

- 1 1. What is legal is not necessarily ethical.
- 2 What is ethical is not necessarily legal.
- 3 What is ethical turns on scienter and other subjective facts;
- 4 while the law favors the objective.
- 5 2. USA law seeks to satisfy the reasonable expectations of a Reasonable Person.
- 6 3. Because the law seeks to serve the reasonable expectations of the People,
- 7 the law can not anticipate.
- 8 4. Technology often changes reasonable expectations.
- 9 5. USA law favors assigning legal liability to those persons whose actions are both
- 10 knowing and voluntary.
- 11 6. Knowing comes in three forms.
- 12 Actual knowledge (a.k.a. scienter) which is subjective.
- 13 Receipt of notice which is an objective communication that
- 14 if received by a Reasonable Person would have resulted in actual knowledge.
- 15 Reason to know is the objective implied knowledge that
- 16 experiences by a Reasonable Person would have resulted in actual knowledge.
- 17 7. USA law favors assigning liability
- 18 based upon the objective rather than the subjective.
- 19 The objective is what a Reasonable Person would perceive.
- 20 The subjective is what a natural person personally experiences.
- 21 8. The objective comes in two forms.
- 22 Express is in words: oral or written.
- 23 Implied is in acts, words, and/or circumstances.
- 24 9. Person is a key concept of USA law.
- 25 Most important is a natural person (i.e., human).
- 26 Least important are mere legal persons (e.g., corporation).
- 27 Most frequently USA law uses the legal fiction of a Reasonable Person
- 28 (i.e., the objective legal standard of behavior that others may reasonably expect).
- 29 All citizens and all consumers are natural persons.
- 30 10. Central to the organization of USA law is the separation of powers.
- 31 The Nebraska's *Constitution* has an express separation of powers
- 32 while the USA *Constitution* has an implied separation of powers.
- 33 The separation of powers comes in three main forms.
- 34 [i] Individual v. government
- 35 [ii] federal v. State
- 36 [iii] legislative v. executive v. judicial
- 37 The legislature *makes* law via statutes;
- 38 the executive *enforces* law and might use regulations; and
- 39 the judiciary *interprets* law via cases.

- 1 11. Judicial review is the implied power of the judiciary to interpret the *Constitution* and  
2 to declare unconstitutional any act of any USA government.  
3 For example, there are constitutional limits the ability of Congress to  
4 statutorily delegate a power of a branch of government.
- 5 12. The government always owes all persons due process of law.  
6 Due process of law comes in two forms.  
7 Substantive due process which requires active judicial protection of  
8 fundamental constitutional rights: more so if the right is express.  
9 Procedural due process is notice and hearing,  
10 both proportional to the interests involved.  
11 Most frequently the judicial protection of fundamental rights  
12 is to require procedural due process of law.
- 13 13. In the USA the law is divided into a pair of broad categories: law and equity.  
14 Law is seeks to be predictable, thus is based upon rules and precedence.  
15 Equity seeks unique solutions, thus is based upon maxims and no precedence.
- 16 14. Equitable remedies include, but are not limited to,  
17 unilateral rescission; restitution; specific performance;  
18 reformation; and *quasi* contract.
- 19 15. Laches is a defense to suit in a court of equity.  
20 The court of equity has the discretion to bar the plaintiff's suit  
21 if the plaintiff waited an unreasonable time prior to initiating suit.
- 22 16. The legislature specifies what is an unreasonable delay for suits in a court of law.  
23 A statute of limitation (e.g., in Neb. 5 years on written contract) can be tolled.  
24 Tolling stops the clock of a statute of limitations.  
25 A statute of repose sets a maximum duration on tolling a statute of limitations.
- 26 17. Precedence can be binding, authoritative, or persuasive.  
27 Precedence will be over turned when to over turn precedence:  
28 [i] does not materially interfere with the settled expectations of the People;  
29 [ii] doing so furthers the court's legitimacy  
30 (e.g., reflects changes in the court's jurisdiction); and/or  
31 [iii] doing so makes the law more workable  
32 (e.g., accommodates technological changes or sociological changes  
33 unilaterally adopted by the People).
- 34 18. Jurisdiction is the authority (i.e., power) to act.  
35 A court's jurisdiction comes in two forms:  
36 subject matter jurisdiction (e.g., bankruptcy), and  
37 geographic jurisdiction (i.e., substantial minimal contacts).  
38 A court may claim geographic jurisdiction (e.g., long arm statute) over a party  
39 if that party has purposefully availed itself of that geographic jurisdiction.

- 1 19. The USA *Constitution* expressly grants to government,  
2 subject to the requirement of using due process of law, the power to  
3 take your life, take your liberty, and take your property.  
4 Government may take any private property if government takes that private property  
5 [i] with due process of law;  
6 [ii] for a public use; and  
7 [iii] pays just compensation.  
8 Mere regulation is not a taking.
- 9 20. The plaintiff's complaint must allege:  
10 [i] cause of action (e.g., breach of contract);  
11 [ii] court's jurisdiction; and  
12 [iii] pray for a remedy the court has the power to grant.
- 13 21. The plaintiff must have standing to sue  
14 (i.e., injury in fact and within the zone of protected interests).
- 15 22. The role of trial court (i.e., find fact and apply law) is very different than  
16 the role of an appellate court (i.e., find error and interpret law).  
17 An appellate court will affirm the trial court  
18 unless the appellate court finds trial court error that is:  
19 [i] a clear error of fact;  
20 [ii] a *NON*-harmless error of procedure, or  
21 [iii] any error of law.
- 22 23. Unlike in international law,  
23 domestically in the USA all persons typically have the freedom to make a  
24 choice of forum (i.e., court); venue (i.e., court house); law; and language.
- 25 24. Both law and economics use the concept privilege,  
26 but do so in radically different manners.  
27 Privilege in law is form of confidence;  
28 but the trial judge lacks the authority to order in court disclosure of the confidence  
29 (e.g., attorney - client privilege).  
30 Privilege (e.g., proportional to legitimate business interests) in economics  
31 is contrasted with predatory (e.g., unlawful).
- 32 25. Good faith comes in four forms  
33 (i.e., consumer non-UCC, consumer UCC, merchant, and fiduciary).  
34 Good faith as a subjective element and has an objective element.  
35 All four forms use an identical subjective good faith (i.e., honesty in fact).  
36 Each of the four differs materially on objective good faith.  
37 There is no objective good faith for a non-UCC (e.g., common law) consumer.  
38 The objective good faith of a UCC consumer and of a merchant,  
39 at first blush, appear the same (i.e., commercially reasonable):  
40 but are radically different.  
41 The objective good faith of a fiduciary is personalized objective.  
42 So great is a fiduciary's duty of good faith that it also is know as utmost good faith.

