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| Chapter 13 |
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**Capacity and Legality**

**Introduction**

 This chapter logically follows the material covered in the previous chapters, which concern deter­mining when an agreement is reached and if an agreement is supported by legally sufficient consideration. This chapter (and the next chapter) discusses policies and factors that outweigh the reasons for implementing an agreement. This chapter considers first whether or not certain people—minors, in­competent persons, and intoxicated persons—have the capacity to contract (that is, the le­gal ability to enter into a contractual rela­tion­ship). The discussion of the capacity of minors to contract may surprise some of your students. Many may find it hard to believe that sixteen-, seventeen-, and even some eighteen-year-olds may avoid contracts. Other students are surprised to learn that minors have any contractual capacity at all.

 This chapter also discusses how legality affects the validity of a con­tract. To be enforced in court, a contract must call for the performance of a legal act. That courts will not enforce contracts that are con­trary to state or federal law or to public policy is a simple concept. To allow a person to profit from his or her wrongdoing is clearly con­trary to the mores of society.

**Chapter Outline**

**I. Contractual Capacity**

 Generally, courts presume that parties to a contract have contractual capacity, but there are some situ­ations in which capacity is lacking or may be questionable. In some sit­uations, a party may have capacity but also the right to avoid liability under it.

**A. Minors**

**•** In most states, the age of majority for contractual purposes is eighteen. Some states provide for the termination of minority on marriage and emancipation.

• A minor can enter into any contract an adult can, except a contract prohibited by law for minors.

• Generally, a contract en­tered into by a minor is voidable at the minor’s option.

**1. Disaffirmance**

***•*** To avoid a contract, a minor need only mani­fest intent not to be bound. This may be expressed by words or conduct. A minor must disaf­firm an en­tire contract.

• An adult who enters into a con­tract with a minor cannot avoid contractual duties unless the minor opts to avoid the contract.

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| **Case Synopsis—** |
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| **Case 13.1: *PAK Foods Houston, LLC v. Garcia*** |
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|  S.L., a sixteen-year-old minor, worked at a KFC Restaurant operated by PAK Foods Houston, LLC. PAK Foods’s policy was to resolve any dispute with an employee through arbitration. At the employer’s request, S.L. signed an acknowledgement of this policy. S.L was injured on the job, and subsequently terminated her employment. S.L.’s mother Marissa Garcia filed a suit on S.L.’s behalf in a Texas state court against PAK Foods to recover for the injury. PAK Foods filed a motion to compel arbitration. The court denied the motion. PAK Foods appealed. |
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|  A state intermediate appellate court affirmed the decision of the lower court. A minor may disaffirm a contract at his or her option. S.L. opted to disaffirm the agreement to arbitrate by terminating her employment and filing this suit. |
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| **Notes and Questions** |
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|  ***Did S.L. have the contractual capacity to enter into a contract? Why or why not?*** Yes, she could enter the contract but as a minor could later disaffirm it. A minor can enter into any contract an adult can, provided that that contract is not one prohibited by law for minors (such as the sale of alcoholic beverages). A contract entered into by a minor is voidable at the option of that minor. To avoid a contract, a minor need only manifest an intention not to be bound by it. The minor avoids the contract by disaffirming it, as in S.L.’s case. |
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|  ***Suppose that S.L. stated she was eighteen years old when she signed the arbitration agreement. How might this affect her right to disaffirm it?*** S.L.’s misrepresentation of age would not usually affect her right to disaffirm a contract. In some jurisdictions, the minor would not even be liable for the tort of fraudulent misrepresentation, because such a judgment might force the minor to perform the contract. In other jurisdic­tions, a minor who has misrepresented his or her age can be bound by a contract under certain cir­cumstances, such as when the contract has been executed and the minor cannot return the consideration received (which had not occurred in this case). Nevertheless, misrepresentation of age generally does not affect the ability of a mi­nor to disaffirm a contract. |
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|  ***Suppose that Nina, a minor, buys a motorcycle from Buto Motorcycles. She pays $500 as a down payment and agrees to pay the balance in monthly $100 installments. She uses the motorcycle for a month and then takes it back to Buto and demands a full refund. Can she get the money back without accounting for wear and tear on the motorcycle?*** In most states, the answer would be yes. Generally, to disaffirm a contract, a minor need only return the goods (or other consideration), if they are still in his or her possession or control. Even if the goods have been damaged or ruined, a minor’s right to disaffirm is not af­fected. In a few states, minors have a duty to return the other party to the position he or she was in before the contract was made. |
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| **Additional Cases Addressing this Issue—** |
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| **Minors’ Capacity to Contract and Disaffirm** |
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| Cases involving the **capacity of minors to contract and disaffirm** include the following. |
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| • *Dodson v. Schrader*, 824 S.W.2d 545 (Tenn. 1992) (minor’s disaffirmance of a used truck purchase required the seller to be compensated for the depreciated value of the truck, including any damage). |
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| • *Kelly v. United States*, 809 F.Supp.2d 429 (E.D.N.C. 2011) (minor could disaffirm liability waiver that absolved U.S. Marine Corps. from liability for all injuries arising form participation in activities at training facility) |
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| • *Fetters v. Fetters*, 26 N.E.3d 1016 (Ind.App. 2015) (unconscionable prenuptial agreement entered into by minor was voidable at minor’s option) |
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**a. Disaffirmance within a Reasonable Time**

 A con­tract can ordinarily be disaffirmed at any time during minority or for a reasonable time after coming of age.

**b. A Minor’s Obligations on Disaffirmance**

Generally, a minor need only return the goods (or other consideration), if they are still within his or her control, regardless of their condition. In a few states, minors have a duty to restore the other party to the po­sition he or she was in before the contract was made.

**2. Exceptions to a Minor’s Right to Disaffirm**

***•*** *Marriage contracts and contracts to enlist in the armed services*—Cannot be disaffirmed.

• *Misrepresentation of age*—In many states, this is enough to pro­hibit disaffirmance.

• *Business contracts*—Some states prohibit a minor who engaged in business as an adult from disaffirming related contracts.

• *Necessaries*—A minor who enters into a contract for necessaries (food, clothing, and other items) may disaffirm the contract but must still pay the reasonable value of the goods. What qualifies as a necessary depends on what is needed for the minor’s subsistence and the minor’s standard of living or financial or social status.

