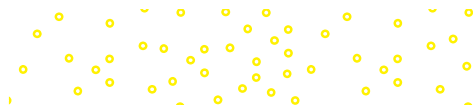


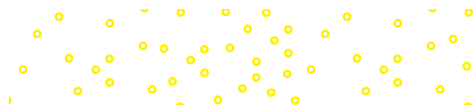
Dynamic Business Law

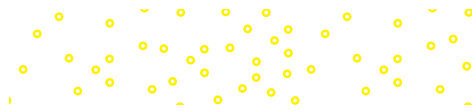
Fifth Edition

**Kubasek
Browne
Herron
Dhooge
Barkacs**



Dynamic Business Law





Dynamic Business Law

FIFTH EDITION

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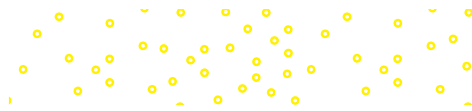
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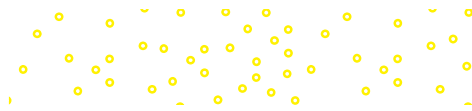
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DYNAMIC BUSINESS LAW, FIFTH EDITION

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This book is printed on acid-free paper.
1 2 3 4 5 6 7 8 9 LWI 21 20 19

ISBN 978-1-260-24789-3
MHID 1-260-24789-9

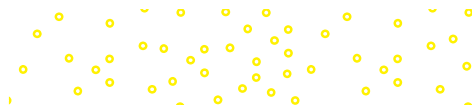
Portfolio Manager: *Kathleen Klehr*
Product Developers: *Jaroslav Szymanski* and *Michael McCormick*
Marketing Manager: *Michelle Williams*
Content Project Managers: *Pat Frederickson* and *Angela Norris*
Buyer: *Laura Fuller*
Design: *Egzon Shaqiri*
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Cover Image: ©*Creative Hat/Shutterstock*
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Library of Congress Cataloging-in-Publication Data

Names: Kubasek, Nancy K., author. | Browne, M. Neil, 1944- author. | Dhooge, Lucien J., author. | Herron, Daniel J., author. | Barkacs, Linda L., author.
Title: Dynamic business law / Nancy Kubasek, Bowling Green State University; M. Neil Browne, Bowling Green State University; Lucien J. Dhooge, Scheller College of Business, Georgia Institute of Technology; Daniel J. Herron, Miami University; Linda L. Barkacs, University of San Diego.
Description: Fifth edition. | New York, NY : McGraw-Hill Education, [2019] | Includes index.
Identifiers: LCCN 2018044378 | ISBN 9781260247893 (alk. paper)
Subjects: LCSH: Commercial law—United States. | LCGFT: Casebooks
Classification: LCC KF390.B84 D96 2019 | DDC 346.7307—dc23
LC record available at <https://lccn.loc.gov/2018044378>

The Internet addresses listed in the text were accurate at the time of publication. The inclusion of a website does not indicate an endorsement by the authors or McGraw-Hill Education, and McGraw-Hill Education does not guarantee the accuracy of the information presented at these sites.



About the Authors



Courtesy of Nancy Kubasek

Nancy K. Kubasek received her J.D. from the University of Toledo College of Law in 1981 and her B.A. from Bowling Green State University in 1978. She joined the BGSU faculty in 1982, became an associate professor in 1988, and became a full professor in 1993.

During her tenure at Bowling Green State University, she has primarily taught courses in business law, legal environment of business, environmental law, health care law, and moral principles. She has published over 75 articles, primarily in law reviews and business journals. Most of her substantive articles focus on environmental questions. She has helped get students involved in legal research, and a number of her articles have been coauthored with students. She has also published a number of pedagogical articles in teaching journals, focusing primarily on the teaching of critical thinking and ethics.

She wrote the first environmental law text for undergraduate students, *Environmental Law*, and coauthored *The Legal Environment of Business: A Critical Thinking Approach*. She has written supplemental materials, such as study guides, test banks, and instructors' manuals.

Active in many professional organizations, she has served as president of the Academy of Legal Studies in Business, the national organization for professors of legal studies in colleges of business. She has also served as president of the Tri-State Academy of Legal Studies in Business, her regional professional association.

In her leisure time, she and her husband, Neil Browne, fish for halibut and salmon in Alaska, as well as largemouth bass in Florida. In addition, they are regular participants in polka, waltz, zydeco, and Cajun dance festivals in Europe and the United States. For almost 30 years, they have been successful tournament blackjack players. Both are avid exercisers—lifting weights, doing yoga, and running almost every day.

M. Neil Browne is a senior lecturer and Distinguished Teacher Professor of Economics and Law emeritus at Bowling Green State University. He received his B.A. in history and economics at the University of



Courtesy of M. Neil Browne

Houston, his Ph.D. in economics at the University of Texas, and his J.D. from the University of Toledo. He has been a professor at Bowling Green for more than five decades.

Professor Browne teaches courses in economics and law, legal research, jurisprudence, ethical reasoning, critical thinking, and economics at both the undergraduate and graduate levels. He has received recognition as the Silver Medalist National Professor of the Year, the Ohio Professor of the Year, and Distinguished Teacher and Master Teacher at Bowling Green State University, as well as numerous research awards from his university and from professional organizations. His consulting activities with corporate, governmental, and educational institutions focus on improving the quality of critical thinking in those organizations. In addition, he serves as a Rule 26 expert with respect to the quality of the reasoning used by expert witnesses called by the party opponent in legal actions.

Professor Browne has published 35 books and over 160 professional articles in law journals, as well as in economics, sociology, and higher-education journals. His current research interests focus on the relationship between orthodox economic thinking and legal policy. In addition, he is in the midst of writing books about the power of questionable assumptions in economics, the usefulness of asking questions as a learning strategy, and the deficiencies of legal reasoning.



Courtesy of Lucien J. Dhooge

Lucien J. Dhooge is the Sue and John Staton Professor of Law at the Scheller College of Business at the Georgia Institute of Technology, where he teaches international business law and ethics and serves as the area coordinator in law and ethics. Prior to his tenure at the Georgia Institute of Technology, Professor Dhooge practiced law for 11 years and served on the faculty of the University of the Pacific in California for 12 years.

He has authored more than 50 scholarly articles, coauthored and contributed to 13 books, and is a past editor in chief of the *American Business Law Journal* and the *Journal of Legal Studies Education*. Professor Dhooge has presented courses and research throughout the United States, as well as in Asia, Europe, and Central and South America, and has received numerous research and teaching awards, including seven Ralph C. Hoerber Awards for excellence in published research. After completing an undergraduate degree in history at the University of Colorado, Professor Dhooge earned his J.D. from the University of Denver College of Law and his LL.M. from the Georgetown University Law Center.



Courtesy of Daniel J. Herron

Daniel J. Herron is a professor of business legal studies in the Richard T. Farmer School of Business at his undergraduate alma mater, Miami University in Oxford, Ohio, where he earned a bachelor's degree in English. He earned his law degree from Case Western Reserve University School of Law in Cleveland and

is a member of the Ohio and federal bars. His research includes articles on business ethics plus a variety of "business and law" topics. In addition to his teaching and scholarly publications, he founded in 1994, and since then has been coaching, the James Lewis Family Mock Trial Program at Miami, a consistent top-10 program in a field of more than 300 mock trial programs nationwide. Before coming to Miami in 1992, he taught at Bowling Green State University, the University of Wyoming, the University of North Carolina-Wilmington, and Western Carolina University. He has been married for over 35 years to Deborah, and they have two children, Christopher (married to Amanda) and Elisabeth (married to Mark). They have four grandchildren—Jack, Nate, Samantha, and Wesley—plus two rambunctious beagles, Max and Missy.



Courtesy of Linda L. Barkacs

Linda L. Barkacs received her J.D. from the University of San Diego in 1993. She also has a B.A. in political science from San Diego State University and an A.A. in accounting from Irvine Valley College.

Upon graduating from law school and passing the California bar exam, Professor Barkacs became an associate at a downtown San Diego law firm. During that time she was involved in a number of high-profile trials, including a sexual harassment case against the City of Oceanside that resulted in a \$1.2 million verdict. In 1997, Professor Barkacs and her husband Craig (also a professor at USD) started their own law firm specializing in business and civil litigation (in both federal and state courts), employment law cases, and appeals. They were also involved in numerous mediations and arbitrations.

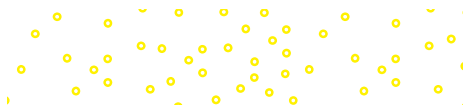
Professor Barkacs began teaching at USD in 1997 and went full-time in Spring 2002. She is now a tenured Associate Professor of Business Law. As an educator, she has designed and taught numerous courses on law, ethics, and negotiation. She teaches in USD's undergraduate and graduate programs, including the Master of Science in Executive Leadership (a Ken Blanchard program), the Master of Science in Global Leadership, the Master of Science in Real Estate, and the Master of Science in Supply Chain Management. Professor Barkacs often teaches in USD's study-abroad classes and has traveled extensively throughout Europe, Asia, and South America.

Professor Barkacs has received numerous awards for her teaching at USD, including the 2008 USD Outstanding Undergraduate Business Educator; 2008 and 2007 Professor of the Year, USD Senior Class (university-wide); 2007 Creative and Innovative Teaching Award, Academy of Education Leadership (national); and 2009 and 2010 nominee for U.S. Professor of the Year (Carnegie Foundation).

She and her husband are principals in The Barkacs Group (www.tbgexecutivetraining.com), a consulting firm that provides negotiation, ethics, and team training for the private sector. Professor Barkacs has published numerous journal articles in the areas of law, ethics, and negotiation. She and her husband are coauthoring a book on negotiation. She has been the president, vice president, conference chair, and treasurer of the Pacific Southwest Academy of Legal Studies in Business (www.pswalsb.net).

Professor Barkacs currently spends her time teaching, publishing, consulting for The Barkacs Group, and doing volunteer work for various civic causes. She enjoys walking, weight lifting, and spending her free time with her husband Craig and their three cats, Phoenix, Violet, and Vanessa.

A Guided Tour



We are full of gratitude to the reviewers, adopters, and students who have stimulated us to create this fresh and improved 5th edition of *Dynamic Business Law*. Any book is a work in progress, and certainly this one is no exception. It is humbling indeed to check and proofread and study, but still omit things that should be included and fail to adequately explain what we do include. But with your assistance, we feel we have a much better book now.

We have constructed a book that is both comprehensive and readable. But the features integrated into the chapters provide its distinctive worth. Each feature stands by itself as an aid to the kind of learning we hope to encourage. Yet the features are also a cohesive unit, contributing both to the liberal education of the students who use this book and to their skills as decision makers in a market economy.

Specifically, we provide a comprehensive examination of all the relevant questions, concepts, and legal rules of business law. Our text addresses the power and authority of constitutions, statutes, case law, and treaties as sources of law. Together the various elements of what we call “the law” make up the foundation and structure of the market exchange process.

Decisions to trade and produce require trust: trust that consumers, firms, workers, financial institutions, and asset owners will do as they promise and that violations of such promises will be unacceptable in the marketplace. Without guarantees that promises will be kept, market exchanges would grind to a halt. Business law provides these guarantees and the boundaries within which certain promises can be made and enforced.

Market decisions are made in a context—a persistently changing context. The law, in turn, is dynamic in response. New technologies and business practices bring new disputes over rights and responsibilities in a business setting. Future business leaders need knowledge of existing business law, as well as a set of skills permitting them to adjust efficiently and effectively to new legal issues that arise over the course of their careers. We are excited about the contents of our features and want to explain the function of each of them in preparing our students for leadership in business.

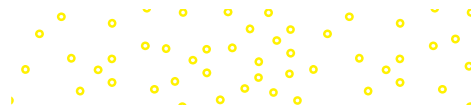
NEW Practical Tips for Business Managers

A new feature called “Practical Tips for Business Managers” emphasizes that our book is a BUSINESS Law book, full of helpful ideas for modern business leaders.

