

MEMORIZATION ITEMS from LAWS 3930

<http://cba.unomaha.edu/faculty/mohara/web/BLF-p12-Memorization-Items.pdf>

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3
- 4 1. Jargon (i.e.,¹ specialized meanings for words) is a universal feature of The Law.
5 Much of learning The Law is learning a new vocabulary for new concepts.
 - 6 2. What is legal is not necessarily ethical.
7 What is ethical is not necessarily legal.
 - 8 3. What is ethical turns on scienter and other subjective facts;
9 while The Law favors the objective.
 - 10 4. The objective comes in two forms.
11 **Express** is in words: oral or written.
12 **Implied** is in acts, words, and/or circumstances.
 - 13 5. USA law favors assigning legal liability to those persons whose actions are both
14 **knowing and voluntary**.
 - 15 6. Knowing comes in three forms.
16 **Actual knowledge** (a.k.a., scienter) which is subjective.
17 **Receipt of notice** which is an objective communication that
18 if received by the Reasonable Person would have resulted in actual knowledge.
19 **Reason to know** is the objective implied knowledge that
20 experiences by the Reasonable Person would have resulted in actual knowledge.
 - 21 7. USA law favors assigning liability
22 based upon the objective rather than the subjective.
23 The objective is what the Reasonable Person would perceive.
24 The subjective is what a natural person personally experiences.
 - 25 8. For greater clarity in this class the words "can", "may" and "should"
26 will be used with very specific meanings.
 - 27 9. CAN = the POWER to act,
28 MAY = legal AUTHORIZATION to act, and
29 SHOULD = it is ETHICAL to act.
 - 30 10. You can not have an ethical question unless you can act.
 - 31 11. For clarity, the future tense of can is MIGHT; the future tense of may is may; and
32 the future tense of should is OUGHT.
 - 33 12. In the USA The Law is divided into a pair of broad categories:
34 law and equity.
35 Law, as a subpart of The Law, seeks predictable, is based upon rules and precedence.
36 Equity, as subpart of The Law, seeks unique solutions,
37 is based upon maxims and has no precedence.

¹ NOTE: **i.e.** means *that is*; in stark contrast, **e.g.** means *for example*. If a list has three items, and if you list all then, then it is appropriate to use i.e. However, if a list has three items, and if you only list one of those three, then it is appropriate to use e.g. The difference between i.e. and e.g. is material. See Memorization Item 139.

- 38 13. USA law seeks to satisfy the reasonable expectations of the Reasonable Person.
39 The Reasonable Person is a legal fiction.
40 **No natural person ever was, is, or ever will be the Reasonable Person.**
41 The Reasonable Person is a legal standard for judging behavior;
42 a legal standard for the reasonable expectations of others.
- 43 14. To exit a court of law and to open the door to the court of equity the party must answer
44 "No." to the question "Do you have an *adequate* remedy at law?.
- 45 15. Because The Law seeks to serve the reasonable expectations of the People,
46 The Law can not anticipate.
47 Reasonable expectations, necessarily, are historical.
- 48 16. Technology often changes reasonable expectations.
49 Technology is the feasible combination of inputs.
50 Technology is dynamic. (*see, Econ Slides²*).
- 51 17. A BSBA graduate tends to be more intelligent than and is more educated than
52 the Reasonable Person.
53 Accordingly,
54 a BSBA graduate will have actual knowledge of things that
55 the Reasonable Person can not objectively know.
- 56 18. To lie requires two things: to "know" the truth and to intentionally tell a falsehood.
- 57 19. Most people use the word lie in error.
58 By frequency of occurrence, most people use the word lie to describe
59 a person who tells a falsehood
60 while being ignorant but subjectively believing the truth is being spoken.
61 The intent to tell a falsehood is central to a lie.
62 Accordingly, while an ignorant person can lie (e.g., believes A is true and says B)
63 most people do not lie because they do not know.
- 64 20. There are two forms of lie: a moral lie and a harmful lie.
- 65 21. A moral lie is an intentional falsehood that is required by the context.
66 For example,
67 a manager with a very limited opportunity for communication (e.g., emergency)
68 coupled with a duty to communicate may require a moral lie.
- 69 22. A harmful lie is an intentional falsehood told with the intent to harm.
- 70 23. When you are told a falsehood, most times it will due to ignorance.
71 It is critical that your learn to identify speakers who tell you harmful lies.
- 72 24. When a person speaks a falsehood that person might be or might not be lying.
73 Most people speak falsehoods because of ignorance: that is, that person's actual
74 knowledge is in error or is materially incomplete.

75

² <http://cba.unomaha.edu/faculty/mohara/web/BLF-p12-Econ-Slides.pdf>

- 76 **25. Person is a key concept of USA law.**
- 77 26. The most important person is a **natural person** (i.e., human).
- 78 The least important person is a mere **legal persons** (e.g., corporation).
- 79 27. To be either a citizen or a consumer the person must be a natural person.
- 80 28. Most frequently USA law uses the legal fiction of the **Reasonable Person**
- 81 (i.e., the objective legal standard of behavior that others may reasonably expect).
- 82 29. Economics use the concept of a **Rational Person**.
- 83 Rarely, The Law will use the concept a Rational Person when setting transaction costs.
- 84 The Rational Person is hyper objective compared to the Reasonable Person.
- 85 30. The difference between The Law's Reasonable Person and economics' Rational Person
- 86 is but one reason why you ought to be reluctant and careful to import economic policy
- 87 conclusions into The Law. Another major difference is The Law seeks fairness whereas
- 88 economics seeks efficiency (and expressly rejects fairness as its goal).
- 89 31. Central to the organization of USA law is the separation of powers.
- 90 **The Nebraska's Constitution has an express separation of powers**
- 91 while the USA *Constitution* has an implied separation of powers.
- 92 32. The separation of powers comes in three main forms.
- 93 [i] Person v. government
- 94 [ii] federal v. State
- 95 [iii] legislative v. executive v. judicial.
- 96 33. The separation of powers within a government allocates the power:
- 97 to *make* laws to the legislature (i.e., statutes);
- 98 to *enforce* laws to the executive, including power to make regulations; and
- 99 to *interpret* laws, via cases, to the judiciary.
- 100 34. Judicial review is the implied power of the judiciary to interpret the *Constitution* and
- 101 to declare unconstitutional any act of any USA government.
- 102 For example, there are constitutional limits on the power of Congress to
- 103 statutorily delegate a power of a branch of government.
- 104 **35. Every USA government always owes all persons due process of law.**
- 105 36. Due process of law comes in two forms:
- 106 substantive due process and procedural due process.
- 107 37. **Substantive due process** which requires active judicial protection of
- 108 fundamental constitutional rights: more so if the right is express.
- 109 Most frequently the judicial protection afforded fundamental rights
- 110 is for the courts to require more procedural due process of law.
- 111 38. **Procedural due process** is notice and hearing,
- 112 both proportional to the interests involved.
- 113

- 114 39. Equitable remedies include, but are not limited to,
115 unilateral rescission; restitution; specific performance;
116 reformation; and *quasi* contract.
- 117 40. Laches is a defense to suit in a court of equity.
118 If the plaintiff waits an unreasonable time prior to initiating a claim,
119 then the court of equity has the discretion to bar the plaintiff's claim.
- 120 41. The legislature specifies what is an unreasonable delay for suits in a court of law.
121 A statute of limitation (e.g., in Neb. 5 years on written contract) can be tolled.
122 Tolling stops the clock of a statute of limitations.
- 123 42. A statute of repose sets a maximum duration on tolling a statute of limitations.
- 124 43. Substantive due process is more frequently a concern with a statute of repose
125 than it is for a statute of limitations.
- 126 44. Jurisdiction is the legal authority (i.e., power) to act.
127 A court's jurisdiction comes in two forms:
128 subject matter jurisdiction (e.g., bankruptcy), and
129 geographic jurisdiction (i.e., substantial minimal contacts).
130 A court may claim geographic jurisdiction (e.g., long arm statute) over a party
131 if that party has purposefully availed itself of that geographic jurisdiction.
- 132 45. Most of the USA is a common law jurisdiction, as is most of Canada.
133 In a civil law jurisdiction the courts are so inferior to the legislature
134 that a civil law court lacks the authority to resolve a case of first impression.
- 135 46. The role of trial court (i.e., find fact and apply law) is very different than
136 the role of an appellate court (i.e., find error and interpret law).
- 137 47. A case of first impression creates **precedence**.
- 138 48. Precedence can be binding, authoritative, or persuasive.
- 139 49. Precedence will be over turned when to over turn precedence:
140 [i] does not materially interfere with the settled expectations of the People;
141 [ii] doing so furthers the court's legitimacy
142 (e.g., reflects changes in the court's jurisdiction); and/or
143 [iii] doing so makes The Law more workable
144 (e.g., accommodates technological changes or sociological changes
145 unilaterally adopted by the People).
- 146 50. The plaintiff must have **standing to sue**
147 (i.e., injury in fact and within the zone of protected interests).
- 148 51. The plaintiff's **complaint** must allege:
149 [i] cause of action (e.g., breach of contract);
150 [ii] court's jurisdiction; and
151 [iii] pray for a remedy the court has the power to grant.
- 152

- 153 52. The trial court will grant a party's **Motion to Dismiss**
154 if,
155 upon assuming as true all that is claimed by nonmoving party,
156 and if
157 after also assuming as true all reasonable inferences from what is claimed by the
158 nonmoving party,
159 then
160 the moving party still wins as a matter of law.
- 161 53. The trial court will grant a party's motion for a **Summary Judgment**
162 if
163 there are no material question of fact (e.g., parties agree on the facts), and
164 the moving party wins as a matter of law.
- 165 54. The plaintiff may plead in the alternative.
166 That is, at the start of the case sue for a cause of action both in tort and in contract.
167 However,
168 at the conclusion of the plaintiff's case the plaintiff must make an
169 election of remedies
170 prior to the defendant starting the defendant's defense.
- 171 55. The Law reaches binary conclusions (e.g., win v. lose);
172 routinely The Law reaches those binary conclusions by way of triad analysis
173 (i.e., **core, penumbra, and emanations**).
- 174 56. **An appellate court will affirm the trial court**
175 **unless**
176 the appellate court finds trial court made a **material error**.
177 The material errors that a trial court might make are:
178 [i] a clear error of fact;
179 [ii] a **NON**-harmless error of procedure, or
180 [iii] any error of law.
- 181 57. To resolve a dispute the parties can use different techniques, one of which is litigation.
182 In addition to litigation the parties might use as their dispute resolution technique
183 negotiation, facilitation, mediation, and/or arbitration: non-binding or binding.
- 184 58. Negotiation may be done at any time between the disputants or related parties.
185 You are strongly recommended to buy and to read the book *Getting to YES!*.
- 186 59. Facilitation involves a neutral third party
187 who helps the parties explore the contours of their dispute and
188 to search for pathways towards potential solutions.
189 However, facilitators are not focused on reaching a solution.
190 Facilitation empowers the parties subsequent negotiations.
- 191 60. Mediation involves a neutral third party who helps the parties reach an agreement.
192 A mediated agreement might resolve part or resolve all of their dispute.
193 Transformative mediation has even higher goals.
- 194