- 1 26. The trial court will grant a party's Motion to Dismiss  
2 if,  
3 upon assuming as true all that is claimed by nonmoving party,  
4 and if  
5 after assuming as true all reasonable inferences from what is claimed by the  
6 nonmoving party,  
7 then  
8 the moving party still wins as a matter of law.
- 9 27. The trial court will grant a party's motion for a Summary Judgment  
10 if  
11 there are no material question of fact (e.g., parties agree on the facts), and  
12 the moving party wins as a matter of law.
- 13 28. The plaintiff may plead in the alternative.  
14 That is, at the start of the case sue for a cause of action both in tort and in contract.  
15 However,  
16 at the conclusion of the plaintiff's case the plaintiff must make an  
17 election of remedies  
18 prior to the defendant starting the defendant's defense.
- 19 29. The law reaches binary conclusions by way of triad analysis  
20 (i.e., core, penumbra, and emanations).
- 21 30. One of the broadest federal powers is the Commerce Clause (i.e., Art. I, sec. 8, cl. 3).  
22 The Commerce Clause grants the federal government power to regulate commerce with  
23 the foreign nations, among the several States, and with the Indian Tribes.
- 24 31. Police Power is the power of the State government  
25 to regulate for the People's  
26 health, safety, morals, and general welfare.  
27 The USA federal government only has a fragment of the Police Power  
28 (i.e., general welfare).  
29 The Police Power is stronger when an action is  
30 **in** the human body v. **on** the body v. **next to** the body v. used **away from** body.

- 1 32. The law requires proof.  
2 The amount of proof required varies by the type of legal action.  
3 The plaintiff always starts with the burden of proof;  
4 but, as the trial progresses the burden may shift to other parties.  
5 The highest burden of proof is in criminal suits where the burden is  
6 beyond a reasonable doubt (e.g., > 99% certain).  
7 Rarely, the civil law uses the high burden of proof of clear and convincing (e.g., ≈ 75%).  
8 The most frequently used burden of proof is the civil burden of  
9 preponderance of the evidence (e.g., > 50.1% certain).  
10 In the preliminary phases of criminal process  
11 the executive may obtain from the judiciary an  
12 indictment based upon probable cause (e.g., ≈ 25%).  
13 The same phrase (i.e., probable cause) also is used for the criminal process of  
14 arrest (e.g., ≈ 10%).  
15 However, those two probable cause burdens of proof are radically different.  
16 The indictment probable cause is measured while only looking at evidence of guilt.  
17 The arrest probable cause only requires enough proof that a Reasonable Person  
18 could believe a crime was committed and that the defendant did it.
- 19 33. The law defines rights (i.e., private property, torts, contracts, and crimes) and  
20 sets transaction costs (e.g., strict liability; burdens of proof).
- 21 34. The power to tax is the power to destroy.  
22 A government may not do indirectly that which may not do directly.  
23 The specific controls the general.
- 24 35. Each USA States has all powers of any government unless:  
25 [i] in the USA *Constitution* the States gave that power away  
26 to the USA federal government (e.g., Commerce Clause);  
27 [ii] in the USA *Constitution* the States took that power away  
28 from the USA States (e.g., impair the obligation of contracts); or  
29 [iii] the People of a State took that power from that State in the State's *Constitution*.  
30 In start contrast,  
31 the federal government only has those powers expressly granted  
32 to it in the USA *Constitution* (e.g., patents and copyrights).
- 33 36. The Commerce Clause contains an ambiguity that the judiciary must interpret.  
34 In English (both in 1789 and in 2009), the word among  
35 has a broad meaning (i.e., within) and  
36 has a narrow meaning (i.e., between).  
37 Pre-1937, legally, the meaning of among was between; and the law used the phrase  
38 direct effect  
39 Post-1937, legally, the meaning of among is within; and the law uses the phrase  
40 close and substantial affect.  
41 Transportation is the core of the Commerce Clause (i.e., direct effect),  
42 the penumbra is manufacturing, and the emanations are retail.

- 1 37. If  
2 the federal government has power,  
3 then USA law presumes concurrent State and federal powers.  
4 If  
5 the federal government has power, then preemption automatically exists  
6 if there is a direct conflict (e.g., dormant Commerce Clause).  
7 Preemption is not favored, but may be allowed if:  
8 [i] clear intent of Congress and national interests outweigh State interests;  
9 or  
10 [ii] express intent of Congress and a need for uniformity.
- 11 38. Comity is an implied international tradition; but,  
12 domestically comity is an express constitutional duty and right of each USA State.  
13 Domestically, comity shall be granted by the receiving jurisdiction  
14 when the sending jurisdiction's law is  
15 consistent with the public policy of the accommodating jurisdiction.
- 16 39. The First Amendment has five express freedoms  
17 (i.e., religion, speech, press, assembly, and petition government).  
18 Any USA government always may regulate all free speech  
19 reasonably with respect to the time, place, and manner of that speech.
- 20 40. Political free speech  
21 focuses on the rights of the speaker;  
22 and as a matter of law there is no objective truth in political speech.  
23 Accordingly, no USA government every may regulate the content of political speech.  
24
- 25 41. Commercial free speech  
26 focuses on the rights of the listener  
27 and as a matter of law there is objective truth in commercial speech.  
28 Content regulation of commercial free speech may be allowed  
29 if and only if the regulation  
30 [i] directly furthers substantial government interest;  
31 [ii] is proportional to that governmental interest; and  
32 [iii] is the least restrictive regulatory alternative.  
33
- 34 42. Some speech is unprotected speech (i.e., defamatory, criminal, or obscene).
- 35 43. The Fourth Amendment requires a USA government  
36 to provide probable cause to the judiciary as a condition precedent to  
37 obtaining a warrant if a search or seizure is unreasonable.  
38 The requisite probable cause is  
39 greater for a natural person than for a mere legal person; and  
40 the requisite probable cause is less for a regulated industry  
41 (e.g., statistical probable cause rather than personal probable cause).

