope of Articles 2 and 2A

- The UCC
 - The UCC attempts to provide a consistent, uniform, and integrated framework of rules to deal with all phases ordinarily arising in a commercial sales or lease transaction, including contract formation, passage of title and risk of loss, performance, remedies, payment for goods, warehoused goods, and secured transactions.
- Article 2 (Sales)
 - Article 2 governs contracts for the sale of goods (tangible, movable personal property). The common law of contracts also applies to sales contracts to the extent that the common law has not been modified by the UCC. If there is a conflict between a common law rule and the UCC, the UCC controls.
- Article 2A (Leases)
 - Article 2A governs contracts for the lease of goods. Except that it applies to leases, instead of sales, of goods, Article 2A is essentially a repetition of Article 2 and varies only to reflect differences between sales and lease transactions.

The Formation of Sales and Lease Contracts

- Offer
 - Not all terms have to be included for a contract to be formed (only the subject matter and quantity term must be specified).
 - The price does not have to be included for a contract to be formed.
 - Particulars of performance can be left open.
 - A written and signed offer by a merchant, covering a period of three months or less, is irrevocable without payment of consideration.
- Acceptance
 - Acceptance may be made by any reasonable means of communication. It is effective when dispatched.
 - An offer can be accepted by a promise to ship or by prompt shipment of conforming goods, or by prompt shipment of nonconforming goods if not accompanied by a notice of accommodation.
 - Acceptance by performance requires notice within a reasonable time. Otherwise, the offer can be treated as lapsed.
 - A definite expression of acceptance creates a contract even if the terms of the acceptance differ from those of the offer, unless the additional or different terms in the acceptance are expressly conditioned on the offeror's assent to those terms.
- Consideration
 - A modification of a contract for the sale of goods does not require consideration.
- The Statute of Frauds
 - All contracts for the sale of goods priced at \$500 or more must be in writing. A writing is sufficient as long as it indicates a contract between the parties and is signed by the party against whom enforcement is sought. A contract is not enforceable beyond the quantity shown in the writing.

- When written confirmation of an oral contract between merchants is not objected to in writing by the receiver within ten days, the contract is enforceable.
- For exceptions to the Statute of Frauds, see Exhibit 11–2.
- Parol evidence rule
 - a. The terms of a clear and complete written contract cannot be contradicted by evidence of prior agreements or contemporaneous oral agreements.
 - Evidence is admissible to clarify the terms of a writing if the contract terms are ambiguous or if evidence of course of dealing, usage of trade, or course of performance is necessary to learn or to clarify the parties' intentions.
- Unconscionability
 - An unconscionable contract is one that is so unfair and one sided that it would be unreasonable to enforce it. If the court deems a sales contract to have been unconscionable at the time it was made, the court can:
 - refuse to enforce the contract;
 - refuse to enforce the unconscionable clause; or
 - limit the application of any unconscionable clauses to avoid an unconscionable result.

Title and Risk of Loss

- Shipment contract
 - In the absence of an agreement, title and risk pass on the seller's or lessor's delivery of conforming goods to the carrier [UCC 2–319(1)(a), 2–401(2)(a), 2–509(1)(a), 2A–219(2)(a)].
- Destination contract
 - In the absence of an agreement, title and risk pass on the seller's or lessor's tender of delivery of conforming goods to the buyer or lessee at the point of destination [UCC 2–319(1)(b), 2–401(2)(b), 2–509(1)(b), 2A–219(2)(b)].
- Delivery without movement of the goods
 - In the absence of an agreement, if the goods are not represented by a document of title, title passes on the formation of the contract, and risk passes on the buyer's or lessee's receipt of the goods if the seller or lessor is a merchant or on the tender of delivery if the seller or lessor is a nonmerchant.
- Sales or leases by nonowners—Between the owner and a good faith purchaser:
 - Void title
 - Owner prevails [UCC 2–403(1)].
 - Voidable title
 - Buyer prevails [UCC 2–403(1)].
 - Entrusted to a merchant
 - Buyer prevails [UCC 2–403(2), (3); 2A–305(2)].
- Risk of loss when the contract is breached
 - If the seller or lessor breaches by tendering nonconforming goods that are rejected by the buyer or lessee, the risk of loss does not pass to the buyer or lessee until the defects are cured (unless the buyer or lessee accepts the goods in spite of their defects, thus waiving the right to reject) [UCC 2–510(1), 2A–220(1)].
 - If the buyer or lessee breaches the contract, the risk of loss immediately shifts to the buyer or lessee for goods that are identified to the contract. The buyer or lessee

bears the risk for only a commercially reasonable time after the seller or lessor has learned of the breach [UCC 2–510(3), 2A–220(2)].

Contracts for the International Sale of Goods

- International sales contracts are governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG) if the countries of the parties to the contract have ratified the CISG and if the parties have not agreed that some other law will govern their contract. Essentially, the CISG is to international sales contracts what Article 2 of the UCC is to domestic sales contracts. Whenever parties who are subject to the CISG have failed to specify in writing the precise terms of a contract for the international sale of goods, the CISG will be applied.

Chapter 12 Notes

Obligations of the Seller or Lessor

- The seller or lessor must tender conforming goods to the buyer or lessee. Tender must take place at a reasonable hour and in a reasonable manner. Under the perfect tender doctrine, the seller or lessor must tender goods that conform exactly to the terms of the contract [UCC 2–503(1), 2A–508(1)].
- If the seller or lessor tenders nonconforming goods prior to the performance date and the buyer or lessee rejects them the seller or lessor may cure (repair or replace the goods) within the contract time for performance [UCC 2–508(1) 2A–513(1)]. If the seller or lessor had reasonable grounds to believe that the buyer or lessee would accept the tendere goods, on the buyer's or lessee's rejection the seller or lessor has a reasonable time to substitute conforming good without liability [UCC 2–508(2), 2A–513(2)].
- If the agreed-on means of delivery becomes impracticable or unavailable, the seller must substitute an alternativ means (such as a different carrier) if one is available [UCC 2–614(1)].
- If a seller or lessor tenders nonconforming goods in any one installment under an installment contract, the buyer or lessee may reject the installment only if its value is substantially impaired and cannot be cured. The entire installment contract is breached only when one or more nonconforming installments substantially impair the value of the whole contract [UCC 2–612, 2A–510].
- When performance becomes commercially impracticable owing to circumstances that were not foreseeable when the contract was formed, the perfect tender rule no longer holds [UCC 2–615, 2A–405].