- 195 61. Arbitration is private litigation. Arbitration can be non-binding or binding.
196 Non-binding arbitration provides an answer,
197 but the parties are free to seek a different answer via subsequent litigation.
198 Binding arbitration provides the answer
199 to all arbitrated questions of fact and/or questions of law.
- 200 62. For **contracts to arbitrate disputes in commerce**
201 the federal government expressly has preempted the USA State judiciaries on the
202 question of enforceability of contracts for binding arbitration.
- 203 63. USA States by general law control which transactions are contracts.
204 Nebraska holds that no consumer has contractual capacity to waive a cause of action
205 until that natural person has standing to sue for that cause of action.
- 206 64. Unlike in international law,
207 domestically in the USA all persons typically have the freedom to make a
208 choice of forum (i.e., court); venue (i.e., court house); law; and language.
- 209 65. Both law and economics use the concept privilege,
210 but do so in radically different manners.
211 Privilege in The Law is form of confidence;
212 but the trial judge lacks the authority to order in court disclosure of the confidence
213 (e.g., attorney - client privilege).
214 Privilege (e.g., proportional to legitimate business interests) in economics
215 is contrasted with predatory (e.g., unlawful).
- 216 66. **Good faith** comes in four forms:
217 non-UCC consumer (e.g., common law consumer),
218 UCC consumer,
219 merchant, and
220 fiduciary.
221 Good faith has a subjective element and has an objective element.
- 222 67. All four forms of good faith use an identical subjective good faith (i.e., honesty in fact).
223 Each of the four differs materially on objective good faith.
- 224 68. There is no objective good faith for a non-UCC consumer.
225 The objective good faith of a UCC consumer and of a merchant,
226 at first blush, appear the same (i.e., commercially reasonable):
227 but are radically different due to their vastly different reason to know.
228 The objective good faith of a fiduciary is personalized objective.
229 So great is a fiduciary's duty of good faith that it also is know as utmost good faith.
- 230 69. The broadest regulatory power of any government anywhere is the Police Power.
- 231 **70. Police Power is the power of the USA State government**
232 **to regulate for the People's**
233 **health, safety, morals, and general welfare.**
- 234 71. The USA federal government only has a fragment of the Police Power
235 (i.e., general welfare: see, Art. I, sec. 8, cl. 1).
236

- 237 72. The Police Power is stronger when an action is
238 **in** the human body v. **on** the body v. **next to** the body v. used **away from** body.
- 239 73. One of the broadest federal powers is the **Commerce Clause** (i.e., Art. I, sec. 8, cl. 3).
240 The Commerce Clause grants the federal government power to regulate commerce
241 **with** the foreign nations, **among** the several States, and **with** the Indian Tribes.
- 242 74. The Law requires proof.
243 The amount of proof required varies by the type of legal action.
244 The plaintiff always starts with the burden of proof;
245 but, as the trial progresses the burden may shift to other parties.
- 246 75. The highest burden of proof is in criminal suits where the burden is
247 beyond a reasonable doubt (e.g., > 99% certain).
- 248 76. Rarely, the civil law uses the high burden of proof of
249 clear and convincing evidence (e.g., ≈ 75%).
- 250 77. The most frequently used burden of proof is the civil burden of
251 preponderance of the evidence (e.g., > 50.1% certain).
- 252 78. In the preliminary phases of criminal process
253 the executive may obtain from the judiciary an
254 indictment based upon probable cause (e.g., ≈ 25%).
255 The same phrase (i.e., probable cause) also is used for the criminal process of
256 arrest (e.g., ≈ 10%).
257 However, those two probable cause burdens of proof are radically different.
258 The indictment probable cause is measured while only looking at evidence of guilt.
259 The arrest probable cause only requires enough proof that the Reasonable Person
260 could believe a crime was committed and that the defendant did it.
- 261 79. The Law defines rights (i.e., private property, torts, contracts, and crimes) and
262 sets transaction costs (e.g., strict liability; burdens of proof).³
- 263 80. In the law of evidence **presumptions** can be strong or can be weak.
264 For example, in the criminal law the presumption of innocence is very strong
265 (i.e., until proven guilty beyond a reasonable doubt).
266 Typically, a presumption could act on one or could act on two requirements of
267 evidence. The first require is the burden of going forward with evidence (i.e., who has
268 to produce evidence) the second is the burden of persuasion. (e.g., prove by
269 preponderance of the evidence).
270 In civil law,
271 some jurisdictions use the weak rebuttal standard of the bursting bubble.
272 The bursting bubble
273 rebuts the presumption with any credible and relevant evidence to the contrary.
274 Professor Wigmore was a champion of the bursting bubble standard.
275 Professor McCormick was a champion of the far higher standard which required
276 preponderance of the evidence to rebut the presumption.
277 The *Federal Rules of Evidence* and Nebraska's rules use the higher standard.

278

³ NOTE: See the last page of the Econ Slides.

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- 279 81. The power to tax is the power to destroy.
- 280 **82. A government may not do indirectly**
281 **that which it is prohibited from doing directly.**
- 282 **83. The specific controls the general.**
- 283 84. A government may not do indirectly that which it is prohibited from doing directly.
284 However,
285 a government that may act directly
286 may knowingly generate an indirect consequence
287 when that consequence neither is authorized nor is prohibited.
- 288 **85. Each USA States has all powers of any government unless:**
289 [i] in the USA *Constitution* the States **gave** that power away
290 to the USA federal government (e.g., Commerce Clause);
291 [ii] in the USA *Constitution* the States **took** that power away
292 from the USA States (e.g., impair the obligation of contracts); or
293 [iii] the People of a State have **taken** that power from that State in the State's
294 *Constitution*.
- 295 86. Judicial activism is both
296 a technical term of The Law used to describe a very rare and very bad event
297 as well as
298 a meaningless political pejorative.
299 As a political pejorative it is most frequently spoken as a falsehood.
- 300 87. Because of Amendment IX and Amendment X,⁴
301 it is **judicial activism if any USA court**
302 **limits a natural person's rights**
303 **solely to the express rights in the Bill of Rights.**
- 304 88. The express terms of the constitutions of California and of Nebraska are
305 radically different.
306 The California *Constitution* expressly directs the California judiciary
307 to follow the policy lead of the California legislature.
308 That is, the judiciary is obligated to expand the scope of the legislature's policy choices.
309 The Nebraska *Constitution* expressly separates
310 the legislative, executive, and judicial powers.
311 Thus, the policy choices of the Nebraska legislature only bind the Nebraska judiciary
312 within the confines of the Nebraska legislature's statutory language.
313 Accordingly, what is judicial activism varies by State.
314 If a California court acted like a Nebraska court that would be judicial activism.
315 If a Nebraska court acted like a California court that would be judicial activism.
- 316 89. The USA *Constitution* expressly grants to government,
317 subject to the requirement of using due process of law, the power to
318 take your life, take your liberty, and take your property.
- 319

⁴ See Memorization Items 112 and 114.

- 320 90. Government may **take** any private property if government takes that private property
321 [i] with due process of law;
322 [ii] for a public use; and
323 [iii] pays just compensation.
324 Mere regulation is not a taking.
- 325 91. In stark contrast to broad and presumed powers of the USA States,
326 the federal government only has those powers expressly granted
327 to it in the USA *Constitution* (e.g., patents and copyrights).
- 328 92. If the USA States both have granted the federal government a power
329 and
330 if the USA States have taken that same power away from the USA States
331 (e.g., naturalization, bankruptcy, foreign affairs),
332 then
333 the federal government has exclusive power.
- 334 93. The **Commerce Clause** contains an ambiguity that the judiciary must interpret.
335 In the English language (both in 1789 and in 2012), the word **among**
336 has a narrow meaning (i.e., **between**) and
337 has a broad meaning (i.e., **within**).
- 338 94. Pro-slavery southern Justices (see, Art. I. sec. 9, para. 1)
339 pre-1937 favored the narrow meaning of among (i.e., between)
340 so as to constrain the federal authority over actions within the States,
341 and used the legal phrase
342 **direct effect**
- 343 95. Post-1937, legally, the meaning of among is within; and The Law uses the phrase
344 **close and substantial affect**.
345 Congress has subject matter jurisdiction over any cause of commerce between the
346 several States that is both a close cause and a substantial cause.
- 347 96. Transportation is the core of the Commerce Clause (i.e., direct effect),
348 manufacturing is the penumbra of Commerce Clause, and
349 retail is the emanation of the Commerce Clause.
- 350 97. If
351 the federal government has power,
352 then USA law presumes concurrent State and federal powers.
353 If
354 the federal government has power, then preemption automatically exists
355 if there is a direct conflict (e.g., dormant Commerce Clause).
- 356 **98. Preemption is not favored, but may be allowed if:**
357 **[i] clear intent of Congress and**
358 **national interests outweigh State interests;**
359 **or**
360 **[ii] express intent of Congress and**
361 **a need for uniformity.**
362