- 1 44. The Fifth Amendment imposes many express limitations on governmental action  
2 including but not limited to  
3 no double jeopardy,  
4 no self incrimination,  
5 grand jury for federal felonies, and  
6 due process of law to deny a person's life, liberty, or property.
- 7 45. The Ninth Amendment  
8 (i.e., enumeration of rights does not disparage additional rights of the People) and  
9 the Tenth Amendment  
10 (i.e., powers not delegate nor denied is reserved to States and/or the People)  
11 unambiguously identify government (especially the federal government)  
12 as inferior to the Individual.
- 13 46. The Absorption Doctrine is a judicial interpretation of Amendment Fourteen's  
14 due process clause  
15 as binding the USA States to honor the fundamental rights of the Bill of Rights.
- 16 47. Interpretation of the Fourteenth Amendment's Equal Protection Clause  
17 uses the triad of core, penumbra, and emanations.  
18 The core of a USA State's legislative power is the Rational Basis Test.  
19 A State's legislative action is presumed valid and  
20 the State only needs a rational relationship between the State's  
21 legitimate governmental interest (e.g., Police power) when  
22 the State engages in social or economic regulation.  
23 The penumbra of a USA State's legislative power is Heightened Judicial Review.  
24 If the State regulates gender, legitimacy, or handicap,  
25 then the State must demonstrate a substantial relationship between the State's  
26 regulation and an important governmental interest (e.g., health or safety).  
27 The emanation of a State's legislative power is Strict Scrutiny.  
28 If the State regulates a topic over which it has no authority  
29 (i.e., race, national origin, or citizenship),  
30 then the State must demonstrate that the State's  
31 regulation is necessary to achieve a compelling governmental interest (e.g., life).
- 32 48. In international relationship law only extends as far as the  
33 predictable projection of power.  
34 Treaties are contracts between nations.  
35 In the USA treaties are the supreme law of the land equal to the USA *Constitution*.  
36 The President and the 2/3rds of the Senate must agree to a USA treaty.
- 37 49. An Act of State is an action by a government as a government.  
38 The judiciary of Nation A will not review  
39 Nation B's domestic governmental acts take occur in Nation B.  
40 But, if Nation B takes an action within Nation A,  
41 then Nation B may need Nation A to recognize that action as an Act of State.
- 42 50. All governments have sovereign immunity for all acts by that government within its  
43 own jurisdiction: unless that government waived or surrendered sovereign immunity.  
44 Amendment XI reserves to each USA State sovereign immunity in the federal courts.

- 1 51. There are three types of torts:  
2 [i] intentional torts;  
3 [ii] negligence torts; and  
4 [iii] strict liability torts.  
5 Intentional torts and negligence torts are based on fault.  
6 Strict liability torts are not based on fault,  
7 but instead are based on social risk allocation.
- 8 52. All torts have the same five elements:  
9 [i] defendant owes a duty of care to the plaintiff;  
10 [ii] defendant breaches that duty of care;  
11 [iii] plaintiff suffers damages (i.e., legally recognized injury in fact);  
12 [iv] defendant's breach is the proximate cause of the plaintiff's injury; and  
13 [v] defendant has no defenses (e.g., self defense).
- 14 53. Actual cause is the chain of events from first cause to plaintiff's injury.
- 15 54. Proximate cause truncates the defendant's legal liability to a fraction of actual cause.  
16 Proximate cause exists if the plaintiff's injury would have been reasonably foreseeable  
17 to a Reasonable Person in the position of the defendant (i.e., Bounded Rationality).
- 18 55. Assumption of the Risk  
19 is a defense to a fault based tort and exists if the plaintiff  
20 knowing and voluntarily  
21 exposes the plaintiff to the risk of harm created by the defendant.
- 22 56. Contributory negligence is a bar to suit (coupled with actual cause).  
23 Comparative negligence is an offset at suit (coupled with proximate cause).
- 24 57. Common law fraud  
25 exists if the defendant  
26 [i] knowingly and  
27 [ii] intentionally  
28 [iii] misrepresents a material fact (e.g., expert's opinion)  
29 thereby  
30 [iv] inducing the plaintiff's justifiable reliance and  
31 [v] proximately causing  
32 [vi] the plaintiff's damages.
- 33 58. Security law fraud  
34 is much easier to prove than common law fraud.  
35 Security law fraud  
36 exists if there is a misrepresentation *or an omission* of  
37 a material fact proximately causing an injury.
- 38 59. The material terms are:  
39 [i] parties;  
40 [ii] time;  
41 [iii] consideration; and  
42 [iv] subject matter.

- 1 60. Material is a legal term of art that is used in many contexts.  
2 The meaning of the word material varies substantially by context.  
3 In common law contexts  
4 something is material if it is big enough to change a Reasonable Person's mind.  
5 But the magnitude of change required to be material  
6 is greatest for mutual mistake (i.e., outer limits of liberty),  
7 much smaller for a unilateral mistake (i.e., inadvertent mutual harm), and  
8 small for common law fraud (i.e., deliberate effort to harm).  
9 What is material in the context of security law fraud  
10 is minute because the legislature has ordered the judiciary to protect investors.  
11 In the context of security law fraud  
12 an item is material if a reasonable prudent investor would want to know.
- 13 61. A security is an investment of money  
14 in a common enterprise  
15 with a reasonable expectation of profit;  
16 that profit derived from the undeniably significant efforts of others.
- 17 62. Contracts are legally enforceable promises.  
18 The law allows some relationships to be legally enforceable  
19 without being contracts (i.e., employment, bailment, warranty, and license).  
20 Employment, bailment, and warranty relationships  
21 often lack capacity and/or capacity.  
22 If these have all of the elements of a contract, then these may be contracts.
- 23 63. Capacity is the minimum component of the knowing component of the law.  
24 Capacity focuses upon the ability to know rather than upon actual knowledge itself.  
25 Capacity is the ability to grasp the natural consequences of one's action.  
26 All persons who obtain the age of majority are presumed to have capacity.  
27 Different areas of law require different amounts of capacity:  
28 crime > contract > tort > wills.
- 29 64. Due to the separation of powers, only the legislature has the power to create a crime.
- 30 65. A tort involves harm to an individual with a remedy of compensatory damages.  
31 A crime involves harm to society a remedy of punishment.
- 32 66. The elements of a crime are:  
33 [i] *actus reus* (i.e., bad deed);  
34 [ii] *mens rea* (i.e., bad thought); and  
35 [iii] no defenses.
- 36 67. Normally, only an objective bad thought is required; however,  
37 occasionally the law will require scienter.  
38 The defendant in a criminal trial has the burden of proof for the defense of insanity.
- 39 68. Ignorance of the law is no excuse.  
40 But, a mistake of fact  
41 (especially if due to justifiable reliance upon the opinion of one's attorney)  
42 might be an adequate defense.