PRACTICAL TIPS FOR BUSINESS MANAGERS

1. Remember that an insurance policy is a specialized form of contract. Reading is fundamental in order to know what types of losses are covered and who is covered by the policy. It is also very important to be familiar with claims procedures and loss documentation requirements as coverage may be reduced or lost entirely if the insured fails to follow policy rules or is deemed uncooperative with the insurer.
2. Insurance coverage should be reviewed on a periodic basis in order to determine if changes are necessary. For example, an insured business may have acquired more inventory and customers, moved facilities to a different location, entered into agreements with third parties or even changed its line of business entirely. It cannot be assumed that current insurance policies will cover these changes, and, in fact, policies may require reporting of such changes. There are few things more damaging to a company's financial health than to suffer a catastrophic loss and subsequently discover that it is underinsured or uninsured.
3. Life insurance is important not only for individuals in order to care for their dependents in the event of an unexpected loss of life but is also crucial for businesses as well. Life insurance policies on key personnel help a company adjust to the loss of individuals upon whom the company's future well-being depends.





BUT WHAT IF . . .

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say, in the Case Opener, that Rogers Corporation was dumping PCBs into a small stream behind the plant, making the water unsafe. The stream flowed onto the properties of other individuals in the area. What kind of a tort would this be?



BUT WHAT IF . . .

The “But What If” feature is designed to promote critical thinking by providing students with hypothetical variations on the fact patterns outlined in real cases.

This feature takes advantage of what we were taught so regularly in law school: Change the factual context and the legal conclusion may well shift along with the fact pattern. The “But What If” hypotheticals should heighten students’ sensitivity to the importance of details in legal reasoning.

COMPARING THE LAW OF OTHER COUNTRIES

TAKE-BACK LAW IN GERMANY

Germany has found one effective way to help alleviate problems with trash: manufacturers must take back packing materials for their products such as crates, drums, boxes, and shrink wrap. They may not dispose of these items in the public waste disposal system. The legislation also requires that retailers take back packaging materials such as cartons and antitheft devices on CDs. Retailers must install bins into which consumers may easily deposit packaging materials. The law also imposes a mandatory deposit on non-refillable containers for beverages, washing and cleansing agents,

and water-based paints to provide an incentive for consumers to return the containers.

In response to the heavy burden placed on manufacturers under this law, a nonprofit organization, DSD, was founded to allow manufacturers, for a fee, to shift responsibility for recycling primary packing material to DSD through its green-dot program. Participating companies can mark their products with the green dot, and the packaging may then be dropped off at green-dot collection points or, in some cities, be left outside in special containers for curbside recycling.

COMPARING THE LAW OF OTHER COUNTRIES BOXES

This feature highlights the emerging, interconnected global market. Each chapter contains multiple “Comparing the Law of Other Countries” boxes. Because so many market decisions are made in an international context, future business leaders need to familiarize themselves with the likeli-

hood that a particular legal principle essential to doing business in one country may not be appropriate in other countries. The “Comparing the Law of Other Countries” boxes provide heightened awareness of this likelihood by illustrating how unique the law in a certain country often is. After reading dozens of these “stories of difference,” readers will certainly better understand the need to discover relevant law in all jurisdictions where their market decisions have legal implications.

We believe that students learn innumerable valuable lessons about U.S. business law by contrasting the concepts of our business law system with those of our primary trading partners. We typically use Canada, Japan, China, Russia, Mexico, and the European Union for our comparisons because modern business managers will more likely be interacting with the law in those particular jurisdictions.

E-COMMERCE AND THE LAW

INTECHRA MODELS HOW TO DISPOSE OF E-WASTE

Electronic waste, or e-waste, is created when consumers and companies dispose of electronics in improper ways. Today, e-waste from electronics accounts for 70 percent of the heavy metals dumped in landfills. Consumers and companies dispose of both computers and cell phones on a regular basis. E-waste is one of the fastest-growing sectors of the waste stream.

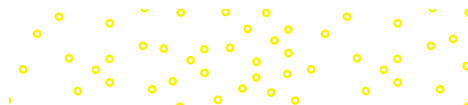
Some businesses have responded by offering handling services. Intechra is the industry leader in the field of information technology asset disposition (ITAD).¹ In particular, Intechra recycles electronics throughout the United States. The company repairs

and donates some equipment, making sure hard drives are wiped clean. Intechra also disassembles and recycles equipment that cannot be reused. The company employs a zero-landfill policy—it sends nothing to landfills.¹ Intechra makes sure companies dispose of equipment in ways that comply with local, state, and federal laws that protect both privacy and the environment. Intechra is part of a growing industry, one that promises to manage electronics throughout products’ complete life cycles.

¹ <https://www.businesswire.com/news/home/20070501006055/en/Intechra-Earth-Day-Recycling-Drive-40-Tons>

E-COMMERCE BOXES

A central feature of modern business decisions is new technology, specifically the rapid spread of electronic commerce. This development has created new challenges and opportunities that were unforeseeable until very recently. With each edition, we are enhancing our coverage of technology related changes in the law.



Our initial approach was to construct an e-commerce chapter that stood by itself. But the more we thought about that approach and listened to our reviewers, we decided to place E-Commerce boxes in most of our chapters, as well as to integrate the e-commerce material throughout relevant chapters. By this infusion approach, we think we can best convince students of the pervasive influence of this new, complicating aspect of business decisions.

CONNECTING TO THE CORE

The business curriculum, as experienced by students, can easily be seen as a collection of silos, with each silo, or academic department, walled off from the others with its own special language and issues. But successful business decisions start with the recognition that decision makers should take advantage of the interrelatedness of the various subject areas.

The purpose of the Connecting to the Core feature is to drive home the point that concepts from finance, accounting, marketing, management, and economics are closely linked to concepts and dilemmas in business law. The study of business law is best seen as a foundational component of the larger study of business administration. This feature for the fifth edition has been placed on the website assigned to *Dynamic Business Law*.

The program remains in force today, with the cap set at 8.95 million tons, a level of about one-half of the emissions from the power sector in 1980.⁵ According to the Environmental Defense Fund, the program has been widely regarded as highly effective at solving the problem in a flexible, innovative way.⁶

GREEN TAXES

An idea that is popular in Europe and gaining interest in the United States is the imposition of **green taxes** on environmentally harmful activities. Green taxes can discourage consumers and firms from engaging in these activities, while revenue from the taxes can fund environmental projects. When a province in Canada imposed a \$.10 tax on each alcoholic beverage sold in a nonrefillable container, there was a dramatic shift among beer drinkers from nonrefillable containers to more environmentally friendly reusable bottles.

Green taxes are consistent with international environmental law's principle of "polluter and user pay." The ultimate goal of this approach is to phase out environmentally harmful action through the imposition of a tax.

⁴ U.S. Environmental Protection Agency, "Acid Rain Program 2008 Progress Report," www.epa.gov/airmarkets/progress/ARP_1.html, January 2009.

⁵ EPA Acid Rain Program, <https://www.epa.gov/airmarkets/acid-rain-program>.

⁶ Environmental Defense Fund, How economics solved acid rain, <https://www.edf.org/approach/markets/acid-rain> (accessed March 28, 2018).

For a better understanding of the economic principles underlying the use of marketable discharge permits, as well as green taxes, please see the **Connecting to the Core** activity in Connect.

CRITICAL THINKING

After each case in the book, we have provided critical-thinking questions to highlight the need to think critically about the reasoning used by the court. In addition, we include in every chapter a Point/Counterpoint problem that encourages the reader to evaluate the conflicting reasoning surrounding a key issue in the chapter. Legal evolution occurs through a process of curiosity, an awareness of new problems in the marketplace, and sensitivity to rights and responsibilities that have not been given proper attention.

But we do much more than just ask a lot of critical-thinking questions at particular locations throughout the chapters. We encourage the use of a step-by-step critical-thinking approach that has been developed and used in classrooms in many countries. We do not just repeatedly urge students to "think critically." Instead, we describe for them what is meant by that phrase in the context of business law. We include this step-by-step approach in Appendix 1A

significant impact (FONSI) was inadequate. According to the defendant, the environmental assessment looked at increase in fire safety risk and any other adverse environmental effect. In the end, the United States District Court for the Southern District of New York concluded that the defendant agency's environmental assessment satisfied its minimal burden to justify forgoing the environmental impact statement, and granted the defendant summary judgment. The plaintiff appealed.

JUDGE SACK Plaintiffs contend that the NRC erred in failing to produce an environmental impact statement ("EIS") under NEPA, instead producing only an environmental assessment ("EA") and a finding of no significant impact ("FONSI"). We disagree:

"Judicial review of agency decisions regarding whether an EIS is needed is essentially procedural," and "the decision

convincingly documented its determination of no significant impact."

The NRC's EA and FONSI satisfy the agency's minimal burden to justify forgoing the EIS. The EA contains extended discussion of why the exemption does not create any fire safety risk, examines whether this exemption would have any other adverse environmental effect, and considers the alternative of not granting the exemption (and thereby requiring compliance). The NRC was not required to say more.

We have considered plaintiffs' remaining arguments and, with the exception of the public participation challenge under NEPA addressed in our related opinion issued today, conclude they are without merit. The judgment of the district court is therefore affirmed in accordance with this order.

AFFIRMED.

CRITICAL THINKING

What is the reasoning Judge Sack uses to support his argument? Is the evidence used to support the decision in this case reliable and abundant?

ETHICAL DECISION MAKING

Given the consequentialist theory of ethics, do you think the outcome of this case will yield the greatest amount of good for the greatest number of people? Who would be affected by this case?



at the end of Chapter 1. Instructors who want to emphasize critical thinking can use that appendix as a structured approach for learning how to evaluate legal reasoning.

ETHICAL REASONING

After each case in the book, we have provided ethical reasoning questions to highlight the need to think ethically about the reasoning used by the court. Throughout, our book emphasizes consideration of all stakeholder interests in every market decision. Business ethics should never be an afterthought or something firms consider because they think they must.

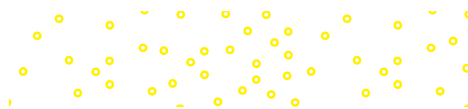
Instead, business ethics is what provides the social legitimacy for markets, what distinguishes markets from the life of the jungle. While market decisions are calculating and purposeful, they must at the same time reflect awareness that the good and the right provide social borders that elevate those decisions above simple greed and egoism.

Ethical discussion focuses on the basic observation that we are socially and globally interdependent as entrepreneurs, asset owners, workers, businesspeople, and consumers. Our inescapable contact with one another requires that our aspirations be defined, at least in part, by their impact on others.

Our text has several ethical reasoning possibilities in each chapter. But for the reader to make use of this emphasis requires a practical step-by-step approach. In other words, students need more than just a discussion about values or ethics. They need to have some sense that the discussion is headed somewhere. They want to know, “How will my behavior be any more ethical after I have read the chapter and participated in the class discussions?” Our text answers their question.

Chapter 2 provides a clear explanation of our approach—an approach that students can use on a regular basis. The language and organization of our model of ethical reasoning leans implicitly on standard ethical theories. But it meets the challenge of a fast-paced business world. It pushes stakeholders to the forefront of market decisions, where they belong, and does so in a manner that is both powerful and doable without becoming tedious.

Business ethics are the guidelines we use to shape the world we want to create. As such, they provide guidance for the kind of business behavior we want to reinforce. After each case excerpt, under the heading “Ethical Decision Making,” we pause to think about the ethics of business law by asking a question or questions derived from the practical approach to business ethics developed in Chapter 2. Because we want students to see stakeholder interests as having numerous ethical dimensions, we have included frequent references to the ethical questions arising in modern business enterprises throughout *Dynamic Business Law*.



What's New in the Fifth Edition?

Changes to the Chapters

We received an incredible amount of feedback prior to writing the fifth edition of *Dynamic Business Law*. The following list of changes and improvements is a testament to our users and their commitment to making *Dynamic Business Law* the best content of its kind.

Every chapter has new cases in the Questions & Problems section in response to suggestions from adopters and reviewers of the fourth edition.

Each chapter contains the following:

- A new feature in the final pages called “Practical Tips for Business Managers.” The idea of the feature is to emphasize that our book is a BUSINESS Law book, full of helpful ideas for modern business leaders.
- Either a new major case or a new “Point/Counterpoint”. Reviewers consistently applauded the freshness of our cases, and we want to continue to earn their applause in this regard.
- New end-of-chapter case problems.

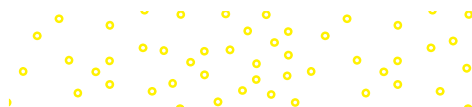
In addition, wherever it is practical to do so, we enlarged our coverage of the responsibility of businesses to protect privacy rights of consumers and employees.