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| **Additional Background—****Exceptions to a Minor’s Right to Disaffirm** Many states have statutes restricting the ability of minors to avoid certain contracts. The following is an example of a California statute that sets out a number of contracts minors cannot disaffirm in the state. |
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| WEST’S ANNOTATED CALIFORNIA CODES |
| CIVIL CODE |
| DIVISION 1. PERSONS |
| PART 1. PERSONS |
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| **§ 36. Minors; contracts not disaffirmable** |
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| (a) Contracts not disaffirmable. A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the person entering into such con­tract, or at any time thereafter, in the following cases: |
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| 1. Necessaries. A contract to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them; provided, that these things have been actually furnished to him or to his family. |
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| 2. Artistic or creative services; judicial approval. |
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| (A) A contract or agreement pursuant to which such person is employed or agrees to render artistic or creative services, or agrees to purchase, or otherwise secure, sell, lease, license, or otherwise dis­pose of literary, musical or dramatic properties (either tangible or intangible) or any rights therein for use in motion pictures, television, the production of phonograph records, the legitimate or living stage, or oth­erwise in the entertainment field, if the contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither re­sides in or is em­ployed in this state, if any party to the contract or agreement has its principal office in this state for the transaction of business. |
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| (B) As used in this paragraph, “artistic or creative services” shall include, but not be limited to, ser­v­ices as an actor, actress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor, or de­signer. |
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| 3. Professional sports contracts; judicial approval. A contract or agreement pursuant to which such person is employed or agrees to render services as a participant or player in professional sports, in­clud­ing, but without being limited to, professional boxers, professional wrestlers, and professional jockeys, if the contract or agreement has been approved by the superior court in the county in which such minor re­sides or is employed or, if the minor neither resides in or is employed in this state, if any party to the contract or agreement has its principal office in this state for the transaction of business. |
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| (b) Judicial approval; procedure; extent. The approval of the superior court referred to in para­graphs (2) and (3) of subdivision (a) may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and its approval when given shall extend to the whole of the contract or agreement, and all of the terms and provisions thereof, including, but without being lim­ited to, any optional or conditional provisions contained therein for extension, pro­longation, or termi­nation of the term thereof. |
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| 1982 Main Volume Credit(s) |
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| (Enacted 1872. Amended by Code Am.1873-74, c. 612, p. 183, § 8; Stats.1927, c. 876, p. 1917, § 1; Stats.1931, c. 1070, p. 2259, § 3; Stats.1941, c. 734, p. 2251, § 1; Stats.1947, c. 526, p. 1518, § 1; Stats.1963, c. 52, p. 677, § 1; Stats.1974, c. 771, p. 1692, § 1; Stats.1980, c. 676, § 37.) |
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| HISTORICAL AND STATUTORY NOTES |
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| 1982 Main Volume Historical and Statutory Notes |
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| As originally enacted in 1872, § 36 provided that “A minor, or a person of unsound mind of whatever degree, cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or for that of his family, entered into by him when not under the care of a parent or guardian able to provide for him.” |
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| In 1874, the clause “or a person of unsound mind of whatever degree” was deleted. |
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| In 1927, a second paragraph was added to the section as follows: “A minor cannot disaffirm a con­tract otherwise valid to perform or render services as actor, actress, or other dramatic services where such contract has been approved by the superior court of the county where such minor resides or is em­ployed. Such approval may be given on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard.” |
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| In 1931, a proviso was added at the end of the first paragraph “that these things have been actually furnished to him or to his family.” |
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| The 1941 amendment added to the second paragraph “as participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys”. |
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| The 1947 amendment changed the style of the section by creating a general introductory statement against disaffirmance and by placing the substance of the former paragraph dealing with necessaries in subsection 1 and the substance of the former paragraph dealing with particular services in subsec­tion 2. This amendment also enlarged the scope of subsection 2 to cover agreements and to specify the scope of the court’s jurisdiction in approving a contract or agreement. |
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| The 1963 amendment rewrote provisions of former subsection 2 [now, subd. (a)(2)(A)], which had read: “A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, or as a participant or player in pro­fessional sports, including, but without being limited to, professional boxers, professional wres­tlers and profes­sional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed. Such approval may be given upon the peti­tion of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and said court shall have jurisdiction to approve, and its approval when given shall extend to the whole of said contract or agreement, and all of the terms and provisions thereof, including, but without being lim­ited to, any op­tional or conditional provisions contained therein for extension, pro­longation or termi­nation of the term thereof.”; and transferred former provisions relating to profes­sional sports con­tracts and judicial ap­proval to new subsections 3 and 4 [now, subds. (a)(3) and subd. (b)]. |
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| The 1974 amendment rewrote subd. (a)(2), which as amended in 1963, had read: “A contract or agreement pursuant to which such person is employed or agrees to render artistic or creative serv­ices in motion pictures, television, the production of phonograph records, the legitimate or living stage, or oth­erwise in the entertainment field, including, but without being limited to, services as an actor, ac­tress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor or designer, where such con­tract or agreement has been approved by the superior court in the county in which such mi­nor resides or is employed.”; added subds. (a) and (b) designations; added subd. (a)(2)(ii) [now, subd. (a)(2)(B); added to the end of subd. (a)(3), the words “or, if the minor neither resides in or is employed in this state, where any party to the contract or agreement has its principal office in this state for the trans­ac­tion of business”. |
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| The 1980 amendment designated former subds. (a)(2)(i) and (a)(2)(ii) as subds. (a)(2)(A) and (a)(2)(B); substituted in subd. (a)(2)(A) “if the contract” for “where such contract” and “if any party” for “where any party”; substituted in subd. (a)(3) “contract or agreement” for “contractor or agreement”, “if the contract or agreement” for “where such contract or agreement”, and “if any party” for “where any party”; and substituted in subd. (b) “the contract or agreement” for “said contract or agreement”. |
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| **Additional Background—****Can a Minor Disaffirm a Contract for a Student Loan?** Some states prohibit minors from disaffirming insurance contracts. Others hold that loans for education or medical care received by minors create binding legal duties that they cannot avoid. The following is an example of a state statute that regulates student loan contracts. |
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| MCKINNEY’S CONSOLIDATED LAWS OF NEW YORK ANNOTATEDEDUCATION LAW |
| CHAPTER 16 OF THE CONSOLIDATED LAWS |
| TITLE I—GENERAL PROVISIONS |
| ARTICLE 5—UNIVERSITY OF THE STATE OF NEW YORK |
| PART II—LIBRARIES |
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| **§ 281. Loans and extensions of credit to infants** |
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| A contract hereafter made by an infant after he has attained the age of sixteen years in relation to ob­taining a loan or extension of credit from an institution of the university of the state of New York in con­nection with such infant’s attendance upon a course of instruction offered by such institution, or from a bank, trust company, industrial bank or national bank whose principal office is in this state for the purpose of defraying all or a portion of the expenses of such infant’s attendance upon a course of instruc­tion in an institution of the university of the state of New York or any other institution for higher educa­tion without this state which is a member of or accredited by an accrediting agency recognized by the department, may not be disaffirmed by him on the ground of infancy. |
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| (Added L.1959, c. 90; amended L.1960, c. 296; L.1961, c. 13.) |
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| Effective Date. Section effective Mar. 17, 1959, pursuant to L.1959, c. 90, § 2. |

**3. Ratification**

Ratification is an act or an expression in words by which a minor, on or after reaching ma­jority, indicates intent to become bound by a contract. In gen­eral, any act or conduct show­ing an intent to affirm the contract will be deemed ratifica­tion.

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| **Special Exhibit—** |
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| **Contractual Capacity** |
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| The following illustration summarizes the principles of **contractual capacity** discussed in the text. |
| **reasonable time**Contracts entered into by minors, mentally incompetent persons, or intoxicated persons are voidable by those persons for a reasonable time after they reach the age of majority, or become mentally competent or sober. |

Intoxicated persons

• A contract is enforceable if an intoxicated person understands its legal consequences at the time of contracting.