- 1 69. The law recognizes three types of relationships between a "principal" an "agent".  
 2 Each of the three vary by who has control, and thus has liability.  
 3 Those three are:  
 4 [i] principal and agent:  
 5 both P & A share control of both the what & how of the relationship,  
 6 so both share liability;  
 7 [ii] principal and independent contractor (IC):  
 8 P controls the what & IC controls the how;  
 9 liability per control, thus strict liability to P and negligence to IC;  
 10 [iii] employER and employEE:  
 11 employER controls both the what & the how; thus all liability to employER.
- 12 70. Upon obtaining the age of majority (i.e., age 19 in Nebraska),  
 13 a natural person is objectively presumed to possess the capacity for legal liability.  
 14 This presumption can be rebutted.  
 15 Rebuttal is easier for involuntary intoxication than for voluntary intoxication.  
 16 Adjudicated insanity is legally binding in all contexts;  
 17 whereas objective insanity in a specific transaction only loses capacity in that context.  
 18  
 19  
 20 +++++  
 21 +++++  
 22  
 23
- 24 71. All contracts require:  
 25 [i] agreement,  
 26 [ii] capacity,  
 27 [iii] consideration,  
 28 [iv] reality of assent,  
 29 [v] form, and  
 30 [vi] legal subject matter.
- 31 72. Unilateral contracts only can be accepted with performance.  
 32 Bilateral contracts are an exchange promises to perform.
- 33 73. The law requires some contracts to be in a specific form (e.g., writing).  
 34 Most contracts may be informal.  
 35 All of the terms of an express contract are in words.  
 36 The terms of an implied-in-fact contract are known by the parties'  
 37 acts, words, and/or circumstances.
- 38 74. A *quasi* contract is not a contract even though its name is implied-in-law contract.  
 39 A *quasi* contract is an equitable remedy (e.g., *quantum meruit*).
- 40 75. A discharged contract is executed.  
 41 A contract that is not yet discharged is executory  
 42 USA *Constitution* Article I, section 10 applies to executory contracts when it provides  
 43 "No State shall ... impair the obligations of contracts."

- 1 76. Transactions that seek create contracts result in  
2 [i] valid contracts,  
3 [ii] unenforceable "contracts",  
4 [iii] voidable contracts, or  
5 [iv] void "contracts".
- 6 77. An agreement requires an offer and an acceptance.
- 7 78. The offer must be sufficiently definite that all the offeree need say is a "yes".  
8 The offer must sufficiently reasonably certain that a court  
9 can enforce the parties' agreement.  
10 The offer requires an intent to be bound.
- 11 79. The Mirror Image Rule requires the acceptance to be identical to the offer.  
12 The offerEE's acceptance must be unequivocal.  
13 Anything other than an unequivocal acceptance is a rejection of the offer.
- 14 80. An offer can be terminated.  
15 The offerOR can revoke some offers.  
16 The offerEE can reject the all offers.  
17 Termination of an offer can be by operation of law:  
18 time v. destruction of subject matter v. supervening illegality.  
19 A counter offer is a rejection of the original offer and simultaneously a new offer.
- 20 81. Objectively, silence is not acceptance  
21 unless  
22 coupled with some prior agreement between the parties to give silence that meaning.
- 23 82. Revocation of either an offer or the acceptance of an offer must satisfy the  
24 Mail Box Rule.  
25 The offerOR initially selects the mode of communication and  
26 by implication authorizes the offerEE to respond in the same mode.  
27 The offerOR accepts the risks inherent in that mode.  
28 The Mail Box Rule allows either the offerOR or the offerEE  
29 to revoke by racing ahead of that mode's ordinary timeliness.
- 30 83. All contracts require consideration.  
31 Consideration provides the objective proof of the requisite intent to be bound.  
32 Consideration requires:  
33 [i] legally sufficient value; and  
34 [ii] bargained for exchange.  
35 NOTE:  
36 value is a term of art (i.e., jargon) that is materially different from consideration.
- 37 84. Since life is worth more than liberty, and since liberty is worth more than property,  
38 a promise almost always is legally sufficient value  
39 if it is  
40 a promise to do that which one has the right to not do;  
41 or  
42 a promise to not to do that which one has the right to do.  
43 Accordingly, neither a preexisting duty nor past consideration is consideration.

- 1 85. Quantity must be specified if the contract is to avoid being an illusory promise.  
2 At first blush both requirement contracts and output contracts can appear illusory.  
3 However,  
4 the objective measure of the seller's business capability to produce output and  
5 the objective measure of the buyer's business capability to consume output  
6 each provide a sufficiently objective measure of the quantity  
7 to avoid being an illusory promise.
- 8 86. The law enforces freedom **of** contract.  
9 Equity enforces freedom **from** contract.  
10 For example, see,  
11 mutual rescission (i.e., new contract) versus unilateral rescission (i.e., equity).  
12 However, recently the legislatures have adopted statutes that do not respect this  
13 judicial distinction.  
14 For example,  
15 it use to be that all unconscionable "contracts" only were in equity;  
16 now  
17 many statutes created freedom from contract by defining unconscionable "contracts".  
18 Similarly,  
19 some remedies for unenforceable "contract" terms only had existed in equity;  
20 now  
21 many statutes create identically phrased remedies (e.g. reform v. sever v. void).
- 22 87. The express terms of the constitutions of California and of Nebraska are  
23 radically different.  
24 The California *Constitution* expressly directs the judiciary  
25 to follow the policy lead of the legislature.  
26 That is, the judiciary is obligated to expand the scope of the legislature's policy choices.  
27 The Nebraska *Constitution* expressly separates  
28 the legislative, executive, and judicial powers.  
29 Thus, the policy choices of the legislature only bind the judiciary  
30 within the confines of the legislature's statutory language.  
31 Accordingly, what is judicial activism varies by State.  
32 If a California court acted like a Nebraska court that would be judicial activism.  
33 I a Nebraska court acted like a California court that would be judicial activism.  
34 Similarly, because of Amendment IX and Amendment X,  
35 it is judicial activism if any USA court  
36 limits a natural persons rights solely to the express right in the Bill of Rights.

- 1 88. An adhesion contract can range from a valid contract to a void "contract".  
2 Adhesion contracts,  
3 at a minimum, are suspect and often are contrary to public policy  
4 because these "contracts" are less knowing and less voluntary.  
5 However,  
6 some contracts must be adhesion contracts  
7 (e.g., by necessity [e.g., insurance contracts] or  
8 by public policy [e.g., Amendment XIV's Equal Protection Clause]),  
9 in which case the law is less hostile to such adhesion contracts.  
10 An ambiguity in an adhesion contract is interpreted against the drafter;  
11 unless the non-drafting party had a reasonable opportunity to discover  
12 (i.e., receipt of notice) and object to the ambiguity;  
13 in which case the adhesion contract ambiguity is interpreted reasonably.
- 14 89. The good faith dispute  
15 underlying an accord and satisfaction  
16 allows what would otherwise be a preexisting duty to serve as consideration.
- 17 90. A liquidated debt is an obligation with no good faith dispute.
- 18 91. Liquidated damages are contractually agreed upon damages prior to breach.  
19 To avoid being a penalty (i.e., unenforceable), liquidated damages must:  
20 [i] be the result of a reasonable belief by the parties to assume that  
21 at the time of contract it will be difficult to estimate damages  
22 at the time of breach; and  
23 [ii] at the time of contract the parties make a reasonable estimate damages  
24 at the time of breach.  
25 Liquidated damages clauses always are enforceable  
26 if  
27 the result of sophisticated risk management between merchants; and  
28 often are unenforceable penalties  
29 when embedded in a merchant's adhesion contract with a consumer.
- 30 92. Promissory estoppel is an equitable remedy.  
31 If the defendant makes a clear and definite promise to the plaintiff  
32 thereby inducing the plaintiff's  
33 reasonably foreseen justifiable and detrimental reliance,  
34 and if justice will be served by enforcement of the promise,  
35 then the promise will be enforced even though it is not a contract.
- 36 93. A minor (e.g., under age 19 in Nebraska) presumptively lacks legal capacity.  
37 This presumption can be rebutted.  
38 If a minor's subjective capacity is objectively established (e.g., adjudicated),  
39 then the minor may engage in legal transactions (e.g., get married) as if an adult.  
40 In contract law,  
41 if the minor's subjective capacity is adjudicated,  
42 then the minor is emancipated.  
43 In criminal law,  
44 that adjudication must precede the indictment.