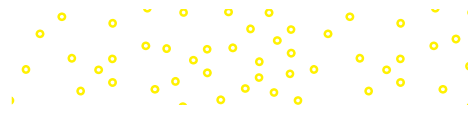
Chapter 1 An Introduction to Dynamic Business Law

- Clarified the meaning of “commercial” and “supreme law of the land” because reviewers said their students were not familiar with the terms.
- Broadened the treatment of the boundaries of “criminal law” in response to reviewer’s concern that the previous discussion of criminal law had focused too much on insider trading.
- Revised the discussion of the importance of comparative law by replacing the outdated material based on Google’s conflicts with China by discussing the restrictions on American firms resulting from the new 2017 cybersecurity law. This addition contributes to our expanded treatment of cyberlaw.
- Expanded the discussion of the ways in which critical thinking enhances creative business leadership and effectiveness.
- Explained in the description of critical thinking the significance of the “But What If” feature in *Dynamic Business Law*, 5e, for being alert to the impact of single facts on success or failure in a legal dispute.

Chapter 2 Business Ethics

- Made explicit the open-ended nature of ethical decisions. In other words, we should never expect universal agreement about how to answer ethical questions. But by learning





the various ways that thoughtful people have learned to talk about ethical dilemmas, businesspeople can play a leadership role in sustaining an ethical market system.

- Enlarged the discussion of social responsibility of business, including a description of Friedman's view that the only social responsibility firms have is to maximize profits, as well as critiques of his argument. That inclusion was in direct response to reviewers' suggestions.
- Introduced the history and rationale of the Foreign Corrupt Practices Act in response to a reviewer's suggestion.
- Revised and simplified the WH approach to Business Ethics in response to reviewers' requests.
- Expanded coverage of the ethics of care and used that material to demonstrate just how challenging it is to reach a satisfactory ethical decision.

Chapter 3 The U.S. Legal System

- Added a new Case Nugget illustrating how the courts handle the increasing problem of defining when activities on the internet can constitute sufficient minimum contacts to give the court jurisdiction over an out of state defendant. This change is part of our effort to increase the coverage of cyberlaw issues.
- Removed discussion of quasi-in rem jurisdiction in response to reviewer comments that the concept is really an unnecessary concept for business students.
- Added a brief discussion of the doctrine of exhaustion of remedies in response to a reviewer request.
- Added a sentence clarifying that the map of the Circuit Courts of Appeal did not include the DC Circuit in response to a reviewer's concern about a potential conflict between the text, which correctly specifies that there are 12 Circuit Courts of Appeal, and the map, that showed only 11 circuits.
- Replaced the 1996 *J.E.B. v. ALABAMA*, case with a 2016 case to provide a more current illustration of the concept of the Bateson challenge.
- Inserted new Point/Counterpoint, Should all states copy the federal system and appoint state judges for life?

Chapter 4 Alternative Dispute Resolution

- Added a list of states that have adopted the Uniform Mediation Act in response to reviewers' suggestions.
- Inserted a new 2016 case, *Maribel Baltazar v. Forever 21*, illustrating an unconscionable binding arbitration clause.
- Added a new Point/Counterpoint, Should Court Annexed ADR be Mandatory in Certain Cases?
- Added a discussion of *Epic Systems Corp v. Lewis Corporation*, the controversial 2018 Supreme Court case holding that companies may require workers to settle employment disputes through individual arbitration rather than joining together in class actions. This case follows an earlier Supreme Court case holding that corporations could similarly force consumers to settle claims through individual arbitration rather than class actions.





Chapter 5 Constitutional Principles

- Inserted a new 2016 case, *Direct Marketing Association v. Barbara Broh*, to provide a more current illustration of a challenge to a state law as imposing an undue burden on interstate commerce.
- Added a new Case Nugget discussing the 4th Amendment implications of the use of drones by law enforcement to conduct searches. This issue is important in our attempts increase coverage of privacy issues.
- Updated the case wrap up to reflect the change that was made to the Affordable Care Act (ACA), removing the mandate to purchase health insurance that had been the focus of the court's decision.

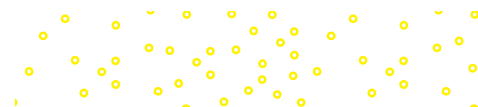
Chapter 6 International and Comparative Law

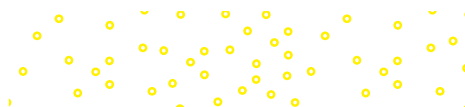
- Added section of treaties and executive agreements in the United States.
- Added section relating to labor and human rights in ethics section.
- Updated Exhibit 6-1, Summary of the FCPA Top Ten list.
- Updated membership in the World Trade Organization (WTO).
- Added section dealing with the controversies regarding NAFTA and Brexit.
- Added new Case Nugget addressing force majeure clauses in contracts.
- Updated number of states parties in NY Convention.

Chapter 7 Crime and the Business Community

- Added a new Supreme Court case, *Salman v. United States*, clarifying how the recipient of a tip can be held liable for insider trading.
- Expanded the discussion of embezzlement in response to reviewer comments.
- Added a new Point/Counterpoint raising the question of whether we should make insider trading legal. The issue addressed in the previous edition's Point/Counterpoint was no longer a controversial issue.

Chapter 8 Tort Law

- Added new Case Nugget, *Jacobus v. Trump*, in response to a reviewer suggestion that we expand discussion of the distinction between fact and opinion. The case involves actions taken on Twitter, and thus is in line with our increased emphasis on cyber law.
 - Added a new Case 8-1, *Mazda Motor Corporation v. Hurst*, providing a more updated scenario that shows the application of the Gore guideposts.
 - Added a discussion about the innovative attempt by five California cities to use the tort of public nuisance sue the big five oil companies for damages caused by climate change, arguing that these firms created a public nuisance by misleading the public as to the effects of using fossil fuels.
 - Added a new-Point/Counterpoint that asks the following question, Should a percentage of each punitive damages award be given to the state?
- 



Chapter 9 Negligence and Strict Liability

- Updated the discussion of the case against Peanut Corporation of America.
- Added a new Case 3-3, *Swigart v. Bruno*, providing a more updated illustration of the use of the comparative negligence defense.
- Added a new Point/Counterpoint, *Should the U.S. Enforce a Duty to Rescue?*

Chapter 10 Product Liability

- Added case discussing the standards for foreseeability in design defect cases.
- Reduced the size of all three cases in the chapter in response to requests of reviewers.
- Added a case emphasizing the importance of foreseeability for duty to warn and design defect cases.
- Added a discussion of the efforts of toy manufacturers to avoid a duty to warn regarding fidget spinners by arguing that the spinners are for general use, not children specifically.

Chapter 11 Liability of Accountants and Other Professionals

- Added a new Case 11-2, *Michael Williamson v. Recovery Limited Partnership*, demonstrating an unsuccessful attempt at using the accountant-client privilege.
- Added a new Point/Counterpoint, *Should Accountants be Held Liable for Negligence to Reasonably Foreseeable Third Parties?*

Chapter 12 Intellectual Property

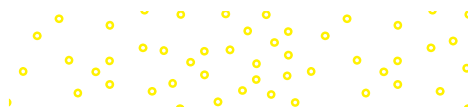
- Extended the discussion of copyrights.
- Added an important 2017 U.S. Supreme Court case, *Star Athletica, LLC, v. Varsity Brands, Inc. et al*, that clarified the test for when a copyright can be issued for designs.
- Added a new Point/Counterpoint, *Should the Law Allow Disparaging Trademarks to be Registered?*

Chapter 13 Introduction to Contracts

- Added new Case 13-2, *Trapani Const. C. v. Elliott Group, Inc.*, which is a more current and somewhat better reasoned case illustrating how the court may find an implied in fact contract.
- Added a new Point/Counterpoint, *Should the Business World Embrace Smart Contracts? that furthers our emphasis on e-commerce.*

Chapter 14 Agreement

- Replaced the old Case 14-2 with a more current case illustrating a contract containing terms that were not sufficiently definite and certain to constitute valid terms of an enforceable agreement.
- Added a new Point/Counterpoint, *Should Offers Made through Electronic Communications, Such As Text Messages And E-Mail, Use the Normal Mailbox/Dispatch Rule or A Receipt Rule?*





Chapter 15 Consideration

- Added new Case Nugget, *Ruzicka v. Conde Nast Publishing*, in Promissory Estoppel section in response to reviewers request for more coverage of privacy issues.
- Included new case, *Margeson v. Artis*, in “Preexisting Duty” section in response to multiple reviewers who wished to see a case on preexisting duty. Generally, reviewers also requested more coverage of small business issues. This case deals with the sale of a small business.
- Added a Point/Counterpoint, *Should Past Consideration Be Acceptable Consideration for a Contract?*

Chapter 16 Capacity and Legality

- Replaced the old Case 16-3 with *Riley v. Iron Gate Self Storage*, a more current case illustrating how a court analyzes when an exculpatory clause is enforceable.
- Added a new Point/Counterpoint, *Should Minors Have Full Capacity to Enter into Binding Legal Contracts at the Age of 15?*

Chapter 17 Legal Assent

- Added new Case 17-3, *Garage Solutions, LLC, v. Monty J. Person*, to provide a current example of the use of the affirmative defense of duress.
- Added a new Point/Counterpoint, *Should Browse Wrap Agreements be Enforceable?* which focuses on another issue related to e-commerce.

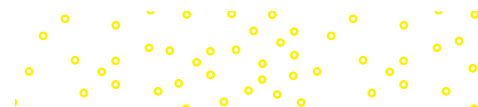
Chapter 18 Contracts in Writing

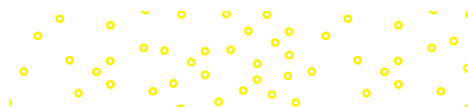
- Added new Case 17-3, *Garage Solutions, LLC, v. Monty J. Person*, to provide a current example of the use of the affirmative defense of duress.
- Added a new Point/Counterpoint, *Should Browse Wrap Agreements be Enforceable?* which focuses on another issue related to e-commerce.

Chapter 19 Third-Party Rights to Contracts

- Added a 2017 Case 19-2, *Tucker v. Tom Raper, Inc.*, to show how a person does not have to be identified in writing to be a legitimate third part beneficiary.
- Changed the Point/Counterpoint to one that illustrates the importance of identifying whether ne is an intended or incidental beneficiary.

Chapter 20 Discharge and Remedies

- Added new case, *Hemlock Semiconductor Operations, LLC v. Solarworld Industries Sachsen GMBH*, which is an updated illustration of the application of the doctrine of commercial impracticability.
 - Added a new Point/Counterpoint, *Should Punitive Damages be Awarded in Certain Breach of Contract Cases?*
- 



Chapter 21 Introduction to Sales and Lease Contracts

- Added a new case opener that focuses on local business activities of “common,” “every-day” business between a supplier of machinery and the business which uses the machinery.
- Included a new Case Nugget and a new Case 21-1 about UCC article 2 contract formation “hot off the presses” from just the past two years.
- Inserted new case focusing on the definition and status of a merchant.
- Included a new Point/Counterpoint relevant to the growing issues surrounding the merits of global trade. Should the US adopt the CISG?

Chapter 22 Title, Risk of Loss, and Insurable Interests

- Added case opener that lays out nearly every question posed in this chapter on title, risk of loss and insurable interest.
- Included new case showing the complications of the sale of goods when bankruptcy gets in the way.
- Added case focusing on the difficult concept of “entrustment,” a topic also addressed in the Point/Counterpoint.
- Wrote new Case Nugget dealing with merchant-on-merchant transactions.

Chapter 23 Performance and Obligations under Sales and Leases

- Added case opener that lays out nearly every question posed in this chapter on title, risk of loss and insurable interest.
- Included new case showing the complications of the sale of goods when bankruptcy gets in the way.
- Added case focusing on the difficult concept of “entrustment,” a topic also addressed in the Point/Counterpoint.

Chapter 24 Remedies for Breach of Sales and Lease Contracts

- Added new case, Des Moines Flying Servs. v. Aerial Servs. It addresses whether a seller can be liable for a defective product that it did not manufacture.
- Created new Point/Counterpoint, Is the Economic Loss Doctrine a Legitimate Concept that is Needed?

Chapter 25 Warranties

- Added new case, Cannon v. Bodensteiner Implement Co. which considers whether a salesman’s puffing statements constitute an express warranty.
- New Point/Counterpoint, Do the Implied Warranties Diminish the Fundamental Free Market and the Right to Contract?





