

Study Guide
for
CPCU 530
Navigating the Legal
Landscape of Insurance

- For use with 1ST EDITION course -



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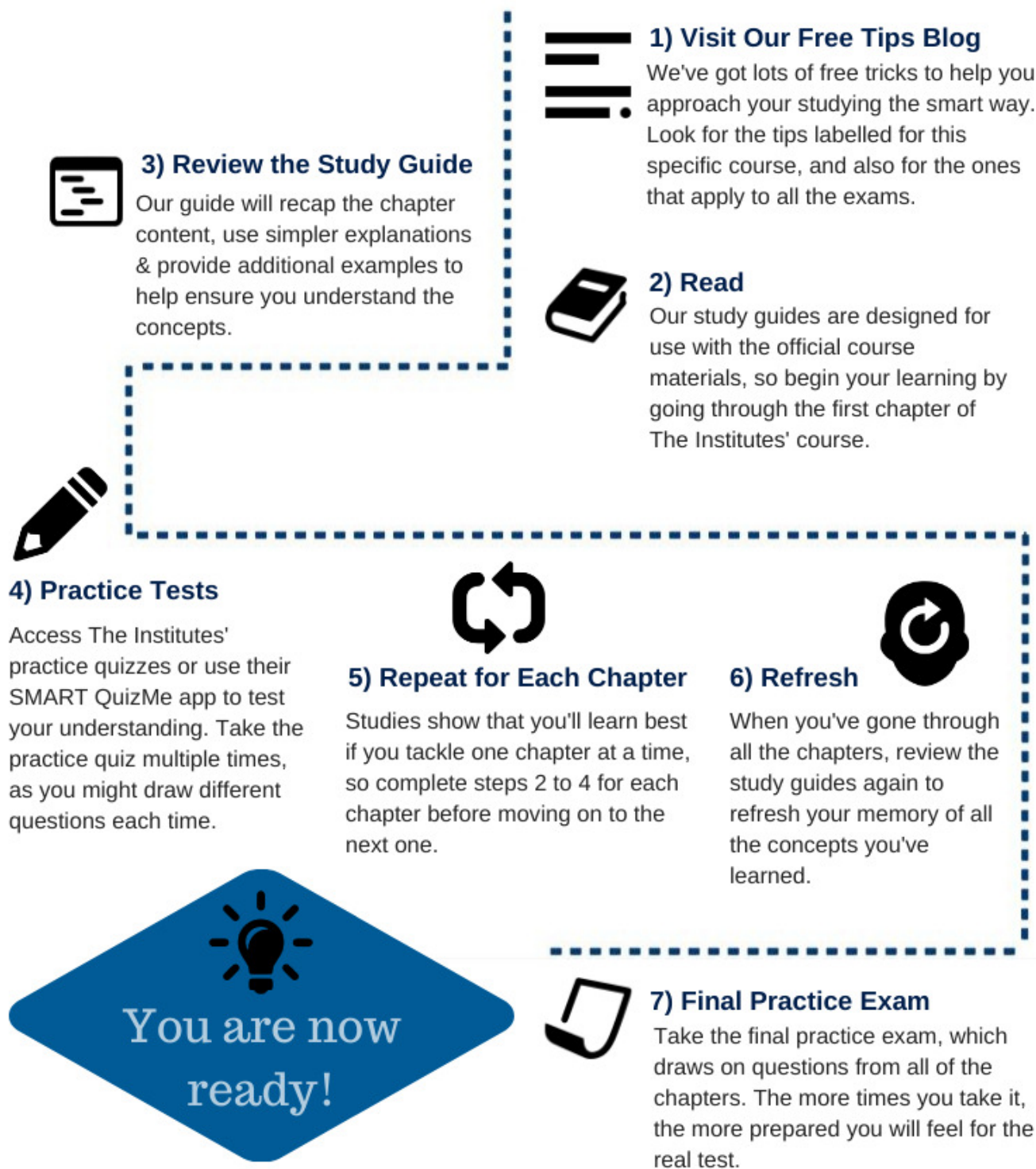
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Recommended Study Plan



How to Use This Study Guide

Underlined terms

- ⤴ Specifically-defined terms
- ⤴ Identified by the textbook as a vocabulary word
- ⤴ Found in the margins of the textbook

Italicized terms

- ⤴ Jargon or specialized terms that have a technical definition
- ⤴ Not identified by or easily distinguished in the textbook as a formal vocabulary word
- ⤴ Just as important to understand and study

Highlighted items

- ⤴ Item has been reportedly seen before on CPCU™ practice exams
- ⤴ May seem like random points or examples, but the purpose is for you to get them right if they appear on the test

LIST OF ABBREVIATIONS

(+)	(refers to an advantage)	ID (IDs)	identify (identifies)
(-)	(refers to a disadvantage)	ins	insurance
? (?s)	question (questions)	insd	insured
acct	account or accounting	liab	liability
addt	additional	misrep	misrepresentation or misrepresented
admin	administrative	mgmt	management
avg	average	neg	negligence
ax (axs)	accident (accidents)	orig	original
biz	business	pol (pols)	policy (policies)
btwn	between	poss	possible or possibly
clm (clms)	claim (claims)	prem	premium
co (cos)	company (companies)	prob	probability
cov	coverage	prop	property
diff	difference or different	u/s	understand
dmg	damage	u/w	underwriting
DOI	Department of Insurance	w/	with
govt	government	w/o	without

1: INTRO TO US LAW

- *statute*: law
- civil law
 - relies mainly on comprehensive codes of extensively-written laws
 - based on scholarly interpretations of law (rather than judges' & courts' opinions)
 - judges' & courts' decisions don't necessarily set precedence that future cases must follow
 - applies in Louisiana only
- common law
 - there are basic statutes/laws, but precedents set in prior cases is main component
 - main body of law is derived from court decisions
 - foundation of US legal system
 - based on England's system of law
 - doctrine of stare decisis:
 - principle that lower courts must follow precedents set by higher courts
 - if courts rule differently than precedents, need to have strong reason why
 - *mandatory/binding authority*: authority or law that a court **must** follow
 - *persuasive authority*: authority that a court is not required to follow (ex: other jurisdiction; discussion in a legal treatise)
 - *synthesis*:
 - combining several rulings from various authorities into a new rule of law that is applied to a new legal problem or case
 - uses sources like:
 - existing laws
 - prior cases that involved interpreting those laws
 - prior cases that set legal precedence
 - *threshold cases*: cases for which there is no precedent or law that directly applies
 - landmark cases relating to ins
 - Paul v. Virginia: ins to be governed by **state** law
 - South-Eastern Underwriting (SEUA) case: **federal** law still applies to ins in **some** cases, under the commerce clause of the US Constitution
 - McCarran-Ferguson Act:
 - reversed the applicability of SEUA
 - allows ins cos to be generally exempt from **federal** anti-trust laws
 - still allows federal law to override state law if:
 - state law is not specifically relating to regulation or taxation of ins industry
 - federal law is specifically relating to ins industry
 - Gramm-Leach-Bliley (GLB) Act:
 - allows companies to offer bank, insurance and securities products within the same corporate structure
 - reinstates some **federal** power for regulatory oversight
 - promotes uniform producer licensing laws
 - provides framework to determine what financial products are banking/security (regulated at federal level) vs ins (regulated at state level)

- *equity court*:
 - offers solutions beyond traditional legal remedies of monetary compensation
 - traditional courts just require defendant to pay money
 - equity court may order defendant to take a specific action if that is more fair
 - (ex: buyer suing for breach of antiques sale contract can't be completely remedied w/ money if antique can't be purchased elsewhere, so court of equity might force seller to sell)
- 3 ways to classify US law
 - criminal vs. civil
 - criminal law:
 - imposes penalties for wrongs against society
 - focus is on defendant's bad actions, rather than results of his actions (ex: if you steal car but return it w/ no dmg, you are still guilty of stealing)
 - govt is plaintiff, and responsible for prosecuting & punishing
 - functions of law:
 - defines offenses
 - regulates investigation, charging & trying of accused offenders
 - establishes punishments
 - *felony*: major crime
 - *misdemeanor*: minor crime
 - *summary offenses*: neither felonies or misdemeanors (usually results in fine but not jail)
 - civil law:
 - (differs from *civil law* as described earlier)
 - protects rights & provides remedies for breaches of duties owed to others
 - focus is on loss that victim suffered, and purpose of lawsuit is to get compensated
 - if there is no dmg suffered, you can't initiate a civil suit
 - burden of proof is **less** strict than criminal law
 - supporting evidence just needs to be more than evidence to the contrary
 - "more likely than less likely"
 - (as opposed to *beyond a reasonable doubt* for criminal law)
 - by subject matter (ex: criminal, tort, agency, prop, etc.)
 - substantive vs. procedural
 - substantive law
 - creates/defines/regulates each party's rights/duties/powers
 - i.e., theories, definitions, principles
 - ex: defining a crime
 - procedural law
 - related to steps/processes/procedures for enforcing substantive law
 - ex: deadline for filing a suit
- 5 sources of US law (both at federal and state level)
 - 1) constitution
 - specifies govt's powers, and limitations on those powers
 - highest priority of law
 - constitution is the highest law
 - US Constitution overrides state constitution
 - any law that violates US constitution is void
 - each state has its own constitution too

- key provisions relevant to ins
 - delegation of powers to Congress
 - establishes **express** powers of Congress
 - regulate commerce
 - levy/collect taxes
 - borrow money
 - establish uniform laws of bankruptcy
 - **implied** powers given to Congress to pass laws necessary to use express powers
 - delegates to **states** any powers aren't specifically reserved for fed govt
 - Commerce Clause
 - gives Congress power to regulate trade w/ other countries & trade btwn multiple states (*interstate*)
 - any state law/action that interferes w/ interstate commerce is unconstitutional
 - **Due Process**
 - i.e., the right to state your case, if someone brings any action against you
 - **5th Amendment: guarantees notice & hearing before fed govt can deprive a person of life, liberty, property (i.e., put you in jail or make you pay)**
 - **14th Amendment:**
 - extends 5th Amendment protection to state govt actions
 - extends 5th Amendment protection to corporations
 - **(ex: ins co can complain to DOI before a rate change is made)**
 - Equal Protection Clause (14th Amendment)
 - prohibits state laws that discriminate; requires equal treatment to all
 - applies to both individuals & corporations
- 2) legislative branch
 - **main power is to pass/enact laws**
 - US Congress
 - is the **federal** legislative branch
 - is *bicameral* (has two chambers: Senate & House of Reps)
 - use of *uniform laws* to minimize conflicts
 - Nat'l Assoc of Ins Commissioners (NAIC)
 - purpose is to coordinate ins regulation activities among various state DOIs
 - helps regulators coordinate responses to changes in ins marketplace
 - develops model laws, regulations, guidelines
- 3) judicial branch (courts)
 - US District Court (trial court for fed crimes)
 - US Circuit Court of Appeals (handles appeals from US District Courts)
 - *jurisdiction*
 - the scope of a particular court's authority
 - usually based on geographical area or type of case
 - diversity jurisdiction:
 - federal cases involving parties from diff states, or btwn one state & foreign country
 - must be over a min dollar amt
 - *appellate jurisdiction courts*: courts that hear appeals from other courts
 - *general jurisdiction*: courts that hear a variety of types of cases

- conflicts of jurisdiction
 - in **tort** cases, law from state where injury occurred usually applies
 - in **contract** cases
 - *center of gravity rule*: law from state w/ most significant relationship to case usually applies
 - many contracts specify which state's laws will apply if a dispute arises
- 4) executive branches (i.e., president & his cabinet)
 - enforce, recommend, approve, or veto laws
 - influences rule makers
 - nominates/appoints important officials (like Supreme Court judges)
- 5) admin agencies (make & enforce regulations)
 - ex: DOI
 - technically part of executive branch [but treated separately in this book]
 - creates/enforces laws & acts as own judicial branch
 - produces the most legislation
 - *administrative law*:
 - statutory laws that grant power to admin agencies to act
 - also includes/refers to laws that are created by admin agencies themselves
 - 3 criteria for admin agency rules to be constitutional:
 - legislation carefully defines scope of delegated power to admin agency
 - agency exercises rulemaking w/i that scope
 - rules are subject to court/judicial review
 - 2 main functions
 - 1) rule-making
 - process by which rules are broadcast
 - agency regulations become effective 30 days after publication, or immediately in emergencies
 - 3 types of rules
 - legislative rules
 - a type of **substantive** rule [creates/defines/regulates each party's rights/duties/powers]
 - comes from statutory delegation of authority (i.e., a law granted power to this admin agency)
 - have the same force as legislative or Congressional law
 - interpretive rules
 - interpret statutes to guide staff or regulated parties
 - lack force of law, not binding on individuals
 - procedural rules
 - related to agency operations or adjudication proceedings
 - Model State Administrative Procedure Act (MSAPA)
 - standard procedure for creating rules
 - 3 basic steps
 - publish notice of intent to adopt a regulation
 - provide opportunity for public comment
 - publish final regulation
 - public hearing required if govt agency or 25+ individuals request it

- 2) adjudication function
 - process by which agency decides cases & settles disputes btwn two parties
 - due process (giving notice to parties involved)
 - hearing time/place/nature
 - statement of hearing's legal auth & jurisdiction
 - reference to particular statute/rule involved
 - list of matters/issues at hand
 - can impose fines or grant/revoke/suspend licenses
- investigative powers
 - usually used for:
 - rulemaking
 - prosecuting
 - establishing general policy
 - recommending legislation
 - *subpoena ad testificandum* (requiring a witness to testify)
 - *subpoena duces tecum* (requiring documents to be provided)
 - 4th Amendment (protects against unreasonable searches & seizures)
 - 5th Amendment
 - protects against self-incrimination
 - i.e. "you have the right to remain silent"
 - Privacy Act (prohibits govt from releasing info that violates individual privacy)
 - Freedom of Info Act (guarantees public access to govt & agency records)
- judicial review
 - appeals process for complaints against the agency itself
 - plaintiff must have standing to sue (suffered or will suffer an adverse effect from an action)
 - agencies usually given great respect on questions of fact b/c of their expertise
 - 2 requirements for judicial review to occur
 - agency has issued final order (agency's final conclusion at the end of an agency proceeding, ruling on a party's material private right)
 - exhaustion of admin remedies: party has taken case through all poss admin procedures & appeals avenues
 - 5 grounds under which a court can set aside an agency's action
 - arbitrary & irrational, abuse of discretion, or otherwise unlawful
 - unconstitutional
 - violated statutory auth
 - violated agency procedural rules or was result of illegal procedures
 - unsupportable by substantial evidence in the record
- civil trial procedures (the process of a lawsuit)
 - (general vocabulary)
 - *plaintiff*: party who initiates case
 - *defendant*: party who has to defend himself against allegations brought by plaintiff
 - *defense*: if someone raises an allegation/lawsuit against you, point you can raise that justifies your action or exempts you from having to paying dmgs

- 1) pretrial
 - (NOTE: major goal is for parties to resolve w/o having to go to trial)
 - pleadings
 - formal written statement of the facts & claims of each party in the lawsuit
 - i.e., each party explains what their position will be
 - complaint by plaintiff
 - initiates the lawsuit
 - IDs allegations (claims that plaintiff intends to prove to get judgment against defendant)
 - states cause of action (why plaintiff has grounds to sue defendant)
 - IDs requested *remedy* (solution)
 - includes a statement of how this court has jurisdiction to hear case
 - *summons* by court
 - notifies defendant of lawsuit
 - contains copy of complaint
 - sets timeframe for defendant to answer
 - *answer* by defendant
 - states why plaintiff shouldn't win
 - may include counterclaims
 - might only be an *entry of appearance* (where defendant states they'll appear in court for trial, but doesn't admit or deny allegations)
 - *reply* by plaintiff
 - plaintiff responds to defendant's answer
 - usually required if defendant files a counter claim, or if judge orders a reply
- *pretrial conference*: meeting w/ both parties + judge to encourage pre-trial settlement
- discovery by both parties
 - a pretrial exchange of relevant information between plaintiff and defendant
 - i.e., gathering evidence from the other side, to prepare for trial
 - purposes:
 - allows parties to know as much as possible before trial
 - if court testimonies contradict evidence from discovery, party can raise that
 - may lead to settlement (if parties decide they don't want to go to trial based on evidence)
 - can take months or years, to examine thousands of records
 - can use *electronic discovery (e-discovery) experts* who apply data science to electronic records to find useful information
 - parties can file motion to compel compliance if someone objects to producing evidence
- motions:
 - formal request for court to take particular action
 - 3 types usually filed in hopes of avoiding trial
 - *motion to dismiss*
 - says plaintiff failed to state a claim that this court can grant relief for
 - usually asks for case to be thrown out due to technical violation
 - ex: plaintiff case is over max dollar threshold for this court
 - usually filed by **defendant** before pleadings are done

- *motion for judgment on pleadings*
 - defendant admits allegations but questions whether law provides remedy
 - i.e., defendant agrees w/ case facts, but thinks law is in his favor
 - usually filed immediately after pleadings
- *motion for summary judgment*
 - similar to judgment on pleadings
 - usually filed during/after discovery
- 2) trial
 - jury decides all *questions of fact* (what happened in **this specific case?**)
 - judge decides all *questions of law* (how does the law apply **generally, in all cases?**)
 - if jury trial is waived, judge decides all ?s of fact & law
 - 3 rules of evidence (qualities that evidence must possess to be admissible)
 - relevance
 - "helps prove or disprove an element of the case"
 - i.e., does your evidence help prove a fact you are trying to establish?
 - (ex: no ins citation is **not** relevant to proposed fact that driver was at-fault in ax)
 - materiality
 - "whether evidence establishes a particular element of legal significance in clm"
 - i.e., in light of this specific case's situation, is the evidence important?
 - (ex: veh year/make/model is normally **not** material in ax case, but might be if car had recall for brakes)
 - competence
 - "whether a source is reliable & adequate to justify admission in court"
 - i.e. trustworthiness
 - *hearsay*: opinions or repeated statements from parties who don't have personal knowledge about whether they're true
 - trial procedure
 - jury selection
 - swearing-in of jury (jury members take oath)
 - opening statements (each side summarizes what they expect to prove to jury/judge)
 - questioning **plaintiff's** witnesses (to establish allegations)
 - direct examination by plaintiff
 - cross examination by defendant
 - challenge witnesses' testimony
 - bring out evidence favorable to defendant
 - questioning **defendant's** witnesses
 - direct examination by defendant
 - cross examination by plaintiff
 - challenge witnesses' testimony
 - bring out evidence favorable to plaintiff
 - closing arguments (each side summarizes what they felt they proved)
 - instructions to jury by judge