Mentally incompetent persons

• A mentally incompetent person is liable for the reasonable value of necessaries on disaffirmance.

# **minors**

• A minor who commits fraud may be denied the right to disaffirm.

• A minor must return received goods on disaffirmance or may be liable for their reasonable value.

• A minor is liable for the reasonable value of necessaries on disaffirmance.

## exceptions

# **Incapacity**

Contracts entered into by minors, mentally incompetent persons, or intoxicated persons are in most cases voidable by those persons.

#### capacity

**4. Parents’ Liability**

Generally, parents are not liable for their minor children’s con­tracts. If a parent is a co-party, he or she may be liable. Generally, minors are also liable for their own torts unless a parent fails to use proper parental control.

**B. Intoxicated Persons**

**•** Intoxication is a condition in which a person’s capacity to act or think is inhib­ited by alcohol or some other drug. Many courts look at objective indi­cations to deter­mine whether a contract is voidable because of intoxication.

• If a person was intoxicated enough to lack mental capacity, a contract entered into at the time may be voidable at his or her option (with, in most states, return of considera­tion). Being intoxicated enough to lack mental capacity means be­ing so impaired as not to com­prehend the conse­quences of entering into a contract. Otherwise, the contract is enforceable.

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| Enhancing Your Lecture— |
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|  Should Retailers Enter into Contracts |
|  with Minors and Intoxicated Persons?  |
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|  Sales personnel, particularly those who are paid on a commission basis, are often eager to make contracts. Sometimes, however, these salespersons must deal with minors and intoxicated persons, both of whom have limited contractual capacity. Therefore, if you are a retailer, you should make sure that your employees are acquainted with the law governing minors and intoxicated persons. |
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| Contracts with Minors |
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|  If your business involves selling consumer durables, such as furniture or automobiles, your sales personnel must be careful in forming contracts with minors and should heed the adage, “When in doubt, check.” Remember that a contract signed by a minor (unless it is for necessaries) normally is voidable, and the minor may exercise the option to disaffirm the contract. Employees should demand proof of legal age when they have any doubt about whether a customer is a minor. |
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|  In addition, because the law governing minors’ rights varies substantially from state to state, you should check with your attorney concerning the laws governing disaffirmance in your state. You and those you hire to sell your products should know, for example, what the consequences will be if a mi­nor has misrepresented his or her age when forming a sales contract. Similarly, you need to find out whether and in what circumstances a minor, on disaffirming a contract, can be required to pay for damage to goods sold under the contract. |
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| Dealing with Intoxicated Persons |
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|  Little need be said about a salesperson’s dealings with obviously intoxicated persons. If the cus­tomer, despite intoxication, understands the legal consequences of the contract being signed, the con­tract is enforceable. Nonetheless, it may be extremely difficult to establish that the intoxicated cus­tomer understood the consequences of entering into the contract if the customer claims that she or he did not understand. Therefore, the best advice is, “When in doubt, don't.” In other words, if you sus­pect a customer may be intoxicated, do not sign a contract with that customer. |
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| Checklist for the Retailer |
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| **1.** When in doubt about the age of a customer to whom you are about to sell major consumer durable goods or anything other than necessaries, require proof of legal age. |
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| **2.** If such proof is not forthcoming, require that a parent or guardian sign the contract. |
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| **3.** Check with an attorney about the laws governing minors' contracts in your state. |
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| **4.** Do not sign contracts with intoxicated customers. |
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**C. Mentally Incompetent Persons**

**•** If a court has previously determined that a person is mentally incompetent and has appointed a guardian to represent the person, any contract made by the incompetent person is void.

• If a person has not been adjudged incompetent, any contract entered into by the person is voidable if the individual does not know he or she is entering into a contract or lacks the ca­pacity to comprehend its subject matter, na­ture, and consequences. Voidable contracts may be disaffirmed or ratified (at the option of the in­competent person).

• An incompetent person may have a lucid interval during which he or she will be considered to have full capacity.

**II. Legality**

 A contract to do something that is prohibited by statute or public policy is illegal and unenforceable.

**A. Contracts Contrary to Statute**

**1. Contracts to Commit a Crime**

 Any contract to commit a crime is a contract in violation of a statute and is not enforceable. If the contract is rendered illegal *after* it has been en­tered into, it is discharged by law.

**2. Usury**

 Usury statutes place a ceiling on rates of interest, but there are exceptions to, for example, facilitate business transactions such as corporate loans. The effects of a usurious loan—whether the lender can recover only the principal, or the principal plus interest up to the legal maximum, or nothing—differ from state to state. Federal regulations set upper limits on interest rates and fees on credit cards.

**3. Gambling**

All states regulate gambling. Nearly all states op­erate lotteries, allow horse racing, or permit games of chance (such as bingo) for charitable purposes. A few states allow casino gambling.