Chapter 26 Negotiable Instruments: Negotiability and Transferability

- Added a new 2017 case *Amplify Federal Credit Union v. Garcia, Tex.*, discussing whether a particular instrument is a contract or a negotiable instrument and therefore which statute of limitations applies.
- Created a new Point/Counterpoint, Should your business use contracts rather than negotiable instruments to set payment?

Chapter 27 Negotiation, Holder in Due Course, and Defenses

- Inserted new 2017 case *Dennis Walker v. John Probandt and John Raynor* that discusses the criteria for being a holder in due course.
- Wrote new Point/Counterpoint, Should holder in due course laws be revised?

Chapter 28 Liability, Defenses, and Discharge

- Added new case *IGS Industries, Inc. v. Discover Financial Services, Inc.*, discussing whether a party exercised care and whether doing so discharged its liability.
- Created new Point/Counterpoint, Should employers be held responsible when their employees forge a signature on a check?

Chapter 29 Checks and Electronic Fund Transfers

- Added 2018 major case analyzing the criteria for wrongful dishonor of a check.
- Created new Point/Counterpoint, Should your business start accepting Bitcoin?

Chapter 30 Secured Transactions

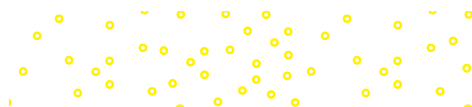
- Added new major case *1st Source Bank v. Wilson Bank & Trust* that discusses whether a secured party can have a secured interest in the products of collateral.
- Added another new case *The Four County Bank v. Tidewater Equipment Co.* analyzing whether a party that acquires property has a duty to investigate whether a secured interest exists on that property.

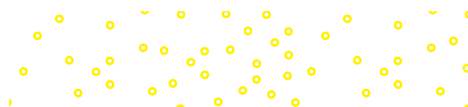
Chapter 31 Other Creditors' Remedies and Suretyship

- Included a new case *Alcantar v. Sanchez*, providing an argument about the nature of conversion when a firm attempts to garnish funds.
- Added a second major case *Sharp v. Horton*, focusing on the procedural criteria required for a successful writ of execution to recover a debt.

Chapter 32 Bankruptcy and Reorganization

- Updated numerous bankruptcy filing statistics.
- Created new chapter opener, Student Loans and Bankruptcy.





- Added Case Nugget Discharge of Claims for Willful or Malicious Conduct Townsend v. Ganci U.S. District Court for the Eastern District of New York 566 B.R. 129 (E.D.N.Y.2017).
- Updated Exhibit 32-4 Federal Bankruptcy Exemptions.
- Updated Exhibit 32-8 and accompanying text.

Chapter 33 Agency Formation and Duties

- Added new major case City of Binghamton v. Whalen Appellate Division of the Supreme Court of New York 141 AD 3D 145 (2016) discussing the impact of the agent's failure to fulfill the duty of loyalty.

Chapter 34 Liability to Third Parties and Termination

- Added new major case Doe v. Uber Technologies, Inc. United States District Court for the Northern District of California, 184 F. SUPP. 3D 774 (2016). This case examines the scope of the employment relationship.
- Created new Point/Counterpoint, Should Independent Contractors Be Able to Recover Damages from Their Employers Resulting from Injuries on the Job?

Chapter 35 Forms of Business Organization

- Made a major expansion of the treatment of LLP's in response to reviewers' requests.
- Updated the data in Exhibit 35-8, specifically the list of the largest franchises.
- Added new major case: Live Cryo, LLC v. Cryousa Import and Sales, LLC, United States District Court, E.D. Michigan, Southern Division (2017). This case looks at how courts make the choice of forum to hear disputes between the franchisee and franchisor and consider the elements required in a franchise agreement.

Chapter 36 Partnerships: Nature, Formation, and Operation

- Included new major case Floyd Finch v. Bruce Wayne Campbell, Court of Appeals of Missouri, Western District (2017) WD 80283 Cons WD 80317. This case discusses the intricacies present when both parties to a dispute believe the other violated his fiduciary duty to the partnership.
- Created a new Point/Counterpoint, Are Proportional Partnerships a Good Idea?

Chapter 37 Partnerships: Termination and Limited Partnerships

- Added major new case: William C. Styslinger III v. Brewster Park, LLC, et al. Supreme Court of Connecticut, 138 A.3D 257 (2016). This case discusses whether an assignee of a partnership interest can require a winding up when not granted an accounting from the LLC.



Chapter 38 Corporations: Formation and Financing

- Added new major case *Protect My Check, Inc. v. Craig C. Dilger, John*, United States District Court, E.D. Kentucky, Central Division. Frankfort 176 F.Supp.3D 685 (2016). In this case the Court discusses whether Kentucky's ban on direct corporate contributions to influence elections is an unconstitutional limit on speech.
- Created new Point/Counterpoint, *Should the Citizens United Ruling Be Overturned?*

Chapter 39 Corporations: Directors, Officers, and Shareholders

- Created a major exhibit exploring the relationship between corporations and privacy rights in response to an explosion of interest in this issue. So extensive is the scope of this issue that many corporations now employ a CPO, a Chief Privacy Officer.
- Added new major case *George T. Koshy v. Anupam Sachdev*, Supreme Judicial Court of Massachusetts, Middlesex 477 MASS. 759 (2017). This case provides an analysis of the criteria used in seeking dissolution.
- Included a new Point/Counterpoint, *Is Shareholder Activism Good for Business?*

Chapter 40 Corporations: Mergers, Consolidations, Terminations

- Added new major case *Parshall v. HCSB Financial Corporation* United States District Court, D. South Carolina Lexis 114948 (2017). This case analyzes the attempt of a shareholder to prevent a vote on a merger that had been approved by the Board of Directors.
- Wrote a new Point/Counterpoint, *Are Mergers Good for the Economy?*

Chapter 41 Corporations: Securities and Investor Protection

- Expanded Exhibit 41-1 to include a discussion of the impact of Dodd-Frank on the SEC.
- Replaced the older case 41-1 that provided an illustration of the application of the Howey Test with a 2016 case, *Securities And Exchange Commission, v. Arcturus Corporation*, fulfilling that same function.
- Changed point-counterpoint to, *Should the requirement for the disclosure of the ratio of CEO to employee pay be rescinded?* This change is timely as 2018 is the first year the disclosures have been mandated.

Chapter 42 Employment and Labor Law

- Updated the FLSA regulations concerning pay for full-time salaried executive, administrative and professional employees.
- Added major new case about privacy rights, *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659 (Delaware 2013). This case discusses an employee suit against her employer for violation of the ECPA based on the employer's reprimand for a Facebook post.
- Greatly expanded the treatment of employee privacy rights.
- Included new Case *Nugget Social Media Policies: Boch Honda and International Association of Machinists & Aerospace Workers, District Lodge 15, Local Lodge 447.*



Chapter 43 Employment Discrimination

- Created new Point/Counterpoint, Should Employers Be Permitted to Use Social Media in Hiring and/or Firing Decisions?

Chapter 44 Administrative Law

- Added new Case Nugget, Notice and Comment Rule Making Open Communities Alliance v. Carson U.S. District LEXIS 21131 (2017).
- Included another Case Nugget to expand our treatment of privacy rights: Informational Privacy—NASA v. Nelson, 562 U.S. 134 (2011).
- Included a new Point/Counterpoint, Is Administrative Regulation of Business a Good Thing?

Chapter 45 Consumer Law

- Added Exhibit 45-3 Consumer Privacy and Internet Advertising as yet another element in our expanded concern about privacy rights.
- Inserted new major case: United States of America v. Michael Stanley Kaplan, MD United States Court of Appeals, Ninth Circuit U.S. v. Kaplan, 836 F. 3D 1199(2016).
- Included a new Point/Counterpoint, Should the Dodd-Frank Act be repealed?

Chapter 46 Environmental Law

- Updated the status of the Acid Rain Trading Program.
- Updated section discussing the responsibilities of the EPA and updated changes under the Trump administration.
- Described the new e-manifest system that is coming into effect in June of 2018.
- Replaced the old case 46-3 with a new case, Elvis Mirzaie, Edison Mirzaie, Romi Mirzaie, v. Monsanto Company, which addresses the same issue, but is more current.
- Added information that shows students how they can search to see whether they live by a Superfund site.
- Updated United States' ranking on the Environmental Performance Index to show the latest result from 2018.
- Updated the section discussing international environmental treaties to include the United States' pulling out of the Paris climate accord.
- Added a new point-counterpoint, "What Role Should the EPA Play in Enforcing Environmental Regulations?" This issue is extremely timely as the enforcement budget of the EPA is being slashed and therefore the EPA is not able to bring as many enforcement actions as it has in the past.

Chapter 47 Antitrust Law

- Added new major case: Federal Trade Commission v. Penn State Hershey Medical Center, The United States Court of Appeals for The Third Circuit, 838 F.3D 327



(2016). This case demonstrates shows how a court decides whether to grant a preliminary injunction against a merger under Section 7 of the Clayton Act.

- Included a new Case Nugget, Mergers and Acquisitions U.S. v. AB Electrolux, Electrolux North America, Inc. and General Electric Company; United States District Court for the District of Columbia (2015).

Chapter 48 The Nature of Property, Personal Property, and Bailments

- Replaced the old case 46-3 with a 2017 case, In Re: Nelson T. Rodriguez, Belinda Georgeson v. Nelson T. Rodriguez.
- Replaced the previous edition's Case Nugget with a more recent illustration of the same point in the case of Arguello v. Sunset Station, Inc.

Chapter 49 Real Property

- Replaced the old case 46-3 with a new case, Douglas Stolipher v. Estate of Charles A. Rocheleau, to provide a more current illustration of an attempt to prove waste.
- Added a new Point/Counterpoint, "Should the federal government sell national park land to private interests?" This issue is one that periodically arises, and is more likely to arise in the next few years as the current administration is interested in reducing the size of the government.

Chapter 50 Landlord-Tenant Law

- In response to a reviewer suggestion, corrected the description of tenant's interest in a leasehold.
- Replaced the old case 50-3 with a newer case, Linda K. Miller v. William Burnett that not only explores the meaning of the covenant of quiet enjoyment, but looks at how that covenant interacts with other rules governing the landlord-tenant relationship.
- Replaced the old point counterpoint with: Should Landlords Be Barred from Asking Potential Tenants about Their Criminal Records?

Chapter 51 Insurance Law

- Created new chapter opener, The Obligation of Insurance Companies to Restore Property.

Chapter 52 Wills and Trusts

- Added new case, Pace v. Steele, addressing incompetency and undue influence in the execution of a will.
- Included new case, Bogar v. Baker, regarding the interpretation of a will in order to determine what property was included and excluded from its operation.
- Added new Case Nugget, Merrick v. Helter, addressing public policy reasons for a court to disregard a provision in a will specifically disinheriting a surviving child.
- Added new Case Nugget, Milbourne v. Milbourne, addressing requirements necessary to revoke a previously-executed will.



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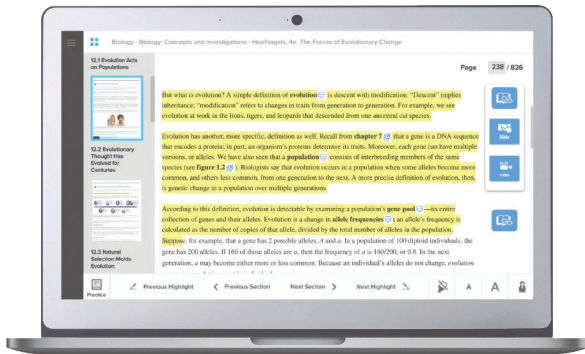
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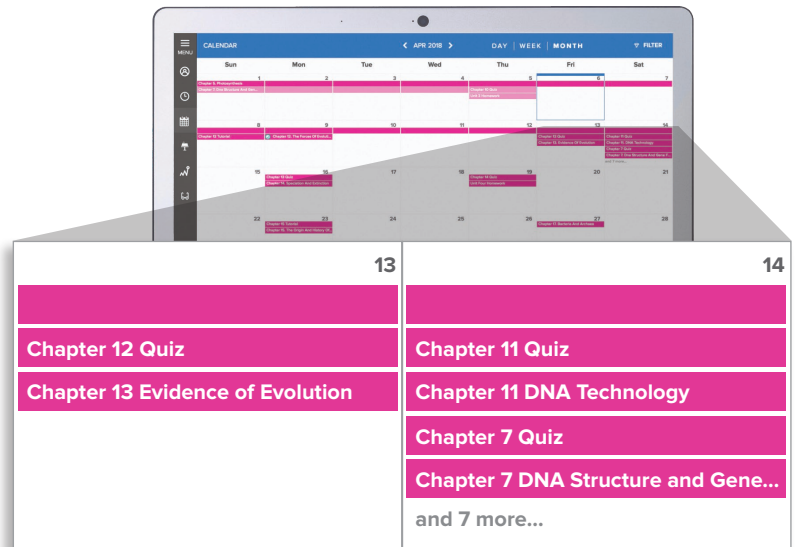
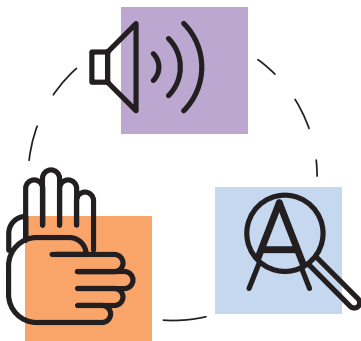
- Jordan Cunningham,
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We have designed our features around the things we do in our classes to encourage excitement about business law. We believe they provide **Business Law Plus**. We also have a variety of supplementary material available for instructors, to aid in course development, and for students, to provide additional study.