Obligations of the Buyer or Lessee

- On tender of delivery by the seller or lessor, the buyer or lessee must pay for the goods at the time and place the goods are received, unless the sale is made on credit. Payment may be made by any method generally acceptable in the commercial world unless the seller demands cash [UCC 2–310, 2–511]. In lease contracts, the lessee must make lease payments in accordance with the contract [UCC 2A–516(1)].
- Unless otherwise agreed, the buyer or lessee has an absolute right to inspect the goods before acceptance [UCC 2–513(1), 2A–515(1)].
- The buyer or lessee can manifest acceptance of delivered goods expressly in words or by conduct, or by failing to reject the goods after a reasonable period of time following inspection or after having had a reasonable opportunity to inspect them [UCC 2–606(1), 2A–515(1)]. A buyer will be deemed to have accepted goods if he or she performs any act inconsistent with the seller's ownership [UCC 2–606(1)(c)].
- The buyer or lessee can make a partial acceptance if some of the goods do not conform to the contract and the seller or lessor failed to cure [UCC 2–601(c), 2A–509(1)].

Anticipatory Repudiation

If, before the time for performance, one party clearly indicates to the other an intention not to perform, under UCC 2–610 and 2A–402, the aggrieved party may do the following:

- Await performance by the repudiating party for a commercially reasonable time.

- Resort to any remedy for breach
- In either situation, suspend performance.

REMEDIES FOR BREACH

Remedies of the Seller or Lessor

- When the goods are in the possession of the seller or lessor, the seller or lessor may do the following:
 - Cancel the contract [UCC 2–703(f), 2A–523(1)(a)].
 - Withhold delivery [UCC 2–703(a), 2A–523(1)(c)].
 - Resell or dispose of the goods [UCC 2–703(d), 2–706(1), 2A–523(1)(e), 2A–527(1)].
 - Sue to recover the purchase price or lease payments due [UCC 2–709(1), 2A–529(1)].
 - Sue to recover damages [UCC 2–708, 2A–528].
- When the goods are in transit, the seller or lessor may stop the carrier or bailee from delivering the goods under certain conditions [UCC 2–705, 2A–526].
- When the goods are in the possession of the buyer or lessee—The seller or lessor may do the following:
 - Sue to recover the purchase price or lease payments due [UCC 2–709(1), 2A–529(1)].
 - Reclaim the goods. A seller may reclaim goods received by an insolvent buyer if the demand is made within ten days of receipt (reclaiming goods excludes all other remedies) [UCC 2–702(2)]. A lessor may repossess goods if the lessee is in default [UCC 2A–525(2)].

Remedies of the Buyer or Lessee

- When the seller or lessor refuses to deliver the goods—The buyer or lessee may do the following:
 - Cancel the contract [UCC 2–711(1), 2A–508(1)(a)].
 - Recover the goods if the seller or lessor becomes insolvent and the goods are identified to the contract [UCC 2–502, 2A–522].
 - Obtain specific performance (when the goods are unique and the remedy at law is inadequate) [UCC 2–716(1), 2A–521(1)].
 - Obtain cover [UCC 2–712, 2A–518].
 - Replevy the goods (if cover is unavailable) [UCC 2–716(3), 2A–521(3)].
 - Sue to recover damages [UCC 2–713, 2A–519].
- When the seller or lessor delivers or tenders delivery of nonconforming goods—The buyer or lessee may do the following:
 - Reject the goods [UCC 2–601, 2A–509].
 - Revoke acceptance if the nonconformity substantially impairs the value of the unit or lot and if one of the following factors is present:
 - Acceptance was predicated on the reasonable assumption that the nonconformity would be cured, and it was not cured within a reasonable time [UCC 2–608(1)(a), 2A–517(1)(a)].

- The buyer or lessee did not discover the nonconformity before acceptance, either because it was difficult to discover before acceptance or because the seller's or lessor's assurance that the goods were conforming kept the buyer or lessee from inspecting the goods [UCC 2-608(1)(b), 2A-517(1)(b)].
- Accept the goods and recover damages [UCC 2-607, 2-714, 2-717, 2A-519].

Limitation of Remedies

- Remedies may be limited in sales or lease contracts by agreement of the parties. If the contract states that a remedy is exclusive, then that is the sole remedy unless the remedy fails in its essential purpose. Sellers and lessors can also limit the rights of buyers and lessees to consequential damages unless the limitation is unconscionable [UCC 2-719, 2A-503].
- The UCC has a four-year statute of limitations for actions involving breach of contract. By agreement, the parties to a sales or lease contract can reduce this period to not less than one year, but they cannot extend it beyond four years [UCC 2-725(1), 2A-506(1)].

WARRANTIES

Warranties of Title Under the UCC, three types of title warranties can automatically arise in sales and lease contracts.

- In most sales, sellers warrant that they have good and valid title to the goods sold and that transfer of the title is rightful [UCC 2-312(1)(a)].
- The seller or lessor warrants that the goods are free of any encumbrances, or liens, of which the buyer or lessee is unaware [UCC 2-312(1)(b), 2A-211(1)].
- When the seller or lessor is a merchant, he or she warrants that the buyer or lessee takes the goods free of infringements [UCC 2-312(3), 2A-211(2)].