- 363 99. Comity is an implied international tradition.
364 But, domestically comity is an express constitutional duty and right of each USA State
365 per Article IV, section 1 (i.e., Full Faith and Credit clause).
- 366 100. Domestically, comity shall be granted by the receiving jurisdiction
367 when the sending jurisdiction's law is
368 consistent with the public policy of the accommodating jurisdiction.
- 369 101. **Full Faith and Credit** (i.e., domestic comity)
370 rarely allows the receiving State refuse to enforce the sending State's law.
371 Only when
372 the sending USA State's law
373 violates a fundamental public policy of the receiving USA State
374 may that receiving State refuse to enforce the sending State's law.
- 375 102. The First Amendment has six express freedoms
376 (i.e., religion (x2), speech, press, assembly, and petition government).
377 Note how these rights range across the continuum of subjective to objective.
- 378 103. Any USA government always may regulate all free speech
379 reasonably with respect to the time, place, and manner of that speech.
- 380 104. **Political free speech**
381 as an express fundamental constitutional right
382 focuses on the rights of the speaker;
383 and as a matter of law there is no objective truth in political speech.
384 Accordingly, no USA government every may regulate the content of political speech.
- 385 105. **Commercial free speech**
386 as an implied fundamental constitutional right
387 focuses on the rights of the listener
388 and as a matter of law there is objective truth in commercial speech.
- 389 106. Content regulation of commercial free speech may be allowed
390 if and only if the regulation
391 [i] directly furthers substantial government interest;
392 [ii] is proportional to that governmental interest; and
393 [iii] is the least restrictive regulatory alternative.
- 394 107. Some speech is unprotected speech (i.e., defamatory, criminal, or obscene).
- 395 108. The Fourth Amendment requires a USA government
396 to provide **probable cause** to the judiciary as a condition precedent to
397 obtaining a warrant if a search or seizure is UNreasonable.
- 398 109. The probable cause required for a warrant is
399 greater for a natural person than for a mere legal person.
- 400 110. The probable cause required for a warrant against a firm in a regulated industry
401 is greatly reduced
402 (e.g., statistical probable cause rather than personal probable cause).
- 403

- 404 111. The Fifth Amendment imposes many express limitations on governmental action
405 including but not limited to
406 no double jeopardy,
407 no torture in criminal cases
408 no self incrimination,
409 grand jury needed for federal felonies, and
410 due process of law to deny a person's life, liberty, or property.
- 411 112. Some express constitutional rights present a variety of ambiguities.
412 For example, in Art. I, sec. 9, para. 2, does the Congress or does the President or do
413 both control the contours of the Privilege of *Habeas Corpus*?
- 414 113. The Ninth Amendment
415 **expressly** recognizes that **the People have implied constitutional rights**
416 (i.e., enumeration of rights does not disparage additional rights of the People).
- 417 114. The Tenth Amendment
418 expressly limits the USA **federal** government to **solely of granted powers**
419 and
420 expressly makes the USA **State** governments of **all but denied powers**
421 (i.e., powers not delegate nor denied is reserved to States and/or the People).
- 422 115. Unambiguously the Ninth and Tenth Amendments
423 identify USA governments (especially the federal government)
424 as inferior to the Person.
- 425 116. The **Absorption Doctrine** is a judicial interpretation of Amendment Fourteen's
426 due process clause
427 as binding the USA States to honor the fundamental rights of the Bill of Rights.
- 428 117. Interpretation of the Fourteenth Amendment's Equal Protection Clause
429 uses the triad of core, penumbra, and emanations.
- 430 118. The core of a USA State's legislative power is judged by the
431 **Rational Basis Test.**
432 A State's legislative action is presumed valid under the Rational Basis Test.
433 If the State enacts social or economic regulation,
434 then the State only needs a rational relationship
435 between the State's legitimate governmental interest (e.g., Police power)
436 and that social or economic regulation.
- 437 119. The penumbra of a USA State's legislative power is judged by
438 **Heightened Judicial Review.**
439 If the State regulates a suspect class (e.g., gender, legitimacy, or handicap),
440 then the State must demonstrate a substantial relationship
441 between an important governmental interest (e.g., health; safety)
442 and that State's regulation of the suspect class.
- 443

- 444 120. The emanation of a State's legislative power is judged by
445 **Strict Scrutiny.**
446 If the State regulates a topic over which it has no authority
447 (i.e., race, national origin, or citizenship),
448 then the State must demonstrate that regulation is necessary to achieve
449 a compelling governmental interest (e.g., life).
- 450 121. In an international relationship,
451 The Law only extends as far as the predictable projection of power.
- 452 122. Treaties are contracts between nations.
- 453 123. Domestically, the USA *Constitution* is a treaty between the USA States
454 and the USA federal government created by the USA *Constitution*.
- 455 124. Domestically in the USA the international treaties by the USA are
456 the supreme law of the land equal to the USA *Constitution*.
- 457 125. The President and the 2/3rds of the Senate
458 must agree to the USA entering into an international treaty.
459 Generically, as a matter of national politics,
460 treaties can not clear the Senate without having "fast track" approval.
461 Generically, fast track approval requires the prior consent of
462 both the House and the Senate to the outline of the treaty to be negotiated.
- 463 126. An **Act of State** is an action by a government as a government.
- 464 127. As a part of comity with respect to an Act of State,
465 the judiciary of Nation A will not review
466 Nation B's domestic governmental acts that occur in Nation B;
467 but,
468 if Nation B takes an action within Nation A,
469 then Nation B needs Nation A to recognize that action as an Act of State.
- 470 128. All governments have **sovereign immunity** for all acts by that government within its
471 own jurisdiction: unless that government waived or surrendered sovereign immunity.
- 472 129. Amendment XI reserves to each USA State's sovereign immunity in the federal courts.
- 473 130. **Amendments after Amd. XI amend Amd. XI.**
474 For example, Amendment XIV grants the federal judicial power over the USA States.
475

476

START EXAM #2 TORTS AND CRIMES

477

131. There are three types of torts:

478

[i] intentional torts;

479

[ii] negligence torts; and

480

[iii] strict liability torts.

481

132. Intentional torts and negligence torts are based on fault.

482

Strict liability torts are not based on fault,

483

but instead are based on social risk allocation.

484

133. All torts have the same five elements:

485

[i] defendant owes a duty of care to the plaintiff;

486

[ii] defendant breaches that duty of care;

487

[iii] plaintiff suffers damages (i.e., legally recognized injury in fact);

488

[iv] defendant's breach is the proximate cause of the plaintiff's injury;

489

and

490

[v] defendant has no defenses (e.g., self defense).

491

134. Actual cause is the chain of events from first cause to plaintiff's injury.

492

135. **Proximate cause** truncates the defendant's legal liability to a fraction of actual cause.

493

Proximate cause exists if the plaintiff's injury would have been

494

reasonably foreseeable to the Reasonable Person in the position of the defendant

495

(i.e., Bounded Rationality).

496

136. **Assumption of the Risk**

497

is a defense to a fault based tort and exists if the plaintiff

498

knowing and voluntarily

499

exposes the plaintiff to the risk of harm created by the defendant.

500

137. Contributory negligence is a bar to suit (it is coupled with actual cause).

501

138. Comparative negligence is an offset at suit (it is coupled with proximate cause).

502

139. In common law contexts

503

something is **material** if it is big enough to change the Reasonable Person's mind.

504

140. The material terms are:

505

[i] parties;

506

[ii] time;

507

[iii] consideration; and

508

[iv] subject matter.

509

141. Material is a legal term of art that is used in many contexts.

510

The meaning of the word material varies substantially by context.

511

- 512 142. **Common law fraud**
513 exists if the defendant
514 [i] knowingly and
515 [ii] intentionally
516 [iii] misrepresents a material fact (e.g., expert's opinion)
517 thereby
518 [iv] inducing the plaintiff's justifiable reliance and
519 [v] proximately causing
520 [vi] the plaintiff's damages.
- 521 143. Security law fraud
522 is much easier (in five ways) to prove than common law fraud.
- 523 144. A security is an investment of money
524 in a common enterprise
525 with a reasonable expectation of profit;
526 that profit derived from the undeniably significant efforts of others.
- 527 145. Security law fraud
528 exists if there is a misrepresentation *or an omission* of
529 a material fact proximately causing an injury.
- 530 146. The magnitude of change required to be material
531 is greatest for mutual mistake (i.e., outer limits of liberty),
532 much smaller for a unilateral mistake (i.e., inadvertent mutual harm), and
533 small for common law fraud (i.e., deliberate effort to harm).
534 What is material in the context of security law fraud
535 is minute because the legislature has ordered the judiciary to protect investors.
536 In the context of security law fraud
537 an item is material if the reasonable prudent investor would want to know.
- 538 147. Defamation can be written (i.e., libel) or oral (i.e., slander).
539 A defamation suit usually ends on a Motion to Dismiss due to lack of proof of damages.
- 540 148. Libel *per se* presumes damages, and thus avoids the Motion to Dismiss.
541 Libel *per se* exists if the defendant defames the plaintiff as to:
542 [i] a felony; [ii] unprofessional conduct;
543 [iii] communicable disease; or [iv] unchaste.
- 544 149. **Damages** are legally recognized pecuniary loss.
- 545 150. In tort, compensatory damages are to make the party whole.
- 546 151. In contract, compensatory damages are to cover the loss of the bargain
547 (i.e., difference between the contract price and the market price).
- 548 152. Compensatory damages include incidental damages (e.g., cost of entering the market).
- 549 153. Nominal damages (e.g., \$1) are the pecuniary minimum for each right infringed.
550

- 551 154. Punitive damages are recoverable in tort law,
552 but in contract law only are recoverable for bad faith breaches of
553 insurance and employment contracts.
- 554 155. Punitive damages are calibrated by:
555 [i] degree of reprehensibility of the defendant's conduct;
556 [ii] reasonable ratio between punitive and compensatory damages
557 (i.e., maximum ration of 10:1);
558 [iii] proportional to legislatively specified fines for similar behavior.
- 559 156. The non-breaching party has a duty **mitigate** damages.
560 The non-breaching party may not merely allow damages to escalate.
- 561 157. **Capacity** is the minimum component of the knowing component of The Law.
562 Capacity focuses upon the ability to know rather than upon actual knowledge itself.
- 563 158. Capacity is the ability to grasp the natural consequences of one's action.
- 564 159. All persons who obtain the age of majority are rebuttably presumed to have capacity.
- 565 160. Upon obtaining the age of majority (i.e., age [usually] 19 in Nebraska),
566 a natural person is objectively presumed to possess the capacity for legal liability.
567 This presumption can be rebutted.
568 Rebuttal is easier for involuntary intoxication than for voluntary intoxication.
569 Adjudicated insanity is legally binding in all contexts;
570 whereas mere objective insanity in a specific transaction
571 only loses capacity in that context.
- 572 161. Different areas of law require different amounts of capacity:
573 crime > contract > tort > wills.
- 574 162. A tort involves harm to an person with a remedy of compensatory damages.
- 575 163. Due to the separation of powers, only the legislature has the power to create a crime.
- 576 164. A crime involves harm to society with a remedy of punishment.
- 577 165. The elements of a **crime** are:
578 [i] *actus reus* (i.e., bad deed);
579 [ii] *mens rea* (i.e., bad thought); and
580 [iii] no defenses.
- 581 166. In criminal law adjudication of capacity must precede the indictment.
- 582 167. Criminal laws are **void for vagueness**
583 if
584 the Reasonable Person upon reading the criminal statute
585 can not be reasonably certain as which deeds are bad deeds.
- 586 168. Normally, only an objective bad thought is required for a crime; however,
587 occasionally The Law will require scienter.
- 588 169. The defendant in a criminal trial has the burden of proof for the defense of insanity.
589

