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*print name on the line above as your signature*

**INSTRUCTIONS:**

1. This Midterm Exam must be completed within the allocated time (i.e., *between 10:30 AM and 11:45 AM*).  
It is a **closed book** and open mind exam.
2. **Recall the material difference between i.e. (that is) versus e.g. (for example).**
3. When you finish your exam,  
collect all of your personal items before approaching the professor  
since you must promptly exit the exam room upon finishing.  
Thursday students will receive an answer key at exit.  
Wednesday students may pick up, in person,  
an answer key after the Thursday exam.
4. This Midterm Exam is worth 300 of the course total of 1,000 points.  
This true/false exam has 73 questions graded as if there are 70.  
Each correct answer on this Midterm Exam is worth *about* 4.29 course points.
5. Based upon the instructor's statistical analysis of all students' answers,  
the instructor unilaterally may alter the grading of specific exam questions.  
Any student may appeal the grading of any other exam questions.  
However, only if a student successfully appeals the ambiguity of  
AT LEAST **FOUR** questions on this exam does that student objectively  
demonstrate non-harmless error due to any ambiguities.  
Also, a successful appeal only will change *that* student's exam grade and only will  
do so by the number of successful appeals in excess of **THREE** successful appeals.  
*Appeals only affect the exam grades of those students that appeal.*
6. **All appeals** of this exam's questions must be:
  - [6A] typed;
  - [6B] signed by the student in three ways, typed name, handwritten signature,  
and typed university identification number;
  - [6C] immediately following the signature, list in sequence, *solely by number*,  
each of the questions being appealed;
  - [6D] after the [6C] list, argue each question, one at a time;
  - [6E] at the beginning of each question's [6D] appeal, identify  
at least two reasonable meanings that the question could have had;
  - [6F] argue why one or more of the [6E] identified reasonable meanings  
is as appropriate or is more appropriate than  
the meaning used for the answer key answer; and
  - [6G] personally handed  
to the instructor or to the instructor's suite secretary in MH 228  
no later than 11:30 AM the **day of your next class meeting**  
(i.e., Monday/Tuesday, October 24/25, time is of the essence.

**NOTES:**

- A.** Recall the material difference between **i.e.** (that is) **versus e.g.** (for example).
- B.** Use bubble **A** for **TRUE** and use bubble **B** for **FALSE**.
- C.** If a question contains a number (e.g., Amendment IX), then the truth or falsity of that question never depends upon that number.  
This is not a test of trivia recall.  
It is an objective demonstration of your subjective knowledge.
- D.** For clarity in distinguishing a "principal" from a principal as well as distinguishing from an "agent" from an agent, quote marks will be used for the generic words "principal" and "agent" and no quote marks will be used for the specific words principal and agent. That is, "principal" **and** "agent" refer to all three relationships (*i.e., principal **and** agent; **and** principal **and** independent contractor; **and** employER **and** employEE*).
- E.** For clarity in distinguishing enforceable from **unenforceable** transactions, the word contract is **not** in quotes for an enforceable contract (e.g., a voidable contract elected to be enforced), whereas the word "contract" is in quotes for a transaction that is **not** an enforceable contract (e.g., a void "contract").
- F.** The quote marks described in D. and in E. may be the very essence of the question's truth or falsity. For example, it is true to say "An employEE is one of the three relationship in "agent"."; and it is false to say "An employEE is an agent.".

**QUESTIONS:**

1. T F The Law only uses the objective and does not use the subjective
2. T F In USA law liability flows towards those whose actions either are sufficiently knowing or are sufficiently voluntary.
3. T F An accord and satisfaction is a new contract that requires new consideration; but, for an accord and satisfaction that consideration must be in the form of a good faith dispute.
4. T F Everything that is express also is implied.
5. T F To be protected with substantive due process as opposed to protected only with procedural due process, a fundamental constitutional right must be expressly named in the USA *Constitution* (e.g., *privacy*).
6. T F The Mirror Image Rule allows an offerEE to first accept and then race ahead to reject the offer prior to the arrival of the acceptance; whereas, the Mirror Image Rule only allows the offerOR to wait for the offerEE's communication after the offer is delivered to the offerEE.
7. T F The last question of analysis in the law subset of The Law, the question that must be answered "No." if one is to open the door to the court of equity, is: "Do you have an adequate remedy at law?".
8. T F Only to citizens must all governments in the USA always give procedural due process (i.e., *notice and hearing, both proportional to the interests involved*).

9. T F Under the Mail Box Rule, for a formal contract, the offerOR's offer must be communicated to the offerEE by the official surface mail of the U.S. Postal Service.
10. T F In the USA separation of powers generally, the legislature has far more governmental power than the judiciary has; but specifically, the judiciary has greater power when enforcing fundamental constitutional rights of the individual.
11. T F The power of judicial review is the power the courts to declare actions of government as unconstitutional.
12. T F The elements of a contract are agreement, consideration, capacity, reality of assent, form, and legal subject matter.
13. T F In Nebraska a natural person is presumed to not have contractual capacity to waive a cause of action unless that natural person has standing to sue. This general rule of contracts significantly reduces the scope of the federal preemption with respect to contracts to arbitrate disputes in commerce.
14. T F The elements of a crime are a legislatively defined bad deed, a legislatively defined bad thought, and no defenses.
15. T F In Nebraska a fiduciary is presumed to engage in undue influence.
16. T F Comity is an implied duty under both international law between nations as well as under USA domestic law between USA States.