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| **Additional Background—** |
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| **Gambling on Native American Reservations** |
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|  Although the status of different Indian tribes and nations in the United States varies, generally, they are not considered states, territories, or foreign nations in the constitutional sense, but they are considered distinct, dependent quasi sovereignties. In their local affairs, Indians tribes or nations are granted some of the powers of sovereign political entities. In the absence of a controlling statute or treaty, Indian affairs are governed by tribal customs. For instance, private suits against tribal of­ficers are re­solved by tribal courts, not by U.S. courts. |
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|  An Indian reservation is land to which the Indians retain their original title or is land that has been set aside from the public domain for use by a tribe. Most reservations are run by Indians in con­junction with the federal Bureau of Indian Affairs (BIA). Only the federal government—not the states—has the power to deprive Indians of their rights in a reservation. |
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|  Nevertheless, Indian rights have always been directly or indirectly dependent on state law. A fed­eral court, for example, may weigh the interests of a state against tribal interests in determining whether the state may assert jurisdiction in Indian country. In Indian affairs, then, there are three sets of competing interests: tribal, federal, and state, or local. |
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|  How do these interests balance? In the words of one commentator: “The one sure fact of Indian law is that it is a fluid concept, subject to few permanent and enduring concepts.”**a** The same com­men­tator made this prediction for the future: “Tribal sovereignty .  .  . is subject to gradual erosion as Indians and non-Indians live closer together, in ever-increasing numbers.” |
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|  Traditional Indian games were not the focus of federal regulations. **The federal government has regulated gambling in Indian country since 1924.** In that year, the BIA adopted tribal gaming or­di­nances for the purposes of its administrative law courts. Only since 1983 has Indian gaming become a significant economic activity in Indian country. In a 1986 survey, the Department of the Interior re­ported that 108 tribes had gaming facilities, 104 of them involving bingo. Some tribes operated both bingo and card games, and others ran only card games. As of 1990, no tribes were known to operate pari-mutuel dog racing, horse racing, or jai-alai. Currently, less than 100 of the nation’s 557 tribes are involved in gaming, with about 200 gaming sites in 19 states. Gross re­ceipts of all tribes conduct­ing gaming activities in 1993 exceeded $2.5 billion.**b** Tribes use these revenues largely for the eco­nomic, educational, and health benefit of their members, constructing roads, schools, medical clinics, and other buildings. The next step is to create a broader economic foundation. |
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|  On October 17, 1988, President Reagan signed the Indian Gaming Regulatory Act (IGRA).**c** Un­der the IGRA, the National Indian Gaming Commission has the power to regulate the conduct of gam­bling on Indian lands. At least two of the five commission members must be members of a feder­ally recognized Indian tribe. The law established three classes of gambling. Class I includes tradi­tional Indian games, over which the tribes are given exclusive jurisdiction. Class II includes bingo. Before a tribe can conduct bingo games, the state must not prohibit bingo (although if the state per­mits gam­bling in any form, bingo is probably ok). Next, a tribe must enact a tribal ordinance regu­lating the game, and the ordinance must be approved by the commission. Also, the tribe must obtain a state li­cense. |
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|  Class III gambling is gambling in other forms. To conduct Class III gambling, the IGRA re­quires tribes to adopt a gaming ordinance, which must be approved by the commission chairman. The tribe and state must then negotiate in good faith and agree to a com­pact that would govern the conduct of the games and the allocation of related civil and criminal jurisdic­tion in Indian country. Under the IGRA, the state can assess its law enforcement costs against the tribal Class III game, but the state is expressly forbidden from using the compact as a legal basis to col­lect taxes on gambling or other activ­i­ties that take place in Indian country. The IGRA also contains provisions for a mediation proc­ess to develop a compact if the parties reach an impasse in their negotia­tions. |
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|  All gambling revenues must be dedicated only to tribal governmental operations or for the wel­fare of individual tribal members, tribal economic development, other charitable organizations, or to help lo­cal government agencies fund their operations. Tribes may make per capita payments to mem­bers, sub­ject to some restrictions. |
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|  The federal government has exclusive criminal jurisdiction for violations of the act, unless a tribe consents to the transfer of jurisdiction to a state. |
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|  In passing the IGRA, Congress balanced the state concerns of crime prevention with Indian tribes’ historic and continuing opposition to any imposition of state jurisdiction into tribal lands. “The IGRA gives the tribes a significant voice as to the nature of state jurisdiction on gambling in Indian country. .  .  . Only time will tell how well the IGRA .  .  . works. At least the tribes and the states now have a framework in which to solve their differences over who should regulate gambling in Indian Country.”**d** |
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|  For a recent case discussing the IGRA, the jurisdiction of federal and tribal courts, gambling law, and telecommunications law, see *AT&T Corp. v. Coeur d’Alene Tribe,* 295 F.3d 899 (9th Cir. 2002)), a case regarding whether AT&T was required to provide toll free phone service to an Indian tribe’s gambling lottery offered interstate by phone. |
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| a. Gary Sokolow, “The Future of Gambling in Indian Country.” 15 *Am. Indian L. Rev.* 151 (1990).b. Dick Dahl, “The Gamble that Paid Off,” *ABA Journal* (May 1995), p. 86.c. 25 U.S.C. Sections 2701–2721; 18 U.S.C. Sections 1166–1168.d. Sokolow. |

**4. Licensing Statutes**

All states require certain professionals to obtain licenses. When a person con­tracts with an unlicensed individual, the contract may not be enforceable, depending on the underlying purpose of the licensing requirement.

• If the purpose is to raise revenue, the contract nor­mally will be enforceable.

• If the purpose is to protect the public from unlicensed practitio­ners, the contract will be unenforceable.

**B. Contracts Contrary to Public Policy**

**1. Contracts in Restraint of Trade**

Contracts in restraint of trade (price-fixing agree­ments, for example) ad­versely affect the public because they in­hibit competition. Also, they usually vio­late an antitrust statute (Chapter 46). Excepted are re­straints that are considered rea­sonable.

**a. Covenants Not to Compete and the Sale of an Ongoing Business**

A covenant not to compete is often in a contract for the sale of an ongoing business. This enables a seller to sell, and a buyer to buy, the goodwill and reputation of a busi­ness. A seller agrees not to initiate a similar business within a certain area for a specified period of time. The restrictions must be reasonable.

**b. Covenants Not to Compete in Employment Contracts**

A covenant not to compete may accompany an employment agreement if the restriction is no greater than necessary to protect a legitimate business interest. What constitutes a reasonable time period online may be shorter because the restrictions are global.