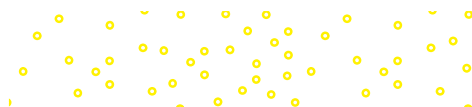
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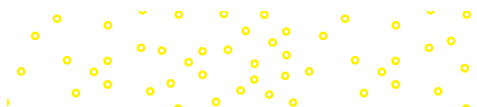
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Instructor's Manual Written by our co-author Neil Browne, this resource includes lecture notes, case briefs, answers to all questions in each chapter, assignment ideas, teaching assistance (emphasizing practical tips that new or part-time teachers can try right away), and suggested handouts.

Test Bank and Quizzes Our test bank and quizzes contain a variety of true/false, multiple-choice, and essay questions as well as scenario-based questions, which are application-based and use a situation described in a narrative, with three to five multiple-choice test questions based on the situation.





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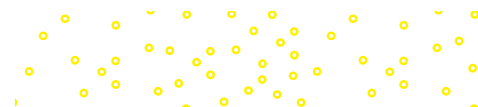
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Acknowledgments

This element of the Preface contains a palpable tone of gratitude and humility. Any project the scope of *Dynamic Business Law* is a collective activity; the authors are but the visible component of a remarkably large joint effort. We want to thank several contributors by name, but there are doubtlessly many other students, colleagues, and friends who made essential contributions to these pages.

Our largest gratitude goes to the dozens of business law colleagues who saved us from many embarrassing errors, while tolerating our stubborn reluctance to adhere to certain of their suggestions. Many thanks go to our manuscript reviewers and focus group participants:

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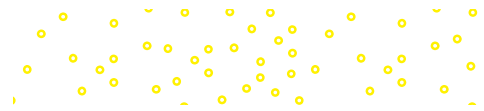


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In addition, the fifth edition of the book could not have been written without the competent and dedicated research assistance we received from Alex Jacobs, Arataenrique Kaku, and Aaron Moots.

Finally, a book is but a raw, unsold manuscript until the skilled publishing team refined it. Our manuscript benefited immeasurably from the guidance of the multiple levels of skill provided to us by McGraw-Hill Education. We respect and honor our Managing Director Tim Vertovec; our Product Developers Jaroslaw Szymanski and Michael McCormick; Executive Portfolio Manager Kathleen Klehr; and Content Project Managers Pat Frederickson and Angela Norris.

Brief Contents



Part One

THE LEGAL ENVIRONMENT OF BUSINESS

- 1 An Introduction to Dynamic Business Law 1
- 2 Business Ethics 16
- 3 The US Legal System 40
- 4 Alternative Dispute Resolution 73
- 5 Constitutional Principles 101
- 6 International and Comparative Law 135
- 7 Crime and the Business Community 158
- 8 Tort Law 194
- 9 Negligence and Strict Liability 226
- 10 Product Liability 246
- 11 Liability of Accountants and Other Professionals 272
- 12 Intellectual Property 298

Part Two

CONTRACTS

- 13 Introduction to Contracts 323
- 14 Agreement 345
- 15 Consideration 366
- 16 Capacity and Legality 384
- 17 Legal Assent 409
- 18 Contracts in Writing 430
- 19 Third-Party Rights to Contracts 455
- 20 Discharge and Remedies 480

Part Three

DOMESTIC AND INTERNATIONAL SALES LAW

- 21 Introduction to Sales and Lease Contracts 505
- 22 Title, Risk of Loss, and Insurable Interest 528
- 23 Performance and Obligations under Sales and Leases 549
- 24 Remedies for Breach of Sales and Lease Contracts 568
- 25 Warranties 587

Part Four

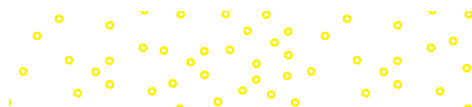
NEGOTIABLE INSTRUMENTS AND BANKING

- 26 Negotiable Instruments: Negotiability and Transferability 607
- 27 Negotiation, Holder in Due Course, and Defenses 625
- 28 Liability, Defenses, and Discharge 648
- 29 Checks and Electronic Fund Transfers 674

Part Five

CREDITORS' RIGHTS AND BANKRUPTCY

- 30 Secured Transactions 704



- 31** Other Creditors' Remedies and Suretyship 726
- 32** Bankruptcy and Reorganization 746

Part Six

AGENCY

- 33** Agency Formation and Duties 773
- 34** Liability to Third Parties and Termination 798

Part Seven

BUSINESS ORGANIZATIONS

- 35** Forms of Business Organization 821
- 36** Partnerships: Nature, Formation, and Operation 847
- 37** Partnerships: Termination and Limited Partnerships 867
- 38** Corporations: Formation and Financing 887
- 39** Corporations: Directors, Officers, and Shareholders 912
- 40** Corporations: Mergers, Consolidations, Terminations 938
- 41** Corporations: Securities and Investor Protection 960

Part Eight

EMPLOYMENT AND LABOR RELATIONS

- 42** Employment and Labor Law 986
- 43** Employment Discrimination 1012

Part Nine

GOVERNMENT REGULATION

- 44** Administrative Law 1041
- 45** Consumer Law 1061
- 46** Environmental Law 1093
- 47** Antitrust Law 1117

Part Ten

PROPERTY

- 48** The Nature of Property, Personal Property, and Bailments 1148
- 49** Real Property 1169
- 50** Landlord-Tenant Law 1194
- 51** Insurance Law 1221
- 52** Wills and Trusts 1241

APPENDIXES

- APPENDIX A** The Constitution of the United States of America A-1
- APPENDIX B** Uniform Commercial Code (Articles 1, 2, 2A, and 3) B
- APPENDIX C** Title VII of the Civil Rights Act of 1964 C-1
- APPENDIX D** The Civil Rights Act of 1991 D-1
- Glossary G-1
- Name Index I-1
- Subject Index I-4

Contents



Part One

THE LEGAL ENVIRONMENT OF BUSINESS

CHAPTER 1

An Introduction to Dynamic Business Law	1
Law and Its Purposes	2
Classification of the Law	2
Sources of Business Law	5
<i>Constitutions</i>	5
<i>Statutes</i>	5
<i>Cases</i>	5
<i>Administrative Law</i>	7
<i>Treaties</i>	8
<i>Executive Orders</i>	8
<i>Schools of Jurisprudence</i>	9
Global and Comparative Law	11
Key Terms	12
Appendix 1A Critical Thinking and Business Law	13
Key Term	15

CHAPTER 2

Business Ethics	16
Case Opener	
Acne Medication and Gastrointestinal Injury	16
Business Ethics and Social Responsibility	17
Business Law and Business Ethics	19
The WH Framework for Business Ethics	22
<i>Who Are the Relevant Stakeholders?</i>	23
<i>How Do We Make Ethical Decisions?</i>	24
Case 2-1: United States of America et al. ex rel. Andrew Hagerty v. Cyberonics, Inc.	28
Case Opener Wrap-Up: Acne Medication and Gastrointestinal Injury	29
Key Terms	30
Summary of Key Topics	30
Point / Counterpoint	31
Questions & Problems	32
Appendix 2A Theories of Business Ethics	35
Key Term	39

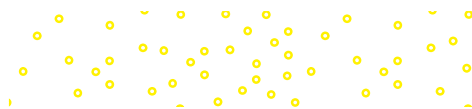
CHAPTER 3

The US Legal System	40
Case Opener	
Questionable Jurisdiction over Caterpillar	40

Jurisdiction	41
<i>Original Versus Appellate Jurisdiction</i>	41
<i>Jurisdiction Over Persons and Property</i>	41
<i>Subject-Matter Jurisdiction</i>	44
Case 3-1: Hertz Corp. v. Friend	46
Venue	48
Forum Selection and Choice of Law	49
Case 3-2: Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas et al.	49
The Structure of the Court System	51
<i>The Federal Court System</i>	51
<i>State Court Systems</i>	52
Threshold Requirements	54
<i>Standing</i>	54
<i>Case or Controversy</i>	55
<i>Ripeness</i>	55
Steps in Civil Litigation	56
<i>The Pretrial Stage</i>	56
<i>The Trial</i>	61
Case 3-3: Timothy Tyrone Foster, Petitioner v. Bruce Chatman, Warden	62
<i>Appellate Procedure</i>	65
<i>Collecting the Judgment</i>	67
Case Opener Wrap-Up: Questionable Jurisdiction over Caterpillar	67
Key Terms	68
Summary of Key Topics	69
Point / Counterpoint	69
Questions & Problems	70

CHAPTER 4

Alternative Dispute Resolution	73
Case Opener	
Mandatory Arbitration at Hooters	73
Primary Forms of Alternative Dispute Resolution	75
<i>Negotiation</i>	75
<i>Mediation</i>	75
<i>Arbitration</i>	79
Case 4-1: AT&T Mobility LLC v. Concepcion	83
Case 4-2: Maribel Baltazar v. Forever 21, Inc.	85
Case 4-3: Equal Employment Opportunity Commission v. Waffle House, Inc.	89



Other ADR Methods	91
<i>Med-Arb</i>	91
<i>Summary Jury Trial</i>	91
<i>Minitrial</i>	92
<i>Early Neutral Evaluation</i>	93
<i>Private Trials</i>	93
Court-Annexed ADR	94
Use of ADR in International Disputes	95
Case Opener Wrap-Up: Mandatory Arbitration at Hooters	96
Key Terms	97
Summary of Key Topics	98
Point / Counterpoint	98
Questions & Problems	99
CHAPTER 5	
Constitutional Principles	101
Case Opener	
The Constitutionality of the Affordable Care Act	101
The US Constitution	102
<i>Judicial Review</i>	102
The Supremacy Clause and Federal Preemption	103
The Commerce Clause	104
<i>The Commerce Clause as a Source of Authority For the Federal Government</i>	104
Case 5-1: Christy Brzonkala v. Antonio J. Morrison et al.	105
<i>The Commerce Clause as a Restriction On State Authority</i>	108
Case 5-2: Direct Marketing Association v. Barbara Brohl	109
Taxing and Spending Powers of the Federal Government	111
Other Constitutional Restrictions on Government	113
<i>The Privileges and Immunities Clause</i>	113
<i>The Full Faith and Credit Clause</i>	113
<i>The Contract Clause</i>	113
The Amendments to the Constitution	113
<i>The First Amendment</i>	115
<i>The Fourth Amendment</i>	120
Case 5-3: David Leon Riley v. California and United States v. Wurie	121
<i>The Fifth Amendment</i>	124
<i>The Ninth Amendment</i>	127
<i>The Fourteenth Amendment</i>	127
Case Opener Wrap-Up: The Constitutionality of the Affordable Care Act	128
Key Terms	129

Summary of Key Topics	130
Point / Counterpoint	131
Questions & Problems	132

CHAPTER 6

International and Comparative Law	135
-----------------------------------	-----

Case Opener

Resolving a Breach of Contract under the CISG	135
Doing Business Internationally	137