- deliberation & delivery of verdict
 - general verdict:
 - entails complete finding & single conclusion by jury on all issues
 - typically asks the “bottom-line” question
 - ex: “is the defendant guilty?”
 - special verdict:
 - verdict on specific questions of fact posed by judge, who then applies law to facts that jury has decided
 - typically is a series of questions
 - ex: “did the defendant violate a reasonable standard of care & did that violation result in the plaintiff suffering injury?”
- judge can end trial at any point by declaring:
 - *directed verdict* (judge tells jury what verdict to give if there is only one reasonable outcome)
 - *mistrial* (ends trial b/c of error/event making it impossible for jury to reach fair verdict)
 - *non-suit* (plaintiff failed to present sufficient case, or case didn’t comply w/ court order)
- res judicata (*clm preclusion*):
 - (after a judgment has been reached) bars parties from bringing a second lawsuit on the same claim or on related transactions
 - i.e., you can’t have the **same** plaintiff suing **same** defendant over the **same** incident
- collateral estoppel or *issue preclusion*:
 - bars parties from re-litigating an issue or element of argument on which the court has already ruled, even if ruling was on a different/prior lawsuit
 - (ex: if court held on lawsuit for one loss that mold dmg is excluded on pol, you can’t sue ins co again about mold exclusion if you’re denied cov on a second mold loss)
- 3) appeals
 - purpose is to decide whether law was correctly applied, **not** to have re-trial
 - you can’t file appeal to debate questions of **fact**
 - *appellant*: losing party of original lawsuit who is initiating appeal
 - *appellee*: non-appealing party (usually the party who won original lawsuit)
 - *writ of certiorari*: petition requesting the US Supreme Court to hear an appeal
 - *brief*:
 - atty’s written statement
 - mandatory for appeals
 - outcomes:
 - affirm (uphold orig decision)
 - reverse (reverse orig decision)
 - remand (send case back for retrial)
 - **US Supreme Court reviews at its discretion & is not required to explain reasons choosing cases**
- *alternative dispute resolution (ADR)*
 - other ways to resolve disputes besides trial
 - benefits:
 - cheaper
 - faster
 - less hostility
 - more privacy

- arbitration (arb)
 - a neutral 3rd party hears case & makes **binding** final decision
 - award is filed with the appropriate court & is as enforceable as any court judgment
 - main means of dealing disputes for contracts, labor/mgmt relations, and ins
 - Uniform Arbitration Act & Federal Arbitration Act
 - American Arbitration Assoc (provides arb services, designs arb systems, provides training)
- mediation
 - parties submit dispute to agreed-upon outside mediator
 - neutral 3rd party helps examine issues & consider settlement options
 - **non-binding**
- negotiation
 - *private mini-trial*
 - allows both parties to present evidence/arguments to a neutral panel
 - not binding (only useful in influencing negotiation btwn parties)
 - *court-sponsored mock summary jury trials*
 - allows both parties to present evidence/arguments to a jury
 - parties can elect to accept jury's verdict
 - not binding (only useful in influencing negotiation btwn parties)

2: UNDERSTANDING CONTRACT LAW, PART 1

- key terms
 - offeror: party who initially promises to give something up in exchange for something from the other party
 - offeree: party who agrees to give something up in return for something offered by the other party
 - promisor: party making a promise in contract
 - promisee: party that promise is being made to in contract
 - privity of contract: refers to the contractual relationship that exists btwn the parties of contract
 - breach of contract: the failure to fulfill a contractual promise, w/o valid legal reason for failure
 - forbearance: act of giving up legal right or promising to give up legal right
 - avoid: exercising your lawful right to cancel a contract
 - ratify: agreeing to go through w/ & be bound by a contract when you had the right to cancel it
 - restitution: repaying or reimbursing for goods/services received, usually b/c you are canceling contract
 - remedy: solution sought by innocent party in court
- types of contracts
 - bilateral:
 - both parties make a promise
 - i.e., each party is both a promisor and a promisee
 - either party can sue the other for not acting on the promise
 - (ex: ins co promises to indemnify & insured promises to pay prem)
 - unilateral:
 - only 1 party makes promise
 - usually takes format of “**IF** A does ____, then B promises to ____”
 - A is not obligated to act
 - if A **does** act but B fails to uphold their promise, B is in breach of contract
 - executed: contract already completely performed by both parties (i.e., finished contract)
 - executory:
 - contract that hasn't been completely performed by all parties
 - (ex: homeowner's pol, because ins co promise to indemnify isn't done until pol period over)
 - express: contract terms & intentions explicitly stated
 - implied-in-fact:
 - contract whose terms/intentions are implied by context/surroundings
 - typically applies to parties w/ prior transactions that set pattern/expectation
 - ex: if party w/ credit acct shows cashier an item but doesn't pay, it can be presumed they'll pay later
 - implied-in-law:
 - not explicit, but is imposed by law
 - usually enforced to avoid one party being unfairly enriched
 - void:
 - agreement that **never** reaches contract status **despite** parties' intentions & thus is **not** binding
 - ex: contract to commit crime
 - voidable:
 - contract that one of parties can rightfully avoid based on some circumstance
 - i.e., contract that becomes cancelable b/c one party did something wrong
 - innocent party can usually still choose to affirm/go through w/ contract
 - **right of avoidance is reserved for innocent party**

- (6) elements of a contract (**see BONUS printable – Ch 2/3 Elements of a Contract**)