Types of Warranties

- Express Warranties
 - Under the UCC, an express warranty arises under the UCC when a seller or lessor provides, as part of the basis of the bargain, any of the following [UCC 2-313, 2A-210]:
 - An affirmation or promise of fact.
 - A description of the goods.
 - A sample shown as conforming to the contract goods.
- Implied Warranty of Merchantability
 - When a seller or lessor is a merchant who deals in goods of the kind sold or leased, the seller or lessor warrants that the goods sold or leased are properly packaged and labeled, are of proper quality, and are reasonably fit for the ordinary purposes for which such goods are used [UCC 2-314, 2A-212].
- Implied Warranty of Fitness for a Particular Purpose
 - Arises when the buyer's or lessee's purpose or use is expressly or impliedly known by the seller or lessor, and the buyer or lessee purchases or leases the goods in reliance on the seller's or lessor's selection [UCC 2-315, 2A-213].

- Warranties Implied from Prior Dealings or Trade Custom
 - Implied warranties can arise as a result of course of dealing or usage of trade [UCC 2-314(3), 2A-212(3)].
- Overlapping Warranties
 - The UCC construes warranties as cumulative if they are consistent with each other. If warranties are inconsistent, then express warranties take precedence over implied warranties, except for the implied warranty of fitness for a particular purpose. Also, samples take precedence over general descriptions, and exact or technical specifications displace inconsistent samples or general descriptions.

Warranty Disclaimers

- Express warranties can be disclaimed if the disclaimer is written in clear language, is conspicuous, and is called to the buyer's or lessee's attention at the time the contract is formed.
- A disclaimer of the implied warranty of merchantability must specifically mention the word merchantability. The disclaimer need not be in writing, but if it is written, it must be conspicuous.
- A disclaimer of the implied warranty of fitness must be in writing and must be conspicuous, though it need not mention the word fitness.

Chapter 4 Notes

Intentional Torts against Persons

- Assault and battery
 - An assault is an unexcused and intentional act that causes another person to be apprehensive of immediate harm. A battery is an assault that results in physical contact.
- False imprisonment
 - The intentional confinement or restraint of another person's movement without justification.
- Intentional infliction of emotional distress
 - An extreme and outrageous act, intentionally committed, that results in severe emotional distress to another.
- Defamation (libel or slander)
 - A false statement of fact, not made under privilege, that is communicated to a third person and that causes damage to a person's reputation. For public figures, the plaintiff must also prove actual malice.
- Invasion of the right to privacy
 - Includes four types: wrongful intrusion into a person's private activities; publication of information that places a person in a false light; disclosure of private facts that an ordinary person would find objectionable; and appropriation of identity, which involves the use of a person's name, likeness, or other identifying characteristic, without permission and for a commercial purpose.
- Misrepresentation (fraud)
 - A false representation made by one party, through misstatement of facts or through conduct, with the intention of deceiving another and on which the other reasonably relies to his or her detriment.
- Abusive or frivolous litigation
 - A person who initiates a lawsuit out of malice and without probable cause, and loses the suit, can be sued for the tort of malicious prosecution. A person who uses a legal process against another improperly or to accomplish a purpose for which it was not designed can be sued for abuse of process.
- Wrongful interference
 - The knowing, intentional interference by a third party with an enforceable contractual relationship or an established business relationship between other parties for the purpose of advancing the economic interests of the third party.

Intentional Torts against Property

- Trespass to land
 - The invasion of another's real property without consent or privilege.
- Trespass to personal property
 - Unlawfully damaging or interfering with the owner's right to use, possess, or enjoy her or his personal property.
- Conversion
 - Wrongfully taking or using the personal property of another without permission.

- Disparagement of property
 - Any economically injurious falsehood that is made about another's product or property. The term includes the torts of slander of quality and slander of title.

Unintentional Torts (Negligence)

- Negligence
 - The careless performance of a legally required duty or the failure to perform a legally required act. A plaintiff must prove that a legal duty of care existed, that the defendant breached that duty, that the breach caused the plaintiff's injury, and that the plaintiff suffered a legally recognizable injury.
- Defenses to negligence
 - The basic affirmative defenses in negligence cases are assumption of risk, superseding cause, and contributory or comparative negligence.
- Special negligence doctrines and statutes
 - Res ipsa loquitur
 - A doctrine under which a plaintiff need not prove negligence on the part of the defendant because "the facts speak for themselves."
 - Negligence per se
 - A type of negligence that may occur if a person violates a statute or an ordinance and the violation causes another to suffer the kind of injury that the statute or ordinance was intended to prevent.
 - Special negligence statutes
 - State statutes that prescribe duties and responsibilities in certain circumstances. Strict Liability Under the doctrine of strict liability, parties may be held liable, regardless of the degree of care exercised, for damages or injuries caused by their products or activities. Strict liability includes liability for harms caused by abnormally dangerous activities, by dangerous animals, and by defective products.

Product Liability

- Negligence
 - A manufacturer is liable for failure to exercise due care to any person who sustains an injury proximately caused by a negligently made (defective) product.
- Strict liability requirements
 - The defendant must sell the product in a defective condition.
 - The defendant must normally be engaged in the business of selling that product.
 - The product must be unreasonably dangerous to the user or consumer because of its defective condition (in most states).
 - The plaintiff must incur physical harm to self or property by use or consumption of the product.
 - The defective condition must be the proximate cause of the injury or damage.
 - The goods must not have been substantially changed from the time the product was sold to the time the injury was sustained.
- Product defects
 - A product may be defective in its manufacture, its design, or the instructions or warnings that come with it.