Ethical Considerations 138

The General Agreement on Tariffs and Trade and the World Trade Organization 139

Regional Trade Agreements 141

Comparative Law 142

Legal Systems and Procedures 142

Civil Law Systems 142

Common Law Systems 143

Other Legal Systems 143

Substantive Law: An Example Utilizing Comparative Contract Law 144

Introduction 144

Case 6-1: It's Intoxicating, Inc. v. Maritim Hotelgesellschaft MBH 146

Dispute Settlement in an International Context 147
 Litigation 148

Case 6-2: Fallhowe v. Hilton Worldwide, Inc. 149
 Arbitration 152

Case Opener Wrap-Up: Resolving a Breach of Contract under the CISG 152

Key Terms 153

Summary of Key Topics 154

Point / Counterpoint 155

Questions & Problems 155

CHAPTER 7

Crime and the Business Community	158
----------------------------------	-----

Case Opener

A Questionable Stock Investment 158

Elements of a Crime 159

Classification of Crimes 159

Common Crimes Affecting Business 160

Property Crimes Against Business 160

White-Collar Crime 161

Case 7-1: Salman v. United States 165

Liability for Crimes 171

Corporate Criminal Liability 171

Liability of Corporate Executives 171

Classic Case 7-2: United States v. Park

Defenses to Crimes 173	Damages Available in Tort Cases 214
<i>Infancy</i> 173	<i>Compensatory Damages</i> 214
<i>Mistake of Fact</i> 173	<i>Nominal Damages</i> 214
<i>Intoxication</i> 173	<i>Punitive Damages</i> 215
<i>Insanity</i> 174	Case 8-3: Mazda Motor Corporation v. Hurst 217
<i>Duress</i> 174	Key Terms 220
<i>Entrapment</i> 175	Case Opener Wrap-Up: Plastic Surgeon Defamation 220
<i>Necessity</i> 175	Key Terms 220
<i>Justifiable Use of Force</i> 175	Summary of Key Topics 221
Constitutional Safeguards 175	Point / Counterpoint 222
<i>Fourth Amendment Protections</i> 175	Questions & Problems 223
<i>Fifth Amendment Protections</i> 176	CHAPTER 9
<i>Sixth Amendment Protections</i> 176	Negligence and Strict Liability 226
<i>Eighth Amendment Protections</i> 176	Case Opener
<i>Fourteenth Amendment Protections</i> 177	The Case of the Collapsing Dock 226
<i>The Exclusionary Rule</i> 177	Introduction to Negligence and Strict Liability 227
Criminal Procedure 177	Elements of Negligence 227
<i>Pretrial Procedure</i> 177	<i>Duty</i> 228
Classic Case 7-3: Miranda v. Arizona 179	<i>Breach of Duty</i> 230
<i>Trial Procedure</i> 182	<i>Causation</i> 231
<i>Posttrial Procedure</i> 183	Classic Case 9-1: Palsgraf v. Long Island Railroad Company 232
Tools for Fighting Business Crime 184	<i>Damages</i> 233
<i>The Racketeer Influenced and Corrupt Organizations Act</i> 184	Plaintiff's Doctrines 233
<i>The False Claims Act</i> 185	<i>Res Ipsa Loquitur</i> 233
<i>The Sarbanes-Oxley Act</i> 186	Case 9-2: Swoboda v. Fontanetta 234
Case Opener Wrap-Up: A Questionable Stock Investment 187	<i>Negligence Per Se</i> 236
Key Terms 187	<i>Special Plaintiff's Doctrines and Statutes</i> 236
Summary of Key Topics 188	Defenses to Negligence 237
Point / Counterpoint 190	<i>Contributory Negligence</i> 237
Questions & Problems 191	<i>Comparative Negligence</i> 238
CHAPTER 8	<i>Assumption of the Risk</i> 238
Tort Law 194	Case 9-3: Swigart v. Bruno 239
Case Opener	<i>Special Defenses to Negligence</i> 240
Plastic Surgeon Defamation 194	Strict Liability 240
Introduction to Tort Law 195	Case Opener Wrap-Up: The Case of the Collapsing Dock 241
Classification of Torts 196	Key Terms 242
Intentional Torts 196	Summary of Key Topics 242
<i>Intentional Torts Against Persons</i> 197	Point / Counterpoint 243
Case 8-1: Joseph E. Hancock, Petitioner, v. Easwaran P. Variyam, Respondent 200	Questions & Problems 244
Case 8-2: Aaron Olson, Appellant, v. Centurylink, Respondent 208	CHAPTER 10
<i>Intentional Torts Against Property</i> 210	Product Liability 246
<i>Intentional Torts Against Economic Interests</i> 212	Case Opener
	Is Human Sperm Subject to Product Liability Laws? 246

Theories of Liability for Defective Products 247

Case 10-1: *Montemayor v. Sebright Products, Inc* 248
Negligence 251
Strict Product Liability 255

Case 10-2: *Welge v. Planters Lifesavers Co.* 257

Case 10-3: *Sperry–New Holland, A Division of Sperry Corporation v. John Paul Prestage and Pam Prestage* 259
Warranty 261

Market Share Liability 264

Case Opener Wrap-Up: Is Human Sperm Subject to Product Liability Laws? 266

Key Terms 267

Summary of Key Topics 267

Point / Counterpoint 268

Questions & Problems 269

CHAPTER 11

Liability of Accountants and Other Professionals 272

Case Opener

Questionable Accounting at WorldCom 272

Common Law Accountant Liability to Clients 273

Accountant Liability for Negligence 273

Accountant Liability for Breach of Contract 275

Accountant Liability for Fraud 275

Common Law Accountant Liability to Third Parties 276

Liability Based on Privity or Near-Privity (The Ultramares Rule) 276

Liability to Foreseen Users and Foreseen Class of Users (The Restatement Rule) 277

Liability to Reasonably Foreseeable Users 277

Case 11-1: *Bily v. Arthur Young & Co.* 278

Accountants' and Clients' Rights 280

Working Papers 280

Accountant-Client Privilege 281

Extending the Attorney-Client Privilege to Accountants 281

Case 11-2: *Michael Williamson, et al., Plaintiffs, v. Recovery Limited Partnership, et al., Defendants* 282

Federal Securities Law and Accountant Liability 283

The Securities Act of 1933 283

The Securities Exchange Act of 1934 285

Case 11-3: *Matrixx Initiatives, Inc., et al. v. Siracusano et al.* 286

The Private Securities Litigation Reform Act of 1995 289

The Sarbanes-Oxley Act of 2002 289

Liability of Other Professionals 291

Protection from Claims of Professional Malpractice 292

Case Opener Wrap-Up: Questionable Accounting at Worldcom 292

Key Terms 293

Summary of Key Topics 293

Point / Counterpoint 294

Questions & Problems 295

CHAPTER 12

Intellectual Property 298

Case Opener

Smartphone Wars: Focus on Intellectual Property Rights 298

Types of Intellectual Property 299

Trademarks 299

Case 12-1: *In Re Simon Shiao Tam* 301

Case 12-2: *Itoys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.* 303

Trade Dress 305

Federal Trademark Dilution Act of 1995 307

Copyrights 307

Case 12-3: *Star Athletica, L.L.C., Petitioner v. Varsity Brands, Inc., et al.* 307

Fair-Use Doctrine 310

No Electronic Theft Act 311

Digital Millennium Copyright Act 311

Patents 312

Anatomy of Patent Litigation 314

The America Invents Act 314

Trade Secrets 315

International Protection of Intellectual

Property 316

The Berne Convention of 1886 316

The Universal Copyright Convention of 1952, As Revised in 1971 316

The Paris Convention of 1883 316

The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights 317

Case Opener Wrap-Up: Smartphone Wars: Focus on Intellectual Property Rights 318

Key Terms 318

Summary of Key Topics 318

Point / Counterpoint 319

Questions & Problems 320

Part Two CONTRACTS

CHAPTER 13

Introduction to Contracts 323

Case Opener

A Questionable Contract 323

The Definition of a Contract 324

Elements of a Contract 324

Defenses to the Enforcement of a Contract 326

The Objective Theory of Contracts 327

Sources of Contract Law 327

Common Law 327

Uniform Commercial Code 328

Classification of Contracts 328

Bilateral Versus Unilateral Contracts 329

Case 13-1: In Re Zappos.com Inc., Customer Data Security Breach Litigation 329

Express Versus Implied Contracts 331

Case 13-2: Trapani Const. Co. v. Elliot Group, Inc. 331

Case 13-3: Reisenfeld & Co. v. The Network Group, Inc.; Builders Square, Inc.; Kmart Corp. 333

Valid, Void, Voidable, and Unenforceable Contracts 334

Executed Versus Executory Contracts 335

Formal Versus Informal Contracts 335

Interpretation of Contracts 337

Case Opener Wrap-Up: A Questionable Contract 339

Key Terms 340

Summary of Key Topics 340

Point / Counterpoint 341

Questions & Problems 342

CHAPTER 14

Agreement 345

Case Opener

The Problematic Promotion 345

Elements of the Offer 346

Intent 346

Case 14-1: Lucy v. Zehmer 347

Definite and Certain Terms 350

Case 14-2: Lawrence W. Shipley III v. Andrea Vasquez 351

Communication to the Offeree 352

Termination of the Offer 352

Revocation by the Offeror 352

Rejection or Counteroffer by the Offeree 353

Death or Incapacity of the Offeror 354

Destruction or Subsequent Illegality of the Subject Matter 354

Lapse of time or Failure of Another Condition Specified in the Offer 354

The Acceptance 355

Manifestation of Intent to be Bound to the Contract 355

Acceptance of Definite and Certain Terms: The Mirror-Image Rule 356

Communication to the Offeror 356

Case 14-3: Paul Ehlen v. John M. and Lynndee Melvin 358

Key Terms 361

Summary of Key Topics 361

Case Opener Wrap-Up: The Problematic Promotion 361

Point / Counterpoint 362

Questions & Problems 363

CHAPTER 15

Consideration 366

Case Opener

Upper Deck—Contract Liability or Gift? 366

What is Consideration? 367

Rules of Consideration 367

Lack of Consideration 367

Adequacy of Consideration 369

Classic Case 15-1: Hamer v. Sidway 370

Case 15-2: Thelma Agnes Smith v. David Phillip Riley 371

Illusory Promise 373

Past Consideration 373

Case 15-3: Jamil Blackmon v. Allen Iverson 374

Preexisting Duty 375

Case 15-4: Margeson v. Artis 375

Partial Payment of a Debt 377

Case Opener Wrap-Up: Upper Deck—Contract Liability or Gift? 379

Key Terms 380

Summary of Key Topics 380

Point / Counterpoint 381

Questions & Problems 381

CHAPTER 16

Capacity and Legality 384

Case Opener

Apple's Questionable Contracts 384

Capacity 385

Minors 385**Case 16-1:** Adrian Lopez, v. Kmart Corporation 385*Mentally Incapacitated Persons* 389*Intoxicated Persons* 390

Legality 392

*Contracts that Violate State or Federal**Statutes* 393**Case 16-2:** King v. Riedl 394*Agreements In Contradiction to Public Policy* 397**Case 16-3:** Riley v. Iron Gate Self Storage 400*Effect of Illegal Agreements* 402

Case Opener Wrap-Up: Apple's Questionable Contract 404

Key Terms 404

Summary of Key Topics 405

Point / Counterpoint 405

Questions & Problems 406

CHAPTER 17

Legal Assent 409

Case Opener

A Disagreement over an Agreement 409

The Importance of Legal Assent 410

Mistake 411

Unilateral Mistake 412*Mutual Mistake* 412**Case 17-1:** Simkin v. Blank 414

Misrepresentation 415

Innocent Misrepresentation 416*Negligent Misrepresentation* 416*Fraudulent Misrepresentation* 416**Case 17-2:** Fantastic Sams Salons Corp. v. Pstevo, LLC and Jeremy Baker 418

Undue Influence 421

Duress 422

Case 17-3: Garage Solutions, LLC, v. Monty J. Person 423

Case Opener Wrap-Up: A Disagreement over an Agreement 425

Key Terms 425

Summary of Key Topics 425

Point / Counterpoint 426

Questions & Problems 427

CHAPTER 18

Contracts in Writing 430

Case Opener

Admissibility of an Oral Contract in Court 430

Statute of Frauds 431

Contracts Falling within the Statute of Frauds 432

*Contracts Whose Terms Prevent Possible**Performance Within One Year* 432*Promises Made In Consideration of Marriage* 433*Contracts for One Party to Pay The Debt of Another if the Initial Party Fails to Pay* 434**Case 18-1:** Power Entertainment, Inc., et al. v. National Football League Properties, Inc. 435*Contracts Related to an Interest In Land* 436*Contracts for the Sale of Goods Totaling More than \$500* 436*Further Requirements Specific to Certain States* 437