17. T F A statute creating a crime is void for vagueness if when a Reasonable Person reads the statute the Reasonable Person can not reasonably know what is prohibited.
18. T F Under the common law an item is "material" if changing that item would change the mind of the Reasonable Person. The magnitude of "material" varies by context (*e.g., mutual mistake requires a larger magnitude change to amount to material than does common law fraud*). There are four contract terms that are material (*i.e., parties, time, consideration, and subject matter*).
19. T F Each USA State and the federal government each has the Police Power (*i.e., the power to regulate to protect People's morals*).
20. T F Intentional torts and negligence torts are based upon fault. Strict liability torts are based on social risk allocation for ultra-hazardous activities.
21. T F Common law fraud exists when the defendant knowingly omits a material fact thereby inducing the plaintiff's justifiable reliance and proximately causing the plaintiff's damages.

22. T F The word "among" in the Commerce Clause is ambiguous. The USA Supreme Court currently interprets "among" with its broad meaning, within  
(*i.e., a close and substantial affect [i.e., cause] on commerce between the USA States*). The core of the Commerce Clause is the narrow meaning of "among", that is, between  
(*i.e., a direct effect [i.e., result] of commerce moving between two or more USA States*).
23. T F Proximate cause exists if a consequence is foreseen by the defendant at the time of the defendant's wrongful action.
24. T F The burden of proof always starts on the plaintiff. In most civil law suits the burden is by the preponderance of the evidence. In criminal law suits the burden is beyond a reasonable doubt.
25. T F The appellate court will affirm the trial court unless the trial court makes a clear error of fact, a harmless error of procedure, or any law.
26. T F Consideration is a bargained for exchange of legally sufficient value that manifests that party's objective intent to be bound to the contract.

27. T F The Statute of Frauds requires five types of contracts  
(*i.e.*,  
*sale of an interest in land;*  
*sale of goods at or over \$500;*  
*might take longer than one year;*  
*surety the debts of another; and*  
*marriage*)  
to have all of their material terms in a writing signed  
(*i.e.*, *any mark with the current intent*  
*to authenticate the record/document*)  
by the party to be sued.
28. T F The USA separation of powers, in the USA *Constitution's* Article VI, paragraph 2, Supremacy Clause, read in junction with the USA *Constitution's* Article IV, paragraph 1, Full Faith and Credit Clause's "effect thereof" subclause expressly permits congressional preemption of any and all laws enacted by individual USA States.
29. T F Capacity is a person's ability to grasp the natural consequences of one's actions. The amount of capacity required varies by context. The most capacity is required for crimes, then contracts, then torts, and the least capacity is required for wills.
30. T F If a "contract" is contrary to public policy (*e.g.*, *unreasonable area and unreasonable time in a covenant not to compete*), then the court will not enforce that "contract".  
(*HINT: Recall NOTE F. on page 2.*)

- 31. T F** The good faith required of a fiduciary is greater than the good faith required of a common law consumer. For both a common law consumer and a fiduciary the subjective element of good faith is identical (*i.e., honesty in fact*). In contrast, there is no objective element of good faith for common law consumer, whereas the objective element of good faith for a fiduciary is the very high standard of commercial impracticability.
- 32. T F** Actual knowledge is subjective but to be proved requires objective evidence.
- 33. T F** A statute of repose is a legislatively specified maximum duration between a defendant's wrongful action and the plaintiff filing suit. However, a statute of repose may be tolled if the plaintiff proves laches.
- 34. T F** A California Supreme Court decision in a Nebraska court might be authoritative precedence or might be persuasive precedence, but is not binding precedence.
- 35. T F** A trial court needs both subject matter jurisdiction and geographic jurisdiction. Geographic jurisdiction of the court, springs from the actions of the defendant who has purposefully availed the defendant of the geographic jurisdiction. Purposeful availment requires substantial minimal contacts.
- 36. T F** All government regulation is a taking.

- 37. T F** The plaintiff starts a law suit by filing a complaint that alleges the cause of action (*e.g.*, *breach of contract*) and asserts the court's jurisdiction, then requests a remedy within the power of the court to grant.
- 38. T F** If business #1 suffers losses as the direct result of lawful competition by business #2, then those losses are not recoverable damages since causing that loss is privileged.
- 39. T F** A judge will grant the defendant's Motion to Dismiss unless in the plaintiff's complaint or in the plaintiff's answer all material questions of facts and law are objectively proved by the preponderance of the evidence.
- 40. T F** A government's action that is an Act of State might be, but is not necessarily, protected from civil liability by sovereign immunity.
- 41. T F** All free speech may be subject to regulation that is reasonable as to time, place, and manner of the speech if that regulation is not content regulation. Political free speech is the core of the constitutionally protected right of free speech. Commercial free speech is not at the core, and may be subjected to content regulation.
- 42. T F** If the police officer who has probable cause for that search, then that search by a police officer is not an unreasonable search that requires a warrant.