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| **Case Synopsis—** |
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| **Case 13.2: *Brown & Brown, Inc. v. Johnson*** |
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|  Brown & Brown, Inc., hired Theresa Johnson to provide actuarial analysis. On Johnson’s first day of work, she was asked to sign a non-solicitation covenant, which prohibited her from soliciting or servicing any client of Brown’s New York offices for two years after the termination of her employment. Less than five years later, Johnson was terminated and went to work for Lawley Benefits Group, LLC. Brown filed a suit in a New York state court against Johnson, alleging breach of contract. The court ruled in Johnson’s favor. Brown appealed. |
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|  A state intermediate appellate court affirmed. The non-solicitation covenant was “overbroad,” and Johnson was not presented with it until her first day of work, nor did she receive any benefit for signing it beyond her continued employment. |
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| **Notes and Questions** |
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|  ***Suppose that a non-solicitation or non-compete agreement is held to be unenforceable, but that the employee has violated what would have been its terms by competing with the employer. Are there other causes of action that the employer might assert against the employee?*** Yes. When a non-solicitation or non-compete agreement is held to be unenforceable, but the employee has violated what would have been its terms by competing with the employer, there are other causes of action that the employer might assert. The employer might file a suit against the employee and her subsequent employer for wrongful interference with a contractual relationship or a business relationship. There might also be grounds for a suit based on misappropriation of trade secrets. The employer’s success with these causes would depend, of course, on the facts and the applicable law. |
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| ***Does the Internet affect covenants not to compete?*** The Internet could impact the terms that an employer might want—or might be permitted—to include in a covenant not to compete by expanding their scope. The Internet might affect the enforceability—or the lack thereof—of a cove­nant not to compete if the provision is construed as too broad a limitation. The Internet might also undercut the point for insisting on such a covenant in the first place. Restricting a former employee from competing within a fifty-mile radius, for example, might seem outdated when international busi­ness is possible with the click of an online link. Of course, the effect of any covenant covering, or not covering, the Internet would depend on the nature of the parties’ business. |
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| ***To determine the enforceability of a covenant not to compete, the courts balance the rights of an employer against those of a former employee. What are these rights?*** A covenant not to com­pete must balance a former employee's right to earn a livelihood with an employer's right to protect itself from a former employee's unfair appropriation of unique business information or customer con­tacts developed while working for the employer. A prohibition on a former employee from working for a competitor in any capacity would tip the scale too far in favor of the employer. |
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| ***Should an employer be able to restrict a former employee from engaging in a competing business on a global level?*** It could be acceptable to limit a former employee’s employment to a wide radius, depending on the individual’s significance to the employer’s trade and the reach of that trade. But it would seem to be too aggressive to extend that restriction beyond the territory in which the employer actually does business. |
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| **Additional Cases Addressing this Issue —** |
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| **Covenants Not to Compete** |
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| Cases considering the legality of **covenants not to compete** include the following. |
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| • *QSP, Inc. v. Hair,* \_\_ N.C.App. \_\_,566 S.E.2d 851 (2002) (a covenant not to compete that prohib­ited a fund-raising sales representative from competing with his former employer, a chocolate prod­ucts distributor, for twelve months in a five-county area was “reasonable and not unduly oppressive”). |
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| • *Unger v. FFW Corp.,* 771 N.E.2d 1240 (Ind.App. 2002) (a covenant not to compete that prohibited a financial products sales representative from competing with his former employer, a bank, for one year in a seven-county area was “reasonable in terms of time, geography, and types of activity prohibited”). |
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| • *Albany Medical College v. Lobel,* \_\_ A.D.2d \_\_, 745 N.Y.S.2d 250 (3 Dept. 2002) (a covenant not to compete that prohibited a medical school professor from competing with the school, which was also a medical practice group, by not practicing medicine for five years within thirty miles, was “reasonable as to time and area, necessary to protect the employer’s legitimate interests, not harmful to the pub­lic, and not unduly burdensome”). |
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| • *Hoff v. Mayer, Brown and Platt,* 331 Ill.App.3d 732, 772 N.E.2d 263, 265 Ill.Dec. 225 (1 Dist. 2002) (a covenant not to compete that denied retirement benefits to a “retired” law firm partner, who continued to practice law in competition with the firm from which he “retired,” was not overbroad, even though it was unlimited in time, place, and scope of practice). |
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| • *First Allmerica Financial Life Insurance Co. v. Sumner,* \_\_ F.Supp.2d \_\_ (D.Or. 2002) (a cove­nant not to compete that prohibited an employee from soliciting other employees and any customers to terminate their relationship with the employer was void, because it was not signed on the com­mencement of employment or on the employee’s advancement with the employer: “such provisions re­strained competition among employers for talented employees, and also restricted competition for cus­tomers’ business”). |
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| • *Ozark Appraisal Service, Inc. v. Neale,* 67 S.W.3d 759 (Mo.App. S.D. 2002) (a covenant not to com­pete that prohibited an employee from competing with her employer, a real estate appraisal serv­ice, for one year within ninety-five miles, was unenforceable, because the employer breached the par­ties’ employment agreement ). |
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| • *Minnesota Mining And Manufacturing Co. v. Francavilla,* 191 F.Supp.2d 270 (D.Conn. 2002) (a covenant not compete that prohibited an employee from “render[ing] services directly or indirectly in connection with any Conflicting Product” for two years to “any Conflicting Organization” in any coun­try in which the employer “has a plant” or “provides a service” was enforceable, because it was “know­ingly entered into,” reasonable, not overly broad, “did not violate the public interest,” etc. |
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**c. Enforcement Problems**

The laws governing the enforceability of covenants not to compete vary from state to state. Some states prohibit or limit their enforcement.

**d. Reformation**

Occasionally, depending on the jurisdiction, courts will reform covenants not to compete. If a covenant is unreasonable in time or geographic area, to prevent undue hard­ship courts in some states convert the terms into reasonable ones and enforce the covenant.

**2. Unconscionable Contracts or Clauses**

In some circumstances, bargains are so oppressive that a court will relieve an inno­cent party of part or all of the contractual duties.

**a. Procedural Unconscionability**

 Procedural unconscionability concerns how a term becomes part of a contract. It may involve a party’s lack of knowledge or understand­ing of a term due to inconspicuous print, unintelligible language, or lack of opportunity to read the contract or to ask about its meaning, such as may occur in cases involving adhesion contracts.

**b. Substantive Unconscionability**

 Substantive un­conscionability describes contracts or terms that are oppres­sive—provisions that de­prive one party of the benefits of the agreement or leave that party without remedy for nonperformance.

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| Enhancing Your Lecture— |
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|  Is It Unconscionable for Physicians |
|  to Prescribe Medication Online?  |
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|  Anyone with an e-mail address has undoubtedly received scores of messages offering to sell pre­scription medications, such as Viagra, online. In the past, someone who wanted a prescription for a certain medication—whether it was for allergies, weight loss, or sexual enhancement—had to see a physician and, normally, undergo a physical examination to see if that medication was appropriate. Today, however, it is possible to enter into a contract to obtain a prescription for, and order, many medications via the Internet without ever setting foot in a physician’s office. Contracting with a phy­sician online to receive prescription drugs may be ill advised, but are such contracts unconscionable? |
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| A Virtual Diagnosis |
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|  The hallmark of an unconscionable contract is that its terms are so oppressive, one sided, or un­fair as to “shock the conscience” of the court. Thus, the issue is whether Internet prescription con­tracts are so unfair that they “shock the conscience” of the court. After all, physicians are trained to examine patients, diagnose medical conditions, and evaluate possible treatments. A physician who is prescribing medication for a person online, however, has no objective way to determine the person’s health status or whether the person understands the risks involved. For example, in the online con­text, a physician cannot tell if a person is truthfully reporting his or her age and weight, which can significantly affect whether a medication is recommended. In addition, physicians who prescribe drugs online cannot monitor the use of these drugs and evaluate their effectiveness. |
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| An Emerging Issue |
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|  To date, only a few courts have addressed this issue, and no court as yet has held that prescrib­ing drugs online is unconscionable. For example, in 2003, in a case before the Kansas Supreme Court, the state attorney general claimed that it was unconscionable for an out-of-state physician to contract with residents to prescribe drugs via the Internet. The case involved three Kansas resi­dents, including a minor, who entered contracts on the Web to obtain prescription weight-loss drugs (Meridia and phentermine).**a** |
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|  The court held that the physician’s conduct and the resulting contracts were not unconscionable because there was no evidence that the physician had deceived, oppressed, or misused superior bar­gaining power. The Web site used by the physician had included a great deal of general information about the specific drugs and their side effects, online questionnaires to obtain medical histories and waivers of the physician’s liability for the prescriptions. The Web site had also provided an online calculator for body weight so that a person could determine if she or he was twenty-five pounds over­weight, as required to obtain a prescription for Meridia. Because the court found that the individuals had gotten exactly what they bargained for—the prescription medications they sought—the court re­fused to step in and declare the contracts unconscionable. |
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| For Critical Analysis |
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|  ***If the physicians are not deceptive, should the courts allow all types of medications to be prescribed over the Internet? Why or why not? Might the practice of prescribing medications via the Internet reach the point at which it “shocks the conscience” of the court?*** |
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| a. *State ex rel. Stovall v. DVM Enterprises, Inc.,* 275 Kan. 243, 62 P.3d 653 (2003), seealso *State ex rel. Stovall v. Confimed.com, L.L.C.,* 272 Kan. 1313, 38 P.3d 707 (2002). |
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**3. Exculpatory Clauses**

**a. Often Violate Public Policy**

Often held to be unconscionable are contract clauses attempting to absolve parties of negli­gence or other wrongs.