- Other applications of strict liability
 - Manufacturers and other sellers are liable for harms suffered by bystanders as a result of defective products. Suppliers of component parts are strictly liable for defective parts that, when incorporated into a product, cause injuries to users.
- Defenses to product liability
 - Assumption of risk
 - The user or consumer knew of the risk of harm and voluntarily assumed it.
 - Product misuse
 - The user or consumer misused the product in a way unforeseeable by the manufacturer.
 - Comparative negligence
 - Liability may be distributed between the plaintiff and the defendant under the doctrine of comparative negligence if the plaintiff's misuse of the product contributed to the risk of injury.
 - Commonly known dangers
 - If a defendant succeeds in convincing the court that a plaintiff's injury resulted from a commonly known danger, such as the danger associated with using a sharp knife, the defendant will not be liable

Chapter 3 Notes

Business Ethics

- Business ethics
 - Business ethics focuses on how moral and ethical principles are applied in the business context.
- Short-run versus long-run profit maximization
 - One of the most pervasive reasons why ethical breaches occur in the business world is the focus on short-term profit maximization. Only long-run profit maximization is consistent with business ethics.
- The moral minimum and ethics
 - Lawful behavior is the moral minimum. The law has its limits, though, and some actions may be legal but not ethical. The study of ethics goes beyond legal requirements to evaluate what is right for society.
- Ethical codes
 - Most large firms have internal ethical codes. Many industry associations also have codes of ethics for their members.
- Ethics and “gray areas”
 - It may be difficult to predict whether particular actions are legal, given changes in the laws regulating business and “gray areas” in the law. In such cases, a company that can show it acted ethically has a better chance of succeeding in a dispute.

Business Ethics and Social Media

Employers today may conduct Internet searches to see what job candidates have posted on social media. Employers may also look at, but not interfere with, the social media posts of their employees. Many companies have explicit policies regarding the use of social media by workers, but employers must be careful when considering disciplinary action for violations of these policies.

Approaches to Ethical Reasoning

- Duty-based ethics
 - Ethics based on religious beliefs; philosophical reasoning, such as that of Immanuel Kant; and the basic rights of human beings (the principle of rights). A potential problem for those who support this approach is deciding which rights are more important in a given situation. Management constantly faces ethical conflicts and trade-offs when considering all those affected by a business decision.
- Outcome-based ethics (utilitarianism)
 - Ethics based on philosophical reasoning, such as that of Jeremy Bentham and John Stuart Mill. Applying this theory requires a cost-benefit analysis, weighing the negative effects against the positive and deciding which course of action produces the better outcome.
- Corporate social responsibility
 - A number of theories based on the idea that corporations can and should act ethically and be accountable to society for their actions. These include the stakeholder approach and corporate citizenship.

Making Ethical Business Decisions

Making ethical business decisions is crucial in today's legal environment. Doing the right thing pays off in the long run, both by increasing profits and by avoiding negative publicity. Management must take the lead in establishing an ethical workplace.

Global Business Ethics

Businesses must take account of the many cultural, religious, and legal differences among nations. Notable differences relate to employment laws governing workplace conditions and the practice of giving side payments to foreign officials to secure favorable contracts.

Chapter 22 Notes

Advertising, Marketing, and Sales

- Deceptive advertising
 - Generally, an advertising claim will be deemed deceptive if it would mislead a reasonable consumer.
- Bait-and-switch advertising
 - Advertising a lower-priced product (the bait) to lure consumers into the store and then telling them the product is unavailable and urging them to buy a higher-priced product (the switch) is prohibited by the FTC.
- Online deceptive advertising
 - The FTC has issued guidelines to help online businesses comply with the laws prohibiting deceptive advertising.
- FTC actions against deceptive advertising
 - Cease-and-desist orders
 - Requiring the advertiser to stop the challenged advertising.
 - Counteradvertising
 - Requiring the advertiser to advertise to correct the earlier misinformation.
- Marketing
 - Telemarketers are prohibited from using automatic dialing systems and prerecorded voices and cannot fax ads without the recipient's permission. Telemarketers must identify the seller, describe the product being sold, and disclose all material facts related to the sale.
- Sales
 - "Cooling-off" laws permit buyers of goods sold in certain sales transactions (such as trade shows and door-to-door sales) to cancel their contracts within three business days.

Labeling and Packaging

Manufacturers must comply with the labeling and packaging requirements for their specific products. In general, all labels must be accurate and not misleading.

Protection of Health and Safety

- Food and drugs
 - The Federal Food, Drug, and Cosmetic Act protects consumers against adulterated and misbranded foods and drugs. The act establishes food standards, specifies safe levels of potentially hazardous food additives, and sets classifications of food and food advertising.
- Consumer product safety
 - The Consumer Product Safety Act seeks to protect consumers from injury from hazardous products. The Consumer Product Safety Commission has the power to remove products that are deemed imminently hazardous from the market and to ban the manufacture and sale of hazardous products.

Credit Protection

- Consumer Credit Protection Act, Title I (Truth-in-Lending Act, or TILA)
 - A disclosure law that requires sellers and lenders to disclose credit terms or loan terms in certain transactions, including retail installment sales and loans, car loans, home-improvement loans, and certain real estate loans. Additionally, the TILA provides for the following:
 - Equal credit opportunity
 - Creditors are prohibited from discriminating on the basis of race, religion, marital status, gender, national origin, color, or age.
 - Credit-card protection
 - Liability of cardholders for unauthorized charges is limited to \$50, providing notice requirements are met. Consumers are not liable for unauthorized charges made on unsolicited credit cards. The act also sets out procedures to be used in settling disputes between credit-card companies and their cardholders.
- Fair Credit Reporting Act
 - Entitles consumers to request verification of the accuracy of a credit report and to have unverified or false information removed from their files.
- Fair and Accurate Credit Transaction Act
 - Combats identity theft by establishing a national fraud alert system. Requires account numbers to be truncated and credit reporting agencies to provide one free credit report per year to consumers.
- Fair Debt Collection Practices Act
 - Prohibits debt collectors from using unfair debt-collection practices, such as contacting the debtor at his or her place of employment if the employer objects or at unreasonable times, contacting third parties about the debt, and harassing the debtor.