- 1 94. As an implied agent of the minor's parents, the minor may contract for necessities.
- 2 95. If an adult contracts with a minor,  
3 then the contract is voidable at the election of the minor.  
4 If the minor elects to void a voidable contract with an adult,  
5 then the minor owes restitution  
6 (i.e., as is value [*majority rule & Neb. rule*] at time of disaffirming  
7 versus  
8 reasonable value at time of formation of the voidable transaction)  
9 to the adult.  
10 A minor may ratify a contract upon reaching the age of majority.  
11 But, recall that capacity required for the tort of common law fraud  
12 is less than the capacity required for contract formation.
- 13 96. Legal subject matter  
14 can be absent if the subject matter is contrary to public policy (e.g., restraint of trade)  
15 or the subject matter is unlawful (e.g., usury; gambling).
- 16 97. Insurance allocates existing risk upon chance.  
17 Gambling creates risk and allocates risk upon chance.
- 18 98. A covenant not to compete  
19 is lawful restraint of trade  
20 if  
21 the both the area and the time are reasonable.  
22 In Nebraska,  
23 a presumptively reasonable time is one year and  
24 a presumptively reasonable area is one county;  
25 also note, in Nebraska such a covenant must be a contract.
- 26 99. As an example of freedom **from** contract,  
27 an unconscionable "contract" is not enforceable.
- 28 100. An exculpatory clause is a form of liquidated damages clause.  
29 In an exculpatory clause  
30 the parties agree that one party may harm the other party and  
31 the harmed party has no recourse against the harming party.  
32 Like a liquidated damages clause,  
33 an exculpatory clause always is enforceable  
34 if  
35 it is part of sophisticated risk management between merchants;  
36 but, routinely is an unenforceable unconscionable term within an adhesion contract  
37 between a merchant and a consumer.
- 38 101. Parties lack reality of assent if there is a mistake underlying their agreement.  
39 In a mutual mistake  
40 both parties make the same material mistake of fact.  
41 In a unilateral mistake  
42 the non-mistaking party objectively knows  
43 of a material mistake of fact being made by the mistaking party.

- 1 102. Duress is the theft by force of another's capacity.  
2 To be duress (i.e., legally objectionable force) the force must be objective.  
3 Accordingly,  
4 the law reacts more quickly and surely in the following sequence:  
5 [i] physical duress;  
6 [ii] emotional duress;  
7 [iii] predatory economic duress; and  
8 [iv] privileged economic duress.
- 9 103. Economic duress exists if a party unlawfully creates or uses economic pressure.  
10 Predatory economic duress  
11 is pressure created by the defendant (e.g., unjustified anticipatory breach of contract).  
12 Privileged economic duress  
13 is pressure created by the economic system (e.g., poverty).  
14 The courts are slow to remedy privileged economic duress  
15 because liberty is not reduced by being in poverty, and those in poverty  
16 are free to use subjective valuations that are not consistent with objective valuations.
- 17 104. Undue influence  
18 exists if the defendant had:  
19 [i] opportunity for taking advantage;  
20 [ii] inclination to take advantage; and  
21 [iii] the result is consistent with taking advantage.  
22 In Nebraska,  
23 a fiduciary is rebuttably presumed to have engaged in undue influence.  
24 As contrasted with emotional duress, undue influence is a surer path to recovery.
- 25 105. Some contracts are formal.  
26 Some formal contracts must be in a signed writing.  
27 The parole evidence rule enforces a requirement that a contract be in writing  
28 by prohibiting the introduction into evidence oral testimony  
29 that contradicts or varies the written terms of any contract.
- 30 106. The State of Frauds  
31 requires some contracts to be in a signed writing.  
32 That signed writing must be a written memorandum that contains  
33 the material terms with sufficient definiteness that  
34 the court can enforce the parties objective agreement.
- 35 107. Five types of contracts are covered by the Statute of Frauds:  
36 [i] sale of interest in land;  
37 [ii] sale of goods (i.e., tangible and moveable personal property) at or over \$5,000;  
38 [iii] must take longer than one year;  
39 [iv] guarantee the debts of another; and  
40 [v] in consideration of marriage.  
41 Only the signature of the party to be sued must be affixed to the written contract.
- 42 108. A signature  
43 is any mark with the current intent to authenticate the document or record.

- 1 109. A surety  
2 involves co-promisors both of whom are primarily liable  
3 (i.e., the creditor may sue either debtor  
4 without need for any condition precedent).
- 5 110. A guarantee  
6 involves co-promisors one of whom is primarily liable  
7 and one of whom only has secondary liability  
8 (i.e., a condition precedent for the secondarily liable debtor  
9 is the primarily liable debtor failing to pay).
- 10 111. A marriage  
11 is a mutual, exclusive, unlimited, perpetual  
12 requirements and output contract.  
13 Prenuptial agreements  
14 were void in NEB prior to 1996 as contrary to public policy.
- 15 112. Interpretation of a written contract  
16 ordinarily is done within the four corners of the document.  
17 However,  
18 an incorporation by reference clause  
19 is used by the parties to bring other documents within those four corners; and  
20 a merger clause (a.k.a., integration clause)  
21 expressly excludes everything not a part of the parties' express agreement.
- 22 113. Contracts create rights and create duties.  
23 It is easier to transfer those rights than it is to transfer those duties.  
24 Both the old common law and the new common law  
25 seek to satisfy the parties' reasonable expectations.  
26 The old common law  
27 views all changes in the parties to a contract as material changes  
28 to the parties' reasonable expectations.  
29 Thus,  
30 the old common law  
31 does not allow assignments of contract rights and  
32 does not allow delegations of contract duties.  
33 The new common law  
34 views parties as less material.  
35 Accordingly,  
36 the new common law  
37 usually permits assignment of rights; but,  
38 usually prohibits most delegations of duties.
- 39 114. A delegation of a duty or an assignment of a right  
40 always is an unenforceable material alteration of the parties' reasonable expectations  
41 if:  
42 [i] the parties' had expressly agreed to a prohibit such alternations;  
43 [ii] the contract's subject matter is personal services; or  
44 [iii] a statute prohibits the alternation.