- 590 170. Ignorance of The Law is no excuse.
591 But, a mistake of fact
592 (especially if due to justifiable reliance upon the opinion of one's attorney)
593 might be an adequate defense.
- 594 171. Contracts are legally enforceable promises.
- 595 172. The Law allows some relationships to be legally enforceable
596 without being contracts (i.e., employment, bailment, warranty, and license).
- 597 173. Employment, bailment, and warranty relationships
598 often lack capacity and/or capacity.
599 If these have all of the elements of a contract, then these may be contracts.
- 600 174. The Law recognizes three types of relationships between a
601 **"principal" and its "agent"**.
- 602 175. Each of the three "P" & "A" relationships
603 vary by who has control, and thus has liability.
- 604 176. The person who is to have liability must have capacity.
- 605 177. Those three "P" & "A" relationships are:
606 [i] **principal and agent:**
607 both P & A share control of both the what & the how of the relationship,
608 so both share liability;
609
610 [ii] **principal and independent contractor (IC):**
611 P controls the what & IC controls the how;
612 liability per control, thus strict liability to P and negligence to IC;
613
614 [iii] **employER and employEE:**
615 employER controls both the what & the how; thus all liability to employER.
616

617 **START EXAM #3: CONTRACTS**

- 618 178. The specific controls the general.
- 619 179. All torts have the same five elements:
- 620 [i] defendant owes a duty of care to the plaintiff;
- 621 [ii] defendant breaches that duty of care;
- 622 [iii] plaintiff suffers damages (i.e., legally recognized injury in fact);
- 623 [iv] defendant's breach is the proximate cause of the plaintiff's injury; and
- 624 [v] defendant has no defenses (e.g., self defense).
- 625 180. Contracts are legally enforceable promises.
- 626 **181. All contracts require:**
- 627 **[i] agreement,**
- 628 **[ii] capacity,**
- 629 **[iii] consideration,**
- 630 **[iv] reality of assent,**
- 631 **[v] form, and**
- 632 **[vi] legal subject matter.**
- 633 182. The Law allows some relationships to be legally enforceable
- 634 without being contracts (i.e., employment, bailment, warranty, and license).
- 635 183. Employment, bailment, and warranty relationships
- 636 often lack capacity and/or capacity.
- 637 If these have all of the elements of a contract, then these may be contracts.
- 638 184. The **presumption⁵ at common law is you do NOT want a contract.**
- 639 To rebut this presumption you need objective proof of the six elements of contract.
- 640 185. Unilateral contracts only can be accepted with performance.
- 641 186. Bilateral contracts are an exchange of promises to perform.
- 642 187. The Law requires some contracts to be in a specific form (e.g., writing).
- 643 Most contracts may be informal.
- 644 188. All of the terms of an **express** contract are in words: oral or written.
- 645 189. The terms of an **implied-in-fact** contract are known by the parties'
- 646 acts, words, and/or circumstances.
- 647 190. A **quasi "contract"** is not a contract even though its name is implied-in-law contract.
- 648 A *quasi "contract"* is an equitable remedy (e.g., *quantum meruit*).
- 649 191. A discharged contract is executed.
- 650 192. A contract that is not yet discharged is executory.
- 651 193. USA *Constitution* Article I, section 10 applies to executory contracts when it provides
- 652 "No State shall ... impair the obligations of contracts."
- 653 In stark contrast, the federal government may impair contracts (e.g., bankruptcy).
- 654

⁵ See #80.

- 655 194. Transactions that seek create contracts result in
656 [i] valid contracts,
657 [ii] unenforceable "contracts",
658 [iii] voidable contracts, or
659 [iv] void "contracts". (*NOTE the absence & the presence of quote marks.*)
- 660 195. An **agreement** requires an offer and an acceptance.
- 661 196. The offer must be sufficiently definite that all the offeree need say is a "yes".
662 The offer must sufficiently reasonably certain that a court
663 can enforce the parties' agreement.
- 664 197. An illusory promise is one that is not sufficiently definite.
- 665 198. The offer to contract requires an objective intent to be bound.
- 666 199. The **Mirror Image Rule**
667 requires the acceptance to be identical to the offer.
668 The offerEE's acceptance must be unequivocal.
669 Anything other than an unequivocal acceptance is a rejection of the offer.
- 670 200. An offer can be terminated.
- 671 201. The offerOR can revoke some offers: which terminates the offer.
- 672 202. The offerEE can reject all offers: which terminates the offer.
- 673 203. Termination of an offer can be by operation of law:
674 time v. destruction of subject matter v. supervening illegality.
- 675 204. A counter offer is a rejection of the original offer and simultaneously a new offer.
- 676 205. **Objectively, silence is not acceptance**
677 **unless**
678 coupled with some prior agreement between the parties to give silence that meaning.
- 679 206. Revocation of either an offer or the acceptance of an offer must satisfy the
680 **Mail Box Rule.**
681 The offerOR initially selects the mode of communication and
682 by implication authorizes the offerEE to respond in the same mode.
683 The offerOR accepts the risks inherent in that mode.
684 The Mail Box Rule allows either the offerOR or the offerEE
685 to revoke by racing ahead of that mode's ordinary timeliness.
- 686 207. All contracts require consideration.
- 687 208. Consideration provides the objective proof of the requisite intent to be bound.
- 688 **209. Consideration requires:**
689 **[i] legally sufficient value; and**
690 **[ii] bargained for exchange.**
- 691 210. **Value** is a term of art (i.e., jargon) that is materially different from consideration.
692 By legislative mandate the UCC replaces the common law's consideration with value.
693

- 694 211. Since life is worth more than liberty, and since liberty is worth more than property,
695 a promise almost always is legally sufficient value
696 if it is
697 a promise to do that which one has the right to not do;
698 or
699 a promise to not to do that which one has the right to do.
700 Accordingly, neither a preexisting duty nor past consideration is consideration.
- 701 212. Recall the difference between a unilateral contract and a bilateral contract.
- 702 213. **Modification** of an existing contract is a new contract.
703 As such, new consideration is required to modify a common law contract.
- 704 214. New consideration is required for a novation.
- 705 215. Consideration is required for an accord and satisfaction.
706 A specific type of consideration is required for an accord and satisfaction:
707 a good faith dispute.
- 708 216. If quantity is not objectively defined,
709 then the transaction is not a contract and instead is an illusory "contract".
- 710 217. At first blush both **requirements contracts** and **output contracts** can appear
711 illusory.
712 However,
713 the objective measure of the seller's business capability to produce output and
714 the objective measure of the buyer's business capability to consume output
715 each provide a sufficiently objective measure of the quantity
716 to avoid being an illusory promise.
- 717 218. The law subpart of The Law enforces freedom **of** contract.
718 Equity enforces freedom **from** contract.
- 719 219. For an example of freedom **of** contract versus freedom **from** contract, see,
720 mutual rescission (i.e., new contract) versus unilateral rescission (i.e., equity).
- 721 220. Recently the legislatures have adopted statutes that do not respect
722 this common law judicial distinction between law and equity.
723 For example,
724 it use to be that all unconscionable "contracts" only were in equity;
725 now
726 many statutes created freedom **from** contract by defining unconscionable "contracts".
- 727 221. Additionally,
728 some remedies for unenforceable "contract" terms which only had existed in equity;
729 now
730 many statutes create identically phrased remedies (e.g. **reform v. sever v. void**).
731

- 732 222. **Adhesion contracts,**
733 at a minimum, are suspect and often are contrary to public policy
734 because such transactions are less knowing and less voluntary.
- 735 223. Some contracts must be adhesion contracts
736 (e.g., by necessity [e.g., insurance contracts] or
737 by public policy [e.g., Amendment XIV's Equal Protection Clause]),
738 in which case the law subpart of The Law is less hostile to such adhesion contracts.
- 739 224. An ambiguity in an adhesion contract is interpreted against the drafter;
740 unless
741 the non-drafting party had a reasonable opportunity to discover (i.e., receipt of notice)
742 and object to the ambiguity;
743 in which case the adhesion contract ambiguity is interpreted reasonably.
- 744 225. An insurance contract must be an adhesion contract.
745 All ambiguities in an insurance contract always are interpreted against the insurer.
- 746 226. Doing business on the web makes adhesion contracts almost as necessary
747 as adhesion contracts are necessary for insurance. Almost.
748 Accordingly, more jurisdictions are permitting adhesion contract terms for
749 web merchants dealing with consumers that never would be permitted in contracts by
750 a brick-and-mortar retailer.
751 In particular, choice of law, limitations on remedies (e.g., exculpatory clause; loser
752 pays winner's attorney fees), and dispute resolution contract terms are permitted even
753 when grossly one-sided
754 as long as the adhesion contract demonstrates some reciprocity.
- 755 227. Contract terms are first given their plain meaning.
756 If the plain meaning does not remove the ambiguity,
757 then the contract terms are interpreted by the court according to the parties'
758 [i] course of performance of this contract;
759 [ii] course of dealings across successive similar contracts; or, finally,
760 [iii] trade usage specialized meanings.
- 761 228. An adhesion contract can range from a valid contract to a void "contract".
- 762 229. The good faith dispute must underlie an accord and satisfaction.
763 Without a good faith dispute to support an accord and satisfaction
764 there would only be a preexisting duty to serve as consideration;
765 in which case the accord and satisfaction would fail for want of consideration.
- 766 230. A **liquidated debt** is an obligation with no good faith dispute.
767