- agreement
 - offer
 - acceptance
- capacity to contract
- assent
- consideration
- legal purpose
- made in the form required by law

~~~~~

- offer:

- promise that requires some action/acceptance by intended recipient to form a complete agreement
- (3) key elements for a valid offer
  - 1) intent to contract
    - key question: did the offeror intend to be **immediately bound** to a particular party by their acceptance?
    - **language of offeror is most important factor**
    - examples of **no** intent to contract:
      - advertisements, if they don't promise who specifically they are selling to
        - not binding: "Milk on sale \$2.99"
        - probably binding: "Milk for \$2.99 to first five customers to enter our store"
      - social invitations (ex: you can't sue for someone canceling a party)
      - predictions (ex: you can't sue because the weatherman was wrong)
      - offers made in excitement or jest (ex: you can't sue someone who was joking)
  - 2) definite terms (but absence of 1 term doesn't necessarily invalidate entire contract)
    - involved parties
    - subject matter
    - price
    - time
  - 3) communication to other party
    - i.e., you didn't really make an offer if the other party didn't know about it
    - (ex: if person didn't know there was reward for finding dog, he can't claim it after he's already turned in the dog)
    - you can accept offer if you started performing your part before you knew of offer (ex: you can claim reward offered as long as you learned of it before turning in the dog)
- how offers can terminate
  - lapse of time
    - offers aren't open indefinitely
    - if offer terminated, attempt to accept afterwards is considered a counteroffer
  - operation of law
    - if law makes contract illegal (ex: becomes illegal to sell a certain product)
    - if subject matter is destroyed before acceptance (ex: offer to sell house canx'd if house burns down)
    - if either party dies or is formally declared insane before acceptance



- offeree's rejection
  - rejection terminates original offer
  - attempts to accept the offer again are considered a new offer
- counteroffer
  - explicit rejection of orig offer & change in terms that creates a new offer
  - differs from request for info (where you don't reject orig offer yet)
- offeror's revocation
  - offers to general public must be revoked in same manner offer was made
  - for unilateral contract offers, if offeree has substantially performed act then offer is irrevocable (performance of the primary, necessary terms of the agreement)
- acceptance
  - assent to an offer, where offeree agrees to proposal or does what has been proposed
  - 3 requirements for valid acceptance
    - accepted by offeree (person who promise is being made to)
      - i.e., someone else can't accept offer & automatically bind offeror
      - offers made to a group or the public can be accepted by any member of group/public
    - unconditional & unequivocal
      - acceptance can't have modifications to offer (if it does, that's a counteroffer)
      - acceptance must show clear, definite intent to be bound
        - i.e., "maybe I can pay you next week" is *equivocal* (**not** clear enough)
    - communication of acceptance
      - if offer specifies how acceptance to be communicated, offeree must comply for valid acceptance
      - if offer doesn't specify, any reasonable method acceptable
      - forms of acceptance:
        - explicit return promise
        - performing the act requested by the offeror
          - if offeree does substantial performance, offeror might lose right to revoke offer
  - timing of acceptance
    - in most cases, *mailbox rule* applies (acceptance effective as soon as it leaves offeree's possession **even if it never reaches offeror**)
    - in some jurisdictions, offeror must receive acceptance, especially if knowledge of acceptance is critical
    - offeror can make offer conditional upon their receipt of acceptance
    - communication to party other than offeror is **not** valid acceptance
    - offeree **cannot** revoke acceptance once it is made
  - silence is usually **not** acceptance, unless past behavior establishes otherwise
    - ex: if seller delivers goods each month & buyer doesn't reject them, buyer will have to pay
  - complaints about offer do **not** negate offeree's right to accept it anyway
- capacity to contract
  - competent party:
    - has the basic or minimal ability to do something
    - has the mental ability to understand problems & make decisions

- 4 types of parties who may **lack** capacity (and can dispute a contract)
  - 1) minors
    - generally, minor can dispute contract even if minor lied about his age
    - to avoid contract, minor must avoid it w/i reasonable time after coming of age
      - if minor doesn't avoid contract, generally assumed they are ratifying it
    - usually required to pay restitution before avoiding contract
    - **circumstances when contract is **not** voidable**
      - **contract to purchase necessities**
        - for things related to health, education, comfort for his standard of living
        - law doesn't want merchants to fear entering contracts w/ minors for basic necessities
      - minor has married
      - minor has assumed obligation of bail bond
      - minor has duty of child support
      - certain contracts for child to perform services or biz transactions (ex: child actor)
    - parents **generally not** liable for child's contracts unless:
      - parent co-signed
      - child acted on parent's behalf in transaction
      - parent directed child to sign for parent's benefit
      - parent neglected or refused to pay for necessities, which is what contract is for
  - 2) insane
    - 2 classes:
      - *adjudged insane*: legally declared insane by court
      - *self-declared*: person who claims he is insane or mental incompetent
    - those who claim insanity must prove 1 of 2 conditions:
      - person didn't know contract was forming
      - person didn't u/s consequences of acts purporting to form contract
    - **insane person **can't** avoid contract if other party proves **both**:**
      - sane party didn't know about insanity
      - **contract has already benefited insane person**
      - (ex: sane person enters contract & paints a guy's house, then finds out guy is mentally incompetent when trying to collect pay)
      - not fair to let insane party get a benefit (newly painted house) while sane innocent party suffers loss (loss of time & cost of supplies)
  - 3) intoxicated
    - generally, intoxicated party **can't** avoid contract but case law has tempered that
    - intoxicated party must prove 1 of 2 conditions:
      - person didn't know contract was forming
      - person didn't u/s consequences of acts purporting to form contract
    - upon being sober, intoxicated person can ratify or avoid contract
    - if 1 party purposely caused the other to be intoxicated, contract is voidable
  - 4) artificial entities that are restricted by law or corporate charter from entering certain contracts
    - i.e., non-person party (company, biz, assoc, etc) that didn't have auth to enter contract
    - *ultra vires contract*: contract "beyond one's powers"
    - usually voidable
    - if either party performed part of contract, other party must still perform

- assent
  - involved parties must have willingly intended to be bound by a contract
  - (see Chapter 3 for details)
- consideration
  - something of value or relinquishment of a loss, exchanged by the parties to the contract
  - i.e., both parties need to exchange something tangible or intangible w/ each other
  - 5 ways to describe consideration
    - valuable consideration
      - consideration that is necessary & sufficient to support a valid contract
      - catch-all term for anything that doesn't fit the other categories, but still qualifies as valid consideration
      - courts generally do **not** review *adequacy* of consideration (whether amt/value of consideration was fair or worth it)
    - forbearance (agreeing to give up a right)
    - present consideration (committing to something now)
    - future consideration (committing to something in the future)
    - binding promises
      - (ex: ins pol – ins co promises to cover loss & ph promises to pay prem)
      - both parties must be bound to something (ex: if Kate promises to hire Leah to do all repair work **if** Kate decides to build, consideration is **not** sufficient b/c Kate is not bound)
  - 3 types of **invalid** consideration
    - past consideration (ex: asking for car now in exchange for a gift you gave 5 yrs ago)
    - promise to perform existing obligation
    - compromise & release of clms
      - i.e., offering partial performance and getting the rest of your obligation under the contract waived
      - exceptions (i.e., when compromises are valid)
        - *bona fide* (good faith) dispute exists about amts owed
        - creditor agrees to accept lesser payment to discharge entire debt
        - if a debtor has many creditors & those creditors join together to negotiate
        - accord and satisfaction:
          - substituting performance of other than what was originally required
          - (ex: pay part of debt & agree to add't consideration besides money)
  - exceptions to requirement for consideration
    - promissory estoppel:
      - 3 elements:
        - 1<sup>st</sup> party made promise expecting 2<sup>nd</sup> party to act
        - 2<sup>nd</sup> party justifiably relied on promise and suffered detriment
        - only enforcement of promise would achieve justice
      - court can enforce contract in order to prevent injustice
      - ex: if ins co agrees to fix claimant's car so claimant orders parts, then ins co changes mind & denies cov, claimant suffered a loss (the cost of parts)
    - charitable subscriptions
    - promise to repay old debt that was barred by bankruptcy (does not require **new** consideration)

- legal purpose
  - i.e., contract can't be for illegal purpose
  - if contract was illegal from the start:
    - neither party can sue for breach or seek damages for partial performance
    - does **not** automatically become enforceable if change in law makes it legal
  - if contract was legal but becomes illegal due to change in law, parties still owed fair compensation for work done thus far
  - (9) types of illegal contracts
    - to commit crimes/torts (ex: biz interruption ins for prostitute)
    - wagering (gambling)
    - harmful to public interest or against law (ex: contract to bribe wit)
      - insurable interest:
        - beneficiary to an ins pol must actually have the potential to suffer a financial loss if insd suffers harm
        - i.e., you can't take a pol out on someone who has no financial connection to you
    - usury (charging higher interest rate than legally allowed)
    - contracts w/ unlicensed practitioners
    - transferring liab for [your own] negligence
      - i.e., your contract can't exempt you from **all** neg & give you the right to act recklessly
      - exculpatory clause:
        - clause where one party is excused from liab
        - not viewed favorably by court, especially if that party is trying to get away w/ willful/wanton negligence
    - restraint of marriage
      - contract btwn 2 people to bring about or prevent marriage of 3<sup>rd</sup> person
      - marriage brokerage contracts that prevent freedom of choice for marriage
    - restraint of trade
      - suppressing free trade or fair competition
      - illegal, unless necessary to protect interests of parties & doesn't impose undue hardship
      - noncompete agreements
        - when two parties agree not to share confidential biz info (clients, recipes, trade secrets, etc.) after they've terminated a biz relationship w/ each other
        - generally enforceable if there is definite time limit set
    - unconscionable bargains
      - (i.e., too-extreme terms)
      - (ex: if you miss even 1 mortgage payment, bank keeps all the money you paid + house)
  - exceptions to requirement for legal purpose
    - when a specific group is protected by law
      - (ex: ins co that issued illegal pol can't use this defense to get out of covering loss)
    - in pari delicto agreements
      - illegal transaction in which both parties were equally at fault
      - usually renders contract unenforceable
      - however, contract might be enforceable if one party is far more at fault
    - severable contract:
      - contract w/ 2+ promises that court can enforce separately
      - i.e., court won't uphold illegal part, but may require parties to do rest of contract

### 3: UNDERSTANDING CONTRACT LAW, PART 2

- mutual assent
  - two or more parties coming together to agree to the terms of the contract
  - situations that **lack** assent (i.e., you didn't really want to be bound by this contract)
    - fraud
      - when one party lies or hides facts, tricking the other party into entering contract
      - elements of fraud that must be proven
        - a false representation, concealment, or alteration
          - involving material fact
          - knowingly made w/ intent to deceive
          - innocent party justifiably relied on fact (i.e., was it reasonable for them to believe that fact?)
          - (if victim seeking dmgs) innocent party suffered dmgs/detriment
      - 2 remedies
        - rescission:
          - voiding contract & putting parties back to original positions
          - usually means to cancel transaction & refund money
        - sue for dmgs
          - often used if rescission wouldn't make plaintiff whole (innocent party incurred other costs beyond what they paid to defendant)
          - (ex: actor backs out of movie, but studio lost more than just his salary)
- mistake
  - contract says something different than what was intended due to a mistake
  - not all mistakes make contract voidable or unenforceable (depends on circumstances)
  - bilateral mistake:
    - **both** parties' believed something other than what contract says
    - bilateral mistake about value of the contract's subject matter does **not** make contract voidable
      - (ex: both parties enter contract not realizing art is worth millions more)
  - unilateral mistake: **one** party believed something other than what contract says
  - parties **cannot** knowingly exploit mistake if error was obvious
- duress
  - use of restraint, violence, or threats to get someone to enter contract
  - threats that are **not** usually considered duress
    - threatening to sue
    - threatening that the other party will suffer economic loss
    - threatening to stop doing biz w/ someone
    - threatening to withhold payment for work already done until addt work is done
- undue influence:
  - improper use of power/trust to pressure or influence someone
  - (i.e., you feel like you can't say no due to pressure/guilt)
  - often a product of close/intricate relationship
  - (ex: nurse telling infirmed patient, mom telling daughter)

- **innocent misrepresentation**
  - similar to fraud, but without intent
  - can ask for contract to be rescinded, but not for monetary dmg
  - (ex: seller was mistaken about key product fact)
- statute of frauds
  - requires certain contracts to be in writing & signed by party whom contract is being enforced against
    - if not in writing, defendant can get out of contract by raising this as a defense
    - oral contracts are not automatically void, as defendant can elect to be bound by it
  - **5 types of contracts that must be in writing**
    - **sale of real estate**
      - **real estate**: land, all structures attached to land, and whatever is growing on land
    - **long-term contracts that can't be performed in 1 yr (bilateral contracts only)**
    - sale of goods **totaling \$500 or more**
    - to pay someone else's debt
    - by executor of an estate who agrees to pay estate's debts from executor's own funds
- *parol evidence rule*
  - once agreement is in writing, no evidence from **before** that is admissible **if it contradicts terms** in written agreement
  - i.e., court assumes everything before was just negotiations to arrive at the written terms
  - 3 purposes of rule
    - to carry out parties' presumed intention
    - to achieve certainty & finality as to parties' rights & duties
    - to exclude fraudulent & perjured claims
  - exceptions (when pre-contract date evidence **is** admissible)
    - to help interpret/explain terms (but **not** to alter them)
    - when essential contract term is missing
    - contract contains ambiguous language
    - (if claim of fraud or illegality involved) to support allegation of wrongdoing
    - **to show that contract never became a true contract b/c of one party's failure to adhere to a condition of agreement**
- how courts interpret contracts
  - **main goal is effectuation of (to actualize) parties' intent**
  - in general, words are defined by their plain meaning
    - **however, individual clauses/words are considered in relation to main purpose of contract and diff definition might be applied**
  - entire vs divisible
    - *divisible*: performance/payment are divided into multiple stages/sections
    - courts try to have parties pay for what's done so far, out of fairness
  - any clerical errors/omissions are corrected
  - **contradictory terms have priority for court's attention**
    - **handwriting prevails over printed words**
    - words prevail over figures (ex: "one hundred" vs. "100")

- 2 types of ambiguities
  - when provision can be reasonably interpreted in more than 1 way
    - courts follow the *Contra Proferentem Doctrine/Ambiguity Doctrine* (choose the interpretation **least** favorable to party who wrote provision)
      - court interprets words re: offer **against** offeror
      - court interprets words re: acceptance **against** acceptor
  - when meaning can't be determined, even after applying all tools of interpretation
    - evidence from outside the contract may be considered
      - prior agreements
      - concurrent agreements
      - industry standards
- parties' own interpretations (based on their actions post-contract) carries a lot of weight
- court assumes contract should be legal & fair
- trade usage, course of dealings, and performance are considered
- for sales contracts, applicable law is usually law where sale made
- assignment of contract
  - when a 3<sup>rd</sup> party formally replaces one of the original parties to the contract
  - *assignor*: original party to contract
  - *assignee*: new party to contract
  - once contract **assigned**, original assignor has no rights or duties or under contract
    - assignee completely takes over rights/responsibilities
    - assignee's responsibilities/rights are same as assignor's
  - *delegation*: asking a 3<sup>rd</sup> party to do your part of contract, but you agree to still be legally liable for ensuring your end of the bargain is properly upheld
  - **non-assignable** rights
    - law prohibits pre-assigning certain rights like VA benefits, pensions, wages, workers comp
    - if specified in contract that assignment **not** allowed
    - rights to personal service (ex: personal trainer)
    - when assignment would materially alter/vary a party's performance
    - generally, when judgment is still pending for personal inj case (inj'd party can't assign clm)
  - normally, assignments are **not** contracts
    - **promise** to assign can be used as consideration for another contract, which is enforceable if it meets all other requirements for a contract
  - assignments **not** need to be in writing (unless related to something covered by statute of frauds)
  - valid assignment is effective **immediately**, even if other party to contract hasn't been notified yet
- third-party beneficiary:
  - person who is **not** party to contract but benefits from it and has legal right to sue to enforce contract if either party breaches
  - usually, only the two parties to a contract have rights to sue each other but there are some exceptions
  - to determine if 3<sup>rd</sup> party has right to sue:
    - binding contract must exist btwn promisor & promisee
    - parties to contract must intend for 3<sup>rd</sup> party to receive benefit & have rights
    - parties must clearly ID to whom performance is owed to
      - if performance owed to 3<sup>rd</sup> party, 3<sup>rd</sup> party can sue to enforce
      - if performance owed to promisee only, 3<sup>rd</sup> party **cannot** sue to enforce

- promisor can raise the same defenses against 3<sup>rd</sup> party as what they can raise against the promisee
- usually parties can cut off 3<sup>rd</sup> party's rights, unless 3<sup>rd</sup> party proves his position has materially changed in reliance on contracts
- 3 types of 3<sup>rd</sup> party beneficiaries (when someone other than parties to contract has rights/benefits)
  - **creditor beneficiary**
    - 3<sup>rd</sup> party is owed debt, which can be satisfied by performance of contract
    - elements:
      - A is to pay B under a contract
      - B happens to owe creditor some money
      - A & B agree to make A pay money directly to creditor, to satisfy B's debt
    - 3<sup>rd</sup> party (creditor) can pursue A or B for money if not rcvd
  - **donee beneficiary**
    - 3<sup>rd</sup> party is **not** formally owed debt but receives benefit from performance of contract
    - elements:
      - A is to pay B under a contract
      - B does **not** owe anything to C, but decides to give/donate money to C
      - A & B agree to make A pay money directly to C (donee)
    - 3<sup>rd</sup> party (donee) can only pursue A if money not rcvd
    - 3<sup>rd</sup> party (donee) **cannot** sue B, since B had no original obligation to give gift to 3<sup>rd</sup> party
  - **incidental beneficiary**
    - 3<sup>rd</sup> party that happens to receive benefit from performance of contract, but parties to contract **did not** intend to give 3<sup>rd</sup> party any rights to sue
    - example:
      - A is to sell car to B
      - B tells a friend that B can drive them to work if B gets the car
      - A & B do **not** agree to give friend any rights to sue
      - sale does not go through
      - friend **cannot** sue A or B
    - has **no** enforceable rights
    - (ex: citizen can't sue either for breach of contract btwn county & water company, if fire hydrant doesn't get enough water)
- how a contract can end (be discharged)
  - complete performance (i.e., parties acted and the contract is considered settled)
    - you pay the debt/monies owed
    - you tender (offer) to perform your part & other party declines
    - good faith performance, if entire performance turns out to be too difficult
    - if satisfaction guaranteed, promisee experiences personal/subjective satisfaction
    - if no timeframe set, after reasonable timeframe has passed
  - agreement of parties to terminate contract
  - substitution of new contract
    - **novation:**
      - substituting 3<sup>rd</sup> party for 1 of parties to contract, **relieving original party of duties**
      - similar to **assignment**, but this requires a formal contract
      - differs from **delegation**, which does **not** relieve original party of duties
    - **accord & satisfaction:**
      - agree to do/exchange something else instead of what was originally agreed
      - ex: instead of paying \$4000 for car, will trade motorcycle for car



- *impossibility of performance*
  - when performance **cannot** be completed
  - ex: contract to paint house, but house burns down
  - ex: contract for certain type of apple, but harsh winter destroys all crops of that type
  - includes:
    - change in law that makes contract illegal
    - death or incapacitating illness of specific person who was to perform personal service
    - one party's act prevents other party from being able to fulfill contract
    - destruction of contract subject matter
  - temporary impossibility suspends duty to perform, but does **not** eliminate it
  - *objective impossibility*: the promisor cannot conceivably perform
  - *subjective impossibility*:
    - promisor refuses to perform, even though it is technically possible
    - not sufficient for getting out of obligation to perform contract
  - similar concepts to *impossibility*:
    - *frustration*:
      - inability to achieve the **purpose** that was served by contract
      - must arise from an unforeseeable circumstance that is neither party's fault
      - ex: if plumber buys supplies to fix bldg that then gets destroyed, plumber can cancel contract to buy supplies
      - allows for parties to be discharged from contract
    - *impracticability*:
      - when performance becomes **extremely & unreasonably** difficult
      - applies when it is not completely impossible, but would be much more costly
      - ex: foreign country charges 100% tax as political retaliation for precious stones that can't be obtained elsewhere
- fraudulent alteration of contract
- contractual conditions
  - if condition doesn't occur, contract terminates & any innocent party may be entitled to dms
  - types of conditions
    - condition precedent
      - condition that must be fulfilled **before** performance required
      - ex: payment for goods is due **before** they are delivered
    - condition concurrent
      - condition that must be fulfilled when performance is being made
      - ex: payment for goods is due when they are delivered
    - condition subsequent
      - event that, if it occurs, allows contractual rights to be terminated
      - ex: tenant paid rent already, but then violates condo house rules
- contract breaches
  - repudiation:
    - a party's refusal to meet contract obligations, made at the time performance is due