Chapter 16 Notes

Agency Relationships

In a principal-agent relationship, an agent acts on behalf of and instead of the principal in dealing with third parties. An employee who deals with third parties is normally an agent of the employer. An independent contractor is not an employee, because the employer has no control over the details of the independent contractor's physical performance. An independent contractor may or may not be an agent.

Formation of an Agency

Agency relationships may be formed by the following methods:

- Agreement
 - The agency relationship is formed through express consent (oral or written) or implied by conduct.
- Ratification
 - The principal either by act or by agreement ratifies the conduct of a person who is not in fact an agent.
- Estoppel
 - The principal causes a third person to believe that another person is the principal's agent, and the third person deals with the agent.
- Operation of law
 - The agency relationship is based on social policy (as in family relationships) or formed in emergency situations when the agent is unable to contact the principal and failure to act outside the scope of the agent's authority would cause the principal substantial loss.

Duties of Agents and Principals

- Duties of the agent
 - Performance
 - In performing her or his duties, the agent must use reasonable diligence and skill or use the special skills that the agent has claimed to possess.
 - Notification
 - The agent is required to notify the principal of all matters that come to his or her attention concerning the subject matter of the agency.
 - Loyalty
 - The agent has a duty to act solely for the benefit of the principal and not in the interest of the agent or a third party.
 - Obedience
 - The agent must follow all lawful and clearly stated instructions of the principal.
 - Accounting
 - The agent has a duty to make available to the principal records of all property and funds received and paid out on behalf of the principal.
- Duties of the principal
 - Compensation
 - Except in a gratuitous agency relationship, the principal must pay the agreed-on value (or reasonable value) for the agent's services.

- Reimbursement and indemnification
 - The principal must reimburse the agent for all funds disbursed at the request of the principal, as well as for funds disbursed for necessary expenses in the reasonable performance of agency duties.
- Cooperation
 - A principal must cooperate with and assist an agent in performing her or his duties.
- Safe working conditions
 - A principal must provide safe working conditions for agents and employees.

Agent's Authority

- Express authority
 - Can be given orally or in writing. Authorization must be in writing if the agent is to execute a contract that must be in writing.
- Implied authority
 - Authority deemed necessary for the agent to carry out expressly authorized tasks or authority customarily associated with the agent's position.
- Apparent authority
 - Exists when the principal, by word or action, causes a third party to reasonably believe that an agent has authority to act, even though the agent has no express or implied authority.
- Ratification
 - The affirmation by the principal of an agent's unauthorized action or promise. For the ratification to be effective, the principal must be aware of all material facts.

Liability in Agency Relationships

- Liability for contracts
 - If the principal's identity is disclosed or partially disclosed at the time the agent forms a contract with a third party, the principal is liable to the third party under the contract if the agent acted within the scope of his or her authority. If the principal's identity is undisclosed at the time of contract formation, the agent is personally liable to the third party, but if the agent acted within the scope of his or her authority, the principal is also bound by the contract.
- Liability for agent's negligence
 - Under the doctrine of respondeat superior, the principal is liable for any harm caused to another through the agent's torts if the agent was acting within the scope of her or his employment at the time the harmful act occurred.
- Liability for agent's intentional torts
 - Usually, employers are not liable for the intentional torts that their agents commit, unless:
 - The acts are committed within the scope of employment, and thus the doctrine of respondeat superior applies.
 - The employer knows or should know that the employee has a propensity for committing tortious acts.
 - The employer allowed the employee to engage in reckless acts that caused injury to another.

- Liability for independent contractor's torts
 - A principal is not liable for harm caused by an independent contractor's negligence, unless hazardous activities are involved or other exceptions apply.
- Liability for agent's crimes
 - An agent is responsible for his or her own crimes, even if the crimes were committed while the agent was acting within the scope of authority or employment. A principal will be liable for an agent's crime only if the principal participated by conspiracy or other action or (in some jurisdictions) if the agent violated certain government regulations in the course of employment.

Termination of an Agency

- By act of the parties
 - Lapse of time.
 - Purpose achieved.
 - Occurrence of a specific event.
 - Mutual agreement.
 - Action of one party. Notice to third parties is required when an agency is terminated by act of the parties.
- By operation of law
 - Death or insanity.
 - Impossibility.
 - Changed circumstances.
 - Bankruptcy.
 - War.

Chapter 17 Notes

Employment at Will

- Employment-at-will doctrine
 - Under this common law doctrine, either party may terminate the employment relationship at any time and for any reason (“at will”).
- Exceptions to the employment-at-will doctrine
 - Courts have made exceptions to the doctrine on the basis of contract theory, tort theory, and public policy. The public policy exception may sometimes apply to whistleblowers.
- Wrongful discharge
 - Whenever an employer discharges an employee in violation of an employment contract or statutory law protecting employees, the employee may bring a suit for wrongful discharge.