- 768 231. **Liquidated damages** are contractually agreed upon damages prior to breach.
- 769 232. To avoid being a penalty (i.e., unenforceable), **liquidated damages** must:
- 770 [i] be the result of a reasonable belief by the parties to assume that
- 771 at the time of contract it will be difficult to estimate damages
- 772 at the time of breach; and
- 773 [ii] at the time of contract the parties make a reasonable estimate damages
- 774 at the time of breach.
- 775 233. Liquidated damage clauses always are enforceable
- 776 if
- 777 the result of sophisticated risk management between merchants.
- 778 234. Liquidated damage clauses often are unenforceable penalties
- 779 if
- 780 embedded in a merchant's adhesion contract with a consumer.
- 781 235. An **exculpatory clause** is a form of liquidated damages clause.
- 782 236. Promissory estoppel is an equitable remedy.
- 783 237. **Promissory estoppel** exists
- 784 if the defendant makes a clear and definite promise to the plaintiff
- 785 thereby inducing the plaintiff's
- 786 reasonably foreseen justifiable and detrimental reliance,
- 787 and if justice will be served by enforcement of the promise,
- 788 then the promise will be enforced via equity even though it is not a contract.
- 789 238. A minor (e.g., under age [usually] 19 in Nebraska) presumptively lacks legal capacity.
- 790 239. The **presumption**⁶ that a minor lacks capacity can be rebutted.
- 791 240. To rebut the presumption that a minor lacks capacity the other party must objectively
- 792 establish (e.g., adjudicate) that the minor's subjective capacity is sufficient; whereupon
- 793 then the minor may engage in legal transactions (e.g., get married) as if an adult.
- 794 241. In contract law,
- 795 if the minor's subjective capacity is adjudicated,
- 796 then the minor is emancipated.
- 797 242. Acting as an implied agent of the minor's parents,
- 798 the minor may contract for necessities (i.e., using the parent's capacity).
- 799 243. If an adult contracts with a minor,
- 800 then the contract is voidable at the election of the minor.
- 801 244. If the minor elects to void a voidable contract with an adult,
- 802 then the minor via equity owes restitution.
- 803 245. Restitution owed by a minor varies by jurisdiction.
- 804 The majority rule (& the rule Neb. follows) is value at time of disaffirming.
- 805 The minority rule is reasonable value at time of formation.
- 806

⁶ See #80.

- 807 246. The restitution rule (i.e., value at time of ??) is an example of The Law setting
808 transaction costs. (*See, Econ slides*⁷)
- 809 247. A minor may ratify a contract upon reaching the age of majority.
- 810 248. Recall that
811 the capacity required for a tort (e.g., common law fraud)
812 is less than
813 the capacity required for contract formation.
- 814 249. **Legal subject matter**
815 can be absent if the subject matter is contrary to public policy (e.g., restraint of trade)
816 or the subject matter is unlawful (e.g., usury; gambling).
- 817 250. Insurance allocates **existing** risk upon chance for a price.
- 818 251. Gambling **creates** risk and allocates that risk upon chance for a price.
- 819 252. A covenant not to compete
820 can be either lawful restraint of trade or a violation of public policy.
- 821 253. To be a lawful restraint of trade a covenant not to compete must be for both a
822 reasonable area and for a reasonable time.
- 823 254. **Nebraska public policy is hostile to restraints of trade.**
824 In Nebraska,
825 covenants not to compete must be in the form a contract.
826 Also, presumptively⁸ the Nebraska reasonable time is one year and
827 presumptively the Nebraska reasonable area is one county.
- 828 255. The only State more hostile to covenants not to compete is California.
829 The California *Constitution* requires a sale of good will as consideration
830 for a covenant not to compete.
831 California public policy is so hostile that not even the USA *Constitution's*
832 Full Faith and Credit clause requires California to honor out-of-state covenants.⁹
- 833 256. As an example of freedom **from** contract,
834 an unconscionable "contract" is not enforceable.
- 835 257. An exculpatory clause is a form of liquidated damages clause.
- 836 258. In an **exculpatory clause**
837 the parties agree that one party may harm the other party and
838 the harmed party has no recourse against the harming party.
- 839 259. Like a liquidated damages clause,
840 an exculpatory clause always is enforceable
841 if
842 it is part of sophisticated risk management between merchants.
- 843

⁷ <http://cba.unomaha.edu/faculty/mohara/web/BLF-p12-Econ-Slides.pdf>

⁸ See #80 or see #274.

⁹ See #101.

- 844 260. Similarly,
845 routinely an exculpatory clause is an unenforceable
846 unconscionable term
847 within an adhesion contract between a merchant and a consumer.
- 848 261. Parties lack reality of assent if there is a **mistake** underlying their agreement.
- 849 262. In a mutual mistake
850 both parties make the same material mistake of fact.
- 851 263. In a unilateral mistake
852 the non-mistaking party objectively knows
853 of a material mistake of fact being made by the mistaking party.
- 854 264. In The Law the word **duress** is ambiguous.
855 You must pay attention to context to obtain the correct meaning.
856 Sometimes duress merely means pressure.
857 Other times duress means a legally material external force
858 that removes the requisite voluntariness from a transaction.
- 859 265. Duress is the theft by force of another's capacity.
- 860 266. To be duress (i.e., legally objectionable force) the force must be objective.
- 861 267. Due to the objective requirements of duress,
862 the law subpart of The Law reacts more quickly and surely in the following sequence:
863 [i] physical duress;
864 [ii] emotional duress;
865 [iii] predatory economic duress; and
866 [iv] privileged economic duress.
- 867 268. Economic duress exists if a party unlawfully creates or uses economic pressure.
- 868 269. **Predatory** economic duress
869 is pressure created by the defendant (e.g., unjustified anticipatory breach of contract).
- 870 270. **Privileged** economic duress
871 is pressure created by the economic system (e.g., poverty).
- 872 271. The courts are slow to remedy privileged economic duress
873 because
874 liberty is not reduced by being in poverty,
875 and those in poverty
876 are free to use subjective valuations that are not consistent with objective valuations.
877

- 878 272. **Undue influence**
879 exists if the defendant had:
880 [i] opportunity for taking advantage;
881 [ii] inclination to take advantage; and
882 [iii] the result is consistent with taking advantage.
883 As contrasted with emotional duress, undue influence is easier to objectively prove.
- 884 **273. In Nebraska,**
885 **a fiduciary is rebuttably presumed¹⁰ to have engaged in undue influence.**
- 886 274. In the law of evidence **presumptions** can be strong or can be weak.
887 For example, in the criminal law the presumption of innocence is very strong
888 (i.e., until proven guilty beyond a reasonable doubt).
889 Typically, a presumption could act on one or could act on two requirements of
890 evidence. The first require is the burden of going forward with evidence (i.e., who has
891 to produce evidence) the second is the burden of persuasion. (e.g., prove by
892 preponderance of the evidence).
893 In civil law,
894 some jurisdictions use the weak rebuttal standard of the bursting bubble.
895 The bursting bubble
896 rebuts the presumption with any credible and relevant evidence to the contrary.
897 Professor Wigmore was a champion of the bursting bubble standard.
898 Professor McCormick was a champion of the far higher standard which required
899 preponderance of the evidence to rebut the presumption.
900 The *Federal Rules of Evidence* and Nebraska's rules use the higher standard.
- 901 275. Some contracts are formal.
902 Some formal contracts must be in a signed writing.
- 903 276. The **parole evidence rule** enforces a requirement that a contract be in writing
904 by prohibiting the introduction into evidence oral testimony
905 that contradicts or varies the written terms of any contract.
- 906 277. Written contract terms are interpreted within the four corners of the document.
- 907 278. The plain meaning of words
908 will be used unless a party can prove that the parties intended to use
909 a special meaning.
- 910 279. Courts are inclined to, in sequence, apply special meanings to words based upon:
911 [i] the parties' course of performance of a contract;
912 [ii] the parties' course of dealings across multiple contracts; and
913 [iii] terms of trade used by reasonable persons in that market.
914

¹⁰ See #80 or see #274.

- 915 280. The **State of Frauds** requires some contracts to be in a **signed** writing.
916 That signed writing must be a **written memorandum that contains**
917 **the material terms with sufficient definiteness** that
918 the court can enforce the parties objective agreement.
- 919 **281. Five types of contracts are covered by the Statute of Frauds:**
920 **[i] sale of interest in land;**
921 **[ii] sale of goods (i.e., tangible and moveable personal property)**
922 **at or over \$5,000;**
923 **[iii] must take longer than one year;**
924 **[iv] guarantee the debts of another; and**
925 **[v] in consideration of marriage.**
- 926 282. Contracts covered by the Statute of Frauds must bear the signature
927 of the party to be sued.
- 928 **283. A signature**
929 **is any mark**
930 **with the current intent to authenticate the document or record.**
- 931 284. The **Equal Dignity Rule** requires an "agent's"¹¹ authority
932 to satisfy the Statute of Frauds (e.g., power of attorney)
933 if
934 the "agent's" action must satisfy the Statute of Frauds.
- 935 285. A **surety**
936 involves co-promisors both of whom are primarily liable
937 (i.e., the creditor may sue either debtor
938 without need for any condition precedent).
- 939 286. A guarantee
940 involves co-promisors one of whom is primarily liable
941 and one of whom only has secondary liability
942 (i.e., a condition precedent for the secondarily liable debtor [i.e., **guarantor**]
943 is the primarily liable debtor failing to pay).
- 944 287. A marriage
945 is a mutual, exclusive, unlimited, perpetual
946 requirements and output contract.
- 947 288. Prenuptial agreements (i.e., contracts in consideration of marriage)
948 were void in NEB prior to 1996 as contrary to public policy.
- 949 289. There is no common law marriage in Nebraska.
- 950 290. Railroads plus the Full Faith and Credit clause
951 prompted the federal preemption requiring
952 each State to issue marriage licenses
953 if their marriages were to be honored outside of that State.
- 954

¹¹ See #175.