    - ex: seller delivers goods to buyer, at which time buyer says they won't pay
    - must be positive & unequivocal to be considered breach (i.e., party **explicitly** refuses)
  - anticipatory:
    - party's unequivocal indication that they will breach, made **before** performance is due
    - ex: **before** seller delivers goods, buyer says they aren't going to pay

- material breach:
  - violation of agreement that would justify termination of contract
  - factors
    - extent to which breaching party has already performed
    - willfulness of breach
    - extent to which non-breaching party has obtained benefits & can receive adequate compensation
  - minor breach can suspend duty to perform or allow for suing of dmgs caused but doesn't count as breach of entire contract
- remedies
  - recovering monetary dmgs
    - compensatory dmgs: reimbursement for harm or loss actually suffered
    - consequential dmgs: compensation for foreseeable **indirect losses**
    - punitive/exemplary dmgs
      - penalty awarded strictly to punish defendant who:
        - acted in bad faith (intentional or reckless act)
        - caused intentional infliction of emotional distress due to outrageous conduct
      - isn't necessary related to the amt of plaintiff's losses (although courts try to be reasonable)
      - **is considered extra-contractual (any payment awarded by court that exceeds what is owed under the contract itself)**
    - liquidated
      - reasonable est of **dmgs** agreed to beforehand parties & included in contract to be paid in event of breach/negligence
      - i.e., pre-determined settlement amt agreed to by both parties
  - mitigation of dmgs:
    - duty owed by inj'd party to take reasonable measures to minimize further loss
    - (ex: if someone breaks your window, you should keep it covered up to prevent other dmg/loss to your home until you get it fixed)
  - equitable remedies (when monetary award is not enough)
    - specific performance:
      - court order requiring a party to perform a certain act
      - ex: singer wants to breach contract to perform, but court requires performance since audience wouldn't necessarily want another singer
    - injunction:
      - court order requiring a party to act or refrain from acting
      - with contract law, usually used to **prevent** someone from acting

#### 4: APPLYING CONTRACT LAW

- characteristics of ins contracts
  - conditional (insd must satisfy conditions before ins co's promise to pay is binding)
  - relates to fortuitous events (accidental & unforeseen)
  - exchange of unequal amts (small prem vs. large clm payout)
  - requires utmost good faith
    - complete honesty & disclosure from both parties
    - *concealment*: intentionally hiding a key (material) fact
    - *misrepresentation*: lying about a key (material) fact
    - incontestable clause:
      - clause that states ins co can't contest pol after it has been in force for specified period
      - contestable period: period during which ins co can challenge validity of life ins pol
  - **adhesion**
    - one party writes the contract & other party has to accept it as-is
    - (i.e., "take it or leave it")
    - for ins contracts, court normally interprets in favor of insd who didn't have say in language
      - court might make exception if language under question was required by the state
  - **indemnity (payment is for amt of dmgs suffered)**
    - principle of indemnity: ins pol shouldn't provide benefit that exceeds potential loss to be suffered by insd
    - valued pol: pol where ins co pays a stated amt, regardless of actual value of loss
  - nontransferable (insd can't assign rights to someone else)
- unique aspects of ins contract formation
  - agreement
    - agent commitments can be binding
    - application submitted to ins co by producer is considered the initial offer
      - if ins co issues pols w/ exact terms, that is acceptance & contract formed
      - if ins co issues pol w/ different terms, that is counteroffer
    - customer asking ins co directly for quote is usually invitation for an offer
    - *indication*: when ins co provides **nonbinding** quote on potential prem price
    - mailing of insd's acceptance binds ins contract at time of mailing, even if not rcv'd by ins co
    - binder: temporary written or oral agreement to provide ins cov until formal written pol issued
    - **silence is usually not binding unless there is established history/pattern w/ those parties**
  - content of ins contracts
    - **(5) necessary terms**
      - type(s) of cov sought
      - object or premises to be insured
      - amt of ins (pol limits)
      - insd's name
      - duration of cov
    - other terms can be implied by:
      - previous dealings
      - policy language in ins co's other policies
      - insd's needs/practices compared to similar customers
      - legal requirements

- *delivery* (placing pol in insd's control/hands)
  - provides evidence of contract formation and that ins co accepted insd offer to do business
  - generally, there is no law or statute that **requires** delivery for pol to be effective
    - but if no prior agreement in place, delivery **and** payment of 1<sup>st</sup> prem (as evidence of offer/acceptance) usually required before pol is bound
    - parties can decide to make delivery and/or payment a requirement before pol is bound
- when 3<sup>rd</sup> parties benefit from ins
  - (situations where someone **other than insd** might be affected by a loss, so they benefit from that fact that ins can help cover a loss)
  - 3<sup>rd</sup> party claimants
    - if insd is liable for a claimant's loss, claimant benefits from being able to claim from ins
    - **direct action statute: allows victim to sue ins co directly or to sue both ins co & tortfeasor**
  - real estate sales
    - buyers have future interest in home, so they benefit if seller's ins covers a loss that occurs
    - once buyer signs agreement, they bear risk of loss unless contract says otherwise
  - mortgagees (lenders)
    - lender want prop to be protected so that it retains its value as collateral for the loan
    - **lender can obtain separate ins on insd's property, solely for the mortgagee's benefit**
  - lessees (renters)
    - lessees/renters will be inconvenienced if prop is dmg'd, so they benefit if owner has ins
  - life estates/life tenants
    - *life tenant* (person who has right to use prop during their lifetime, but can't choose heirs)
    - *remainder party* (heirs who get prop after life tenant dies)
    - want to protect prop so they can use or earn money from prop during their lifetime
    - **party w/ life interest has no obligation to buy ins to protect remainder-party interests**
    - **life tenants can recover entire value of prop insured**
- *representation:*
  - statements made by applicant that ins co uses to decide if they are willing to write pol
  - do **not** directly relate to the pol itself and are **not** incorporated into it
  - can still cause contract to be voidable if proven to be *false representation*
  - 3 elements to proving *false representation*
    - statement is false/misleading
    - statement relates to material fact
    - ins co relied on false/misleading statement in issuing pol
    - (some states also require proof that misrepresentation was intentional)
  - statutes for when ins co has right to avoid pol
    - *increase-of-risk* (if misrep'd fact would have increased risk to ins co)
    - *contribute-to-loss* (ins co can avoid contract **only if** misrep'd fact contributed to loss in question)
- *warranty:*
  - statement that certain facts are true, and if not would render contract voidable
  - i.e., making someone guarantee a fact as a condition of the policy
  - (ex: application includes warranty that insd will maintain certain safety equipment)
  - 2 requirements:
    - parties must have clearly & unmistakably intended statement to be a warranty
    - statement must form part of contract itself

- how warranties differ from representations
  - ins co will write warranty into pol or incorporate them by reference
  - warranties are automatically considered material by law (representations are **not** necessarily assumed to be material)
  - warranties require strict compliance
- 3 classifications
  - affirmative [stating a fact is true at the time pol is formed]
  - continuing (promissory) [promising to do certain things or that certain conditions will continue to exist during pol term]
  - implied
    - obligation that courts impose on a seller to ensure regarding their product, even if those warranties are not expressly stated
    - ex: that product is safe
- ways an **ins co** might lose/forfeit a defense or contractual right
  - **waiver:**
    - relinquishment of a known **right**
    - **contractual in nature and rests upon agreement between parties**
    - **cannot** waive:
      - anything before the pol is actually in force (because no rights exist until the contract does)
      - facts
      - any privileges that are in place to protect public policy
      - exclusions because they aren't "rights" (they are ins co's statement beforehand of what they won't cover)
    - if producer misrepresents cov, ins co **not** liab but producer can be sued
    - if insd breaches a pol condition:
      - ins co must know of breach before ins co can waive it
      - once ins co knows of breach, must act immediately to avoid inadvertent waiver
    - ins co acts that might constitute them waiving a right:
      - receipt of prem w/ knowledge that insd is breaching pol conditions
      - demanding something according to pol provisions (if ins co disputes validity of pol, enforcing a right granted by the pol implies they agree pol is valid)
      - if ins co knows that insd is breaching contract, requesting for proof of loss (statement) w/o nonwaiver agreement in place
      - silence beyond reasonable term after learning of breach
    - insd must prove ins co made waiver
    - parol evidence rule **does** allow for evidence of **oral** waivers made **after** pol formation
  - **estoppel:**
    - prohibits ins co from asserting claim or right that is inconsistent w/ their past conduct when insd has detrimentally relied on
    - i.e., if insd innocently acted on ins co's initial representations, and a change now would result in dmg to the insd
    - ex: insd can claim estoppel if ins co initially says they will cover med bills so insd goes to see dr, then ins co changes mind about cov leaving insd w/ med bills

- 3 elements that must be proved:
  - false representation of a material fact
  - reasonable reliance on this representation
  - **injury or detriment to insd**
- insd **cannot** have committed fraud or acted in bad faith
- election:
  - refers to voluntarily choosing btwn 2 alternative rights/privileges
  - making 1 choice may imply relinquishment of the other option(s)
- non-waiver agreement:
  - **signed agreement** indicating that neither party waives rights during investigation
  - **used to prevent subsequent claims of waiver, estoppel, and election**
  - ins co should send as soon as cov issue arises
- reservation of rights (ROR) ltr:
  - **letter** stating the cov issues being investigated for a claim
  - informs insd that ins co is handling clm w/ understanding that it may end up denying cov
  - provides unilateral notice to insd
  - must be communicated to insd in writing in timely manner

## 5: EXAMINING COMMERCIAL LAW

- (special notes for this chapter)
  - *risk* refers to who bears the cost if a good is dmgd, destroyed, or lost
  - *merchant* refers to a person or co who sells goods as their normal course of work or business
- UCC Article 2
  - governs laws relating to **sale of goods** (tangible & movable property, other than money)
  - is a model code that has been adopted into state law
- 3 types of specialized sales contracts
  - sales on approval
    - buyer wants to try good before agreeing to buy
    - seller retains title/risk until acceptance
  - sale & return
    - buyer intends to resell goods but can return them if items don't sell
    - seller retains title until buyer's payment/resale
    - buyer's creditors can seize goods if creditors were not on notice of seller's interest in goods
  - auction sales
    - at auctions **w/o** reserves, seller **must** sell to highest bidder
    - at auction **w/** reserve, seller has right to reject offers that aren't above reserve price
    - bidders can retract bid before auctioneer announces completion of sale
- formation of sales contracts
  - offer
    - must be definite enough that the parties u/s their obligations
    - may have 1+ terms open if parties intended to form contract & there is a reasonable basis on which breach can be calculated
  - acceptance
    - if offer doesn't say method of acceptance required, any reasonable manner is ok
    - if acceptance includes add't/diff terms:
      - if one party is non-merchant, the non-merchant must agree to terms before contract is binding
      - if both parties are merchants, new terms **automatically** become part of contract unless:
        - acceptance is expressly conditioned on seller's consent to new terms
        - terms would materially alter contract
        - original offeror objects w/i reasonable time
  - consideration
    - especially essential to sales contracts
    - contrary to normal contract law, new consideration is **not** required to modify sales contract
  - statute of frauds
    - applies to sale of goods for \$500 or more
    - allows defendant to avoid contract if there is no contract in writing w/ **defendant's** signature
      - 3 exceptions:
        - buyer accepted & received part of goods
        - buyer has made any part of payment for goods
        - goods were made specifically for buyer:
          - goods aren't suitable for resale to others in ordinary biz
          - seller made substantial commitments/actions to begin
    - does **not** require **plaintiff's** signature to be present

- issues surrounding sales contracts
  - risk of ownership for goods
    - refers to who bears cost if goods are dmgd/destroyed
    - usually transfers w/ title, unless goods remain w/ a seller who is a merchant
      - in that case, risk doesn't transfer until buyer receives goods
    - if buyer rejects goods that don't conform w/ contract, risk remains w/ seller until seller fixes problem or buyer accepts goods
  - delivery terms (who has risk while goods are in transit)
    - key terms
      - "free" → seller is "free" of risk
      - FOB = "free on board"
      - *carrier* refers to shipping co
    - FOB shipment – risk transfers when seller delivers to carrier
    - FOB destination – risk transfers when carrier delivers to buyer
    - FAS (free alongside) vessel – risk transfers when seller delivers goods alongside vessel for loading
    - FOB vessel – risk transfers when goods loaded onto vessel
    - CIF (cost ins freight) – seller obligated to pay for ins & freight (shipping) charges
    - CAF (cost & freight) – seller obligated to pay for freight charges but **not** ins
  - inspection
    - buyer usually has right to inspect before payment & acceptance
    - 2 exceptions:
      - if contract requires buyer to pay at delivery of **title**
      - **COD (collect on delivery)**: when buyer must pay upon **delivery** of goods w/ no right to inspection
  - delivery must occur w/i reasonable time (if no timeframe specified in contract)
  - conformity of goods (goods must match what is promised in contract)
    - non-conformity usually considered breach of contract
    - 2 exceptions
      - if seller informs buyer that shipment is *accommodation* (counteroffer of substituted goods)
      - seller notifies buyer of intention to "cure" (deliver confirming goods) before time for contractual performance has expired
  - warranties
    - promises made by seller about a good
    - **sellers' liab for warranties can extend to 3rd parties who aren't immediate buyers or consumers**
    - 3 types of **express** warranties
      - affirmation of fact about goods (i.e., when you say something about the goods)
      - description of goods in contract
      - contract based on sample/model (i.e., that goods will be the same as sample/model)



- **implied warranties**
  - **merchantability**
    - applies only when seller is a merchant
    - includes 5 warranties:
      - must pass w/o objection in trade under contract description
        - i.e., outside parties would agree that good matches description
        - ex: if you are selling a car, most people would agree that “car” is an accurate description of your good
      - fungible goods must be indistinguishable, interchangeable, and of avg quality (ex: all pieces in load of gravel will pretty much be the same)
      - fit for the **ordinary** purpose for which they will be used
        - (ex: if lid falls off & person burned by hot drink, it was not fit for its ordinary purpose)
        - applies even if buyer didn’t tell seller how he planned to use product
      - all goods in a batch/lot must be approximately like kind/quality
      - must conform to specifications on label/container
  - **fitness for particular purpose**
    - if buyer tells seller he is looking for a something to accomplish a specific goal
  - implied warranty of title
    - seller has legal ownership of good & no knowledge of any other legal claim to it
    - warranty may be waived if it is clear that seller is selling for someone else (ex: real estate agent)
- to sue for breach, buyer must first give seller notice of rejection & state defect/reason
- when buyer can revoke acceptance
  - buyer reasonably assumed seller would cure defect but seller didn’t
  - buyer accepted goods before discovering non-conformity
  - buyer accepted goods b/c it would’ve been difficult to discover defect & b/c of seller’s assurances of quality
- excuses for non-performance (i.e., when its ok to not perform exactly to contract)
  - loss of specified goods before risk transfers to buyer
  - substituted performance
    - if agreed on carrier or facility becomes unavail, seller can use reasonable substitute
    - if agreed payment method fails due to govt regulation, seller can withhold delivery unless buyer provides commercially equivalent means of payment
  - failure of pre-supposed condition
- remedies
  - for seller
    - if buyer insolvent:
      - refuse to deliver goods if learn of insolvency before delivery
      - if goods enroute, stop delivery unless carrier/warehouse notified buyer that it is holding goods or buyer already rcv’d title
      - demand return of goods w/i reasonable time period
    - seller can sue if buyer:
      - buyer wrongfully repudiates/denies contract
      - buyer wrongfully rejects goods
      - fails to make payments that are due before delivery

- if goods being manufactured at time of breach, seller can sell unfinished or finished good to another party for partial pay & sue for diff
- if buyer fails to pay after accepting goods or after liab passes to buyer, seller can sue even if seller possesses goods if seller can't sell to another party at reasonable price
- for buyer
  - if seller repudiates/denies contract or fails to deliver: buyer entitled to diff btwn contract price & mkt price at time buyer **learned** of breach
  - if goods are unique or buyer can't get them from another source: buyer entitled to force seller to perform
  - buyer can buy substitute goods w/i reasonable time of learning of breach & recover diff from seller
  - if buyer accepts non-conforming goods & informs seller of non-conformity: entitled to price difference btwn accepted goods & conforming goods
- *negotiable instruments/commercial paper*
  - **written documents** that promise the holder a specific payment and that are negotiable (can be transferred from person to person)
    - with cash, seller is getting their payment right here & right now
    - with negotiable instrument, you can send payment to seller who is away from you, set payment to occur at future date, or transfer the promise of payment to others
  - governed by UCC Article 3
  - 4 requirements:
    - signed by maker/drawer
    - contains unconditional promise to pay & no other promises, except as provided by Article 3
    - payable on demand (immediately) or at definite time
    - payable to order/bearer
  - 2 categories
    - drafts (**orders** payment to be made)
    - notes (**promises** that a payment will be made)
  - 4 types
    - draft (ex checks)
    - certificate of deposit (CD) (issued by financial institution, promising to repay w/ interest)
    - promissory note
      - a written agreement that says one party promises to repay another
      - similar to CD, but not issued by financial institution
    - trade acceptance
      - two-party draft used when seller wants cash but buyer can't provide it until goods sold
      - works like a promissory note, but you can sell it to others at a discount
      - seller delivers goods & sells trade acceptance at discount for immediate cash
      - buyer pays new holder of trade acceptance
  - *drawer/maker:*
    - party who creates negotiable instrument in someone's favor
    - (ex: the person writing a check)
    - usually has primary liab (legally obligated to pay out according to the terms of the negotiable instrument)
    - if there is a drawee, only has secondary liab (if drawee fails to pay)

- *drawee*:
  - party who will make payment on behalf of the drawer (ex: the bank)
  - has primary liab
- *holder*
  - someone who possesses a negotiable instrument & is entitled to receive payment
  - new holder has same right to enforce payment as original holder had
  - *endorsement*
    - signature (or equivalent) to legally transfer negotiable instrument to a new holder
    - types
      - special – specifies to whom instrument is payable to
      - blank/general – names no specific payee
      - restrictive/collection – includes language placing addt limitations on negotiation
      - qualified – limits endorser's liab to later holders if instrument is dishonored ("w/o recourse")
      - unqualified – places **no** limits on endorser's liab on the paper
      - (can be more than 1 of these types, such as "unqualified special endorsement")
  - secondary liab:
    - obligation to pay instrument only if someone else refuses to pay/accept instrument
    - (ex: when you co-sign for someone)
    - can apply to anyone who endorses instrument and transfer it to another party
  - *holder in due course*:
    - refers to a special category of holder
    - person to whom an instrument has been issued/endorsed who possesses it for value in good faith w/o notice that it may be invalid/overdue/dishonored
    - i.e., innocent party who exchanged good or service for instrument & didn't know it is bad or invalid
    - most holders qualify as *holders in due course*
    - (ex: if A gave B a ck for purchase & B then signs it over to C but A puts a stop-pay, C can still cash ck against A)
    - **cannot** be *holder in due course* if you got instrument under these circumstances:
      - purchased instrument at judicial sale or took it under a legal process
      - acquired when taking over an estate
      - purchased as part of a bulk transaction **not** in regular course of transferor's biz
      - used fraud/illegality to obtain
      - had notice of defense against or claim to instrument
    - personal defense
      - defenses that **can't** be used against a holder in due course to deny payment
      - includes any defense you'd use in a simple contract dispute
    - real defense
      - defenses that **can** be used against any holder, including holders in due course to deny payment
      - includes defenses relating to existence of instrument itself
      - examples:
        - incapacity of parties involved
        - duress
        - illegality
        - discharge in bankruptcy

- documents of title
  - comes into play when goods are being shipping/stored
  - holder of title has ownership rights to goods & can receive/hold/dispose of goods for owner
  - governed by UCC Article 7
  - bailee: person who temporarily possesses another party's property
  - bailor: actual owner of prop
  - 3 required elements of a doc of title:
    - created by bailee as receipt for goods rcv'd
    - is a contract to ship or store goods
    - if negotiable, contains statements that:
      - holder has right to receive, hold, dispose of both goods & title
      - purchaser of title does so free of claims/defenses of prior parties
  - must be issued/addressed to **bailee w/ purpose of covering the goods in bailee's possession**
  - warehouse receipts:
    - provides title to goods in storage & assures delivery to holder of warehouse receipt
    - 9 required items
      - warehouse location
      - date receipt is issued to bailor
      - receipt #, showing consecutive numbering of all receipts issued by warehouse
      - statement indicating party to whom goods will be delivered at end of storage period
      - storage rate & handling charges
      - description of goods or their packages
      - warehouse rep's signature
      - statement of ownership if warehouse is owner or partial owner of goods stored
      - statement indicating amt of any advances made or liab incurred for which warehouse claims security interest
    - parties can limit liab through terms in warehouse receipt or storage agreement
  - bill of lading: (BOL)
    - given by shipping co, includes shipment contract terms & acknowledges receipt of goods from shipper
    - consignor: party shipping goods
    - consignee: party receiving goods
    - 2 most common types:
      - straight BOL **[non-negotiable]**
        - names consignee & obligates carrier to deliver goods to consignee only