Wages, Hours, Layoffs, and Leave

- Davis-Bacon Act
 - Requires contractors and subcontractors working on federal government construction projects to pay their employees “prevailing wages.”
- Walsh-Healey Act
 - Requires firms that contract with federal agencies to pay their employees a minimum wage and overtime pay.
- Fair Labor Standards Act
 - Extended wage and hour requirements to cover all employers whose activities affect interstate commerce plus certain other businesses. The act has specific requirements in regard to child labor, maximum hours, and minimum wages.
- The Worker Adjustment and Retraining Notification (WARN) Act
 - Applies to employers with at least one hundred full-time employees and requires that sixty days’ advance notice of mass layoffs be given to affected employees or their representative (if workers are in a labor union). State layoff notice requirements may be different from and even stricter than the WARN Act’s requirements.
- The Family and Medical Leave Act (FMLA)
 - Requires employers with fifty or more employees to provide employees with up to twelve weeks of unpaid leave (twenty-six weeks for military caregiver leave) during any twelve-month period.
 - May take family leave to care for a newborn baby, an adopted child, or a foster child.
 - May take medical leave when the employee or the employee’s spouse, child, or parent has a serious health condition requiring care.
 - May take military caregiver leave to care for a family member with a serious injury or illness incurred as a result of military duty.
 - May take qualifying exigency leave to handle specified nonmedical emergencies when a spouse, parent, or child is in, or called to, active military duty

Health, Safety, and Income Security

- Occupational Safety and Health Act
 - Requires employers to meet specific safety and health standards that are established and enforced by the Occupational Safety and Health Administration (OSHA).
- State workers' compensation laws
 - Establish an administrative procedure for compensating workers who are injured in accidents that occur on the job, regardless of fault.
- Social Security and Medicare
 - The Social Security Act provides for old-age (retirement), survivors', and disability insurance. Both employers and employees must make contributions under the Federal Insurance Contributions Act (FICA). The Social Security Administration also administers Medicare, a health-insurance program for older or disabled persons.
- Private retirement plans
 - The federal Employee Retirement Income Security Act (ERISA) establishes standards for the management of employer-provided pension plans.
- Unemployment insurance
 - The Federal Unemployment Tax Act (FUTA) created a system that provides unemployment compensation to eligible individuals. Employers are taxed to cover the costs.
- COBRA
 - The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 requires employers to give employees, on termination of employment, the option of continuing their medical, optical, or dental insurance coverage for a certain period.
- HIPAA
 - The Health Insurance Portability and Accountability Act (HIPAA) establishes requirements for employersponsored group health plans. The plans must also comply with various safeguards to ensure the privacy of employees' health information.

Immigration Law

- Immigration Reform and Control Act
 - Prohibits employers from hiring illegal immigrants. The act is administered by U.S. Citizenship and Immigration Services. Compliance audits and enforcement actions are conducted by U.S. Immigration and Customs Enforcement.
- Immigration Act
 - Limits the number of legal immigrants entering the United States by capping the number of visas (entry permits) that are issued each year.

Title VII of the Civil Rights Act

Title VII prohibits employment discrimination based on race, color, national origin, religion, or gender.

- Procedures
 - Employees must file a claim with the Equal Employment Opportunity Commission (EEOC). The EEOC may sue the employer on the employee's behalf. If it does not, the employee may sue the employer directly.
- Types of discrimination
 - Title VII prohibits both intentional (disparate-treatment) and unintentional (disparate-impact) discrimination. Disparate-impact discrimination occurs when an

employer's practices or procedures, such as requiring a certain level of education, have the effect of discriminating against a protected class. Title VII extends to discriminatory practices, such as various forms of harassment, in the online environment.

- Remedies for discrimination under Title VII
 - Remedies include reinstatement, back pay, and retroactive promotions. Damages (both compensatory and punitive) may be awarded for intentional discrimination.

Discrimination Based on Age

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination on the basis of age against individuals forty years of age or older. Procedures for bringing a case under the ADEA are similar to those for bringing a case under Title VII.

Discrimination Based on Disability

The Americans with Disabilities Act (ADA) prohibits employment discrimination against persons with disabilities who are otherwise qualified to perform the essential functions of the jobs for which they apply.

- Procedures and remedies
 - To prevail on a claim, the plaintiff must show that she or he has a disability, is otherwise qualified for the employment in question, and was excluded from it solely because of the disability. Procedures and remedies under the ADA are similar to those in Title VII cases.
- Definition of disability
 - The ADA defines the term disability as a physical or mental impairment that substantially limits one or more of an individual's major life activities, a record of such impairment, or being regarded as having such an impairment.
- Reasonable accommodation
 - Employers are required to reasonably accommodate the needs of qualified persons with disabilities through such measures as modifying the physical work environment and permitting more flexible work schedules.

Defenses to Employment Discrimination

As defenses to claims of employment discrimination, employers may assert that the discrimination was required for reasons of business necessity, to meet a bona fide occupational qualification, or to maintain a legitimate seniority system. Evidence of prior employee misconduct acquired after the employee has been fired is not a defense to discrimination

Chapter 5 Notes

Trademarks

- A trademark is a distinctive word, symbol, or design that identifies the manufacturer as the source of the goods and distinguishes its products from those made or sold by others.
- The major federal statutes protecting trademarks and related property are the Lanham Act of 1946 and the Federal Trademark Dilution Act of 1995. Generally, to be protected, a trademark must be sufficiently distinctive from all competing trademarks.
- Trademark infringement occurs when one party uses a mark that is the same as, or confusingly similar to, the protected trademark, service mark, trade name, or trade dress of another party without permission when marketing goods or services.

Patents

- A patent is a grant from the government that gives an inventor the exclusive right to make, use, and sell an invention for a period of twenty years (fourteen years for a design patent) from the date when the application for a patent is filed. To be patentable, an invention (or a discovery, process, or design) must be genuine, novel, useful, and not obvious in light of current technology. Computer software may be patented.
- Almost anything is patentable, except the laws of nature, natural phenomena, and abstract ideas (including algorithms). Even artistic methods and works of art, certain business processes, and the structures of storylines may be patentable.
- Patent infringement occurs when someone uses or sells another's patented design, product, or process without the patent owner's permission. The patent holder can sue the infringer in federal court and request an injunction, but must prove irreparable injury to obtain a permanent injunction against the infringer. The patent holder can also request damages and attorneys' fees. If the infringement was willful, the court can grant treble damages.