- 1 115. Privity is a concept of tort law and of contract law.  
2 Parties with privity have standing to sue each other.  
3 Those parties with legally recognized direct relationships  
4 (e.g., reasonably foreseeable in tort)  
5 have privity.
- 6 116. Any third party beneficiary to a contract who vests gains privity.  
7 A third party beneficiary to a contract  
8 can be:  
9 [i] intended or  
10 [ii] incidental;  
11 as well as can be  
12 [iii] a creditor or  
13 [iv] a donee.  
14 It is far easier for an intended creditor third party to vest  
15 than it is for an incidental donee third party to vest.
- 16 117. Contract conditions can be:  
17 [i] precedent (turns on a legal duty);  
18 [ii] concurrent; or  
19 [iii] subsequent (i.e., turns off a legal duty).  
20 Conditions can be express or implied.
- 21 118. Contract performance can be:  
22 [i] complete (i.e., exactly per contract terms);  
23 [ii] substantial (i.e., deficient but reasonably sufficient); or  
24 [iii] material breach (i.e., less than reasonably expected).
- 25 119. A contract is discharged by complete performance or substantial performance.  
26 All breaches create legal liability of contract damages.  
27 A breach exists when there is substantial performance or a material breach.
- 28 120. Performance of a personal services contract  
29 is complete performance when  
30 the recipient is subjectively (i.e., honesty in fact) satisfied;  
31 but, that is an objectively subjectively satisfied.
- 32 121. Breach by anticipatory repudiation  
33 exists when the party with the duty to perform delivers notice of  
34 the intent to breach at the time for performance.  
35 Receipt of an anticipatory breach creates in the recipient an election of remedies.  
36 The recipient may elect to:  
37 [i] act on that breach; or  
38 [ii] wait for performance or breach at the time for performance.
- 39 122. A contract can be discharge by operation of law.  
40 The common law discharges a contract due to  
41 commercial impossibility (e.g., ten fold change in market price).  
42 The UCC discharges a contract due to commercial impracticability (e.g., three fold).
- 43 123. The parties may agree upon future events that will discharge their contract.  
44 A Force Majeure Clause specifies such conditions subsequent (e.g., stike).

- 1 124. Damages are legally recognized pecuniary loss.
- 2 In tort, compensatory damages are to make the party whole.
- 3 In contract, compensatory damages are to cover the loss of the bargain
- 4 (i.e., difference between the contract price and the market price).
- 5 Compensatory damages include incidental damages (e.g., cost of entering the market).
- 6 125. Consequential damages (a.k.a., special damages) ordinarily are not recoverable.
- 7 To be recoverable, consequential damages (e.g., lost profits)
- 8 then the parties must have been either
- 9 subjectively or objectively reasonably foreseen losses as within their contract.
- 10 126. Nominal damages (e.g., \$1) are the pecuniary minimum for each right infringed.
- 11 127. Parties that enter into a contract exit from the standard tort law relationships.
- 12 The parties to a contract only get contract remedies.
- 13 Accordingly, tort damages suffered within the context of a contract
- 14 are nor recoverable because those losses are a mere economic loss.
- 15 128. Punitive damages are recoverable in tort law,
- 16 but in contract law only for insurance and employment contracts.
- 17 Punitive damages are calibrated by:
- 18 [i] degree of reprehensibility of the defendant's conduct;
- 19 [ii] reasonable ratio between punitive and compensatory damages
- 20 (i.e., maximum ration of 10:1);
- 21 [iii] proportional to legislatively specified fines for similar behavior.
- 22 129. The non-breaching party has a duty mitigate damages.
- 23 The non-breaching party may not merely allow damages to escalate.
- 24 130. A non-breaching party may waive the breach.
- 25 Silence as response to a breach is not waiver of the breach
- 26 unless that silence becomes a course of performance of the parties' contract.
- 27
- 28
- 29 ++++++
- 30 ++++++
- 31
- 32
- 33 131. The Uniform Commercial Code (UCC)
- 34 reverses many rules of the common law of contracts
- 35 because the UCC imposes on the parties an obligation of good faith.
- 36 132. The UCC focuses
- 37 upon the parties' objective intent and upon the reasonably certain terms of contract.
- 38 The UCC allows for open terms
- 39 and the court shall supply all missing terms with commercially reasonable terms.
- 40 But, the parties must have specified quantity.
- 41 133. Goods are tangible and movable.
- 42 If a sale includes both goods and services,
- 43 then the law reacts according to the predominant nature of the transaction.

- 1 134. A sale passes title from seller to buyer for a price.  
2 A lease sells the right to possess.
- 3 135. A consumer  
4 is a natural person purchasing goods primarily for personal or household use.
- 5 136. Any person can be a merchant.  
6 A merchant is a person who:  
7 [i] deals in goods of that kind (i.e. has reason to know); or  
8 [ii] hires an agent who is a merchant (i.e., vicarious knowledge); or  
9 [iii] holds self out as a merchant (i.e., estopped to deny knowledge).
- 10 137. The UCC is the parties' default written contract for the sale of goods.  
11 Parties may disclaim all terms of the UCC  
12 except UCC 1-202 (19) and a fraction of UCC 2-318.  
13 The parties may not disclaim the obligation of good faith.  
14 The parties may not disclaim liability for personal injury from consumer goods.
- 15 138. A merchant creates a firm offer with a signed writing.  
16 Without the consideration, a merchant's firm offer is an enforceable option contract.
- 17 139. The UCC allows a seller to accept with a prompt shipment of goods, either  
18 conforming (i.e. complete performance) or  
19 non-conforming good (i.e., breach).  
20 If the seller wishes to ship non-conforming goods  
21 only upon the condition that the buyer waives the breach,  
22 then the seller ships with the counter offer of shipped as an accommodation.
- 23 140. The UCC rejects the Mirror Image Rule.  
24 A non-merchant does not make a counter offer if make a definite acceptance.  
25 A merchant's acceptance of a merchant's offer may include additional terms  
26 that do not materially alter (e.g., expressly limited; timely objection) the offer.
- 27 141. The UCC allows contract modifications  
28 made in good faith without requiring new consideration.  
29 However, an offer may expressly require modifications to be in a writing; and  
30 a writing is required if consumer's contract with a merchant is being modified.
- 31 142. The common law governing the sale of goods focuses upon title.  
32 While only one person has title at a time,  
33 knowing with certainty which person in practice has title can be very difficult.  
34 Legally,  
35 title transfers from seller to buyer upon the seller's physical delivery to the buyer.  
36 But, many questions surround the words seller, buyer, and delivery.  
37 Accordingly, the Uniform Commercial Code  
38 has shifted from the difficult title to the easy identified.
- 39 143. The UCC replaces focus on title with a focus on identification.  
40 Goods are identified when the goods are in existence and are designated by the seller.