        - consignee **cannot** transfer goods to other party prior to delivery & tell carrier to just deliver to that party
      - order BOL **[negotiable]**
        - allows consignee to transfer goods to other party & tell carrier to deliver to them
- secured transactions
  - when buyer gives collateral to seller to guarantee payment
  - 5 elements
    - debtor
    - secured creditor
    - collateral (cash or asset that a debtor pledges to secure a debt or obligation)
    - security agreement

- security interest (interest in prop, which gives creditor right to sell the prop to satisfy debt if debtor defaults on payments)
- governed by UCC Article 9
- main forms
  - pledge: creditor keeps the good until payment has been made or service performed
  - chattel mortgage:
    - debtor keeps possession, but creditor has right to take ownership/title
    - debtor can pay amt in default + reasonable expenses incurred by creditor to redeem the collateral
    - *conditional sale*:
      - form of chattel mortgage where seller is also the financier/lender
      - if debtor doesn't make payments, seller (creditor) can take back the sold good
- 5 forms of collateral
  - consumer goods
  - equip (items used in business/govt)
  - farm products (produce/livestock)
  - inventory
  - property on paper
    - papers that serve as evidence that debtor's has rights in a personal prop
    - ex: lienholder w/ title on a car can use title as collateral when borrowing money for themselves
- *attachment*
  - legally creating a security/collateral interest in a prop
  - 3 requirements
    - a consensual security agreement exists btwn debtor/creditor
    - creditor must give value/consideration (such as loan money, forgiveness of debt, etc.)
    - debtor must have (ownership) rights in collateral
  - does **not** protect against claims to prop by parties other than the debtor (i.e., if debtor owes other people money, they can make claim to prop too)
- *perfection*
  - like attachment, but more formal
  - preferred over attachment b/c it protects against other creditors' **non-perfected** claims
    - perfected creditors get priority for their debts to be settled
    - after theirs are resolved, remaining funds go to attached creditors
  - perfected security interest:
    - agreement that has been filed w/ appropriate court to provide a priority interest over others who may also have interest in same prop
    - gives constructive notice to others about your interest in prop (knowledge that others are presumed to have by law)
    - obtained by filing financing statement w/ 3 elements:
      - names/addy of debtor/creditor
      - debtor's signature
      - general description of collateral prop
    - financing statements are valid for 5 yrs & can be renewed as many times 5 yrs at a time

- superior to all interests **except**:
  - holder in due course (i.e., parties who bought goods from a non-merchant & didn't know about secured interest have higher priority interest than secured parties)
  - artisan/mechanic's lien
  - if borrower sells collateral prop to someone who is 1) in the biz of selling that kind of good & 2) didn't know sale violates the borrower's security agreement w/ lender
- creditors often require borrower to buy ins on collateral prop
- *termination statement*: evidence that a secured debt has been paid in full
- default
  - forms of default
    - non-payment
    - failure to insure collateral
    - debtor's bankruptcy
    - loss/destruction of collateral
    - removal of collateral to another place
  - ways to foreclose on collateral property
    - sue on underlying debt (sue debtor for amt owed but don't take collateral)
    - strict foreclosure (if creditor **already has** collateral, keep it for full satisfaction of debt)
      - **not** permitted for consumer goods if borrower paid at least 60% of loan
      - creditor can repo item w/o court order if creditor can do so w/o breaking law
    - sell collateral
    - dispose of collateral as desired
- fair trade laws
  - protects consumers by limiting *restraints on trade* to ensure a competitive marketplace
  - Federal Trade Commission Act (**encourages free competition**, anti-monopoly)
    - fights unfair methods of competition
    - fights unfair or deceptive acts/practices that affect interstate commerce
    - not specific only to competition/monopolies
    - does **not** apply to ins industry
      - per McCarran-Ferguson Act, Fed govt generally doesn't regulate ins industry b/c ins is **subject to state regulation**
    - establishes 5-member commission who takes action in 3 ways
      - **hold trade practice conferences**
      - cease & desist orders
      - informal settlements & consent orders used to settle cases from violations
  - state unfair trade practice acts
    - unfair acts (oppressive or bad-faith conduct)
    - deceptive acts (fraud, deceit, misrepresentation)
    - unfair methods of competition (ex: price fixing or group boycotts)
  - consumer warranty laws / Magnuson-Moss Warranty Act
    - assures product is fit for the purposes for which product will be used
    - required disclosures in a written warranty
      - what it will/won't cover
      - when it expires
      - to whom it applies
      - what warrantor will do if malfunction occurs
      - what service/parts are free

- how to obtain redress (service)
  - if good is priced at over a certain amt, must have one of these types of warranties:
    - *full warranty (lemon provision)*: agree to fix defect w/i reasonable time at no charge, or give full refund or new replacement if warranties fail
    - *limited warranty*: has required warranty disclosures, w/ some limitations on buyer's rights
- consumer credit laws
  - protections provided:
    - fair access to credit
    - right to know/understand terms/interest of a loan prior to agreeing to take on loan
    - access to credit reports & means to correct/repair them
    - methods for resolving credit disputes/discrepancies
  - Truth in Lending Act
    - to ensure consumers know terms & interest rate of credit transactions
    - finance charges must be disclosed
    - prohibits companies from issuing credit cards to those who don't request/apply for them
    - limits cardholder's liab to \$50 for unauthorized use once cardholder notifies co issuing card
    - allows cardholder to withhold payment w/o incurring finance charge until transaction disputes are settled
    - Fair Credit Billing Act – gives person right to not pay remaining amt due for unsatisfactory goods/services if he first tries in good faith to return prop or give merchant chance to correct problem
    - Fair Debt Collection Practices Act (provides rules for debt collection)
  - Electronic Funds Transfer (EFT) Act
    - buyers do **not** have right to stop-pay EFTs
    - a person's liab is limited to \$50 if card is lost/stolen & owner reports w/i 2 biz days
  - Fair Credit Reporting Act
    - 3 circumstances when a credit agency can disclose credit report to others:
      - court order
      - under written instructions of person
      - to person who intends to use info in connection with:
        - credit transaction
        - for employment purposes
        - insurance underwriting
        - to determine eligibility for biz license
        - for legitimate biz need for info in connection w/ biz transaction
    - consumer must receive notice of if recipient of report refuses of credit/ins/employment
  - Equal Credit Opportunity Act (prohibits credit discrimination based on age, race, color, religion, national origin, welfare status)
- bankruptcy
  - Chap 7
    - "last resort"
    - sell & distribute assets among creditors

- creditors paid in following order of priority:
  - secured creditors
  - those entitled to receive unsecured monies from debtor
    - employees
    - unsecured lenders
    - govt
  
- balance of debts owed is discharged
  - creditors can no longer pursue, unless debtor makes new promise to repay
  - purpose is to give fresh start
  - **not** automatic
  - not avail to liquidating corps/partnerships
  - if person was bankrupt in last 6 yrs, discharge request will be denied
- Chap 11
  - s/u payment plans w/ creditors
  - used primarily by:
    - large corps
    - partnerships
    - individuals with a lot of debt
- Chap 13
  - same as Chap 11, but used primarily by small bizs and individual wage earners
- anyone can file for bankruptcy voluntarily
- creditor can force bankruptcy filing if:
  - they believe that a bankrupt person /entity is favoring other creditors
  - they dispute remaining assets of debtor's estate (i.e., they think debtor is hiding assets)
- trustee is responsible for making inventory of assets & selling them off as economically as possible
- assets that are **exempt** from bankruptcy sale:
  - limited homestead exemption (debtor's primary residence, up to a certain value)
  - tools of trade (work tools)
  - life ins
- debts that **cannot** be discharged
  - certain tax clms
  - money, prop, services obtained by fraud
  - clms for willful & malicious inj to people/prop
  - alimony/child support
  - most student loans
  - debts incurred in court actions from DUI



## 6: EXAMINING PROP LAW

- *pers prop*: any prop that isn't real prop/land
- title:
  - legal ownership of prop
  - highest right to prop that a person can acquire
  - *possession*: having control or custody of prop, but not necessarily title/ownership
- 3 features of ownership
  - right to exclude others from use/enjoyment of prop
  - right to pass valid title of prop
  - obligations of ownership (ex: pay taxes, use prop in way that doesn't interfere w/ others' rights)
- intellectual prop rights
  - (legal entitlement attached to intellectual prop)
  - copyrights
    - exclusive right to copy or reproduce a work, except for fair use (teaching, research, commentary)
    - factors used to define fair use
      - purpose of use
      - nature of work
      - amt & substantiality of portion used
      - effect of use on works' value
      - extent to which the use might deprive copyright owner of financial benefit
    - for works created during or after 1978, copyright lasts 70 yrs after date of author's death
  - trademarks (ex: slogan, logo, product names)
  - trade secrets (ex: secret recipe)
  - patents
    - exclusive right granted by fed gov to own & control a new, useful, and non-obvious invention
    - lasts 17 yrs
    - **cannot** be renewed
- accession
  - increase, addition, or improvement to prop that results in increase to prop value
  - usually is a result of a process or transformation
  - examples:
    - livestock produces offspring
    - cut down tree & turn it into lumber
    - painting house
  - owner of original prop usually owns accession too, unless someone took & changed prop w/o knowing it had an orig owner
    - if prop is taken innocently:
      - compare value of new good to old good
      - if very disproportionate, innocent party might be allowed to keep finished goods if they reimb orig owner for value of orig goods
- confusion
  - when goods owned by diff owners are intermingled in a way that it's impossible to tell them apart
  - if intermixture was intentional or fraud, innocent party gets title to wrongdoers portion
  - if intermixture was innocent/accidental, parties jointly own entire mass in proportion to their interests

- gift
  - voluntary & gratuitous transfer of prop w/o consideration
  - 3 elements
    - donative intent (**present & immediate** intent to donate)
      - promise to make future gift is **not** enforceable
    - **delivery**
      - donor must give up all control & possession
      - donee must assume control & possession over item
    - acceptance (including burdens of ownership such as paying tax)
- *bailment*:
  - any situation where an owner gives temporary possession of prop to someone else
  - *bailor*: original owner
  - *bailee*: person taking temporary possession
  - 3 elements:
    - transfer of possession **w/o** transfer of title
    - bailee's acceptance of bailed prop
    - bailee's agreement to deliver the prop to a designed 3<sup>rd</sup> party or back to bailor
  - bailee's rights/duties
    - if for **bailor's** sole benefit
      - ex: you ask someone to watch your car while you're on vacation
      - bailee can use/handle prop only to extent necessary to preserve/protect prop
      - owes only slight degree of care (if dmg foreseeable & bailee could've prevent w/o substantial trouble or expense)
    - if for **bailee's** sole benefit
      - ex: you borrow someone's truck b/c you are moving
      - right to use of prop is limited to what bailor intended to let bailee use prop for
      - extraordinary degree of care
    - if for **mutual** benefit
      - ex: you rent car from Avis (you get to use car, Avis gets to make money)
      - bailee can only use prop as specified in agreement/contract
      - reasonable degree of care
    - **possessory lien**:
      - right to retain possession of bailed prop as collateral
      - can be asserted by bailee if compensation wasn't paid
    - bailment contract can extend/limit liab for ordinary neg, but not willful or wanton misconduct
    - bailee has insurable interest, but is **not** required to get ins unless by law or contract
    - bailee must surrender prop on request, unless bailment is for specified time period
    - bailee's attempt to sell goods or cause extensive dmg terminates bailment & entitles bailor to immediately recover goods + repair/replacement costs
  - bailor's rights/duties
    - that prop is reasonably fit for purpose
    - reasonable inspection of goods for defects & to notify bailee beforehand of known defects
    - **not** liab for bailee's negligent use of bailed prop, except in negligent entrustment
      - ex: giving keys to drunk person

- real property ownership
  - refers to land & everything in/on/above
  - types of ownership
    - fee simple: full ownership w/ unconditional right to transfer/dispose of it
    - life estate:
      - entitled to possession & income for duration of a specific individual's life
      - what happens to prop at end of lifetime is predetermined
    - concurrent estates (ownership by 2+ people)
      - joint tenancy
        - all parties have **equal** shares
        - if someone dies, their share gets split to remaining owners
      - tenancy by entirety (like joint tenancy, but specifically for a husband/wife)
      - tenancy in common
        - parties can have unequal shares
        - if someone dies, their share stays separate & can be passed down to heirs
      - community prop (spouses automatically get ½ interest in any prop acquired during marriage)
    - coop ownership
      - a corp holds title to prop & coop owner purchases stock in corp in exchange for long-term lease for a certain apartment
      - typical duties of corp:
        - arrange for financing
        - construct the bldg
        - operate & maintain the bldg
        - collect monthly assessments/fees to pay mortgage & prop expenses
      - (+) provides for operation/maint by someone other than you, while still guaranteeing your right to occupancy for as long as desired
      - (-) if you want to sell your share, finding buyer can be difficult
      - (-) if other tenants do not keep up their payments, creditor can foreclose on prop
    - condo ownership (individual ownership of a unit plus an undivided interest in common elements)
- real property sales
  - vocabulary
    - deed: legal doc that actually transfer title for real prop
    - vendor: party selling their real estate interest
    - vendee: party buying a real estate interest
    - grantor: party giving title to someone, after sale or as a gift
    - grantee: party receiving title
  - 3 types of sales
    - warranty
      - general
        - grantor has valid title
        - no one else has better title than grantor
        - guarantees there are no encumbrances (loans, prior claims) on prop at all
        - i.e., if you buy prop & anyone else then claims they have stake in it, you can sue seller

- **special**
  - grantor has valid title
  - guarantees there are no encumbrances created since grantor took the title (no promises that prop is free of **prior** encumbrances)
  - i.e., if you buy prop & anyone else then claims they have stake in it, you can only sue seller if that person's claim was dated after seller initial owned prop
- bargain & sale
  - grantor has valid title
  - **no** warranties against someone having a better title
  - **no** warranties against any encumbrances
  - i.e., if you buy prop & anyone else then claims they have stake in it, you can only sue seller if it turns out seller had no right to sell b/c they never legally owned prop
- quit-claim
  - **no** warranties whatsoever
  - if someone asserts rights, grantee has **no** recourse against grantor
- requirements for sales deeds
  - in writing (per statute of frauds)
  - grantor must be legally competent, have their name on deed, and sign deed
  - names grantee
  - states consideration
  - contains words that specify transfer of prop is occurring
  - contains description of prop
  - dated
  - contains paragraph on who transferred prop to grantor, date of transfer, and location of recorded copy of deed
  - (in some states) grantor's signature under seal
  - (in some states) witness to grantor's signature
  - (in most states) acknowledgment (formal written statement by public official, such as notary, confirming grantor appeared before him/her to transferred title voluntarily)
  - deed must be delivered in order to effect transfer
- recording
  - filing a record of transfer w/ gov
  - gives notice to world that transfer of real prop has occurred
  - if parties dispute ownership:
    - person who recorded will prevail over party who didn't record
    - if neither party recorded deed, person who took ownership more recently prevails
- situations where others might have **financial** interest in your prop
  - mortgage
    - mortgagor (borrower)
    - mortgagee (lender)
    - mortgage refers to actual loan document, which lender holds
    - if mortgagor defaults, mortgagee/lender will seek foreclosure in court
    - even if mortgagor sells prop, they are still liab for balance of mortgage debt unless mortgagee releases them

- trust deed / deed of trust / trust indenture
  - similar to mortgage, except 3<sup>rd</sup> party trustee holds mortgage deed instead of lender
  - refers to secured prop interest that is held by a trustee, to protect lender (beneficiary) until loan is repaid by borrower (trustor)
  - (+) if loan in default, trustee handles foreclosure (saving the lender hassle)
  - (+) in some states, foreclosure can be done outside of court (saving time & money)
  - (+) facilitates borrowing large sums of money
  - (+) it's easier to sell a bond secured by a trust deed than to sell a mortgage note
  - disadvantages, usually when # of beneficiaries/bondholders is large
    - (-) trustee must ensure all bondholders are paid otherwise trustee is personally liab
    - (-) a minimum # of beneficiaries/bondholders must be involved to complete foreclosure
- land contract
  - parties have a sales agreement, but seller doesn't transfer title until certain amt is paid
  - frequently used when buyer has bad credit or insufficient down payment & can't get mortgage
  - buyer assumes all burdens of ownership but doesn't hold title
- mechanic's lien
  - lien granted by law to anyone who repairs a specific piece of prop, to secure payment for repairs
  - contractor must show:
    - substantial performance of contract
    - improvement to specific prop
    - specific mention in contract of prop to be improved
  - notice of lien must state:
    - amt claimed
    - claimant's (mechanic's) name/addy
    - type of improvement
    - description of the land
    - prop owner's name
  - 4 methods to determine when mechanic's lien attaches to a prop
    - (most states) attaches on day 1 of **any** work starting under **overall** contract
      - subcontractor's rights attach on day 1, even if subcontractor's portion of job is not done until later
      - ex: if project starts Day 1, bank loan signed Day 5, subcontractor starts his portion Day 7 → subcontractor has priority over bank
    - (some states) attaches when contractor does their portion of work
      - contractor would **not** have priority over any mortgage recorded earlier
      - ex: if project starts Day 1, bank loan signed Day 5, subcontractor starts his portion Day 7 → bank has priority over subcontractor
    - lien attaches on date mechanic **makes** contract
    - lien attaches on date of a formal notice filing (if there is a filing system)
  - waiver of right to place liens
    - can be made in contract, but state law dictates validity:
      - might not be valid unless contract filed w/ state
      - might be valid only against general contractor
      - might be valid against everyone including subcontractors
    - may be done in parts, as work progresses & payments made
  - once debt paid, debtor can clear mechanic's lien

- incidental prop rights (when you may have limited rights to use someone else's prop)
  - adverse possession
    - if you use someone's prop for extended time & they don't do anything about it, you can eventually file claim to become rightful owner
    - commonly known as *squatter's rights*
    - 4 elements:
      - had exclusive possession of prop & occupied it in intended manner of prop (ex: squatter lived in residential bldg)
      - possession was open & obvious
      - possession was w/o owner's consent
      - possession was continuous for required statutory period
  - rights to what is under, above, and on land's surface (ex: mineral or oil rights)
  - lateral support
    - right to have your **land** supported by adjacent **land**
    - if they excavate land, they are liab for dmg to your **land** (and per some courts, things on the land)
  - subjacent support
    - right to have your land supported by earth below it
    - ex: if someone w/ mineral rights digs & your lot collapses, you can sue for dmg
  - water rights
  - fixtures
    - fairly permanent installations or attachments that become part of the bldg/land
    - improvements and betterments:
      - alterations/additions made to bldg by party who doesn't own bldg (ex: tenant)
      - for ins purposes, these become part of leased structure
      - party may lose rights to these to bldg owner
    - factors to decide if something is a fixture
      - article can't be removed w/o major dmg to original prop, **even if dmg can be repaired**
      - specifically constructed or fitted for use in building, or is installed to enable people to use bldg
      - if party who attached item intended it to become part of land/bldg
      - trade fixtures
        - installed by tenant solely for biz purposes & can be removed w/o permanent inj to land/bldg
        - are removable by law
    - **examples:**
      - baseboard heaters installed and hard-wired into the apartment
      - decorative tile wall panel installed in bathroom
- land use restrictions (when your freedom to use your land however you want might be restricted)
  - incorporeal interests
    - nonmaterial interests in real property (minor ways when someone can affect the prop owner's freedom of use)
      - easement:
        - non-possessory **permanent** right to use another's prop for a particular purpose
        - ex: if Lot A totally blocks Lot B from any rd, Lot B may have easement to go thru Lot A
      - profits à prendre: right to extract substances from soil or take products from soil
      - **seller's restrictions on buyer's use of prop**

- license: **temporary** perm to use a prop for a particular purpose
- govt controls
  - zoning
    - exclusionary zoning: prohibiting addt construction, or requiring high standards to build
    - spot zoning: allowing small area to follow totally diff zoning from surrounding area
    - special exception:
      - explicit perm for certain land use w/ certain limitations (ex: church)
      - zone type already allows for this use, but requires applicant to confirm they've met pre-set rules first
    - variances: allowing you to break one or a few rules of your zoning's requirements
      - hardship variance: exception for lots that don't conform to ordinance requirements of zone due to **physical** characteristics of prop
      - use variance:
        - generally allowed if use would benefit general welfare
        - non-conforming use:
          - use that is impermissible under current zoning, but is allowed b/c use was lawful before restrictions took effect
          - i.e., being grandfathered in
  - bldg codes
  - eminent domain:
    - govt right to seize private prop for a public use
    - 2 conditions:
      - land must be used for a public benefit
      - **govt must pay just compensation**
- landlord-tenant relationships
  - types of tenancy
    - tenancy at will:
      - tenant has perm to occupy as long as landlord desires w/ **no** formal term of duration
      - most flexible option
      - very risky for tenant as landlord can end lease w/ very little notice
    - estate for yrs:
      - lease created for a specific time period
      - commonly known as "fixed lease"
      - unless lease explicitly renewed, tenant must move out at end of period
    - periodic tenancy:
      - predefined period (ex: month, quarter) that automatically renews until someone gives notice of intent to end lease
      - ex: month-to-month lease
      - if someone ends lease, tenant has until end of the period to move out
    - holdover tenancy: when tenant continues to occupy premise even after lease ends
  - landlord
    - has duty to deliver possession of premise to tenant at lease start date
    - has right to receive rent & recover premise in same condition
    - remedies against tenant's breaches:
      - **eviction** (order of repossession, generally followed by a warrant of removal)
      - **distrain** (take tenant's prop & sell for rent)

- liab for inj to 3<sup>rd</sup> parties:
  - limited to landlord's own neg or for latent defects on premises
  - generally not liab for tenant's actions
  - if landlord forces tenant to sign waiver of liab, waiver doesn't extend to 3<sup>rd</sup> parties
- tenant
  - has duty to pay rent & return premise in same condition
  - has right to occupy premise for agreed time period
  - does **not** need to pay rent if this happens sequentially:
    - tenant demanded landlord to correct a situation
    - landlord didn't correct w/i reasonable time
    - tenant left premise at end of reasonable time
      - tenant choosing to stay on premise may constitute waiver of right to withhold rent
- ins pol is a type of intangible prop



## 7: EVALUATING TORT LAW, PART 1

- tort:
  - a wrongful act or omission, **other than crime or breach of contract**, that a invades legally protected right
  - note: some items can be considered a crime or tort, but this chapter discusses them in their tort context
  - *tortfeasor*: party who commits a tort
- 4 elements of negligence (**unintentional** tort)
  - legal duties were owed
    - legal duty: obligation imposed by law for preservation of others' legally protected rights
    - can be created by either statutes, contracts, or common law (case law)
      - ex: liab for fleeing the scene of an accident is imposed by statute
    - (ex: pedestrian has duty to stay off road unless it is safe & legal to cross there)
  - breach of those duties
    - reasonable person test: **objective** test based on how a reasonably cautious person would act
    - (ex: pedestrian breached duty if darts out in front of driver when it was unsafe & illegal to do so)
    - (ex: using inferior materials/ingredients)
    - extra high degree of care is **legally** necessary in 2 cases:
      - common carriers: cos offering transportation to any member of the public
      - people handling/storing dangerous materials
    - (ex: agent didn't breach duty if insd lied on application but agent had no reason to know)
  - proximate cause
    - a cause that if left to natural play out with no new intervening event would produce an event that otherwise wouldn't have happened
    - i.e., defendant's actions were direct cause of plaintiff's dmgs
    - (ex: if driver hit pedestrian who darted out & impact caused damage to car)
    - physical distance btwn act & inj, or distance in time doesn't mean they can't be prox cause
      - (ex: if flood dmgs wall which doesn't collapse until weeks later, flood is still prox cause)
    - determining prox cause
      - "but for" rule:
        - would plaintiff have suffered dmg **but for** defendant doing this?
        - (ex: would car have been damaged if pedestrian hadn't darted out?)
      - substantial factor rule : if there was more than one factor causing plaintiff's dmg, as long as defendant's actions were a substantial factor in causing loss they can be held liab
      - must prove duties were defendant's responsibility (as opposed to someone else's)
      - foreseeability rule
        - plaintiff's dmgs have to reasonably foreseeable consequence of defendant's actions
        - (ex: it is foreseeable that if you dart out & get hit by a car, the car can be dmg'd)
      - defendant is **not** liab if there is intervening act (independent act that causes new chain)
        - ex: pedestrian not liab if they dart out, driver stops easily, then 10 sec later another vehicle hits front car pushing them into pedestrian
      - concurrent causation: if loss is attributable to at least one covered cause, pol will still cover even if other causes denied

- dmgs incurred
  - can't pursue defendant if plaintiff didn't actually suffer any dmgs
  - (ex: driver hit pedestrian that darted out, but car is fine)
- other types of neg
  - **negligence per se: an act that is automatically considered negligent b/c it violates law/ordinance**
  - res ipsa loquitur:
    - "when negligence can be inferred simply by loss occurring"
    - i.e., defendant must have been negligent b/c they were the only ones who had control
    - 2 factors
      - probability that under given circumstances, defendant was negligent
      - defendant's has duty to refute negligence b/c they had exclusive control & superior knowledge of causative circumstances
    - **examples:**
      - part explodes causing inj & one co is sole maker of that part
      - **passengers getting inj'd while using common carriers (transportation co)** [since passengers have no control over vehicle]
      - **party has sole control of roll of tar paper & it falls off bldg onto someone**
- defenses against neg
  - contributory neg (if plaintiff has **any** neg, they are **completely** barred from recovery)
  - comparative neg
    - if plaintiff shares any neg, they may be barred in part or in full from recovery
    - last clear chance: party who had last chance to avoid harm & fails to do so is **solely** responsible
    - **assumption of risk: if plaintiff voluntarily incurred risk of known possible harm**
    - 4 variations:
      - pure
        - plaintiff can recover for the portion they aren't liab
        - ex: if plaintiff is 80% at fault, they can still get 20% back from defendant
      - 50% rule
        - plaintiff can recover if their own liab is **equal to or less than** defendant's
        - ex: if plaintiff & defendant are 50/50, plaintiff **can** recover b/c his liab is equal to
      - 49% rule
        - plaintiff can recover only if their liab is **less than** defendant's
        - ex: if plaintiff & defendant are 50/50, plaintiff **cannot** recover b/c his liab is not less than defendant's liab
      - slight vs gross
        - subjective decision of assigning dmgs
        - as long as plaintiff's neg is slight compared to defendant's gross neg
  - release (if plaintiff signed something releasing defendant from further payment)
  - exculpatory clause
    - part of agreement where someone waives their right to sue
    - usually viewed unfavorably by courts
    - **typically unenforceable by defendant if plaintiff was at a bargaining disadvantage**
    - court will uphold if:
      - clause is not adverse to public interest or against public pol
      - party excused from liab is not under duty to perform
      - contract doesn't arise from party's unequal bargaining power or is otherwise unconscionable

- void if clause is made in effort to exclude liab from **willful/wanton** misconduct
- immunity: when a party is automatically exempt from liab
  - sovereign/govt
    - courts vary on whether govt immunity is granted
    - govts are definitely subject to liab when performing proprietary functions
      - proprietary functions: when govt performs a function that a private co could do also
      - govt function: act that can only be performed by govt (more likely to have immunity)
  - public officials
    - judges & legislatures have absolute immunity for acts performed in official capacity
    - administrative/discretionary act:
      - act/decision made w/i authority of job
      - officials have full immunity if performed w/ no malice or bad faith
    - ministerial act:
      - act directed by law/auth that requires no individual judgment about whether or how to perform act
      - official is liab for acts performed improperly even if performed in good faith
    - **not immune from acts done w/ malice & bad faith**
  - charitable (most states reject that charities automatically have immunity)
  - intra-familial (btwn family members)
    - **all** jurisdictions have abolished interspousal immunity (when one spouse is automatically immune from lawsuits by other spouse)
    - **most** jurisdictions have abolished parent-child immunity (when parent is automatically immune from lawsuits by their children)
- time limits
  - statute of limitations:
    - requires suit to be filed w/i certain time after cause of action accrued
    - usually based on when inj occurred or discovered
    - ex: plumber did bad job & pipes leak causing mold; starts when mold discovered
  - statute of repose:
    - requires suit to be filed w/i certain time after wrongful act committed by defendant, regardless of when inj/dmg occurred/discovered
    - looks at when defendant actually did the hurtful action
    - ex: starts when plumber did the actual work, not when mold discovered
  - if victim is minor or incompetent, statute doesn't start until they become of age or incompetence is removed
  - if plaintiff dies before statute expires, plaintiff's rep usually has from 1 yr of death to file suit
- neg for landowners (LO)
  - natural conditions (no alterations have been made to land)
    - **generally**, LO **not** responsible but some courts may require LO to use reasonable control
    - exception: LO **is** responsible for trees if knew they would fall or failed to reasonably inspect
    - LO **definitely not** responsible to trespassers

- artificial conditions (LO alters the prop)
  - LO can be liab for alternations or for causing nuisance
    - ex: generating dust during construction
    - ex: LO damming up creek that dries up downstream would be considered **outrageous conduct**
  - LO **must** warn even trespassers of conditions that can cause serious inj or death
  - attractive nuisance doctrine:
    - treats child as guest/licensee rather than trespasser on land, if land contains an artificial & harmful condition that is certain to attract kids
    - serves to increase burden of care that LO owes to kids
    - ex: pool or playground
- duties owed to those entering LO's prop
  - invitee:
    - person who is allowed by LO to enter a prop
    - public invitee:
      - member of general public entering for purpose for which land is open
      - ex: person using a public park
    - biz invitee: person who has perm to be on prop for purpose of doing biz (ex: shopper)
    - LO owes duty to keep premise reasonably safe and to warn of concealed dangers
    - LO is **not** liab for inj due to dmg to **public sidewalk outside** [since it is not LO's prop]
  - licensee:
    - person who enters land for licensee's own purpose
    - ex: door-to-door salesman, police officer entering premise
    - LO owes **no** duty to promise safety
    - LO **does** owes duty to:
      - refrain from causing willful or wanton inj
      - refrain from acting in way that increases peril to licensee
      - warn of **hidden** defects
    - LO **not** liab for acts of licensees
  - trespassers
    - LO owes minimal duty except to not cause intentional harm more excessive than what is necessary to remove trespasser
    - can be liab to trespassers if LO creates **hidden danger** (ex: artificial icicles)
    - (ex: not liab to a criminal that officer is chasing [trespasser], but may be liab to officer) [licensee]
- **intentional torts**
  - battery
    - **intentionally** harmful or offensive **physical** contact to plaintiff w/o legal justification
    - doesn't have to involve contact w/ defendant's body (ex: throwing something still counts)
    - fear or awareness of harm is **not** requirement (ex: hitting plaintiff from behind still counts)
    - defenses
      - plaintiff consented to physical contact
      - self-defense
      - physical discipline (if reasonable force used in good faith)
  - assault
    - **threat** made w/ intent of creating fear or apprehension
    - does **not** require actual contact to victim

- false imprisonment/arrest
  - false imprisonment: nonphysical restraint (you aren't touching the person) or confinement w/o legal authority (ex: blocking a doorway)
  - false arrest: arrest, seizure, or forcible restraint of a person w/o legal auth
  - police officers' liab:
    - almost complete immunity if arresting w/ warrant
    - can arrest w/o warrant if felony committed in front of them or they had reasonable grounds
    - can arrest w/o warrant for only certain **misdemeanors**
  - citizens' liab:
    - **are** liab for arrests made if victim didn't commit **felony**
    - **cannot** arrest for **misdemeanor** unless there was a breach of the peace
- intentional infliction of emotional distress
  - **intentional** act causing mental anguish resulting in physical reaction (ex: vomiting)
  - i.e., bullying that results in physical symptom
  - if act wasn't intentional, that is poss defense
- defamation
  - making false statements about someone that hurt their reputation
  - publication: the communication of a defamatory statement to another person
  - libel (written/printed)
    - *Sullivan v. New York Times* – US Supreme Court held that **media's** statements must be **knowingly** false before defamation is proved
    - public figures must also prove malice to recover dmgs
  - slander (spoken/speech)
    - law requires substantial proof of inj to plaintiff's reputation as statement is unlikely to be repeated
  - defenses
    - statement was true
    - defendant made retraction (isn't complete defense but reduces dmgs)
    - statement had absolute privilege (statements made in these circumstances **always** immune from defamation)
      - judicial & legislative proceedings
      - communications by executive officers
      - spousal communications
      - **plaintiff consented**
    - statement had conditional or qualified privilege (immune from defamation if made w/o malice & for valid purpose)
      - issues of public interest
      - petitions regarding appointments
      - fair commentary on public matter
      - by credit reporting agencies
  - commercial speech **including advertising** has far less legal protection than speech about public issues
  - product disparagement/trade libel: intentional false/misleading statement about a product's quality, resulting in financial dmg to plaintiff
- invasion of privacy
  - intrusion on solitude (includes unlawful surveillance/eavesdropping)

- *physical invasion* (ex: taking pics of embarrassing/compromising position)
- disclosure of info
  - public disclosure of private fact
  - publicity placing plaintiff in false light (i.e., info taken out of context)
  - unauth release of confidential info
  - appropriation (use) of plaintiff's name/likeness
- defenses
  - plaintiff already published info
  - plaintiff consented
  - plaintiff is public figure, or info is public knowledge
  - info was part of news event
  - info would not offend person of ordinary sensibility
  - matters were disclosed in a judicial proceeding
  - info is of public interest (public has right to know)
- fraud/misrepresentation (misrep)
  - 6 elements that must be proved
    - false statement or misrep was made
    - involving a material fact
    - knowingly made
    - w/ intent to influence or deceive
    - victim had reasonable reliance on truth (**requires proof**)
    - victim suffered dmg
  - disproving any of 6 elements is a defense
  - (ex: incorrect product specs is considered material misrep)
- bad faith/outrage
  - breaching the duty of good faith & fair dealing
  - defenses
    - no intent or recklessness involved
    - no outrageous or extreme conduct occurred
    - defendant didn't breach any implied duty to exercise good faith or fair dealing
    - (for contract cases) defendant owed no contractual duty to plaintiff
    - (for ins cases) no valid ins contract existed
- interferences w/ relationships btwn others
  - injurious falsehood:
    - group of torts involving harm to any kind of legally protected intangible prop (ex: title, lease, trademark)
    - includes negative statements about quality/validity of someone's **intangible** prop right (ex: validity of ownership title)
    - similar to defamation, but also requires proof of dmgs suffered
    - same defenses as defamation
  - malicious interference w/ prospective economic advantage: **malicious** interference w/ commercial/financial dealings
  - unfair competition:
    - use of wrongful or fraudulent biz practices to gain unfair advantage over competitors
    - involves deceiving public into thinking your product is another brand's product
    - i.e., knock-offs/counterfeit goods

- interference w/ employment
- interference w/ copyright, patent, trademark
- interference w/ right to use one's own name in biz
- interference w/ family relationships
  - husband/wife
    - alienation of affection
      - suing 3<sup>rd</sup> party who persuades your spouse to leave marriage
      - some states have abolished this
    - personal inj (suing 3<sup>rd</sup> party for causing inj to spouse)
    - loss of consortium (suing 3<sup>rd</sup> party for lost companionship/services of spouse)
  - parents can sue 3<sup>rd</sup> party for inj to child based on lost services if child helped family economically
  - wrongful-life actions: lawsuit for child w/ birth defect, alleging that parents wouldn't have conceived child or would've terminated pregnancy but for doctor's negligent advice
  - wrongful-pregnancy actions: dmgs resulting from pregnancy after failed sterilization
- misuse of legal process
  - malicious prosecution:
    - improperly instituting legal proceedings against another
    - i.e., suing or pressing charges against someone without merit, just to stress them out
    - defenses
      - defendant acted on advice of counsel (atty)
        - defendant fully disclosed facts to an impartial atty
        - genuinely belief in plaintiff's guilt
        - acted on atty's advice
      - plaintiff's guilt of crime
      - probable cause for arrest
  - malicious abuse of process:
    - use of civil or criminal procedure for purpose other than which they are designed
    - ex: lying to someone that they need to fly in to be wit for case, when you have other motive for bringing them to your state
- trespass
  - unauthorized entry to someone's prop or interference w/ someone's use of their prop
  - actual entry to a prop is not required (ex: you cut tree & it lands in neighbor's prop)
  - defendant can be liab even if trespass is accidental
  - defenses
    - plaintiff didn't own/possess prop
    - plaintiff consented
    - defendant didn't enter onto or take control of prop
- nuisance
  - based on how uncomfortable a **normal** person would be, not the actual victim
  - **nuisance per se: action, occupation, or structure that is automatically considered a nuisance at all times under any conditions regardless of location or surroundings**
- conversion:
  - unlawful exercise of control over someone else's *chattel* (non-real) property
  - interference must be major and not fleeting
  - i.e., taking or using someone's property w/o their permission

## 8: EVALUATING TORT LAW, PART 2

- data & cybersecurity laws
  - US govt has implemented data laws slowly, first applying them to most relevant sectors only
  - many states have enacted laws to cover gaps not addressed at federal level
  - notable fed laws
    - Federal Trade Commission Act (FTCA) of 1914
      - prohibits unfair or deceptive practices
      - has been applied to prohibit use of illegally obtained consumer data
    - Family Educational Rights & Privacy Act (FERPA) of 1974
      - restricts when students' educational records can be accessed
    - Computer Fraud and Abuse Act (1986)
      - prohibits accessing a computer w/o authorization
      - one of first regulations to address hacking
    - Health Insurance Portability and Accountability Act (HIPAA) of 1996
      - regulates how medical info can be stored/shared & what must be done if breach occurs
      - applies to healthcare providers, insurers, cos that process people's medical info
    - Children's Online Protection Act of 1998
      - imposes data collection & privacy requirements on websites aimed at kids under 13
    - Gramm-Leach-Bliley Act/Financial Modernization Act of 1999
      - governs collection, use, and disclosure of financial data
      - applies to financial institutions, such as banks and ins cos
    - Homeland Security Act of 2002
      - produced the Dept of Homeland Security (DHS)
      - DHS Privacy Office:
        - addresses privacy issues related to homeland security
        - responds to complaints of privacy violations
    - Federal Information Security Management Act (FISMA) of 2002
      - provides mandatory framework for federal agencies to use to develop/implement information security programs
    - Cybersecurity Information Sharing Act of 2015
      - authorizes cos to monitor and defend their information systems
      - protects cos that voluntarily share information regarding cyber threats w/ govt authorities (as long as certain guidelines are followed)
  - other key efforts:
    - implementing Payment Card Industry Data Security Standard (PCI DSS)
      - set of information policies/procedures adopted by major credit card cos
      - is **not** a law
      - is required to be adopted by bizs that process a large volume of credit card transactions
    - Executive Order 13636 - Improving Critical Infrastructure Cybersecurity
      - directs US govt to promote & incentivize the adoption of cybersecurity practices & cyberthreat information sharing
  - bizs need to be aware of laws to ensure compliance and keep customers' trust



- 3 areas of data protection law
  - data privacy
    - involves the appropriate use or access of data
    - can cover:
      - what info can be collected
      - how & whom it can be shared
      - how it must be disposed of
    - ex: California Consumer Privacy Act (CCPA)
      - one of strictest data privacy laws in US
      - provides consumers w/ several rights:
        - ability to find out what info has been or is being collected & how
        - right to know if info is sold or disclosed & to whom
        - option to opt out of biz being able to sell their info
        - option to have their info deleted (w/ some exceptions)
        - right to not be discriminated against for exercising these rights
      - viewed by most companies as the de facto (default) standard
      - model for other states' privacy laws
  - breach notification
    - all states require cos to notify people of security breaches if their personally identifiable info (PII) might have been exposed
    - PII includes any unique info (ex: name, address, social security #, etc.) that requires safekeeping & confidentiality
    - *security breach* includes any unauthorized access of computerized personal info
    - safe harbor:
      - easing or eliminating penalties or compliance requirements if good-faith effort is made to provide intended protection of the law
      - many states waive notification requirements for **encrypted** data
  - data security
    - involves the protection of data from unauthorized access
    - laws vary widely from state to state
    - examples of what laws might require a co to have:
      - written information-security procedures
      - encryption of personal info records communicated over wireless networks or stored on personal devices
      - annual review of security measures
      - compliance w/ PCI DSS standards
      - written cybersecurity procedures
      - chief information security officer (responsible for protecting data & info systems)
    - *cybersecurity*: involves the protection of data from unauthorized access **through the internet**
- General Data Protection Regulation (GDPR)
  - comprehensive set of formal data protection rules established under the European Union (EU)
  - viewed as the global model of standard for pers data regulation
    - applies to cos operating **in** EU or that process data from EU residents
  - based on fundamental premise that individuals own their own pers data

- requirements:
  - collect only the min amt of data needed to perform a task
  - collect & store data only if person gives consent
  - keep data only as long as necessary to perform a task
  - erase data upon that person's request
  - breaches must be reported to authorities & individuals w/i 72 hrs
  - allow people to opt out of having a machine make decisions about them
  - document what you are doing to comply w/ GDPR
  - data must be tracked as it moves through an organization
  - perform assessments to ID security vulnerabilities
- best practices
  - establish a culture of strict security
  - appoint someone to be in charge of data security (such as chief info security officer)
  - collect & store only minimum data needed to complete a task
  - limit # of employees who can access pers data
  - install security features on personal devices
  - enforce security pol regarding any devices left unattended or unlocked
  - train employees on:
    - precautions to take before connecting to public networks
    - when it is ok to plug external devices into work computers
    - phishing or malicious emails
    - how to properly destroy pers data records that aren't needed anymore
    - reporting suspicious emails or customers
  - establish online privacy pol that explains how pers info will be used and controlled by co
  - if data is exposed, use it as a teachable moment w/o calling out who was at fault
- strict liab/absolute liab:
  - being held liab even if you acted reasonably & had no fault
  - usually applies to situations considered extremely dangerous or abnormal
  - may extend to things artificially brought onto land
  - liab can extend to non-users (bystanders who weren't the ones using the product or object)
  - ultrahazardous activity:
    - abnormally dangerous activity that can't be performed safely even w/ reasonable care
    - plaintiff must prove 3 circumstances:
      - high degree of risk of serious harm
      - activity can't be performed w/o high degree of risk
      - activity doesn't normally occur in area where it is conducted
    - performer is liab if any harm results
    - includes liab for dangerous substances brought onto real prop that escapes & causes dmg