- 43. T F** Each individual USA State reduced its own legislative power when the USA States collectively adopted the 14th Amendment to the USA *Constitution*. Each individual USA State's remaining legislative power varies in strength according to that power's core, penumbra, and an emanation. The Rational Basis Test defines the core, the Heightened Judicial Review Test defines the penumbra, and the Strict Scrutiny Test defines the emanations of that remaining legislative power.
- 44. T F** If the plaintiff has assumed the risk, then the plaintiff is liable for the otherwise wrongful actions of the defendant.
- 45. T F** There are four transactions that the law insists must be in the form of a contract: employment, bailment, warranty, and license.
- 46. T F** Generally, the age of majority in Nebraska is age 19.
- 47. T F** Since a unilateral contract is one sided it is called quasi.
- 48. T F** Objectively, silence can not be acceptance.
- 49. T F** Under the common law, to modify a contract requires a new contract. Accordingly, if the parties modify the time of delivery in their contract, then that is called a novation.

- 50. T F** Under the common law,  
if  
the parties have not objectively specified quantity,  
then  
their "contract" is illusory.  
The two more frequent examples of illusory "contracts"  
are transactions measuring quantity by  
the seller's output or by the buyer's requirements.  
(*HINT: Recall NOTE F. on page 2.*)
- 51. T F** If  
there is an ambiguity in an adhesion contract,  
then  
that ambiguity always is interpreted against the drafter.
- 52. T F** A word in a contract is first interpreted according to that  
word's plain meaning.  
If, however,  
a word in a contract is ambiguous,  
then,  
because the general controls the specific,  
that ambiguous word will be first interpreted using  
the parties' terms of trade, then  
the parties' course of performance, and finally  
the parties' course of dealings.
- 53. T F** Promissory estoppel (*i.e., enforce the promise*)  
is the typical remedy for the typical breach of contract.
- 54. T F** A unilateral mistake  
exists if  
the non-mistaking party knew of  
the mistaking party's mistake of value.
- 55. T F** Duress requires objective proof.
- 56. T F** That Statute of Frauds governs surety contracts.

- 57. T F** A contract term that is contrary to public policy is not enforceable.  
An unenforceable contract term might or might not make the entire contract unenforceable, depending upon whether that term is material to the contract as a whole.  
The court's reaction to a contract term that is contrary to public policy varies by jurisdiction and type of contract.  
The court's reaction to a contract term that is contrary to public policy might be to reform that term, sever that term, or void the entire contract.  
For example, courts will sever the offensive term if that term is not material to the contract as a whole.
- 58. T F** A liquidated damages clause transforms what would otherwise be an executory contract into a liquidated debt.
- 59. T F** An exculpatory clause is a special type of liquidated damages clause (*i.e., zero dollar damages owed*).  
If an exculpatory clause is in a contract between two merchants engaged in sophisticated risk management, then the court routinely will enforce their contract terms.  
However, if an exculpatory clause is in a contract between a merchant and a consumer, then the court routinely will declare that exculpatory clause unenforceable as it is unconscionable, and sever it.
- 60. T F** The old common law was and the new common law is hostile towards efforts to delegate contractual duties.

- 61. T F** The old common law was but the new common law is not hostile towards effort to assign contractual rights.
- 62. T F** An intended creditor third party can vest and gain privity, whereas an incidental donee third party can neither vest nor gain privity.
- 63. T F** In a contract unrelated to construction, breach of an express condition precedent is a material breach whereas breach of an express condition subsequent is not a material breach.
- 64. T F** Substantial performance is a breach of contract.
- 65. T F** For all purposes, a breach of contract exists at the time of receipt by the non-breaching party of the breaching party's anticipatory repudiation.
- 66. T F** The court will discharge a contract as subject to the occurrence of an implied condition subsequent of a commercial impossibility if the market price increases three-fold.
- 67. T F** Both tort law and contract law award the plaintiff compensatory damages. The compensatory damages of both tort law and contract law seek to make the plaintiff whole.
- 68. T F** Both tort law and contract law rarely award the plaintiff consequential damages. The consequential damages of both tort law and contract law permit recovery of reasonably foreseeable damages.

- 69. T F** If a crime has been committed for which there is a parallel tort, then the crime plaintiff is awarded punitive damages for that tort.
- 70. T F** When nominal damages are awarded by the court the ordinary amount of nominal damages awarded is \$500 and attorney fees.
- 71. T F** The Law's truism that "The specific controls the general." is reflected in the phrase "mere economic loss".
- 72. T F** Both the breaching party and the non-breaching party bears the duty to mitigate damages.
- 73. T F** If a contract requires multiple, similar performances from one party, and if that party breaches on the first such performance, and if the non-breaching party expressly waives that breach, then by course of performance the parties have modified their contract.