**b. When Courts Will Enforce Exculpatory Clauses**

 Exculpatory clauses can be found in rental agreements, sales agreements, and commercial and residential property leases. They may be en­forced if the party seeking enforcement is a private business unimportant to the public in­terest (health clubs, amusement parks).

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| **Case Synopsis—** |
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| **Case 13.3: *Holmes v. Multimedia KSDK, Inc.*** |
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|  Colleen Holmes signed an entry form for the 2009 Susan G. Komen Race for the Cure to be held in St. Louis, Missouri. In the form, Holmes agreed to release “any Event sponsors” for any injury “I might suffer in connection with my participation in this Event \*  \*  \* . This release applies to any \*  \*  \* negligence of the [sponsors].” Later, Multimedia KSDK, Inc., agreed to be a sponsor and to broadcast the race. While a participant in the event, Holmes tripped and fell over an audiovisual box, and sustained injuries. Holmes filed a suit in a Missouri state court against KSDK. The court entered a judgment in the defendant’s favor. The plaintiffs appealed. |
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|  A state intermediate appellate court affirmed. “Public policy disfavors but *does not* prohibit releases of future negligence. \*  \*  \* To be enforceable in Missouri, exculpatory clauses must contain clear, unambiguous, unmistakable, and conspicuous language in order to release a party from his or her own future negligence.” Here, the language used in the exculpatory clause clearly released all sponsors and their agents and employees without exclusion from liability for future negligence. |
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| **Notes and Questions** |
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|  ***If KSDK had placed the audiovisual box on the ground surrounded by a barricade or posted warnings, would the result in this case have been different?*** No. The courts held that the exculpatory clause was binding without such precautions having taken place. It is not likely that they would have held differently if, for example, there had been safety pylons and the plaintiff had deliberately or unintentionally ignored them. |
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|  ***When do courts enforce exculpatory clauses?*** Courts enforce exculpatory clauses if they are reasonable, do not violate public policy, and do not protect parties from liability for intentional misconduct. The language used must not be ambiguous, and the parties need to be in relatively equal bargaining positions. When a business’s services are not essential—such as health clubs, racetracks, amusement parks, skiing facilities, horse-rental operations, golf-cart concessions, and skydiving organizations—the companies offering them have no relative advantage in bargaining strength, and anyone contracting for their services does so voluntarily. Courts also may enforce reasonable exculpatory clauses in loan documents, real estate contracts, and trust agreements. |
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|  ***Was the exculpatory clause at issue in this case enforceable? Why or why not?*** Yes, the court held that the exculpatory clause at issue in this case was enforceable. The clause released “any Event sponsors and their agents and employees” from liability for future negligence. The court held that this language clearly released all sponsors and their agents and employees without exclusion. The court explained that, contrary to the plaintiffs’ argument, the clause was not ambiguous simply because it did not name each individual sponsor that it purported to release from liability. |
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| **Additional Background—** |
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| **Other Contracts That Are Contrary to Law or Public Policy** |
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|  Other contracts that are contrary to public policy or the law include contracts for the commission of a tort, contracts injuring public service, and agreements that ob­struct the legal process. |
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| ***Discriminatory Contracts*** |
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|  Contracts in which a party promises to discriminate in terms of color, race, re­ligion, national origin, or sex (for example, a promise not to sell property to a member of a par­ticular race) are contrary to statute and contrary to public policy. |
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| ***Contracts for the Commission of a Tort*** |
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|  Contracts that require a party to commit a civil wrong, or a tort, are contrary to public policy. |
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| ***Contracts Injuring Public Service*** |
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|  Contracts that interfere or conflict with a public officer’s du­ties (for in­stance, a contract to pay a legislator for favorable votes) are contrary to public policy. To pre­vent con­flicts be­tween public and private interests, statutes require many public officers to liq­uidate their interests in private businesses before serving as elected representatives. Other statutes merely require that while they are in office they take no part in the operation of, or decisions concern­ing, a business in which they have an in­terest. |
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| ***Agreements Obstructing the Legal Process*** |
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|  Agreeing to delay, prevent, or obstruct the legal pro­cess (agreeing to accept $1,500 to delay a trial, for example) is illegal. Agreeing to suppress evi­dence in a legal pro­ceeding or to commit fraud on a court is illegal. Offering jurors money for their votes is ille­gal. Offering to pay one witness more than another is contrary to public policy (most trial witnesses, except expert witnesses, are paid a flat fee for expenses; extra money could provide an in­centive to lie). A promise not to prosecute a crimi­nal offense in return for a reward is void as against public policy. A reward given under the threat of arrest or prosecution is void. |
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| Enhancing Your Lecture— |
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|  For Sale: |
|  “The Most Beautiful Baby in the World”  |
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|  Lawrence Schaub, a former windshield repairman in Detroit, Michigan, was facing financial problems. He was out of work. He was behind in his mobile home payments. He had three children to feed. Desperate to obtain funds, he decided to sell the youngest of his three children. To that end, he created a videotape titled “The Most Beautiful Baby in the World” to show to prospective buyers. Unfortunately for Schaub, his babysitter informed the police of his plan, and he was caught in a “sting” operation when undercover police officers posed as a would-be adoptive family. Schaub ac­cepted $10,000 from the officers as a down payment on the $60,000 contract price. |
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|  If a case involving a similar contract came before a civil court, the court would likely deem the contract void as against public policy. Schaub’s was a criminal case, however, and a significant question immediately arose: What statute had Schaub violated? Until September 1, 2000, Michigan was one of about twenty-five states that did not explicitly outlaw the sale of children. Shortly after Schaub’s arrest drew attention to this “oversight” in state law, the Michigan legislature passed a bill making trafficking in humans punishable by up to twenty years in prison and a $100,000 fine. At the time Schaub tried to sell his daughter, however, the law did not exist. At worst, the only state crime that Schaub committed was attempting to profit from an adoption, which is subject to a pen­alty of ninety days in jail.**a** |
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| The Bottom Line |
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|  Occasionally, bizarre cases such as this one alert state legislatures to loopholes in their laws. Note, though, that the prosecutors in Schaub’s case found other ways to keep Schaub in jail for a while—at least until his former wife claimed custody of the children. The prosecutors charged Schaub with child abandonment, driving with a suspended license, and violating his probation stem­ming from an earlier drug case. |
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| a. For a summary of Schaub’s actions and the prosecution’s case against him, see M. L. Elrick, “Baby for Sale,” *The National Law Journal,* September 11, 2000, pp. A1–A2. |
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**III. The Effect of Illegality**

In general, an illegal contract is void. Exceptions include the following:

**A. Justifiable Ignorance of the Facts**

A party who is relatively innocent can often recover benefits con­ferred under a partially executed contract. An innocent party who has fully performed may be able to enforce the contract (for example, a trucker who unknowingly delivers illegal goods may be able to re­cover the delivery fee).