  - pets
    - may apply if owner knew of animal's propensity to harm/attack
    - law applies differently to domestic vs. wild animals
      - law differentiates btwn what is domestic vs wild based on local customs
      - owner of **wild** animal is strictly liab for any acts/dmgs caused by it
  - toxic torts
    - liab based on exposing others to a toxic substance
    - generally established by statute rather than common law

- product liability
  - ways you can be liab w/ respect to your products
    - misrepresentation
    - breach of warranty (i.e., product doesn't work like it is supposed to)
    - strict liab & neg
      - 5 elements that plaintiff must prove:
        - defendant is merchant (in the biz of selling products)
        - product had defect making it unreasonably dangerous, beyond level of what reasonable user would expect
        - product was dangerously defective when it left defendant's custody/control
        - defect was prox cause of inj
        - product reached plaintiff w/o any material change to product's condition
      - types of product defects
        - defect in manufacture or assembly
          - product doesn't correspond to orig design/specifications
          - includes use of poor-quality materials or shoddy assembly work
        - defect in design (design itself is faulty)
        - failure to warn users
          - 3 factors
            - degree of danger
            - knowledge of danger
            - foreseeability of dangerous use
          - ex: if person knew faulty switch could cause burns to user w/ wet hands, **not be liab under common law but is liab under today's law**
      - manufacturers **not** liab for defect occurring after product left manufacturer's possession
    - defenses
      - state of art
        - product was safe according to existing science & knowledge at time product was made
        - if there was no indication of danger or no technique to obtain knowledge of danger, manufacturer has no reason to prevent production or use
        - **not a complete defense**
        - ex: former use of asbestos in construction, which is now known to be danger to health
      - you complied w/ statutes/regulations
      - you complied w/ product specs
        - manufacturer generally **not** liab for products built to someone else's specs
      - open & obvious danger (user should have known of danger)
      - plaintiff's knowledge (plaintiff has equal level of knowledge as the manufacturer of the risks)
      - comparative neg
        - active neg/assumption of risk: voluntary use of product w/ knowledge of existing defect
        - passive neg:
          - plaintiff's failure to discover a product's defect or to guard against poss defect
          - ex: wire was clearly frayed but plaintiff didn't notice
      - misuse of product
      - alteration of product

- types of dmgs that can be awarded
  - compensatory dmgs
    - special dmgs: actual costs incurred, out of pocket expenses & loss of wages/earnings
    - general dmgs: value of pain, suffering, distress
    - emotional distress dmg includes recurring nightmares & phantom pains
  - punitive dmgs
    - awarded to punish defendant if either:
      - defendant actually intended to cause harm
      - defendant acted maliciously, fraudulently, or outrageously
  - wrongful death action
    - filed by survivors of a deceased party
    - survival statutes: gives a deceased person's estate the right to file for dmgs that the person incurred btwn date of inj and death
- other tort concepts
  - joint tortfeasors (joint & several)
    - an innocent party can collect 100% of damages from any negligent party
    - negligent party who paid 100% then pursues other negligent parties for appropriate portion
      - contribution: right of tortfeasor who has paid more than his share of dmgs to collect from other tortfeasors
    - prevents innocent party from being delayed if negligent parties dispute how to split liab
    - Uniform Contribution Among Joint Tortfeasors Act (UCAJTF)
  - expanded liab concepts (when multiple companies can be liab)
    - enterprise liab (industry-wide liab):
      - each member of an industry can liab for manufacturing harmful/defective product if specific manufacturer at fault can't be ID'd
      - works like joint & several liability, so plaintiff could win 100% from single defendant
    - alternative liab:
      - applies when there are several defendants but unk which one is at fault
      - shifts burden of proof to defendants, who must prove they didn't cause harm or that another defendant did
    - mkt share liab:
      - defendants liab for pro rata mkt share unless they prove they couldn't have made product involved
      - similar to enterprise liab, but defendant max exposure is mkt share % rather than 100%
    - concert of action: applies when multiple defendants had to have act together or cooperatively to create the dangerous product/event (ex: racing)
    - conspiracy: when 2+ parties work together to purposely commit unlawful act
    - joint venture:
      - biz association formed by two or more parties to accomplish a project
      - to pursue all parties to the joint venture, plaintiff must prove 4 elements:
        - agreement by parties to associate for biz activity
        - profits/losses shared by all parties
        - joint control of venture by all parties
        - contribution to the venture's assets by all party

- vicarious liab (when one party is liab for another's actions)
  - principal & agent (when one party was authorized to act on another's behalf)
  - employer & employee
  - parent & child
    - parent **generally not** liab for minor child's torts
    - exceptions:
      - child acted as parent's agent/employee
      - negligent entrustment: involves dangerous instrument (ex: gun/car) that parent gave to child when parent should've expected child can cause harm
      - negligent supervision: failure to reasonably keep child from causing harm
      - (some jurisdictions) family purpose doctrine: owner of car is liab for dmgs caused by any family member driving that car
- good Samaritan law: protects those giving emergency assistance from ordinary neg, but **not gross neg**
- class actions & mass tort litigation
  - class action: when 1 or a few parties represent interest of an entire class of people in litigation
  - **4 considerations**
    - numerosity (too many plaintiffs to practically hear each case separately)
    - commonality
      - well-defined common legal elements
      - at least one common question of law
    - typicality
      - claims, defenses, dmgs sought must be basically the same for all members
      - ex: if most members in asbestos class action suit suffered moderate respiratory problems but one person suffered stage 4 cancer, he would not fit this trait
    - adequacy of representation (named parties must fairly & adequately protect interests of non-named members)
- US laws that affect int'l biz
  - Internal Revenue Code (tax code)
    - foreign tax credits
    - repatriation of earnings:
      - process by which US parent co moves earnings from foreign affiliates back to US parent co or stockholders
      - anti-deferral rules: leads to taxation of foreign income in yr it was earned even if US parent company doesn't repatriate it (part of IRC Subpart F)
    - corp tax brackets
  - Foreign Corrupt Practices Act
    - prohibits payments/bribes to foreign officials to obtain or keep biz
    - requires cos that list their securities (stocks) in the US to meet certain acct provisions
    - **puts US cos at disadvantage**
  - Patriot Act
    - to deter & punish terrorist acts in US
    - increases surveillance & investigative powers of US law enforcement agencies
    - Section 215: broadens FBI's ability to obtain biz records pursuant to court order
    - Sections 351-366: permits govt access to info from banks that might relate to terrorism
    - Section 351: allows Sec of Treas to impose sanctions, including cutting off all dealings w/ US financial institutions/banks in foreign nations whose bank secrecy laws deny info to US agencies

- Section 352:
  - prohibits financial institutions from knowingly becoming involved in unlawful transactions w/ suspected terrorists
  - requires cos to:
    - incorporate internal policies/procedures/controls based on money-laundering risks
    - designate compliance officer
    - establish ongoing training programs & audit functions to test programs

## 9: UNDERSTANDING AGENCY LAW

- **agency:**
  - when one party acts on another's behalf, possibly exposing **both** to liab for each other's actions
  - in ins industry, 2 main types of producers who have agency relationship w/ ins co:
    - *ins agent*: sells ins as an authorized rep for ins co
    - *ins broker*: buys ins on behalf of an insd as their authorized rep
  - **principal**:
    - person that is being represented by the agent
    - (in this guide, Peter will be the principal)
  - **agent**:
    - person acting on the principal's behalf
    - (in this guide, Alan will be the agent)
- 3 ways an agency relationship is created
  - appointment
    - express appointment (explicitly designating an agent)
    - agent must consent to role for agency by appt to exist
    - **power of atty (written document naming an agent)**
  - estoppel
    - when a **principal's** actions led 3<sup>rd</sup> party to incorrectly but reasonably believe an agency exists & 3<sup>rd</sup> party relies on that assumption when completing transaction
    - ex: if 3<sup>rd</sup> party asks Peter to buy pol & Peter says 3<sup>rd</sup> party can arrange purchase w/ Alan, agency exists by estoppel even if Peter didn't officially give Alan any auth beforehand
    - if only **agent** leads 3<sup>rd</sup> party on to falsely believe there is agency relationship, principal is **not** liab for agent's actions
  - ratification
    - when principal accepts actions of a supposed agent who didn't have actual auth to be agent
    - ex: if Alan sells pol to 3<sup>rd</sup> party falsely claiming to be Peter's agent, Peter can **elect** to be accept being part of transaction (which creates agency by ratification)
    - 4 conditions
      - agent must have claimed to act for principal
      - principal must ratify **entire** transaction
      - **principal must ratify before 3<sup>rd</sup> party elects to withdraw from agreement**
        - 3<sup>rd</sup> party can usually rescind/withdraw contract if agent lied about auth
      - principal must have all material facts avail before ratification is binding
- scope of agent authority
  - agents should only act w/i scope of auth granted by principal
    - if agent does, principal usually is liab for agent's actions
    - if agent acts beyond scope, principal **might** still be liab in certain cases
  - actual/real auth (auth that principal intends for agent to have)
    - **express auth**
      - auth specifically granted beforehand
      - (ex: training an agent how to make something or use equip)
    - **implied auth**
      - auth not specifically stated, but principal is fine w/ agent having
      - (ex: waiter buys supplies when owners out of town)

- apparent auth
  - a 3<sup>rd</sup> party's **reasonable** belief that agent had auth to act for principal, even if there was no actual auth
  - (ex: mover tries to repair furniture they dmg'd)
  - (ex: agent restarts pol even though u/w guidelines said not to)
  - principal is bound by agent's actions only if principal had some sort of "wrongdoing"
    - ex: principal took away agent's auth but didn't tell 3<sup>rd</sup> parties who've done biz before
    - ex: principal was present & didn't say anything when agent falsely told 3<sup>rd</sup> party that agent represented principal
  - most often occurs when:
    - principal gives agent less auth than is customary in industry
    - principal's way of biz is different than industry standard for that area
- duties owed
  - by agent
    - loyalty (can't take biz that competes w/ or interferes w/ principal's biz)
    - **obedience (following principal's instructions)**
      - if agent fails to follow instructions, principal can sue for dmgs & terminate relationship
      - agent **cannot** delegate a principal's auth unless:
        - ministerial duties:
          - tasks that don't require delegate's judgment/discretion
          - ex: delivering pol documents to an insd
        - customary appts (custom of industry is to delegate)
        - emergency appts (emergency situation requires delegation to protect principal's interests/assets)
    - act w/ reasonable care (even if agent isn't being paid)
    - acct
      - keep record/accting of principal's assets
      - keep principal's assets separate from agent's assets
      - if agent commits torts/breaches, principal can transfer prop that agent improperly held
    - info
      - keep principal updated on pertinent info
      - (ex: agent violates this duty if he doesn't disclose pertinent info on an insd's application)
  - subagents
    - if agent is authorized to hire subagents:
      - owe same duties to the principal as primary agent
      - **agent** has obligation to compensate subagents
    - if agent is **not** authorized to hire subagents:
      - no agency relationship exists btwn subagent & principal
      - subagent owes no duties to principal
  - by principal
    - employment to agent for agreed-on period
    - compensation
    - reimburse for expenses
    - **indemnify for losses**



- ways an agency relationship can terminate
  - just cause (i.e., for valid reason due to outrageous/serious misconduct)
    - **fraud**
    - criminal activity
    - violation of contract
  - lapse of time
    - if contract had specified time period, when stated period is over
    - if no specified period, when reasonable time has elapsed
  - **accomplishment of purpose** (ex: agent hired to sell 500 policies & meets goal)
  - **revocation**
    - **when principal tells agent that the agent no longer has auth**
    - if principal authorizes another agent to do the same thing:
      - if both agents can't simultaneously serve, first agency terminates (ex: hiring atty to represent you)
      - if either agent could do job and **neither had exclusive rights**, first agency can stay intact (ex: authorizing two people to sell your home; first to sell gets commission)
  - renunciation (when agent relinquishes auth)
  - **death/incapacity**
    - principal's **death**
      - terminates relationship
      - **even if agent/3<sup>rd</sup> party has no actual notice of death**
    - principal's **incapacity** – terminates relationship
    - agent's **death** – terminates relationship
    - agent's **incapacity** – principal has **option** to terminate
  - changed circumstance
    - something happens that agent can reasonably assume principal would want auth to terminate
    - can apply to entire agency or to auth for specific actions
    - ex: agent authorized to sell something, then it is discovered that item is rare artifact worth way more
    - **ex: principal goes bankrupt**
- liab in contracts w/ 3<sup>rd</sup> parties (liab for contract breaches)
  - overview:
    - in most **non-agency** contracts, only the 2 parties to transaction can sue each other for breaches
    - if agent does a transaction on principal's behalf, does that change who can sue who?
    - **key question 1 = what is extent of agent's auth?**
    - key question 2 = does 3<sup>rd</sup> party know agent was acting for principal?
      - disclosed principal:
        - 3<sup>rd</sup> party knows agent is acting on principal's behalf & who the principal is
        - principal is liab, not agent
      - partially disclosed principal:
        - 3<sup>rd</sup> knows there is a principal, but doesn't know who principal is
        - 3<sup>rd</sup> party can sue either agent or principal, assuming they can ID the principal
      - undisclosed principal: 3<sup>rd</sup> party was unaware that agent was acting for a principal
        - agent is typically liab
        - if 3<sup>rd</sup> party learns identity of principal, principal can be liab
    - **an agent's liab is the focus of agent contract liab law**

- when 3<sup>rd</sup> party can sue principal for breaches
  - **generally**, a 3<sup>rd</sup> party can sue a principal once the 3<sup>rd</sup> party discovers the principal's identity
  - 2 exceptions when **undisclosed** principal can't be sued:
    - if principal already made good-faith settlement of 3<sup>rd</sup> party's acct w/ agent (i.e., principal already paid money owed to 3<sup>rd</sup> party to agent) **before** third party learns principal's ID
    - if 3<sup>rd</sup> party wants to hold agent liab instead
- when principal can sue 3<sup>rd</sup> party for breaches
  - **generally**, principal can sue 3<sup>rd</sup> party regardless of whether 3<sup>rd</sup> party knew about principal
  - 5 exceptions, involving **undisclosed** principals:
    - if agent fraudulently said they were representing a different principal or that there was no principal
    - if agent withholds principal's identity b/c they knew 3<sup>rd</sup> party wouldn't want to do deal involving principal
    - if contract w/ principal would impose a much more substantial burden on 3<sup>rd</sup> party than contract w/ agent (ex: 3<sup>rd</sup> party agrees to supply goods for agent since agent is small biz, then learns contract is for principal who is a much larger biz that 3<sup>rd</sup> party can't handle)
    - if contract requires agent's personal performance, principal can't substitute their performance for agent's performance (ex: agent agrees to personally train 3<sup>rd</sup> party, then principal does personal training)
    - if 3<sup>rd</sup> party sues agent for breach of contract & wins judgment before principal's ID is known, principal no longer has rights to sue 3<sup>rd</sup> party
- when 3<sup>rd</sup> party can sue agent for breaches
  - **generally**, 3<sup>rd</sup> party cannot sue agent for principal's breaches
  - 6 exceptions (when agent can be liable)
    - agent has no auth or exceeds granted auth from principal (unless 3<sup>rd</sup> party should have known agent was acting beyond auth)
    - agent acts on behalf of a minor or a mentally incompetent principal
    - 3<sup>rd</sup> party intended to contract w/ agent & agent intended to act on own behalf (i.e., agent wasn't acting for principal)
    - agent voluntarily assumes to personally guarantee contract (ex: agent co-signs for principal)
    - 3<sup>rd</sup> party pays agent, but agent doesn't fwd pay to principal
    - agent acts fraudulently or maliciously
- when agent can sue 3<sup>rd</sup> party for breaches
  - **generally**:
    - for **disclosed** principals, only the principal (not the agent) can sue the 3<sup>rd</sup> party for breaches
    - for **partially disclosed** or **undisclosed** principals, agent **might** be liab and thus might have right to sue
  - exceptions
    - if agent & 3<sup>rd</sup> party agree that contract obligates the agent (ex: agent offered to guarantee if principal didn't come through)
    - if principal is **undisclosed**, either agent or principal can sue 3<sup>rd</sup> party
    - if **partially or fully disclosed** principal gives permission, agent can assert defenses or counterclaims against 3<sup>rd</sup> party that normally only the principal could
      - (ex: 3<sup>rd</sup> party failed to perform their part of contract)
  - agent **cannot** sue if agent falsely represents their auth to act on principal's behalf

- principal's liab for agent's torts/negligence
  - respondeat superior
    - refers to when **employers** are liab for **employees'** tort actions
    - 2 conditions
      - agent is **employee** of principal
      - **tort committed while agent is acting w/i scope of employment**
      - ex: principal tells agent to deliver docs to insd & agent gets into car ax on the way
    - **main element is whether employer has control over how employee performs duty**
  - independent contractors
    - when agent is **not** principal's employee
    - **generally**, principal is **not** liab for contractors' torts
      - 3 exceptions
        - principal negligently enters into agreement w/ unsuitable contractor
        - **tort involves *non-delegable duties* (certain duties that are so important that their responsibility can't be delegated)**
        - for highly dangerous duties, principal must ensure contractor takes appropriate safety precautions
  - agent misrepresentations
    - **3<sup>rd</sup> party has right to rescind contract if agent misreps something**
    - 2 situations where principal is liab for agent's misrep
      - principal intended for agent make misrep
        - in some states, principal is liab if they **allow** agent to make misrep even if that wasn't principal's original intention
      - when agent has actual or apparent auth to make statements about a subject and misreps, **even if principal didn't direct or condone misrep**
        - if agency contract has exculpatory clause to relieve principal of this liab, the principal won't have to pay dmgs but 3<sup>rd</sup> party can still rescind transaction
  - agent's liab for own torts
    - **generally**, agents are liab if they commits their own torts & can't just turn responsibility over to principal
    - 4 situations where agent is **not** liab for committing a tort
      - if principal has been perm to do something, agent would have same perm & wouldn't be liab even though agent wasn't given perm directly
        - ex: if principal has perm to park, agent is **not** liab for trespassing if he parks
      - if principal legally entitled to take action to defend person/prop, agent can do same
      - if agent passed on info that principal misrep'd but agent didn't know & had no reason to know info was false
      - if principal supplies defective tools/instruments to agent didn't know & had no reason to know

## 10: APPLYING AGENCY LAW

- types of ins producers (personnel who sell or place ins for ins cos)
  - agent
    - represents ins co
    - general agent: does **all** of principal's biz of a particular kind or in a particular place
    - special agent: acts for principal in a specific transaction, for specific purpose, or specific customer group only
    - soliciting agent:
      - employed only to solicit applications & perform duties directly related to that
      - all powers & duties spelled out directly in agency contract (because they are so limited)
  - broker
    - represents insds
    - does **not** work for any specific ins co
- producer auth
  - 2 types of auth
    - *actual/real auth* (express or implied auth that ins co intends for producer to have)
    - *apparent/implied auth*
      - a 3<sup>rd</sup> party's reasonable belief that producer had auth
      - if a principal regularly ratifies (approves) an agent's particular action, apparent auth may start to emerge
  - auth for **agents**
    - general agents – have broadest auth & likely to also have apparent auth
    - special agents – usually, any action beyond soliciting won't be binding unless insd can show apparent auth
  - auth for **brokers**
    - since they do **not** work for ins co, they cannot bind ins co to anything w/o ins co agreement
    - typically has power to bind **insd** to a transaction
  - duties as a **broker**
    - procure ins for **insd**
    - select ins co to provide desired cov
    - arrange for payment of prem
    - canx pol upon insd's request & (if broker was one who set up pol) seek refund of any unearned prem due to insd
    - obtain new pol upon canx of a previous one
  - notice & knowledge rcvd by **agents**
    - info known by agent is assumed to be known by ins co too, even if info not actually passed on
      - ex: if insd tells agent a fact, ins co can't later deny cov saying they didn't know that fact
    - exceptions
      - if no actual agency relationship exists
        - info known by **broker** is **not** considered imputed to ins co b/c agency relationship is btwn broker & insd, not broker & ins co
      - if agent passes on false info to ins co
        - if agent knew info was false – agent wasn't acting in ins co's best interest so agency relationship terminated & ins co not liab
        - if agent didn't know info was false – ins co still not liab to insd as insd was the wrongdoer

- auth to bind cov
  - *binder*: temporary cov until formal ins pol issued
  - for cov to bind, parties must agree on essential terms (which don't have to be in writing)
    - subject matter of ins (i.e., who or what is going to be insured)
    - loss exposures to be insured (i.e., what coverages are being purchased)
    - premium
    - pol dates
    - coverage amts
    - ID of parties (who is insd & who is ins co)
  - if producer sells for multiple ins cos & hasn't named specific one for pol yet but a loss occurs:
    - raises question of which ins co is bound to cover loss
    - this is the most commonly-encountered issue w/ oral & temp contracts
    - key questions:
      - does only 1 ins co that producer represents sell the kind of cov purchased?
      - has producer previously placed all of this insd's biz w/ the same ins co?
      - did producer issue any doc before loss indicating intent to form contract w/ a particular ins co?
    - if none of above, no pol contract has formed but insd can sue agent for error
  - if agent sold pol w/o actually having auth to bind cov, **only ins co** can decide whether to ratify/accept agent's transaction
- how to terminate agency relationship
  - usually outlined by agency contract
  - common means to terminate is expression by parties
- producer's duties & liabilities
  - to insds
    - 5 duties to insds
      - follow insd's instructions
        - if instructions ambiguous, agent justified in acting on reasonable interpretation