Sufficiency of the Writing 438

Case 18-2: Heritage Constructors, Inc. v. Chrietzberg Electric, Inc., and Richard Marc Chrietzberg 440

Exceptions to the Statute of Frauds 441

Admission 441*Partial Performance* 442*Promissory Estoppel* 442*Exceptions Under the UCC* 443

Parol Evidence Rule 443

Exceptions to the Parol Evidence Rule 445

Contracts that have been Subsequently Modified 445*Contracts Conditioned on Orally Agreed-On Terms* 445*Nonfinalized, Partially written and Partially Oral Contracts* 446*Contracts Containing Ambiguous Terms* 446*Incomplete Contracts* 446**Case 18-3:** Barker v. Price 446*Contracts With Obvious Typographical Errors* 448*Void or Voidable Contracts* 448*Evidence of Prior Dealings or Usage of Trade (UCC)* 448

Integrated Contracts 448

Case Opener Wrap-Up: Admissibility of an Oral Contract in Court 449

Key Terms 450

Summary of Key Topics	450
Point / Counterpoint	451
Questions & Problems	452

CHAPTER 19

Third-Party Rights to Contracts	455
---------------------------------	-----

Case Opener

Fallout from an Unforgettable Fight	455
-------------------------------------	-----

Assignments and Delegations	456
-----------------------------	-----

Assignment 456

Case 19-1: General Mills, Inc. v. Kraft Foods Global, Inc.	458
---	-----

Delegation 462

Assignment of the Contract	464
----------------------------	-----

Third-Party Beneficiary Contracts	465
-----------------------------------	-----

Intended Beneficiaries 465

Case 19-2: Tucker v. Tom Raper, Inc.,	466
--	-----

Case 19-3: Allan v. Nersesova	468
--------------------------------------	-----

Case 19-4: Juan Mendez, Jr., As Guardian of Juan Mendez, Sr. v. Hampton Court Nursing Center, LLC	471
--	-----

Incidental Beneficiaries 472

Case Opener Wrap-Up: Fallout from a Unforgettable Fight	475
---	-----

Key Terms	475
-----------	-----

Summary of Key Topics	475
-----------------------	-----

Point / Counterpoint	476
----------------------	-----

Questions & Problems	477
----------------------	-----

CHAPTER 20

Discharge and Remedies	480
------------------------	-----

Case Opener

Impossible Wine Bottles	480
-------------------------	-----

Methods of Discharging a Contract	481
-----------------------------------	-----

Conditions 481

Case 20-1: Mind & Motion Utah Investments, LLC, Appellee v. Celtic Bank Corporation	483
--	-----

Discharge by Performance 484

Discharge by Material Breach 485

Case 20-2: Hamilton v. State Farm Fire & Casualty Insurance Company	486
--	-----

Discharge by Mutual Agreement 487

Discharge by Operation of Law 488

Case 20-3: Hemlock Semiconductor Operations, LLC v. Solarworld Industries Sachsen GmbH	490
---	-----

Remedies	492
----------	-----

<i>Legal Remedies (Monetary Damages)</i>	493
--	-----

<i>Equitable Remedies</i>	497
---------------------------	-----

Case Opener Wrap-Up: Impossible Wine Bottles	500
--	-----

Key Terms	500
-----------	-----

Summary of Key Topics	500
-----------------------	-----

Point / Counterpoint	501
----------------------	-----

Questions & Problems	502
----------------------	-----

Part Three

DOMESTIC AND INTERNATIONAL SALES LAW

CHAPTER 21

Introduction to Sales and Lease Contracts	505
---	-----

Case Opener

Let the Good Times “Roll”	505
---------------------------	-----

The Uniform Commercial Code	506
-----------------------------	-----

The Scope of the UCC 506

The Significance of the UCC 507

Articles 2 and 2(A) of the UCC	507
--------------------------------	-----

Article 2 of the UCC 509

Case 21-1: Isenbergh v. S. CHI. Nissan	511
---	-----

Article 2(A) of the UCC 513

Case 21-2: Vanguard Energy Servs. v. Shihadeh	514
--	-----

How Sales and Lease Contracts Are Formed under the UCC	515
--	-----

Formation in General 515

Offer and acceptance 515

Consideration 516

Battle of the Forms 517

Requirements Under the Statute of Frauds 517

The Parol Evidence Rule 518

Unconscionability 519

Contracts for the International Sale of Goods	519
---	-----

The Scope of the CISG 519

The Significance of the CISG 520

Case 21-3: The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc., Plaintiffs v. Saint-Gobain Technical Fabrics Canada Limited, Formerly Known as Bay Mills, Defendant	520
--	-----

Case Opener Wrap-Up: Let the Good Times “Roll”	523
--	-----

Key Terms	523
-----------	-----

Summary of Key Topics	523
-----------------------	-----

Point / Counterpoint 524
 Questions & Problems 525

CHAPTER 22

Title, Risk of Loss, and Insurable Interest 528

Case Opener

Who Owns the Turkeys? 528
 The Concept of Title 529

Case 22-1: Alcoa Materials Mgmt. v. Niagara Worldwide
 LLC, 2016-Ohio-8158 529

Three Kinds of Title 530

Acquiring Good Title 530

Voidable Title 531

Third-Party Purchasers and Good Title 531

Entrustment 532

Case 22-2: Deweldon, Ltd. v. Mckean 533

Recourse Under the UCC 534

Types of Sales Contracts 535

Simple Delivery Contract 536

Common-Carrier Delivery Contract 537

Case 22-3: Pileri Industries, Inc. v. Consolidated
 Industries, Inc. 538

Goods-In-Bailment Contract 540

Conditional Sales Contract 540

Risk of Loss during a Breach of Contract 541

When the Seller is in Breach 541

When the Buyer is in Breach 542

Case Opener Wrap-Up 543

Key Terms 543

Summary of Key Topics 544

Point / Counterpoint 545

Questions & Problems 546

CHAPTER 23

Performance and Obligations under Sales and
 Leases 549

Case Opener

What a Difference a Day Makes! 549

The Basic Performance Obligation 550

Good Faith 550

Promissory Estoppel 551

Case 23-1: XCBob, Inc. v. Ed Tucker Distrib.,
 2016 Pa. Dist. & Cnty. Dec. LEXIS
 14205 551

Specific Obligations of Sellers and Lessors 552

The Perfect Tender Rule 552

Exceptions To The Perfect Tender Rule 553

Case 23-2: Levista, Inc. v. Ranbaxy Pharmaceuticals,
 Inc., 555

Case 23-3: Dejesus v. Cat Auto Tech. Corp. 557

Specific Obligations of Buyers and Lessees 559

*The Basic Obligation: Inspection, Payment,
 And Acceptance* 559

Exceptions to the Basic Obligation 559

Case 23-4: Hubbard v. UTZ Quality Foods, Inc. 561

Case Opener Wrap-Up: What a Difference a Day
 Makes! 563

Key Terms 564

Summary of Key Topics 564

Point / Counterpoint 565

Questions & Problems 565

CHAPTER 24

Remedies for Breach of Sales and Lease
 Contracts 568

Case Opener

Let's "See" the Damages in Defective Eye
 Ointment 568

The Goal of Contract Remedies 569

Case 24-1: Badilla v. Wal-Mart Stores East Inc. 570

Remedies Available to Sellers and Lessors under the
 UCC 571

Cancel the Contract 571

Withhold Delivery 572

Resell or Dispose of the Goods 572

Sue to Get the Benefit of the Bargain 573

Liquidated Damages 573

Stop Delivery 574

Reclaim the Goods 574

Remedies Available to Buyers and Lessees under the
 UCC 575

Cancel the Contract 575

Obtain Cover 576

Sue to Recover Damages 576

Economic Loss Rule 576

Case 24-2: Des Moines Flying Servs. v. Aerial
 Servs. 577

Recover the Goods 578

Obtain Specific Performance 578

Case 24-3: Almetals, Inc., Plaintiff v. Wickedder
 Westfalenstahl, GmbH, Defendant 578