**B. Members of Protected Classes**

If a statute is clearly designed to protect a certain class, a member of the class can enforce a contract in violation of the statute. (Despite statutes limiting excessive working hours, for example, an employee who works overtime can recover overtime pay. Similarly, if an insur­ance company vio­lates an insurance-sales regulation, the buyer can still enforce the policy.)

**C. Withdrawal from an Illegal Agreement**

If the illegal part of a bargain has not been performed, a party can withdraw from the bar­gain and recover whatever he or she rendered in performance or its value (a bettor can quit an illegal bet, for example, before the winner is paid).

**D. Severable, or Divisible, Contracts**

 If a contract is severable and the illegal portion does not affect the essence of the bargain, the legal portion can be enforced. A contract is indivisible if the parties intend that each party’s complete performance be essential, even if the contract contains a number of seem­ingly separate provisions.

**E. Fraud, Duress, or Undue Influence**

A party induced to make an illegal bargain by fraud, duress, or undue influence can recover for his or her performance.

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| Teaching Suggestions |
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| **1.** A minor’s right to disaffirm a contract is a well-settled principle. It may be pointed out that, nev­ertheless, few businesses automatically agree to give money back when a minor who has bought some­thing wants to disaffirm the contract. Ordinarily, the response is likely to be “Sue me,” or an of­fer to “split the differ­ence” or otherwise settle, rather than to amicably rescind the contract. |
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| **2.** Discuss with students under what circumstances, if any, they believe a minor should be required to make restitution when he or she avoids a contract. |
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| **3.** In reading and studying cases, particularly those that involve complex circumstances, your stu­dents may find it helpful to keep in mind that generally a case can have only one of three results: |
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| • The plaintiff proves his or her side of the case and wins. |
| • The plaintiff fails to prove his or her side of the case and loses. |
| • The defendant proves his or her side of the case, and the plaintiff loses. |
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| *Cyberlaw Link* |
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|  ***Are the common law principles relating to contractual capacity more—or less—important in the context of e-commerce and online contracting than in the context of more traditional circumstances?*** |
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**Discussion Questions**

**1. *What is the minor’s right to disaffirm a contract?***A minor can make any contract, except one pro­hibited by law for minors (the sale of alcoholic beverages, for example). Generally, minors can also disaf­firm any contract. This means that they can legally avoid their contractual obligations. To avoid a con­tract, a mi­nor need show only an intent not to be bound, whether by words (telling the other party) or con­duct (acting in­consis­tently with contractual duties). Ordinarily, a contract can be disaffirmed any time dur­ing minority or within a reasonable time after attaining majority. Disaffirmance of certain contracts is pro­hibited in some states. Some states pro­hibit avoidance of contracts for student loans, contracts for medical care, contracts for insurance, and contracts made in running a business. On grounds of public policy, other promises may be enforced, par­ticularly when they entail something that the law would compel anyway (sup­porting an illegitimate child, for instance). If a contract is not disaffirmed within a reasonable time after at­taining majority, it must be deter­mined whether the contract is ratified. Generally, if there has been full per­formance, a con­tract is presumed rati­fied.

**2. *What is a minor’s obligation on disaffirmance?*** A duty of restitution arises when a contract has been exe­cuted—a minor can disaffirm but must return whatever he or she received or pay for its reasonable value. Generally, a minor need only return whatever he or she received, if it is still in his or her possession or control. If it has been damaged, a minor’s right to disaffirm is not affected. In a few states, minors have a duty of resti­tution to return the other party to the position he or she was in before the contract was made. Some states do not re­quire full restitution but only that it be reasonable. The minor may recover whatever he or she trans­ferred as consideration, even if it is in the possession of a third party. If the consideration cannot be returned, the mi­nor is entitled to its value.

**3. *What effect does a minor’s misrepresentation of age have on his or her right to disaffirm?*** In most states, a minor can disaffirm even if he or she misrepresented his or her age. Also, in some states, a mi­nor will not be liable in tort for misrepresenting his or her age, because, indirectly, the judgment might force the minor to perform the contract. In many states, however, under certain circumstances a minor will be bound to a contract despite the misrepresentation. In some states, misrepresentation of age is enough to prohibit disaf­firmance; in others, a minor who engaged in business as an adult is prohibited from disaffirm­ing con­tracts ne­gotiated in carrying on the business. Some courts refuse to allow minors who misrepre­sented their age to disaffirm executed contracts unless they can return whatever consideration they re­ceived, on grounds that the combination of misrepresentation and unjust enrichment estops minors from as­serting contractual incapacity. Some courts allow a minor who misrepresents his or her age to disaffirm a con­tract but hold the minor liable for damages in tort, and the defrauded party may sue the minor for the misrep­resentation.

**4.*****What effect does contracting for neces­saries have on a minor’s right to disaffirm?*** A minor who contracts for necessaries may disaffirm but must pay the reasonable value of whatever he or she re­ceives. A minor is liable only for the reasonable value of the goods because on disaffirmance there is no con­tract and thus no contract price. To be liable for necessaries, a minor must not be under the care of a parent or guardian who is required, and able, to provide for the minor. If a minor has a parent or guardian who is able to provide necessaries, but fails to do so, the parent or guardian is liable—in quasi contract—for the reasonable value of any necessaries that the minor buys.

**5.*****What effect does intoxication have on persons’ contractual capacity?***The inhibition by al­co­hol or some other drug of a person’s capacity to act or think is intoxication. A contract entered into by a per­son who is intoxicated can be either voidable or valid. If the person was intoxicated enough to lack mental ca­pacity (that is, so impaired as not to comprehend the consequences of entering into a contract), the con­tract is void­able at his or her option. Otherwise, the contract is enforceable. Many courts look at objective indications to determine whether a contract is voidable because of intoxication rather than inquire into a party’s mental state. A contract favorable to one party does not mean that it is voidable (unless fraud is present). A contract held voidable because of intoxication may be disaffirmed, but most courts require full restitution as a condition of disaffirmance. (In cases involving necessaries, a person will be liable in quasi contract for the reasonable value of the necessaries.) A contract that is voidable because of intoxication may be ratified, expressly or im­plic­itly (for example, by failing to disaffirm within a reasonable time after becom­ing sober). An alcoholic who makes a contract while sober does not lack capacity.

**6. *When is a contract made by an incompetent person voidable?*** If a court has not adjudged a person incompetent, any contract entered into by the person is voidable if the individual does not know that he or she is contracting or lacks the capacity to comprehend its subject matter, nature, and consequences. This does not include executed contracts, unless the incompetent can return or pay for whatever was re­ceived. (If incompetence was obvious, only benefits re­tained must be paid for.) Voidable contracts may be disaffirmed or ratified (by an appointed guardian or by the incompetent after he or she becomes competent). Incompetents are liable in quasi contract for the reasonable value of nec­essaries.

**7.** ***If it were possible to reform a covenant not to compete, what might be changed, or how might it be redrawn, to be reasonable?*** An employer’s le­gitimate business interests can be adequately protected by a contractual provision prohibiting the employee from engaging in those specific activities in which the employee was trained by the em­ployer or performed for the employer, or through a reasonable non-solicitation provision.