Copyrights

- A copyright is an intangible property right granted by federal statute to the author or originator of certain literary or artistic productions. The Copyright Act of 1976, as amended, governs copyrights.
- Copyright infringement occurs whenever the form or expression of an idea is copied without the permission of the copyright holder. An exception applies if the copying is deemed a "fair use."
- In 1980, Congress passed the Computer Software Copyright Act, which amended the Copyright Act to include computer programs in the list of creative works protected by federal copyright law.

Trade Secrets

Trade secrets include customer lists, plans, research and development, and pricing information. Trade secrets are protected under the common law and, in most states, under statutory law against misappropriation by competitors. The Economic Espionage Act made the theft of trade secrets a federal crime.

International Protections

Various international agreements provide international protection for intellectual property. A landmark agreement is the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which provides for enforcement procedures in all countries signatory to the agreement.

Chapter 6 Notes

Internet Law

- Spam
 - Unsolicited junk e-mail accounts for about three-quarters of all e-mails. Laws to combat spam have been enacted by thirty-seven states and the federal government, but the flow of spam continues.
 - The Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act prohibits false and deceptive e-mails originating in the United States.
 - The U.S. Safe Web Act allows U.S. authorities to cooperate and share information with foreign agencies in investigating and prosecuting those involved in spamming, spyware, and various Internet frauds and deceptions. The act includes a safe harbor for Internet service providers.
- Domain names
 - Trademark owners often use their mark as part of a domain name (Internet address). The Internet Corporation for Assigned Names and Numbers (ICANN) oversees the distribution of domain names. ICANN recently expanded the available domain names to include new generic top-level domain names (gTLDs).
- Cybersquatting
 - Disputes arise when a person registers a domain name that is the same as, or confusingly similar to, the trademark of another and then offers to sell the domain name back to the trademark owner. This is known as cybersquatting, and it is illegal if the one registering, trafficking in, or using the domain name has a “bad faith intent” to profit from that mark. Anticybersquatting legislation is aimed at combatting the problem, but it has had only limited success.
- Meta tags
 - Search engines compile their results by looking through a Web site’s meta tags, or key words. Using another’s trademark in a meta tag without the owner’s permission normally constitutes trademark infringement.
- Trademark dilution
 - When a trademark is used online, without authorization, in a way that diminishes the distinctive quality of the mark, it constitutes trademark dilution. Unlike infringement actions, trademark dilution claims do not require proof that consumers are likely to be confused by a connection between the unauthorized use and the mark.
- Licensing
 - Many companies choose to permit others to use their trademarks and other intellectual property online under a license. The purchase of software generally involves a license agreement. Licensing agreements frequently include restrictions that prohibit licensees from sharing the file and using it to create similar software applications.

Copyrights in Digital Information

- Copyrighted works online
 - Much of the material on the Internet (including software and database information) is copyrighted. In order for that material to be transferred online, it must be “copied.” Generally, whenever a party downloads software or music without authorization, a copyright is infringed.
- Digital Millennium Copyright Act
 - To protect copyrights in digital information, Congress passed the Digital Millennium Copyright Act (DMCA). The DMCA establishes civil and criminal penalties for anyone who bypasses encryption software or other antipiracy technologies, but provides exceptions for certain educational and nonprofit uses. It also limits the liability of Internet service providers for infringement unless the ISP is aware of the user’s infringement and fails to take action.
- File-sharing
 - When file-sharing is used to download others’ stored music files or illegally copy movies, copyright issues arise. Individuals who download the music or movies in violation of copyright laws are liable for infringement. Companies that distribute file-sharing software or provide such services have been held liable for the copyright infringement of their users if the software or technology involved promoted copyright infringement.

Social Media

- Uses in the legal process
 - The emergence of Facebook and other social networking sites has had a number of effects on the legal process. Law enforcement and administrative agencies now routinely use social media to detect illegal activities and conduct investigations, as do many businesses.
- The Electronic Communications Privacy Act (ECPA)
 - The ECPA prohibits the intentional interception or disclosure of any wire, oral or electronic communication.
 - The ECPA includes a “business-extension exception” that permits employers to monitor employees’ electronic communications made in the ordinary course of business (but not personal communications).
 - The Stored Communications Act is part of the ECPA and prohibits intentional unauthorized access to stored electronic communications (such as backup data stored by an employer).
- Social media passwords
 - Private employers and schools have sometimes looked at an individual’s Facebook or other social media account to see if it included controversial postings. A number of states have enacted legislation that protects individuals from having to divulge their social media passwords. Such laws may not be completely effective in preventing employers from rejecting applicants or terminating workers based on their social media postings.
- Company-wide social media networks
 - Many companies today form their own internal social media networks through which employees can exchange messages about topics related to their work.

Online Defamation

Federal and state statutes apply to certain forms of cyber torts, or torts that occur in cyberspace, such as online defamation. Under the federal Communications Decency Act (CDA), Internet service providers generally are not liable for defamatory messages posted by their subscribers.

Privacy

- Expectation of privacy
 - Numerous Internet companies have been accused of violating users' privacy rights. To sue for invasion of privacy, though, a person must have a reasonable expectation of privacy in the particular situation. It is often difficult to determine how much privacy can reasonably be expected on the Internet.
- Data collection and cookies
 - Whenever a consumer purchases items online from a retailer, the retailer collects information about the consumer through "cookies." Consequently, retailers have gathered large amounts of data about individuals' shopping habits. It is not always clear whether collecting such information violates a person's right to privacy.
- Internet companies' privacy policies
 - Many companies establish Internet privacy policies, which typically inform users what types of data they are gathering and for what purposes it will be used.

Chapter 24 Notes

The Nature of Real Property

Real property (also called real estate or realty) includes land, subsurface and airspace rights, plant life and vegetation, and fixtures.