- 955 291. Interpretation of a written contract
956 ordinarily is done within the four corners of the document.
- 957 292. A contract's four corners can be expanded by
958 an incorporation by reference clause.
959 An **incorporation by reference** clause
960 is used by the parties to bring other documents within those four corners.
- 961 293. A **merger clause** (a.k.a., integration clause)
962 expressly excludes everything not a part of the parties' express agreement
963 from being within the four corners of the document.
- 964 294. Contracts create rights and create duties.
- 965 295. It is easier to transfer those rights than it is to transfer those duties.
- 966 296. An **assignment** transfers rights.
967 A **delegation** transfers duties.
- 968 297. Both the old common law and the new common law of assignments and delegations
969 seek to satisfy the parties' reasonable expectations.
970 Both the old common law and the new common law of assignment and delegations
971 prohibit assignments or delegations that
972 materially alter the parties' reasonable expectations.
- 973 298. The old common law
974 views all changes in the parties to a contract as material changes
975 to the parties' reasonable expectations.
976 Thus,
977 the old common law
978 does not allow assignments of contract rights and
979 does not allow delegations of contract duties.
- 980 299. The new common law
981 views parties as less material.
982 Accordingly,
983 the new common law
984 usually permits assignment of rights; but,
985 usually prohibits most delegations of duties.
- 986 300. A delegation of a duty or an assignment of a right
987 always is an unenforceable material alteration of the parties' reasonable expectations
988 if:
989 [i] the parties' had expressly agreed to a prohibit such alternations;
990 [ii] the contract's subject matter is personal services; or
991 [iii] a statute prohibits the alternation.
- 992

- 993 301. **Privity** is a concept of tort law and of contract law.
- 994 302. Parties with privity have standing to sue each other.
- 995 303. Those parties with legally recognized direct relationships
996 (e.g., reasonably foreseeable in tort)
997 have privity.
- 998 304. Any third party beneficiary to a contract who **vests** gains privity.
999 A third party beneficiary to a contract
1000 can be:
1001 [i] intended or
1002 [ii] incidental;
1003 as well as can be
1004 [iii] a creditor or
1005 [iv] a donee.
- 1006 305. It is far easier for an intended creditor third party to vest
1007 than it is for an incidental donee third party to vest.
- 1008 306. Contract conditions can be:
1009 [i] a **condition precedent** (i.e., turns on a legal duty);
1010 [ii] a **condition concurrent** (e.g., ready, willing, and able); or
1011 [iii] a **condition subsequent** (i.e., turns off a legal duty).
- 1012 307. Conditions can be express or implied.
1013 All contracts include the implied condition concurrent of perfect tender
1014 (i.e., ready, willing, and able).
- 1015 308. Contract performance can be:
1016 [i] **complete performance**
1017 (i.e., exactly per contract terms);
1018 [ii] the breach of **substantial performance**
1019 (i.e., deficient but reasonably sufficient); or
1020 [iii] **material breach** (i.e., less than reasonably expected).
- 1021 309. Breach of an express condition is a material breach
1022 (except for construction contracts in some contexts *ala* latches).
- 1023 310. A contract is discharged by complete performance or by substantial performance.
- 1024 311. All breaches create legal liability of contract **damages**.
1025 A breach exists when there is substantial performance or a material breach.
- 1026 312. Performance of a personal services contract
1027 is complete performance when
1028 the recipient is subjectively (i.e., honesty in fact) satisfied;
1029 but, that is an objectively subjectively satisfied.
- 1030

- 1031 313. Breach by **anticipatory repudiation**
 1032 exists when the party with the duty to perform delivers notice of
 1033 the intent to breach at the time for performance.
- 1034 314. Receipt of an anticipatory breach creates in the recipient an election of remedies.
 1035 The recipient may elect to:
 1036 [i] act on that breach; or
 1037 [ii] wait for the owed performance or the breach at the time for performance.
 1038 (*Note: this anticipatory repudiation election of remedies*
 1039 *is radically different from*
 1040 *the plead in the alternative election of remedies.*¹²)
- 1041 315. A contract can be discharge by operation of law.
- 1042 316. The common law discharges a contract due to
 1043 **commercial impossibility**
 1044 (e.g., ten fold change in market price).
 1045 The UCC discharges a contract due to **commercial impracticability**
 1046 (e.g., three fold).
- 1047 317. The parties may agree upon future events that will discharge their contract.
 1048 A **Force Majeure Clause** specifies such conditions subsequent (e.g., strike).
- 1049 318. Mutual mistake
 1050 occurs before there is an agreement and prevents the formation of a contract.
 1051 In contrast, discharge by operation of law or by the parties' *Force Majeure* Clause
 1052 is applied to a contract, but is analogous to a mutual mistake.
 1053 That is, reality is beyond the reasonable expectations of the parties.
- 1054 319. **Damages** are legally recognized pecuniary loss.
- 1055 320. In tort, compensatory damages are to make the party whole.
- 1056 **321. In contract, compensatory damages are to cover the loss of the bargain**
 1057 **(i.e., difference between the contract price and the market price).**
- 1058 322. Compensatory damages include incidental damages (e.g., cost of entering the market).
- 1059 323. Consequential damages (a.k.a., special damages) ordinarily are not recoverable.
- 1060 324. To be recoverable, consequential damages (e.g., **lost profits**)
 1061 then the parties must have been either
 1062 subjectively or objectively **reasonably foreseen** losses as within their contract.
- 1063 325. Nominal damages (e.g., \$1) are the pecuniary minimum for each right infringed.
 1064

¹² See #54.

- 1065 326. Parties that enter into a contract exit from the standard tort law relationships.
1066 The parties to a contract only get contract remedies.
1067 Accordingly, tort damages suffered within the context of a contract
1068 are not recoverable because those tort-like losses are a **mere economic loss**.
- 1069 327. Punitive damages are recoverable in tort law,
1070 but in contract law only are recoverable for bad faith breaches of
1071 insurance and employment contracts.
- 1072 328. Punitive damages are calibrated by:
1073 [i] degree of reprehensibility of the defendant's conduct;
1074 [ii] reasonable ratio between punitive and compensatory damages
1075 (i.e., maximum ration of 10:1);
1076 [iii] proportional to legislatively specified fines for similar behavior.
- 1077 329. The non-breaching party has a duty **mitigate** damages.
1078 The non-breaching party may not merely allow damages to escalate.
- 1079 330. A non-breaching party may **waive** the breach.
1080 Silence as response to a breach is not waiver of the breach
1081 unless that silence becomes a course of performance of the parties' contract.
1082

- 1083 **START EXAM #4: UCC Art. 2 SALE OF GOODS**
- 1084 331. The Uniform Commercial Code (UCC)
1085 reverses many rules of the common law of contracts
1086 because the UCC imposes on the parties an obligation of good faith.
- 1087 332. The UCC focuses
1088 upon the parties' objective intent and upon the reasonably certain terms of contract.
- 1089 **333. The presumption of the UCC is that**
1090 **the parties want a contract for the sale of goods.**
- 1091 334. The UCC is the parties' default written contract for the sale of goods.
- 1092 335. Parties **may disclaim all** terms of the UCC
1093 **except** UCC 1-202 (19) and a fraction of UCC 2-318.
1094 The parties may not disclaim the **obligation of good faith.**
1095 The parties may not disclaim liability for **personal injury from consumer goods.**
- 1096 336. The UCC allows for open terms
1097 and the court shall supply all missing terms with **commercially reasonable** terms.
1098 But, the parties must have specified quantity.
- 1099 337. **Goods** are tangible and movable.
- 1100 338. If a sale includes both goods and services,
1101 then the law subpart of The Law reacts according to
1102 the **predominant nature of the transaction.**
- 1103 339. A sale passes title from seller to buyer for a price.
- 1104 340. A lease sells the right to possess.
- 1105 341. A **consumer**
1106 is a natural person purchasing goods primarily for personal or household use.
- 1107 342. Any person can be a **merchant.**
1108 A merchant is a person who:
1109 [i] deals in goods of that kind (i.e. has reason to know); or
1110 [ii] hires an agent who is a merchant (i.e., vicarious knowledge); or
1111 [iii] holds self out as a merchant (i.e., estopped to deny knowledge).
- 1112 343. A merchant creates a firm offer with a signed writing.
1113 Without the consideration, a merchant's firm offer is an enforceable option contract.
- 1114 344. The UCC allows a seller to accept with a prompt shipment of goods, either
1115 conforming (i.e. complete performance) or
1116 non-conforming good (i.e., breach).
- 1117 345. If the seller wishes to accept the offer by prompt shipment of non-conforming goods
1118 but
1119 only upon the condition that the buyer waives the breach,
1120 then the seller ships with the counter offer of shipped as an accommodation.
- 1121 346. The UCC rejects the Mirror Image Rule since the UCC allows open terms.
- 1122

- 1123 347. An equivocal but definite acceptance by a non-merchant is not a counter offer,
1124 it is an acceptance.
- 1125 348. A merchant's acceptance of a merchant's offer may include additional terms
1126 that do not material alter (e.g., expressly limited; timely objection) the offer.
- 1127 349. The UCC allows contract modifications
1128 made in good faith without requiring new consideration.
- 1129 350. The offerOR can constrain the offerEE's right to make UCC contract modifications.
1130 The offerOR's offer may expressly require modifications to be in a writing.
- 1131 351. All modifications in a consumer's contract with a merchant must be in writing.
- 1132 352. The common law governing the sale of goods focuses upon title.
- 1133 353. Under the common law only one person has **title** at a time.
- 1134 354. Under the common law, knowing with certainty which person in practice has title can
1135 be very difficult.
1136 Legally,
1137 title transfers from seller to buyer upon the seller's physical delivery to the buyer.
1138 But, many questions surround the words seller, buyer, and delivery.
- 1139 355. The Uniform Commercial Code has shifted from
1140 the common law's difficult to prove title
1141 to
1142 the UCC's easy to prove identified.
1143 The UCC replaces focus on title with a focus on identification.
- 1144 356. Goods are **identified** when the goods are in existence and are designated by the seller.
- 1145 357. A person with an insurable interest may enter into a valid insurance contract.
- 1146 358. A person with the **risk of loss** may recover on an insurance contract.
- 1147 359. Once the goods are identified
1148 both the seller and the buyer may have a **risk of loss**
1149 and thus both may have an insurable interest.
- 1150 360. The UCC separates the passage of title from risk of loss.
- 1151 361. Upon identification the buyer has at least a risk of loss.
1152 The risk of loss passes upon identification plus delivery.
- 1153 362. Recall, a sale transfers title; and
1154 title passes upon physical delivery by the seller to the buyer.
- 1155 363. The UCC specifies that physical **delivery** by the seller to the buyer will occur:
1156 [i] at the seller's front door (e.g., to consumer buyers);
1157 [ii] at the seller's back door (e.g., to merchant buyers);
1158 [iii] at a location selected by the buyer (i.e., transportation contract); or
1159 [iv] by delivery without movement of the goods (i.e., documents of title).
1160 Recall, the parties' are free to, in good faith, disclaim such UCC provisions.
- 1161