**8.** ***What public interest might be injured by an overbroad covenant not to compete?*** A covenant not to compete should not be so broad as to constitute an unnecessary restraint of trade. The public interest that might thereby be injured is the public’s interest in free competition among businesses.

**9.** ***What is an exculpatory clause? In what circumstances might exculpatory clauses be en­forced? When will they not be enforced?*** An exculpatory clause releases a party from liability in the event of monetary or physical injury, no matter who is at fault. An exculpatory clause may be en­forced if a party seeking its enforcement is not involved in a business considered important to the public interest. An exculpatory clause will not be enforced if a party seeking its enforcement is in­volved in a business that is important to the public interest.

**10. *Name and discuss some exceptions to the rule that a court will not enforce an illegal agree­ment.*** *Members of protected classes.* If a statute is clearly designed to protect a certain class, a member of the class can enforce a contract that violates the statute. (For example, statutes proscribe excessive work­ing hours, but an employee who works those hours can recover the pay for them.) *Withdrawal from an ille­gal agreement.* If the illegal part of a bargain has not been performed, a party can withdraw from the bar­gain and recover what­ever he or she rendered in performance or its value. *Fraud, duress, or undue influ­ence.* A party induced to make an illegal bargain through fraud, duress, or undue influence can recover for his or her per­formance, even if that party was also partly at fault (transferring assets to defraud creditors, under an agree­ment to transfer them back, may not prevent a recovery of those assets, for example).

**Activity and Research Assignments**

**1.** Historically, the principal categories of persons having no capacity or limited capacity to contract were minors, mentally incompetent persons, and married women. At common law, a married woman had no ca­pac­ity to contract, although courts of equity recognized a limited power with respect to property conveyed to her separate use. In most states, statutes have given married women full power to contract. In some states, how­ever, capacity to contract is still denied with respect to particular types of contracts (contracts between husband and wife, contracts for the sale of real property, and contracts relating to the management of com­munity prop­erty, for example). Treatment of married women as having less capacity to contract than either married men or single women may be of doubtful constitutionality. Some students may find this an interest­ing topic to research and discuss.

**2.** State statutes sometimes authorize the appointment of guardians for non-recovering alcoholics, nar­cotics addicts, spendthrifts, and elderly persons and convicts in cases of mental illness. Even without the ap­pointment of a guardian, civil powers of convicts may be suspended in whole or in part during their incarcer­a­tion. For some purposes, Native Americans are treated as wards of the U.S. government under federal law. As with the common law limitation on the contractual capacity of married women, some students may find one or more of these subjects interesting to investigate.

**Explanations of Selected Footnotes in the Text**

 **Footnote 5:** The United Arab Emirates (UAE) held a competition for the design of an embassy in Washington, D.C. Elena Sturdza—an architect not licensed in the District of Columbia—won. Sturdza and the UAE exchanged proposals, but the UAE stopped communicating with her. About two years later, Sturdza learned that the UAE had contracted with a District of Columbia architect named Angelos Demetriou to use his design. Sturdza filed a suit in a federal district court against the UAE, alleging breach of contract. The court issued a summary judgment in the UAE’s favor. Sturdza appealed to the U.S. Court of Appeals for the District of Columbia Circuit. This court asked the District of Columbia Court of Appeals “precisely how D.C. law applies” in this situation. In ***Sturdza v.* *United Arab Emirates****,* the District of Columbia Court of Appeals’ answer: an architect cannot recover on a contract to perform architectural services in the District of Columbia if he or she lacks a District of Columbia license. For the safety of those who work in and visit buildings in the District of Columbia, and the safety of their neighbors, the architects who design them and oversee their construction should be qualified and licensed. The statute contains no exception.

 ***Should there be an exception to the rule applied in this case for an architect who is licensed elsewhere in the United States and who intends to become licensed in the District of Columbia? How might such an exception have applied in this case?*** There might arguably be an exception for such an architect—or other professional with respect to licensing in other professions—but the exception would be narrow. An architect who performed any services before obtaining the license would still be in violation of the statute. In the case discussed here, Sturdza substantially performed her contract (if there was a contract) without first obtaining a District of Columbia license. Thus, she would not be able to benefit from such an exception.

***The architectural services at the center of this case were to be performed for a foreign embassy. Should the court have made an exception for such a situation? Why or why not?***No. The impact is local—“For the safety and wellbeing of those who work in and visit such buildings, and of neighboring property owners, we would suppose the District has every reason to insist that the architects who design them and oversee their construction be qualified, and hence licensed, to do so.”

***Should the restrictions on the enforcement of contracts with unlicensed practitioners extend beyond the performance of professional services to include negotiations to provide the services? Discuss.*** Yes. An offer by an unlicensed practitioner to render such services would be deceptive if only their performance were prohibited. In fact, the District of Columbia statute at issue in this case defined the “practice of architecture” to encompass negotiations and agreements, as well as performance, of architectural services.

 **Footnote 9:** Speedway SuperAmerica, LLC, hired Sebert Erwin to provide “General Contracting” for five years, but reserved the right to end the contract at any time. The contract contained an indemnification clause under which Erwin promised to “hold [Speedway] harmless” for anything that happened during his employment. Injured while loading a Speedway truck, Erwin filed a suit in a Kentucky state court against Speedway for damages. Speedway counterclaimed on the basis of the indemnification clause. The court dismissed the counterclaim. Speedway appealed. In ***Speedway SuperAmerica, LLC v. Erwin****,* a state intermediate appellate court affirmed, holding that the indemnification clause was the equivalent of an exculpatory cause, contrary to public policy, and unenforceable. The contract was one-sided because the parties—a chain of convenience stores and a single worker—were not of similar bargaining power. Erwin had an eighth-grade education and despite his job title had no control over his work. As a “contractor,” he had no right to workers’ compensation or other employee benefits.

 ***If the contract clause at issue had precluded only litigation and man­dated arbitration, would the court have considered the provision unenforceable?*** Possibly not (although it might depend on the terms of such arbitration—who can initiate it, who selects the arbitrator, who bears the costs, where it is held, etc.). The court might have reasoned that because Erwin could have obtained redress in an alternative forum, the preclusion of litigation would not have been unenforceable. It was the preclusion of all action in the circumstances of the Speedway case that the court found unenforceable.

***What benefit was there to Speedway to impose such a term on Erwin?*** By using this clause, Speedway intended to classify Erwin as an independent contractor, thereby relieving it of any liability for any problems and Speedway would not be liable for workers’ compensation or other benefits due an employee. Speedway would also not have to be responsible for paying various employment-related taxes to the IRS.

***Suppose that Erwin worked for another company as a mover and his employer had sent him to help Speedway move the freezer. Suppose further that the indemnification clause was in a contract signed between Speedway and Erwin’s employer. Would that clause be valid?*** The contract would probably have been acceptable in that situation. If Erwin worked for another company, he would have workers’ compensation benefits. Also, it would be common for a company that hires another company to provide workers to move equipment to make sure that liability for accidents falls on the moving company, not the company that hired it to perform those services.