Ownership Interests and Leases

- Fee simple
 - The most complete form of ownership. Owners can use, possess, or dispose of the property as they choose during their lifetimes and pass on the property to their heirs at death.
- Life estate
 - An estate that lasts for the life of a specified individual, during which time the individual is entitled to possess, use, and benefit from the estate. The life tenant's ownership rights cease to exist on her or his death.
- Concurrent interests
 - When two or more persons hold title to property together, concurrent ownership exists.
 - A tenancy in common exists when two or more persons own an undivided interest in property. On a tenant's death, that tenant's property interest passes to his or her heirs.
 - A joint tenancy exists when two or more persons own an undivided interest in property, with a right of survivorship. On the death of a joint tenant, that tenant's property interest transfers to the remaining tenant(s), not to the heirs of the deceased.
 - A tenancy by the entirety is a form of co-ownership between married persons that is similar to a joint tenancy, except that a spouse cannot separately transfer her or his interest during her or his lifetime.
 - Community property is a form of co-ownership between married persons in which each spouse technically owns an undivided one-half interest in property acquired during the marriage. This type of ownership exists in only a few states.
- Leasehold estates
 - A leasehold estate is an interest in real property that is held for only a limited period of time, as specified in the lease agreement. Types of tenancies relating to leased property include the following:
 - Fixed-term tenancy (tenancy for years)
 - Tenancy for a period of time stated by express contract.
 - Periodic tenancy
 - Tenancy for a period determined by the frequency of rent payments. It is automatically renewed unless proper notice is given.
 - Tenancy at will
 - Tenancy for as long as both parties agree. No notice of termination is required.
 - Tenancy at sufferance

- Possession of land without legal right.
- Nonpossessory interest
 - An interest that involves the right to use real property but not to possess it. Easements, profits, and licenses are nonpossessory interests.

Transfer of Ownership

- By deed
 - When real property is sold or transferred as a gift, title to the property is conveyed by means of a deed. A deed must meet specific legal requirements. A warranty deed provides the most extensive protection against defects of title. A quitclaim deed conveys to the grantee only whatever interest the grantor had in the property. A deed may be recorded in the manner prescribed by recording statutes in the appropriate jurisdiction to give third parties notice of the owner's interest.
- By will or inheritance
 - If the owner dies after having made a valid will, the land passes as specified in the will. If the owner dies without having made a will, the heirs inherit according to state inheritance statutes.
- By adverse possession
 - When a person possesses the property of another for a statutory period of time (ten years is the most common), that person acquires title to the property, provided the possession is actual and exclusive, open and visible, continuous and peaceable, and hostile and adverse (without the permission of the owner).
- By eminent domain
 - The government can take land for public use, with just compensation, when the public interest requires the taking.

Landlord-Tenant Relationships

- Lease agreement
 - The landlord-tenant relationship is created by a lease agreement. State or local laws may dictate whether the lease must be in writing and what lease terms are permissible.
- Rights and duties
 - The rights and duties that arise under a lease agreement generally pertain to the following areas:
 - Possession
 - The tenant has an exclusive right to possess the leased premises. Under the covenant of quiet enjoyment, the landlord promises that during the lease term, neither the landlord nor anyone having superior title to the property will disturb the tenant's use and enjoyment of the property.
 - Use of the premises
 - Unless the parties agree otherwise, the tenant may make any legal use of the property.
 - Maintenance of the premises
 - The tenant is responsible for any damage that he or she causes. The landlord must comply with laws that set specific standards for the

maintenance of real property. The implied warranty of habitability requires that the landlord furnish and maintain residential premises in a habitable condition (that is, in a condition safe and suitable for human life).

- Rent

- The tenant must pay the rent as long as the lease is in force, unless the tenant justifiably refuses to occupy the property or withholds the rent because of the landlord's failure to maintain the premises properly.

- Transferring rights to leased property

- If the landlord transfers complete title to the leased property, the tenant becomes the tenant of the new owner. The new owner may collect the rent but must abide by the existing lease.
- Generally, in the absence of an agreement to the contrary, tenants may assign their rights (but not their duties) under a lease contract to a third person. Tenants may also sublease leased property to a third person, but the original tenant is not relieved of any obligations to the landlord under the lease. In either situation, the landlord's consent may be required, but statutes may prohibit the landlord from unreasonably withholding consent.

ENVIRONMENTAL LAW

Protecting the Environment

- Environmental protection agencies
 - The primary agency regulating environmental law is the federal Environmental Protection Agency (EPA), which administers most federal environmental policies and statutes.
- Assessing environmental impact
 - The National Environmental Policy Act requires the preparation of an environmental impact statement (EIS) for every major federal action. An EIS must analyze the action's impact on the environment, its adverse effects and possible alternatives, and its irreversible effects on environmental quality.
- Nuisance
 - A common law doctrine under which persons may be held liable if their use of their property unreasonably interferes with others' rights to use their own property.
- Negligence and strict liability
 - Parties may recover damages for injuries sustained as a result of a firm's pollution-causing activities if they can demonstrate that the harm was a foreseeable result of the firm's failure to exercise reasonable care (negligence). Businesses engaging in ultrahazardous activities are liable for whatever injuries the activities cause, regardless of whether the firms exercise reasonable care.
- Air pollution
 - Regulated under the authority of the Clean Air Act and its amendments.

- Water pollution
 - Regulated under the authority of the Rivers and Harbors Appropriations Act and the Federal Water Pollution Control Act, as amended by the Clean Water Act.
- Toxic chemicals and hazardous waste
 - Pesticides and herbicides, toxic substances, and hazardous waste are regulated under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act; the Toxic Substances Control Act; and the Resource Conservation and Recovery Act, respectively. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), or Superfund, regulates the clean-up of hazardous waste disposal sites.