- 1 144. A person with an insurable interest may enter into a valid insurance contract.  
2 A person with \_\_\_the\_\_\_ risk of loss may recover on an insurance contract.  
3 Once the goods are identified  
4 both the seller and the buyer may have an insurable interest.  
5 As long as a party has \_\_\_a\_\_\_ risk of loss that party has an insurable interest.
- 6 145. The UCC separates the passage of title from risk of loss.  
7 Upon identification the buyer has at least \_\_\_a\_\_\_ risk of loss.  
8 \_\_\_The\_\_\_ risk of loss passes upon identification plus delivery.  
9 Recall, title passes upon physical delivery by the seller to the buyer.
- 10 146. Physical delivery by the seller to the buyer may occur:  
11 [i] at the seller's front door (e.g., to consumer buyers);  
12 [ii] at the seller's back door (e.g., to merchant buyers);  
13 [iii] at a location selected by the buyer (i.e., transportation contract); or  
14 [iv] by delivery without movement of the goods (i.e., documents of title).
- 15 147. Transportation contracts can be either  
16 shipment contracts (i.e., hands of carrier); destination contract (i.e., location).
- 17 148. Ordinarily, a person only can transfer as good a title as that person has  
18 (e.g., if a seller has a void title, then buyer only gets a void title).  
19 Ordinarily, the true owner recovers against a good faith purchaser.
- 20 149. The UCC created the entrustment rule  
21 that allows a person with void title to transfer good title.  
22 The entrustment rule provides that  
23 if  
24 the true owner entrusts goods  
25 to a merchant who deals in goods of that kind  
26 and if  
27 a buyer in the ordinary course of business  
28 buys for value  
29 and in good faith and without knowledge of any claims or defenses,  
30 then  
31 the buyer obtains good title.
- 32 150. Both the common law and the UCC require perfect tender  
33 (i.e., the implied concurrent condition of ready, willing, and able).
- 34 151. The UCC creates the seller's right to cure.  
35 If the seller delivers a breach to the buyer,  
36 and if the time for performance has not yet arrived,  
37 then the seller has the right to remedy the breach prior to the due date.  
38 In effect the right to cure counter acts the buyer's rights of anticipatory repudiation.  
39 However,  
40 the right to cure may not be exercised if the breach materially impaired the contract.  
41 Routinely, the seller may substitute carriers, and routinely a single breach of a part of  
42 an installment contract may be cured.  
43 However,  
44 if the breach substantially impairs the whole contract, then cure is not allowed.

- 1 152. Under the common law,  
2 if the future that arrives is materially different than the parties reasonably expected,  
3 then the contract will be discharged by operation of law  
4 (e.g., commercial impossibility [x10 price change]).  
5 The UCC changes that to commercial impracticability (e.g., x3 price change).  
6 The parties may specify which risks are not foreseen by the parties (e.g., war, riot, etc.)  
7 in a *Force Majeure* clause.
- 8 153. The UCC uses the Statute of Frauds, however the UCC's application is relaxed.  
9 Consistent with the UCC's facilitation of creation of commercial reasonable contracts,  
10 the parties' partial performance of an otherwise unenforceable oral contract  
11 renders the partially performed portion enforceable.
- 12 154. All parties to a UCC contract for sale of goods are bound to an obligation of good faith.  
13 Accordingly all have a Duty of Cooperation.  
14 As part of the Duty of Cooperation might be honoring a Right of Assurance.  
15 If a party has reasonable grounds to believe performance might not be forthcoming,  
16 the that party may make a written demand for assurance, and  
17 the other party must provide adequate assurance.
- 18 155. Very rarely the law uses the word absolute.  
19 All buyers always have an absolute right of inspection.  
20 The buyer's reasonable opportunity for inspection  
21 is an implied condition precedent to the buyer's duty to pay.
- 22 156. The UCC creates a right to cover.  
23 The non-breaching party has a duty to mitigate damages.  
24 The exercise of the right to cover can discharge the duty to mitigate damages.  
25 To cover is to enter the market to obtain reasonable substitute performance.
- 26 157. The common law imposes several implied warranties  
27 (e.g., good title, no liens, and no infringements).  
28 The parties may expressly disclaim the implied warranties (e.g., quit claim deed).
- 29 158. The UCC allows the parties to make express warranties  
30 by an affirmation of fact (e.g., sample or model) that is the basis of their bargain.  
31 But note, puffery is not an express warranty;  
32 nor is value, unless via an expert's opinion.
- 33 159. The UCC creates two implied warranties:  
34 merchantability and fitness for particular purpose.  
35 All merchants warrant that the goods are reasonably fit for the ordinary purpose.  
36 That is, the goods would pass without objection in the market.  
37 An implied warranty of fitness for a particular purpose  
38 is given by any seller that knows of the buyer's reliance upon the seller.
- 39 160. Under the UCC there may be multiple warranties and they may overlap.  
40 Priority of enforcement of multiple warranties,  
41 if there is a conflict between the warranties, is [1st] express; and then [2nd] implied.  
42 Also, the priority is given  
43 [1st] technical specification; [2nd] sample or model; and then [3rd] description.  
44 All warranties will be enforced if feasible.

- 1 161. Typically, all UCC warranties may be disclaimed.  
2 To disclaim an express warranty, then the disclaimer must be express.  
3 To disclaim merchantability, then the disclaimer must be conspicuous (e.g., "as is").  
4 If a specific disclaimer is unconscionable, then it is not enforceable.  
5 Also, no party may disclaim the obligation of good faith; nor may any party disclaim  
6 liability for personal injury from a consumer product.
- 7 162. Federal regulation tends to focus on causes; while the States focus on symptoms.  
8 The federal Magnuson - Moss Warranty Act defines the words "full" and "limited"  
9 if a seller of consumer products in commerce chooses to grant a written warranty.
- 10 163. Product liability attaches both to goods and to services as it attaches to products.  
11 Product liability can be based on tort (either negligence or strict liability) or contract.  
12 The UCC does not require privity.  
13 The Restatement of Laws, Torts, section 402 A does not require privity.  
14 Section 402 A requires:  
15 [i] a defendant in the business of selling;  
16 [ii] that product reaches the consumer not substantially changed;  
17 [iii] the product is in a defective condition;  
18 [iv] that defect makes the product unreasonably dangerous; and  
19 [v] that defect is the proximate cause;  
20 [vi] of the plaintiff's physical harm.
- 21 164. Defects can be design defects, manufacturing defects, or labeling defects.  
22 A latent defect is a defect known to the seller but which is not reasonably discoverable  
23 by the buyer during the buyer's reasonable inspection.
- 24 165. An administrative agency is created by and has authority delegated by the legislature.  
25 The Enabling Act creates the agency.  
26 The separation of powers allocated powers both within the agency and outside.
- 27 166. Rulemaking by an administrative agency must satisfy  
28 both substantive due process and procedural due process.  
29 By default, the Administrative Procedures Act of 1946 governs  
30 unless the Enabling Act expressly grants the agency other powers.  
31 A legislative rule has the force of law (i.e., binds an Article III judge).  
32 An interpretive rule only binds the agency.  
33 Today, administrative agency rules are adopted using the notice of publication in the  
34 *Federal Register* and the hearing of a comment period for written comments, with the  
35 final rule effective once published in the *Code of Federal Regulations*.
- 36 167. Administrative agencies are subject to judicial review both within and outside.  
37 Within the agency a party must exhaust all administrative remedies before having  
38 standing to sue in an Article III court.  
39 Once in an Article III court, the relationship between the agency and the court is  
40 analogous to the relationship between a trial court and an appellate court.