      - procure ins requested (including types of cov requested & extent of cov requested)
      - maintain cov
      - place ins w/ solvent ins co (agent has duty to investigate ins co's solvency)
      - duty to advise (provide advice)
        - factors that contribute to producer's liab
          - specialized line of ins requiring unique knowledge
          - producer's specific knowledge about insd's biz & ins needs
          - insd clearly relies on producer's expertise
          - insd gives responsibility to producer to negotiate ins contract
          - long relationship btwn insd & producer
        - for their protection, producers should keep written documentation of all advice given to customers
    - 5 defenses producer can raise against allegations of breach of duty
      - no duty owed to insd
      - no duty breached
      - insd partly at fault
      - insd failed to read pol

- if no ins **whatsoever** is avail that meets customer's specifications
  - i.e., if insd wants cov terms that no ins co will sell to them, it is impossible for producer to fulfill his duty
- duties to ins co
  - disclose risks (i.e., pass on any u/w concerns)
  - follow ins co's instructions
  - loyalty & acct
  - transmit info properly & promptly

## 11: EMPLOYMENT LAW

- *employment-at-will*
  - employer can terminate employee at any time for any or no reason
  - exceptions
    - public policy
      - if firing would violate public pol
      - examples where you can't be fired:
        - refusing to commit perjury at employer's request
        - filing workers comp clm
        - applying for medical leave that is provided by law
        - refusing to participate in illegal price-fixing
        - refusing to violate a customer's or coworker's privacy
        - reporting employer's legal infractions
    - implied contract
      - when there were specific terms surrounding employment implied by actions
      - ex: if HR manual says employees are only fired for "just cause"
    - covenant-of-good-faith (ex: firing long time employee right before eligible for retirement)
    - statutory
      - when firing is prohibited by law
      - ex: employees can't discriminate & fire someone over skin color, gender, religion, disability, age, etc.
  - wrongful discharge: cause of action against employer for illegal termination
- anti-discrimination laws
  - age
    - Age Discrimination in Employment Act (ADEA)
      - age 40+
      - applies to employers w/ 20+ employees
      - extends to all aspects of employment (hiring, pay, terms, privileges, etc.)
      - employer may establish age limit for bona fide occupational qualification (ex: pilots, showgirls)
      - applies to apprenticeship programs too
      - forbids mandatory retirement based on age except for:
        - public safety officers (ex: firefighters, police) who have mandatory retirement age of 55 or older as set by govt
        - high-ranking employees after reaching 65 yrs old who are entitled to pension exceeding min amt per yr
      - administered by Equal Employment Opportunity Commission (EEOC)
    - Older Workers Benefit Protection Act (OWBPA)
      - amended ADEA
      - may reduce benefits to older workers if there is justified cost consideration (ex: life ins)
      - may offer less benefits to older employees if govt makes up shortfall
      - allows voluntary waivers of benefits
        - 21 days to think about it
        - employee must be told to get legal consultation
        - 7 day right to revoke waiver

- Civil Rights Acts of 1866
  - prohibited discrimination, initially for contracts but later extended to all aspects of employment
  - **Section 1981** specifically prohibits discrimination based on race/color
  - **does NOT require plaintiff to file with the EEOC**
- Civil Rights Act of 1871
  - protects against intimidation and harassment
  - gives legal remedies to victims to hold aggressors liable
- Civil Rights Act of 1964
  - Title 7 – Equal Employment Opportunity (EEO)
    - extended act to apply to sex/religion/nat'l origin
    - many states extended even more protections (ex: political affiliation, sexual preference, body weight)
    - **applies to any co w/ 15+ employees in industry involving interstate commerce**
    - overseen by EEOC
    - **does require plaintiff to file with the EEOC**
  - disparate treatment theory: plaintiff proves employer **intentionally** treats him differently b/c plaintiff is of protected class
  - disparate impact theory:
    - plaintiff must prove employer's seemingly neutral practice unintentionally affected a protected class
    - ex: implementing written test when certain group has far greater rate of illiteracy
    - employer's intent is irrelevant
    - employer must prove biz need for practice
  - *sexual harassment*
    - **unwelcome** (from perspective of victim) advances/requests/conduct of a sexual nature, where agreeing or disagreeing to engage affects person's employment or work environment
    - quid pro quo sexual harassment: employer demands/expects sexual favors for continued employment, advancement, or benefits
    - hostile work environment: environment subjecting employee to harassment so that it becomes abusive
- Civil Rights Act of 1991
  - allowed recovery of compensatory & punitive dmgs in suits alleging intentional discrimination
  - changed burden of proof for disparate impact cases to defendant, making case easier for plaintiffs
  - allowed jury trials when plaintiff seeks compensatory dmg under Title 7 or ADA
- Executive Order 11246
  - bans job discrimination based on sex/race/color/religion/national origin
  - applies to fed contractors who do more than \$10k biz w/ govt in 1 yr period
  - affirmative action plan:
    - plan for giving priority to groups that used to be discriminated against
    - required of contractors who do more than \$50k biz w/ govt
  - later amendments:
    - allows contractors of certain religion to show religious preference
    - prohibits retaliation against employees who disclose details of their compensation
    - prohibits discrimination based on gender identity or sexual orientation



- Equal Pay Act
  - prohibits paying lower wages to one sex
  - affirmative defenses (acceptable reasons for differentiating pay)
    - seniority system
    - merit system
    - pay system that measures by quality or quantity
    - ability tests
    - employees working in diff locations
    - any other legitimate factor besides sex, race, color, religion, national origin
- Immigration Reform & Control Act of 1986
  - prohibits hiring/employing/referring aliens not auth to work in US
  - bars discrimination based on national origin & citizenship status
  - requires employers to attest they've verified ID of their employees & right to work
- disability
  - Rehabilitation Act of 1973
    - prohibits discriminating against disabled persons otherwise qualified to fulfill contract w/ reasonable accommodation
    - Section 508:
      - requires federal agencies to make internet & other info technology products fully accessible to disabled
      - cos that supply such products to Federal gov must also comply
  - Americans w/ Disabilities Act (ADA)
    - prohibits discrimination against disabled people in many aspects, including employment
    - applies to all employers w/ 15+ employees
    - defines *disability* as a physical/mental impairment that substantially limits 1+ major life activities
    - employer can avoid dmgs by showing it made good faith effort in consulting employee to make reasonable accommodations
- Vietnam Era Veterans' Readjustment Act of 1974 (prohibits terminating employees who leave to serve in military)
- Uniformed Services Employment & Re-employment Rights Act of 1994
  - requires co to promptly re-employ guard members in civilian jobs upon return from active duty
  - cannot discriminate against based on military service
- Jury Systems Improvement Act (protects employee serving jury duty)
- Consumer Credit Protection Act (prohibits termination due to garnishment of wages)
- labor mgmt relations & unions
  - collective bargaining: process by which a union negotiates labor contract w/ employer
  - Norris-LaGuardia Act of 1932
    - prohibits employers from requiring employees to agree to not join union as a condition of employment
    - prohibits fed court from issuing injunction on peaceful union activities or labor disputes until all efforts to negotiate exhausted

- Nat'l Labor Relations Act (NLRA) of 1935 (Wagner Act)
  - **is primary law governing unions**
  - administered by Nat'l Labor Relations Board (NLRB)
    - purposes:
      - to prevent & remedy unfair labor practices
      - to determine if certain groups of employees want organized representation (union) & if so, help them select their union
  - grants employees right to be rep'd by union & participate in collective bargaining
    - employees are given authorization cards to sign if they want to vote for unionizing
    - union can then go directly to employer to initiate collective bargaining
      - if over 50% vote yes, employers usually agree to collective bargaining
      - if employer refuses & over 30% had voted yes, union can file petition w/ NLRB for formal election
        - if over 50% of employees vote YES during election, union is certified and employer **must** collectively bargain
    - once majority of unit workers vote for union, all employees bound by collective bargaining agreement
- bargaining process rules
  - illegal for either employer or union to refuse to bargain collectively on mandatory issues
    - wages/benefits
    - hours
    - working conditions
  - either party can initiate or refuse to bargain on non-mandatory issues
  - prohibited bargaining actions:
    - cannot bargain over illegal activities (ex: discrimination)
    - agreement that violates laws/regulations
    - closed shop provision: requiring workplaces to only hire a particular union's members
    - union clauses in right-to-work states (states where employees are allowed to work in unionized workplaces w/o joining union or paying dues)
    - hot cargo agreement: agreement that employer will not engage in biz with any party that the union has a dispute with
  - employees must still agree by majority vote before settlement ratified
  - economic tactics (if negotiations stall)
    - union/employees
      - strike/cease work (but must completely be off property & not working)
      - boycott
        - primary – when customers/vendors encouraged to stop doing biz w/ employer
        - secondary – when union boycotts one employer to put pressure on them to stop doing biz w/ the co that the union actually has issue w/
      - *sympathy strike*: one union striking against their own employer that they have no grievances against to support another union
      - Taft-Hartley Act of 1947 (Labor-Mgmt Relations Act) – made secondary boycotts & sympathy strikes illegal

- employer
  - for strike over labor contract, employer can hire replacement employees & refuse to reinstate striking employees
  - lockout (only if strike/sabotage is threatened/imminent)
- employee welfare laws
  - issues addressed:
    - safety & health
    - wages & working hours
    - family medical leave
    - privacy
  - Occupational Safety & Health Act of 1970 (OSHA)
    - sets health and safety standards for the workplace
    - state must get OSHA's perm before they can override federal OSHA act
  - Fair Labor Standards Act (FLSA)
    - minimum wage
      - Davis-Bacon Act
      - Walsh-Healey Public Contracts Act
      - Service Contract Act of 1965
    - overtime (applies when employee works over 40 hrs during any given wk)
      - non-exempt: hourly pay & can earn overtime
      - exempt: doesn't earn overtime (usually salaried, but not always)
    - child labor
    - equal pay for men/women
  - Family Medical Leave Act (FMLA) (up to 12 wks unpaid leave in 1 yr period w/ no loss of employment benefits)
  - Employee Retirement Income Security Act (ERISA) (regulates employer duties for retirement plans)
  - Consolidated Omnibus Budget Reconciliation Act (COBRA) (continuation of health ins after lose job)
  - Patient Protection and Affordable Care Act (PPACA, aka Affordable Care Act)
    - amended by Health Care & Education Reconciliation Act of 2010
    - imposes financial penalties for employers who don't offer group health ins
- employee privacy
  - Drug-Free Workplace Act of 1988
    - requires establishment of drug prevention programs & to maintain drug-free workplace
    - drug testing is not violation of privacy if done in accordance w/ Substance Abuse & Mental Health Services Administration (US Dept of Health & Human Services)
  - Employee Polygraph Protection Act of 1988 – prohibits employers from requesting/considering lie detector tests w/ limited exception
  - Omnibus Crime Control & Safe Streets Act of 1968 + Electronics Communications Privacy Act of 1986 – prohibit interception of wire/oral communication unless 1 party has consented to recording
  - Fair Credit Reporting Act – governs permissible disclosure of background info
  - Health Insurance Portability & Accountability Act (HIPAA)
    - applies to employers mainly in the context of their duty to protect privacy of medial info
    - grants patients right to see, copy, and request amendment to their records
    - must disclose to patients who accessed records in past 6 yrs
    - doesn't apply when records were disclosed for treatment, payment & health care operations
    - providers have to acct for disclosures of patients' health info

## 12: DIFFERENTIATING BIZ ENTITIES

- corporations
  - 3 main types of corps
    - govt corps
    - non-profits
    - for-profit bizs
  - (+) advantages of corporations
    - limits owners' liab/debts (**main advantage**)
    - tax advantages
    - easy to sell/xfer ownership
    - easier to raise capital
    - perpetuity beyond the death of owners (co can exist even after owners die)
  - (-) more costly & complicated to create compared to other types of biz formats
  - (-) taxed at higher rates
  - exceptions to a corp's limited liab:
    - certain state laws (ex: stockholders can be liab for employees' wages/benefits)
    - piercing the corp veil: court imposing personal liab on corp officers/directors/stockholders for corp's unlawful acts
    - if stockholders act as if they aren't separate from corp (ex: co-mingling personal/biz funds)
    - *thin financing*: if investors loan money to corp, court might treat loans as investments and give other creditors priority if corp goes bankrupt
    - *inadequate capitalization*: if parent co starts subsidiary w/ insufficient funds, court may require parent co to respond to subsidiary's debts
  - corp is considered a citizen of state where it's chartered (domicile state)
  - *promoter*: person who creates corp
  - *de jure corp*: corp formed in compliance w/ law
  - *de facto corp*:
    - corp formed w/ that doesn't meet legal requirement despite founders' good faith efforts
    - will be treated as corp, but a state govt can challenge its existence in legal matters
  - stocks
    - common stock: has rights like voting & getting dividends
    - preferred stock: non-voting, but has priority over common stock for dividends/payout
    - par value:
      - arbitrary min dollar value that biz assigns to its shares
      - give investors confidence that biz won't offer shares to others below this value
      - *capital surplus*: diff btwn stock's purchase price & par value
    - *stated capital*: total amt of capital contributed by shareholders
    - *stock rights*:
      - short-term options to buy shares at a set price (usually discounted from mkt price)
      - usually given to existing shareholders
    - *stock warrants*: similar to stock rights but is a negotiable instrument that can be sold to others
    - *stock options*:
      - permit purchase of certain # of shares at set price
      - usually given to corp's executives
    - *preemptive rights*: rights to existing stockholders to buy portions of a new issue (batch) of stocks relative to that person's existing portion of total shares

- *redemption*:
  - when biz buys back its own stock
  - treasury stock: stock purchased back by biz but not retired
- legal duties & liab
  - board of directors (BOD)
    - decides corp structure/form (requires stockholder approval)
    - determines biz pol (does **not** require stockholder approval)
    - inside directors: corp officer who serves on BOD
    - outside director: director who usually is not an employee or stakeholder in the company
  - *ultra vires*:
    - corp act that exceeds its chartered powers (powers explicitly granted in charter)
    - BOD can be held personally liab if they commit ultra vires act that loses money
  - corp itself is liab for torts of agents/employees under *respondeat superior*
  - directors & officers owe duty of care & loyalty to the corp
  - stockholder powers
    - elect & remove BOD members
    - approve changes to articles of incorporation
    - make/amend bylaws
    - approve loans to corp's directors/officers/agents
    - ratify board actions
    - sue directors for mis-mgmt
  - stockholders' available actions for remedy
    - class action suit (a few people suing on behalf of many people)
    - derivative suits: stockholder(s) initiating a suit on behalf of the corp for corp's dmgs
    - direct action (stockholder suing for his own dmgs suffered)
- *dividends*:
  - shares of corp's profits that gets distributed to shareholders
  - usually paid in cash, but not always
    - *property dividends*: shares of stock in another corp that was acquired by this corp
    - *stock dividends*: shares of stock from this corp
- changes in corp structure
  - mergers
    - *share exchange merger*: Corp B exchanges all its outstanding shares to Corp A, in exchange for Corp A shares
    - *de facto merger*: Corp B sells all/most of its assets to Corp A, in exchange for Corp A stocks
    - *horizontal*:
      - two companies in same industry & **same** level of supply chain (direct competitors)
      - ex: if Lowes & Home Depot merged
    - *vertical*:
      - two companies same industry, but **different** level of supply chain
      - ex: if Ciquita Bananas & a grocery chain merged
    - *conglomerate*:
      - two companies not linked as customer/supplier
      - i.e., any merger that isn't vertical or horizontal

- ins co mergers
  - regulated corps (such as ins cos) can only engage in that type of biz (i.e., ins cos can only merge w/ ins cos)
  - state DOI must approve ins co mergers
  - if non-ins co wishes to **buy** part of ins co for investment purposes:
    - **holding co**: corp that buys stock in other corps
    - regulated by Nat'l Assoc of Ins Commissioners (NAIC) Model Ins Holding System Regulatory Act
      - co wishing to gain control of or merge w/ ins co must first file Form A & get state's approval
      - ins subsidiaries must file info w/ state DOI
      - limits dividend payments that ins subsidiary can make to holding co
- takeover:
  - assumption of control by one corp over another
  - can be friendly or hostile
  - methods
    - acquiring co gets cooperation/approval from target co's BOD
    - bypass BOD & get enough proxies votes from shareholders
      - **proxy vote**: shareholder gives right to vote to someone else
      - acquiring co can use votes to:
        - choose new BOD who will support takeover
        - vote directly on approving takeover, which would override BOD
  - **tender offer**: offer made by a co directly to shareholders to buy their shares, bypassing BOD & usually at price greater than mkt price
- dissolution
  - voluntary dissolution w/ BOD resolution & majority stockholder approval
  - stockholders can sue to dissolve if:
    - BOD deadlocked which stockholders can't break & irreparable inj to corp may or has occurred
    - BOD or officers have acted illegally, oppressively, or fraudulently
    - stockholders voting is deadlocked & have failed to elect directors for 2 successive mtgs
    - corp assets are being wasted/misapplied
  - receivership: when neutral third party is assigned to handle finances for a company going bankrupt
    - receiver: third party who is designated under a receivership
- reorganization
  - changing of structure, usually due to Chapter 11 bankruptcy or bad debt
- partnerships
  - 2+ parties who share ownership & profits/losses
  - (+) taxed at each partner's individual tax rates instead of corp biz rate
  - (+) easier to form than corp
  - **joint venture**: unincorporated joining of 2+ parties to conduct a specific transaction or specific series of related transactions

- liability issues
  - because of agency law, partners are vicariously liab for other partner's actions
    - originally, **contract** law violations **weren't** joint & several (plaintiff must name each person sued)
    - originally, **tort** law violations **were** J&S
    - most states amended law to make both contract & tort law J&S
  - common name statute:
    - permits service of process (legal notice of lawsuit) on a partnership by properly serving any partner
    - i.e., **not** required to serve **every** partner
  - innocent or less innocent partner can sue at fault partner for reimb
  - partners usually **not** vicariously liab for other partners' criminal acts
- financial
  - partners share in profits/losses/surplus **equally** unless partnership agreement says otherwise
  - partners can assign financial interest (rights to profits) but not other partnership rights (to manage, access acct, or inspect books)
- fiduciary duty owed to all partners (each partner must act in best interest of all partners)
- partners can be bound by estoppel even if a decision usually requires unanimous consent
  - 3 elements
    - person who isn't partner says he is or permits others to think he is
    - 3<sup>rd</sup> party deals w/ that person and has **justifiable** belief that he is acting on behalf of partnership
    - 3<sup>rd</sup> party changes his legal position when entering contract due to belief
  - can also be based on what other similar partnerships in area ordinarily do
- *dissolution/disassociation*
  - rightful dissolution (in accordance w/ agreement & no one at fault)
    - term of partnership ends
    - *partnership at will* (partnership w/o term that can lawfully be dissolved by any partner)
    - **all** partners agree to dissolve even if there is term
    - a partner is declared incompetent by judge or shown to be of unsound mind
    - a partner becomes incapable of performing contract (ex: illness)
    - partnership can only continue at a financial loss (i.e., you can't get it profitable)
  - wrongful dissolution
    - innocent partners can choose to end biz & hold at-fault partner for breach of contract, or continue partnership after paying out wrongful partners share less dmgs
    - ex:
      - partner becomes bankrupt
      - partner acts in harm of biz (competing w/ partnership, embezzles, etc.)
      - partner willfully or persistently breaches partnership agreement
  - assets distributed in following order
    - partnership' creditors
    - partners' advances (loans made by partner to partnership)
    - each partner's capital (initial investment)
    - surplus to partners, divided in same proportion as profits

- (-) in normal partnership, partners usually have unlimited liab for partnership debts
  - limited partnership:
    - 1+ general partners have unlimited liab & 1+ limited partners whose liab is maxed at what they invested (b/c they aren't involved in day-to-day mgmt)
    - if limited partners exercise any mgmt control, can face unlimited liab
  - limited liab partnership (LLP):
    - limits liab for **every** partner except in these situations:
      - individual acts of neg or wrongful acts by yourself
      - debts/obligations that you agreed to be liab for
      - debts/obligations expressly undertaken in the partnership agreement
- limited liab cos (LLC)
  - (+) owners have limited liab (like corp)
  - (+) taxed at each individual owner's rate
  - (-) not all bizz are allowed to operate as LLCs
- *professional corps (PC) and professional LLCs*
  - created by some states to meet needs of professionals (ex: accountants, doctors, lawyers, etc.)
  - structures are often complex, with entities within entities
- unincorporated assoc:
  - assoc or group of individuals voluntarily acting together under a common name to accomplish a lawful purpose
  - 6 common types
    - trade assoc
    - labor unions
    - benevolent & fraternal assoc
    - religious
    - club
    - condo owners assoc
  - not considered its own legal entity
    - entity can't be sued (but agents & individual members can be)
    - each member is individually liab for assoc's activities
  - how it differs from partnership:
    - assoc can't hold title to real prop or execute lease in assoc's name
    - a member's withdrawal doesn't cause dissolution
    - profit/expense-sharing is frequently other than per capita (i.e., it's not equally split)
    - assoc's members don't have auth to participate in day-to-day mgmt
  - bylaws
    - qualifications/selection/terms of directors & trustees
    - mtgs (frequency, rules, etc.)
    - qualifications for memberships
    - acquisitions & transfer of prop
    - rights/duties of members
    - options for dissolution
      - members' vote
      - death/withdrawal of majority of members
      - court action on application of creditors/members, or for illegal conduct
      - expiration of period stated in articles or bylaws
  - each member has prop right in assets as tenants in common



- dues paid become assoc's prop
- assoc directors who aren't compensated owe lesser duty of care than compensated ones

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