- 1162 364. Transportation contracts can be delivery by either
1163 a **shipment contract** (i.e., hands of carrier); or
1164 a **destination contract** (i.e., location other than the UCC specified location).
- 1165 365. Ordinarily, a person only can transfer as good a title as that person has
1166 (e.g., if a seller has a void title, then buyer only gets a void title).
1167 Ordinarily, the true owner recovers against a good faith purchaser.
- 1168 366. The UCC created the entrustment rule
1169 that allows a person with void title to transfer good title.
- 1170 367. The UCC entrustment rule provides that
1171 if
1172 the true owner entrusts goods
1173 to a merchant who deals in goods of that kind
1174 and if
1175 a buyer in the ordinary course of business
1176 buys for value
1177 and in good faith and without knowledge of any claims or defenses,
1178 then
1179 the buyer obtains good title.
- 1180 368. Both the common law and the UCC require **perfect tender**
1181 (i.e., the implied concurrent condition of party being ready, willing, and able
1182 to provide complete performance).
- 1183 369. The UCC creates the seller's **right to cure**.
- 1184 370. If the seller delivers a breach to the buyer,
1185 and if the time for performance has not yet arrived,
1186 then the seller has the right to remedy (i.e., cure) the breach prior to the due date.
1187 In effect the right to cure counter acts the buyer's rights of anticipatory repudiation.
- 1188 371. The right to cure may not be exercised if the breach materially impaired the contract.
1189 Routinely, the seller may substitute carriers, and routinely a single breach of a part of
1190 an installment contract may be cured.
1191 However,
1192 if the breach substantially impairs the whole contract, then cure is not allowed.
- 1193 372. Under the common law,
1194 if the future that arrives is materially different than the parties reasonably expected,
1195 then the contract will be discharged by operation of law
- 1196 373. Commercial impossibility [x10 price change] discharges a common law contract by
1197 operation of law.
1198 The UCC changes that to commercial impracticability (e.g., x3 price change).
- 1199 374. The parties may specify which risks are not foreseen by the parties (e.g., war, riot, etc.)
1200 in a *Force Majeure* clause.
1201

- 1202 375. The UCC uses the Statute of Frauds, however the UCC's application is relaxed.
1203 Consistent with the UCC's facilitation of creation of commercial reasonable contracts,
1204 the parties' partial performance of an otherwise unenforceable oral contract
1205 renders the partially performed portion enforceable.
- 1206 376. **All parties to a UCC contract for sale of goods are bound to an**
1207 **obligation of good faith.** Accordingly all have a Duty of Cooperation.
- 1208 377. As part of the UCC Duty of Cooperation might be honoring a **Right of Assurance.**
- 1209 378. A party has a Right of Assurance
1210 if that party has reasonable grounds to believe performance might not be forthcoming.
1211 To claim that Right of Assurance that party may make a written demand for assurance,
1212 and
1213 the other party must provide adequate assurance.
- 1214 379. Very rarely The Law uses the word absolute.
1215 **All buyers always have an absolute right of inspection**
1216 **prior to completion of their contract.**
- 1217 380. The buyer's absolute right of inspection
1218 is an absolute right to a reasonable opportunity for inspection
1219 is an implied condition precedent to the buyer's duty to pay.
- 1220 381. The UCC creates a **right to cover.**
1221 To cover is to enter the market to obtain reasonable substitute performance.
- 1222 382. The UCC right to cover
1223 helps implement the non-breaching party's **duty to mitigate** damages.
1224 The exercise of the right to cover can discharge the duty to mitigate damages.
- 1225 383. **The common law imposes several implied warranties**
1226 **(e.g., good title, no liens, and no infringements).**
- 1227 384. The parties may expressly disclaim the common law implied warranties
1228 (e.g., via a quit claim deed).
- 1229 385. The UCC allows the parties to make **express warranties**
1230 by an affirmation of fact (e.g., sample or model) that is the basis of their bargain.
- 1231 386. Value is not an express warranty
1232 unless the affirmation of fact is via an expert's opinion.
- 1233 387. Puffery is a statement of value; thus puffery is not an express warranty.
- 1234 388. The UCC creates two implied warranties:
1235 merchantability and fitness for particular purpose.
- 1236 389. All merchants by sale of goods make an **implied warranty of merchantability;**
1237 that is,
1238 warrant that the goods are reasonably fit for the ordinary purpose.
1239 Merchantable goods pass without objection in the market.
- 1240 390. An **implied warranty of fitness for a particular purpose**
1241 is given by any seller that knows of the buyer's reliance upon the seller.
1242

- 1243 **391.** Under the UCC there may be multiple warranties and they may overlap.
1244 **Under the UCC all warranties will be enforced if feasible.**
- 1245 392. Priority of enforcement of multiple warranties,
1246 if there is a conflict between the warranties, is [1st] express; and then [2nd] implied.
1247 Also, the priority is given
1248 [1st] technical specification; [2nd] sample or model; and then [3rd] description.
- 1249 **393.** Typically, all UCC warranties may be disclaimed.
1250 **No party may disclaim the obligation of good faith.**
1251 **No party may disclaim 2-318**
1252 **liability for personal injury from a consumer product.**
- 1253 394. To disclaim an express warranty, then the disclaimer must be express.
- 1254 395. To disclaim merchantability, then the disclaimer must be conspicuous (e.g., "as is").
- 1255 396. If a specific disclaimer is unconscionable, then it is not enforceable.
- 1256 397. Federal regulation focuses on **fixing the cause.**
- 1257 398. State regulation focuses on **fixing the symptoms.**
- 1258 399. The federal Magnuson - Moss Warranty Act defines the words "full" and "limited"
1259 if
1260 a seller of consumer products in commerce chooses to grant a written warranty.
- 1261 400. **Product liability attaches both to goods and to services**
1262 as it attaches to products.
1263 Product liability can be based on tort (either negligence or strict liability) or contract.
- 1264 401. The UCC does not require privity.
- 1265 402. The Restatement of Laws, Torts, section 402 A does not require privity.
- 1266 403. Section 402 A requires:
1267 [i] a defendant in the business of selling;
1268 [ii] that product reaches the consumer not substantially changed;
1269 [iii] the product is in a defective condition;
1270 [iv] that defect makes the product unreasonably dangerous; and
1271 [v] that defect is the proximate cause;
1272 [vi] of the plaintiff's physical harm.
1273

- 1274 404. **Defects can be design defects, manufacturing defects, or labeling defects.**
- 1275 405. A **latent defect** is a defect known to the seller but which is not reasonably
1276 discoverable by the buyer during the buyer's reasonably inspection.
- 1277 406. **Defect depends upon knowledge.**
1278 Bounded Rationality limits liability in recognition of limited knowledge.
1279 Bounded Rationality varies by point of view and its scope of perception.
1280 **Consumers** have the narrowest scope of perception,
1281 the scope of perception of **firms** is many times larger than that of a consumer, and
1282 broader still is the scope of perception of all of the firms in an **industry**.
1283 Ordinarily, the industry can perceive a risk; but,
1284 sometimes the **true market** is materially larger than an industry.
- 1285 407. The U.N. Convention on Contracts for the International Sale of Goods (**CISG**)
1286 requires the parties to specify price.
- 1287 408. CISG does not use the Statute of Frauds.
- 1288 409. CISG uses the Mirror Image Rule more than does the UCC.
- 1289 410. CISG alters the Mail Box Rule.
- 1290 411. CISG does not allow as free a choice of
1291 law, forum, venue, and language as does the UCC.
- 1292

1293 **START EXAM #5: REGULATION OF BUSINESS**

- 1294 412. Federal regulation focuses on **fixing the cause.**
- 1295 413. State regulation focuses on **fixing the symptoms.**
- 1296 414. **Defect depends upon knowledge.**
 1297 Bounded Rationality limits liability in recognition of limited knowledge.
 1298 Bounded Rationality varies by point of view and its scope of perception.
 1299 **Consumers** have the narrowest scope of perception,
 1300 the scope of perception of **firms** is many times larger than that of a consumer, and
 1301 broader still is the scope of perception of all of the firms in an **industry.**
 1302 Ordinarily, the industry can perceive a risk; but,
 1303 sometimes the **true market** is materially larger than an industry.
- 1304 **415. Police Power is the power of the USA State government**
 1305 **to regulate for the People's**
 1306 **health, safety, morals, and general welfare.**
- 1307 416. Post-1937, legally, the meaning of among is within; and The Law uses the phrase
 1308 **close and substantial affect.**
 1309 Congress has subject matter jurisdiction over any cause of commerce between the
 1310 several States that is both a close cause and a substantial cause.
- 1311 417. Transportation is the core of the Commerce Clause (i.e., direct effect),
 1312 manufacturing is the penumbra of Commerce Clause, and
 1313 retail is the emanation of the Commerce Clause.
- 1314 418. If
 1315 the federal government has power,
 1316 then USA law presumes concurrent State and federal powers.
 1317 If
 1318 the federal government has power, then preemption automatically exists
 1319 if there is a direct conflict (e.g., dormant Commerce Clause).
- 1320 **419. Preemption is not favored, but may be allowed if:**
 1321 **[i] clear intent of Congress and**
 1322 **national interests outweigh State interests;**
 1323 **or**
 1324 **[ii] express intent of Congress and**
 1325 **a need for uniformity.**
- 1326 420. An administrative agency is created by and has authority delegated by the legislature.
 1327 The Enabling Act creates the agency.
- 1328 421. The separation of powers allocates powers both within the agency and outside.
- 1329 422. By default, the general law of the Administrative Procedures Act of 1946 governs
 1330 an agency's authority
 1331 unless the specific law of the Enabling Act expressly grants the agency other powers.
- 1332