- 1 168. In the USA, privacy is an implied fundamental USA *Constitution* right; but, the  
2 individual USA State constitutions range from an express right to not an implied right.  
3 In the USA privacy is right of the People versus government.  
4 In the European Union and in Canada privacy is an express right of the individual  
5 against both governments and other individuals.  
6 Accordingly, in the EU statutes routinely provide that a person must opt-in  
7 while in the USA statutes routinely provide that a person must opt-out.
- 8 169. The 1890 federal Sherman Act made it a felony to destroy competition.  
9 Each USA State has adopted similar State statutes.  
10 Sherman Act section 1 makes restraints of trade a felony.  
11 Sherman Act section 2 makes monopolies a felony.
- 12 170. Sherman Act section 1 restraints of trade are evaluated using  
13 either the Rule of Reason Test or the *Per Se* Unreasonable Test.  
14 Horizontal restraints typically damage competition more than vertical restraints.
- 15 171. The Rule of Reason authorizes any restraint of trade if that restraint is  
16 [i] proportional to the firm's;  
17 [ii] legitimate;  
18 [iii] business;  
19 [iv] interest.
- 20 172. Proportionality for the Rule of Reason is measured by the restraint's  
21 [i] purpose of the restraint;  
22 [ii] intent of the restraining party;  
23 [iii] effect of the restraint on the market, and  
24 [iv] power conferred on the restraining party over the market.
- 25 173. Experience teaches that some restraints consistently are disproportionate.  
26 The *Per Se* Unreasonable test applies to:  
27 [i] price fixing;  
28 [ii] horizontal division of territories;  
29 [iii] group boycott; and  
30 [iv] tying.
- 31 174. Recall, the specific controls the general.  
32 In 1914 Congress adopted the Clayton Act to address specific situations that the  
33 general criminal law of the Sherman Act could not make unlawful.  
34 Clayton Act section 4 created treble damages for antitrust violations.  
35 Clayton Act section 6 created antitrust exceptions (e.g., for labor [i.e., not an article of  
36 commerce] and for agricultural co-ops [i.e., countervailing power]).
- 37 175. First Amendment free speech includes the express right to petition government.  
38 Government has zero authority over the content of political free speech.  
39 The core of political speech is lobbying before the legislative and executive branches.  
40 But, every party is obligated to speak truthfully when making a filing in a court.  
41 The *Noerr-Pennington* Doctrine exempts lobbying from antitrust laws.

- 1 176. Gambling creates risk and allocates that new risk upon chance for a price.  
2 An insurance policy pools existing risk and  
3 transfers that risk in exchange for average price premium.  
4 Most jurisdictions make most gambling unlawful, and tightly regulate lawful gambling.  
5 Most jurisdiction make most insurance lawful, and tightly regulate lawful insurance.
- 6 177. By necessity (i.e., pool risk), insurance contracts must be adhesion contracts.  
7 Insurance contracts pool legally identical risks.  
8 Policy premiums recover the average price of those legally identical risks.  
9 Recall how adhesion contracts are interpreted.  
10 Ambiguities in insurance contracts always are interpreted against the insurer.
- 11 178. An insurable interest differentiates a gambling contract from an insurance contract.  
12 Recall, UCC Article 2's sale of goods identification and the risk of loss.  
13 With property insurance the insured needs insurable interest at time of loss.  
14 With life insurance the insured needs insurable interest at time of contract.
- 15 179. Risk is the subject matter of an insurance contract, thus all risk is material.  
16 But, the insurer has a duty to timely discover misrepresentations or a statutorily  
17 required incontestability clause will enforce the insurance contract.
- 18 180. Adverse selection exists when those that have the insured risk are more likely to  
19 purchase insurance.  
20 Moral hazard exists when the insured controls the insured risk.  
21 Because of the moral hazard nearly all jurisdictions require some form of self  
22 insurance (i.e., co-insurance via a deductible and co-pay).
- 23 181. All guarantors and all sureties have rights of  
24 reimbursement, contribution, and subrogation.  
25 An insurer has the right of subrogation; that is the same standing to sue as the insured.  
26 When an insured has multiple policies providing cumulative coverage,  
27 then all jurisdictions limit the insured's maximum recovery at 100% of loss.  
28 Nebraska, however, limits recovery to the coverage of the largest policy  
29 and then pro rates the contributions of the multiple insurers.
- 30 182. The principal of an insurance agent is the insurer.  
31 The principal of an insurance broker is the insured.  
32 Either an agent or a broker may issue a binder,  
33 the principal is liable for the non-procurement of the policy.
- 34 183. Punitive damages ordinarily only are available in tort law.  
35 Both parties to an insurance contract are bound by an implied duty of good faith.  
36 If a insurer engages in a bad faith (i.e., more than mere absence of good faith) breach,  
37 then the court of law may award the insured punitive damages.
- 38 184. Capacity is the ability to grasp the natural consequences on one's actions.  
39 Because the Reasonable Person can not fully grasp that person's own death,  
40 the law requires the most capacity for crimes and the least for wills.  
41 For wills the testator must grasp:  
42 [i] the testator is signing (i.e., has the current intent to authenticate the will);  
43 [ii] owns property and the general nature of that property (e.g., real); and  
44 [iii] the natural objects of one's bounty (i.e., objectively who you love).

- 1 185. The authority to create a will as well as the requirement for a will are set by statute.  
2 Each jurisdiction's statutory requirements for a will vary, but some are common to all.  
3 All jurisdictions require:  
4 [i] capacity;  
5 [ii] intent to create a will and to sign;  
6 [iii] a writing (may be holographic; rarely nuncupative);  
7 [iv] signature;  
8 [v] witnesses (of the capacity and of the signature); and  
9 [vi] publish.
- 10 186. A trust is created when  
11 [i] the grantor  
12 [ii] makes actual delivery of  
13 [iii] the corpus to the trustee  
14 [iv] in such a way that legal title passes to  
15 [v] the trustee who holds legal title  
16 [vi] for the benefit of the beneficiary  
17 [vii] with the beneficiary holding beneficial title in the corpus.
- 18 187. A trustee is a fiduciary of the beneficiary and not to the grantor.  
19 A trustee owes a duty of utmost good faith.