- 1333 423. **Rulemaking** by an administrative agency must satisfy
1334 both substantive due process and procedural due process.
- 1335 424. A legislative rule has the force of law (i.e., binds an Article III judge).
- 1336 425. An interpretive rule only binds the agency
1337 by narrowing the interpretation of its statutory grant of power.
- 1338 426. Today, administrative agency rules are adopted using
1339 the notice of publication in the *Federal Register* and
1340 the hearing of a comment period for written comments,
1341 with the final rule effective once published in the *Code of Federal Regulations*.
- 1342 427. Administrative agencies are subject to judicial review both within and outside.
1343 Within the agency a party must exhaust all administrative remedies before having
1344 standing to sue in an Article III court.
1345 Once in an Article III court, the relationship between the agency and the court is
1346 analogous to the relationship between a trial court and an appellate court.
- 1347 428. In the USA, **privacy** is an **implied fundamental USA Constitution right**.
1348 Your substantive due process right is to a reasonable expectation of privacy.
- 1349 429. The individual USA State constitutions range from
1350 an express right to privacy to not even an implied right.
- 1351 430. In the USA the federal constitutional right to privacy is a
1352 right of the People versus government.
- 1353 431. In the USA tort law (as modified by statute), rather than constitutional law,
1354 creates and governs relatively weak privacy rights of persons
1355 from encroachment by other persons.
- 1356 432. In the European Union and in Canada
1357 privacy is an express fundamental constitutional right of the person
1358 against both governments and other persons.
- 1359 433. In the EU statutes routinely provide that a person must opt-in to surrender privacy.
- 1360 434. In the USA statutes routinely provide that a person must opt-out to claim privacy.
- 1361 435. Because of the Person's right to privacy versus governmental action,
1362 governments in the USA:
1363 [i] may not collect information about persons;
1364 [ii] must allow the person to view any collected information (e.g., FOIA); and
1365 [iii] must accept suggested corrections of any identified errors.
1366

- 1367 436. As part of the procedural due process of the People's privacy,
1368 USA governments are recognized as having a very limited
1369 reasonable expectation of privacy.
1370 Accordingly,
1371 many, but far from all, governmental actions must comply with "open meetings laws".
1372 Generically,
1373 open meetings laws require 24 hour notice of agenda items,
1374 require public copies of all documents; require allowing public comment, and
1375 require voting in public.
- 1376 **437. REVIEW THE ECON SLIDES**
1377 <http://cba.unomaha.edu/faculty/mohara/web/BLF-p12-Econ-Slides.pdf>
1378 **PRIOR TO READING THE ANTITRUST CHAPTER.**
- 1379 438. The 1890 federal Sherman Act made it a felony to destroy competition.
1380 Each USA State has adopted similar State statutes.
1381 Sherman Act section 1 makes restraints of trade a felony.
1382 Sherman Act section 2 makes monopolies a felony.
- 1383 439. Sherman Act section 1 restraints of trade are evaluated using
1384 either the Rule of Reason Test or the *Per Se* Unreasonable Test.
- 1385 440. The damage to competition that one expects from a restraint is influenced by how
1386 one's economy is constructed. The USA economy is different from the EU economy.
- 1387 441. In the USA horizontal restraints (i.e., direct competitors)
1388 are seen as more damaging to competition.
1389 In the EU vertical restraints (e.g., within a supply chain)
1390 are seen as more damaging to competition.
- 1391 442. The Rule of Reason authorizes any restraint of trade if that restraint is
1392 [i] proportional to the firm's;
1393 [ii] legitimate;
1394 [iii] business;
1395 [iv] interest.
- 1396 443. Proportionality of a restraint under the Rule of Reason analysis is measured by the:
1397 [i] purpose of the restraint;
1398 [ii] intent of the restraining party;
1399 [iii] effect of the restraint on the market, and
1400 [iv] power conferred on the restraining party over the market.
- 1401 444. Experience teaches that some restraints consistently are disproportionate,
1402 and thus are *Per Se* Unreasonable.
- 1403 445. The *Per Se* Unreasonable test applies to:
1404 [i] price fixing;
1405 [ii] horizontal division of territories;
1406 [iii] group boycott; and
1407 [iv] tying.
- 1408 446. The specific controls the general.

- 1409 447. Criminal laws are void for vagueness
1410 if
1411 the Reasonable Person upon reading the criminal statute
1412 can not be reasonably certain as which deeds are bad deeds.
- 1413 448. In 1914 Congress adopted the Clayton Act to address specific situations that the
1414 general criminal law of the Sherman Act could not make unlawful.
- 1415 449. Clayton Act section 2 outlawed anticompetitive price discrimination;
1416 but, is particularly effective in how it sets transaction costs.
1417 (*See, Econ slides.*¹³)
- 1418 450. Clayton Act section 4 created treble damages for antitrust violations.
- 1419 451. Clayton Act section 6 created antitrust exceptions
1420 (e.g., for labor [i.e., not an article of commerce] and
1421 for agricultural co-ops [i.e., countervailing power]).
- 1422 452. Clayton Act section 7 outlawed anticompetitive mergers and acquisitions.
- 1423 453. Clayton Act section 8 outlawed anticompetitive interlocking directorships.
- 1424 454. First Amendment free speech includes the express right to petition government.
- 1425 455. USA governments have zero authority over the content of political free speech.
- 1426 456. The core of political speech is lobbying before the legislative and executive branches.
1427 The *Noerr-Pennington* Doctrine exempts lobbying from antitrust laws.
- 1428 457. Every party is obligated to speak truthfully when making a filing in a court.
- 1429 458. GET INSTRUCTION FROM THE PROFESSOR ON HOW TO READ THE
1430 CHAPTER ON INSURANCE PRIOR TO READING THAT CHAPTER.
- 1431 459. Gambling **creates** risk and for a price allocates that new risk upon chance.
- 1432 460. An insurance policy pools **existing** risk and
1433 for a price allocates that risk upon chance.
- 1434 461. Most jurisdictions make most gambling unlawful, and tightly regulate lawful gambling.
- 1435 462. Most jurisdiction make most insurance lawful, and tightly regulate lawful insurance.
- 1436 463. By necessity (i.e., pool risk), insurance contracts must be adhesion contracts.
1437 Ambiguities in insurance contracts always are interpreted against the insurER.
- 1438 464. Insurance contracts pool legally identical risks.
- 1439 465. An insurance policy premium reflects the **average price of the risk**
1440 transferred from the insurED to the insurER.
- 1441 466. Policy premiums recover the average price of those legally identical risks.
- 1442 467. Risk is the subject matter of an insurance contract: thus, **all risk is material**.
- 1443

¹³<http://cba.unomaha.edu/faculty/mohara/web/BLF-p12-Econ-Slides.pdf>

- 1444 468. An **insurable interest** differentiates a gambling contract from an insurance contract.
1445 Recall, UCC Article 2's sale of goods identification and the
1446 difference between ___a___ risk of loss versus ___the___ risk of loss.
- 1447 469. With property insurance the insurED needs insurable interest at **time of loss**.
- 1448 470. With life insurance the insurED needs insurable interest at **time of contract**.
- 1449 471. The insurER has a duty to timely discover misrepresentations by the insurED;
1450 or,
1451 a statutorily required incontestability clause will enforce the insurance contract.
- 1452 472. **Adverse selection** exists when those that have the insured risk are more likely to
1453 purchase insurance.
- 1454 473. **Moral hazard** exists when the insured controls the insured risk.
- 1455 474. Because of the moral hazard
1456 nearly all jurisdictions require some form of self insurance
1457 (i.e., co-insurance via a **deductible** and **co-pay**).
1458 (*See, Econ slides¹⁴*)
- 1459 475. All guarantors and all sureties have rights of
1460 reimbursement, contribution, and subrogation.
- 1461 476. An insurER has the right of subrogation;
1462 that is the same standing to sue **as** the insurED.
- 1463 477. Delaware sells corporation law. Nebraska sells insurance law.
- 1464 478. If an insurED has multiple policies providing cumulative coverage,
1465 then all jurisdictions limit the insured's maximum recovery
1466 to no more than 100% of loss.
- 1467 479. To continue to control for the moral hazard,
1468 Nebraska limits maximum recovery on multiple policies
1469 to the coverage of the largest policy
1470 and then
1471 pro rates the contributions of the multiple insurers.
- 1472 480. The principal of an **insurance agent** is the insurER.
- 1473 481. The principal of an **insurance broker** is the insurED.
- 1474 482. Either an insurance agent or an insurance broker may issue a **binder**.
- 1475 483. The principal is liable for the non-procurement of the policy or of the binder.
- 1476 484. Punitive damages ordinarily only are available in tort law.
1477 Both parties to an insurance contract are bound by an implied duty of good faith.
1478 If a insurER engages in a bad faith (i.e., more than mere absence of good faith) breach,
1479 then the court of law may award the insurED punitive damages.
- 1480

¹⁴<http://cba.unomaha.edu/faculty/mohara/web/BLF-p12-Econ-Slides.pdf>

- 1481 **485. Capacity is the ability to grasp the natural consequences on one's actions.**
- 1482 486. Because the Reasonable Person can not fully grasp that person's own death,
1483 The Law requires the most capacity for crimes and the least for wills.
- 1484 487. For wills the testator must grasp:
1485 [i] the testator is **signing** (i.e., has the current intent to authenticate the will);
1486 [ii] owns **property** and the general nature of that property (e.g., real); and
1487 [iii] the **natural objects of one's bounty** (i.e., objectively who you love).
- 1488 488. The authority to create a will as well as the requirement for a will are set by statute.
1489 Each jurisdiction's statutory requirements for a will vary, but some are common to all.
- 1490 489. All jurisdictions require for a valid will:
1491 [i] capacity;
1492 [ii] intent to create a will and to sign;
1493 [iii] a writing (may be holographic; rarely nuncupative);
1494 [iv] signature;
1495 [v] witnesses (of the capacity and of the signature); and
1496 [vi] publish.
- 1497 490. A signature is any mark with the current intent to authenticate the record.
- 1498 491. All jurisdictions allow for a power of attorney
1499 so you may appoint another natural person as your agent
1500 to act instead of and on behalf of you within the scope of the authority you delegate.
- 1501 492. A person holding your power of attorney for financial matters
1502 is not presumed to hold your power of attorney for medical matters.
- 1503 493. Most jurisdictions permit
1504 a power of attorney for medical matters to include end of life directions
1505 that include authorization for termination (i.e., **living will**);
1506 other jurisdictions hold
1507 such purported delegations to be void as contrary to public policy.
- 1508 494. A **trust** is created when
1509 [i] the grantor
1510 [ii] makes actual delivery of
1511 [iii] the corpus to the trustee
1512 [iv] in such a way that legal title passes to
1513 [v] the trustee who holds legal title
1514 [vi] for the benefit of the beneficiary
1515 [vii] with the beneficiary holding beneficial title in the corpus.
- 1516 495. A trustee is a fiduciary of the beneficiary and not to the grantor.
- 1517 496. A trustee owes a duty of **utmost good faith**.