Reject Nonconforming Goods 579

Revoke Acceptance of Nonconforming Goods 579

*Accept The Nonconforming Goods and Seek
 Damages* 579

Modifications or Limitations to Remedies Otherwise Provided by the UCC 580

Case 24-4: Figgie International, Inc. v. Destileria Serralles, Inc. 580

Case Opener Wrap-Up: Let's "See" the Damages in Defective Eye Ointment 583

Key Terms 583

Summary of Key Topics 583

Point / Counterpoint 584

Questions & Problems 585

CHAPTER 25

Warranties 587

Case Opener

How Much Is That Doggie? 587

Introduction 588

Types of Warranties 588

Express Warranties 588

Case 25-1: Cannon v. Bodensteiner Implement Co., 2017 Iowa App. LEXIS 279 589

Implied Warranties of Title 591

Implied Warranties of Quality 591

Classic Case 25-2: Priscilla D. Webster v. Blue Ship Tea Room, Inc. 593

Warranty Rights of Third Parties 595

Case 25-3: Melissa Kahn v. Volkswagen of America, Inc. 596

Warranty Disclaimers and Waivers 600

Case Opener Wrap-Up 603

Key Terms 603

Summary of Key Topics 603

Point / Counterpoint 604

Questions & Problems 605

Part Four

NEGOTIABLE INSTRUMENTS AND BANKING

CHAPTER 26

Negotiable Instruments: Negotiability and Transferability 607

Case Opener

Oral Agreements and Negotiable Instruments 607

The Need for Negotiable Instruments 608

Contracts as Commercial Paper 608

Problems with Commercial Paper 609

Types of Negotiable Instruments 609

Case 26-1: Reger Development, LLC v. National City Bank 610

An Overview of the Law of Negotiable Instruments 611

Negotiable Instrument Versus Simple Contract 612

Requirements for Negotiability 612

Case 26-2: Amplify Federal Credit Union v. Garcia 613

Case 26-3: Athanasios Valsamis v. Néstor González-Romero 616

Case Opener Wrap-Up 620

Key Terms 620

Summary of Key Topics 621

Point / Counterpoint 621

Questions & Problems 622

CHAPTER 27

Negotiation, Holder in Due Course, and Defenses 625

Case Opener

Dishonored Check and Holder-in-Due-Course Status 625

Case 27-1: Dennis Walker v. John Probandt and John Raynor 626

Negotiation 628

Delivery 628

Endorsement 629

Noncriminal Endorsement Problems 632

Holder-in-Due-Course Doctrine 633

Reason For Holder-In-Due-Course Status 634

Case 27-2: Michael J. Kane, Jr. v. Grace Kroll 634

Requirements for Holder-in-Due-Course Status 634

Be a Holder of a Complete and Authentic Negotiable Instrument 635

Take Instrument for Value 636

Take Instrument in Good Faith 638

Case 27-3: Wavel Savings Bank v. Jersey Tractor Trailer Training, Inc. 638

Take Instrument without Notice 639

The Shelter Principle and HDC 641

Abuse of the Holder-in-Due-Course Doctrine 642

Case Opener Wrap-Up: Dishonored Check and Holder-in-Due-Course Status 643

Key Terms 643

Summary of Key Topics 644

Point / Counterpoint 644

Questions & Problems 645

CHAPTER 28

Liability, Defenses, and Discharge 648

Case Opener

Bank One and the Forged Checks 648

Signature Liability 649

<i>Primary Liability of Makers and Acceptors</i>	650	When a Bank May Charge a Customer's Account	683
<i>Secondary Liability of Drawers and Endorsers</i>	650	<i>Wrongful Dishonor</i>	683
<i>Accommodation Parties</i>	654	Case 29-1: DOE v. Bank of America	685
Case 28-1: Heartland State Bank v. American Bank & Trust	654	<i>Overdrafts</i>	686
<i>Agents' Signatures</i>	655	<i>Stop-Payment Order</i>	687
Case 28-2: Igs Industries, Inc. v. Discover Financial Services, Inc.	657	<i>Postdated Checks</i>	688
Warranty Liability	661	<i>Stale Checks</i>	688
<i>Transfer Warranty</i>	661	Case 29-2: Aliaga Medical Center, S.C. v. Harris Bank N.A., A/K/A Bmo Harris Bank, N.A.	688
<i>Presentment Warranty</i>	662	<i>Forgeries and Alterations</i>	689
Case 28-3: Halliburton Energy Services, Inc. v. Fleet National Bank	662	Case 29-3: Merisier v. Bank of America	690
Avoiding Liability for Negotiable Instruments	663	Electronic Fund Transfers	693
<i>Defenses to Liability</i>	664	<i>Types of Eft Systems</i>	693
Case 28-4: John A. Colfax v. Jpmorgan Chase Bank, N.A.	665	<i>Consumer Fund Transfers</i>	694
<i>Discharge of Liability On Instruments</i>	667	<i>Commercial Fund Transfers</i>	695
Case Opener Wrap-Up: Bank One and the Forged Checks	669	E-Money and Online Banking	695
Key Terms	670	<i>Online Banking Services</i>	696
Summary of Key Topics	670	<i>Regulatory Compliance</i>	696
Point / Counterpoint	671	<i>Privacy Protection</i>	697
Questions & Problems	672	Case Opener Wrap-Up: Fraudulent Electronic Fund Transfers	698
		Key Terms	699
		Summary of Key Topics	699
		Point / Counterpoint	700
		Questions & Problems	701
CHAPTER 29		Part Five	
Checks and Electronic Fund Transfers	674	CREDITORS' RIGHTS AND BANKRUPTCY	
Case Opener		CHAPTER 30	
Fraudulent Electronic Fund Transfers	674	Secured Transactions	704
Checks	675	Case Opener	
<i>Cashier's Checks</i>	676	M&T Bank	704
<i>Teller's Checks</i>	677	Important Definitions Associated with Secured Transactions	705
<i>Traveler's Checks</i>	677	Creation of Secured Interests	706
<i>Money Orders</i>	677	<i>Written Agreement</i>	706
<i>Certified Checks</i>	679	Case 30-1: 1st Source Bank v. Wilson Bank & Trust	706
<i>Why Use Cashier's, Teller's, or Certified Checks?</i>	679	<i>Value</i>	708
<i>Lost, Stolen, or Destroyed Cashier's, Teller's, or Certified Checks</i>	680	<i>Debtor Rights in the Collateral</i>	708
Accepting Deposits	681	<i>Purchase-Money Security Interest</i>	708
<i>The Check Collection Process</i>	681	Perfected Security Interest	708
<i>Types of Banks Involved in Check Collection</i>	681	<i>Perfection by Filing</i>	709
<i>Check Collection within the Same Bank</i>	681	Case 30-2: The Four County Bank v. Tidewater Equipment Co.	710
<i>Check Collection between Different Banks</i>	681		
<i>Federal Reserve System for Clearing Checks</i>	682		
<i>Electronic Check Presentment</i>	682		
<i>Availability Schedule for Deposited Checks</i>	683		

<i>Perfection by Possession</i>	712
<i>Automatic Perfection</i>	712
<i>Perfection of Movable Collateral</i>	713
<i>Perfection of Security Interests In Automobiles and Boats</i>	713
The Scope of a Security Interest	714
<i>After-Acquired Property</i>	714
<i>Proceeds</i>	714
Termination of a Security Interest	714
Priority Disputes	714
<i>Secured Versus Unsecured Creditors</i>	715
<i>Secured Versus Secured Creditors</i>	715
<i>Secured Party Versus Buyer</i>	716
Default	717
<i>Taking Possession of the Collateral</i>	717
Case 30-3: Price Auto Sales, Inc. v. Sanders	718
<i>Proceeding to Judgment</i>	720
Case Opener Wrap-Up: M&T Bank	721
Key Terms	722
Summary of Key Topics	722
Point / Counterpoint	723
Questions & Problems	724
CHAPTER 31	
Other Creditors' Remedies and Suretyship	726
Case Opener	
Mortgage Foreclosure	726
Laws Assisting Creditors	727
<i>Statutory Liens</i>	728
<i>Judicial Liens</i>	731
Case 31-1: Sharp v. Horton	732
Case 31-2: Alcantar v. Sanchez	734
<i>Mortgage Foreclosure</i>	736
<i>Creditors' Composition Agreements</i>	737
<i>Assignment for the Benefit of Creditors</i>	737
Suretyship and Guaranty Contracts	738
<i>Suretyship</i>	738
<i>Guaranty</i>	738
<i>Defenses of the Surety and the Guarantor</i>	738
Case 31-3: Beal Bank v. Biggers	739
<i>Rights of the Surety and the Guarantor</i>	740
Case Opener Wrap-Up: Mortgage Foreclosure	741
Key Terms	742
Summary of Key Topics	742
Point / Counterpoint	743
Questions & Problems	743

CHAPTER 32

Bankruptcy and Reorganization	746
Case Opener	
Student Loans and Bankruptcy	746
The Bankruptcy Act and Its Goals	747
<i>Title 11 of the United States Code</i>	748
Attributes of Bankruptcy Cases	749
<i>Perceptions of Bankruptcy</i>	749
Bankruptcy Proceedings	749
Specific Types of Relief Available	750
Case 32-1: In Re Arkuszewski	750
<i>Chapter 7: Liquidation Proceedings</i>	752
Case 32-2: Rousey v. Jacoway	756
Case 32-3: Margaret Kawaaauhau v. Paul W. Geiger	762
<i>Chapter 11: Reorganizations</i>	764
<i>Chapter 13: Individual Repayment Plans</i>	765
<i>What Are The Repayment Proceedings?</i>	766
<i>Chapter 12: Family-Farmer And Family-Fisherman Plans</i>	767
Case Opener Wrap-Up: Student Loans and Bankruptcy	768
Key Terms	769
Summary of Key Topics	769
Point / Counterpoint	770
Questions & Problems	770

Part Six
AGENCY 746**CHAPTER 33**

Agency Formation and Duties	773
Case Opener	
Fedex And Independent Contractors	773
Introduction to Agency Law	774
Creation of the Agency Relationship	774
Types of Agency	775
<i>Expressed Agency (Agency by Agreement)</i>	775
<i>Agency by Implied Authority</i>	777
<i>Apparent Agency (Agency by Estoppel)</i>	777
Case 33-1: Ackerman v. Sobol Family Partnership, Llp	778
<i>Agency by Ratification</i>	779
Agency Relationships	780
<i>Principal-Agent Relationship</i>	780
<i>Employer-Employee Relationship</i>	780

Employer–Independent Contractor Relationship 780

- Case 33-2:** Glenn v. Gibbs 783
 Duties of the Agent and The Principal 784
 Principal’s Duties to The Agent 784
 Agent’s Duties to The Principal 786

- Case 33-3:** City of Binghamton v. Whalen 787
 Rights and Remedies 789
 Principal’s Rights and Remedies Against the Agent 789
 Agent’s Rights and Remedies Against the Principal 790

- Case Opener Wrap-Up: FedEx and Independent Contractors 791
 Key Terms 792
 Summary of Key Topics 792
 Point / Counterpoint 793
 Questions & Problems 794

CHAPTER 34

Liability to Third Parties and Termination 798

Case Opener

- Vicarious Liability and Medical Malpractice Suits 798
 Contractual Liability of the Principal and Agent 799
Case 34-1: In Re Estate of Kurrelmeyer 799
 Classification of the Principal 800
 Authorized Acts 801
 Unauthorized Acts 802
 Tort Liability and the Agency Relationship 803
 Principal’s Tortious Conduct 803
Case 34-2: DOE v. Uber Technologies, Inc. 804
 Agent Misrepresentation 807
 Principal’s Liability and the Independent Contractor 808
 Crime and Agency Relationships 809
 Termination of the Agency Relationship 809

- Case 34-3:** Jerry A. Mais, et al., v. Allianz Life Insurance Company of North America 810
 Termination by Acts of Parties 811
 Termination by Operation of Law 812

- Case Opener Wrap-Up: Vicarious Liability and Medical Malpractice Suits 814
 Key Terms 815
 Summary of Key Topics 815
 Point / Counterpoint 816
 Questions & Problems 817

Part Seven BUSINESS ORGANIZATIONS

CHAPTER 35

Forms of Business Organization 821

Case Opener

- The Dunkin’ Donuts Franchise Agreement 821
 Major Forms of Business Organization 822
 Sole Proprietorship 822
 Partnership 823
 Limited Liability Company 825
 Corporation 827
 Limited Liability Company 828
 Specialized Forms of Business Organization 831
 Cooperative 831
 Joint Stock Company 831
 Business Trust 832
 Syndicate 832
 Joint Venture 832

- Case 35-1:** Meyer v. Christie 833
 Franchise 834

- Case 35-2:** Live Cryo, LLC v. Cryousa Import and Sales, LLC 835

- Case 35-3:** Patterson v. Domino’s Pizza LLC 837
 Case Opener Wrap-Up: The Dunkin’ Donuts Franchise Agreement 840
 Key Terms 842
 Summary of Key Topics 842
 Point / Counterpoint 843
 Questions & Problems 843

CHAPTER 36

Partnerships: Nature, Formation, and Operation 847

Case Opener

- Joint-Venture Partnership and Liability 847
 Nature of the Partnership 848
Case 36-1: Leoff v. S&J Land Co. 849
 Partnership as a Legal Entity 851
 Partnership as a Legal Aggregate 851
 Formation of the Partnership 852
 Partnership by Estoppel 852
 Interactions between Partners 853
 Duties of Partners to One Another 853
Case 36-2: Floyd Finch v. Bruce Wayne Campbell 853
 Rights of the Partners in their Interactions with Other Partners 855

Interactions between Partners and Third Parties 857

Actual Authority of the Partners 857

Implied Authority of the Partners 857

Liability to Third Parties 857

Case 36-3: Robert Law, on Behalf of the Robert M. Law Profit Sharing Plan v. Ronald Zemp 858

Liability of Incoming Partners 860

The Revised Uniform Partnership Act 860

Case Opener Wrap-Up: Joint-Venture Partnership and Liability 861

Key Terms 862

Summary of Key Topics 862

Point / Counterpoint 862

Questions & Problems 863

CHAPTER 37

Partnerships: Termination and Limited Partnerships 867

Case Opener

Partnership Problems of Wildmeadow Village 867

Termination of the Partnership 868

Dissolution of the Business 869

Act of Partners 869

Operation of Law 871

Act of the Court 871

Case 37-1: Urbain v. Beierling 872

Consequences of Dissolution 873

Winding-Up the Business 873

Case 37-2: Jack A. Kahn and Denise W. Kahn v. Stewart Mesher and Lieselotte Mesher 874

Continuing the Partnership after Dissolution 876

Limited Partnerships 877

Formation of the Limited Partnership 877

Rights and Liabilities of the Limited Partners and the General Partners 878

Dissolution of the Limited Partnership 879

Dissolution of Limited Liability Company 879

Case 37-3: William C. Styslinger III v. Brewster Park, LLC, et al. 879

Case Opener Wrap-Up: Partnership Problems of Wildmeadow Village 881

Key Terms 882

Summary of Key Topics 883

Point / Counterpoint 883

Questions & Problems 884

CHAPTER 38

Corporations: Formation and Financing 887

Case Opener

The Formation of the Facebook Corporation 887

Characteristics of Corporations 888

Legal Entity 888

Rights as a Person and a Citizen 888

Case 38-1: Protect My Check, Inc. v. Craig C. Dilger, John Steffen 888

Creature of the State 891

Limited Liability 891

Free Transferability of Corporate Shares 891

Perpetual Existence 891

Centralized Management 891

Corporate Taxation 891

Liability for Officers and Employees 892

Corporate Powers 892

Express and Implied Powers 893

Classification of Corporations 893

Public or Private 893

Profit or Nonprofit 893

Domestic, Foreign, and Alien Corporations 893

Publicly Held or Closely Held 893

Subchapter S Corporation 894

Professional Corporation 894

Formation of the Corporation 894

Organizing and Promoting the Corporation 894

Case 38-2: King v. American Family Mutual Insurance Company; American Standard Insurance Company of Wisconsin 895

Selecting a State for Incorporation 896

Legal Process of Incorporation 897

Selection of Corporate Name 897

Incorporators 897

Articles of Incorporation 897

First Organizational Meeting 898

Potential Problems with Formation of the Corporation 898

Responses to Defective Incorporation 898

Case 38-3: Wachovia Securities, LLC v. Banco Panamericano 901

Corporate Financing 904

Debt Securities 904

Equity Securities 904

Case Opener Wrap-Up: The Formation of the Facebook Corporation 905

Key Terms 906
 Summary of Key Topics 906
 Point / Counterpoint 907
 Questions & Problems 908

CHAPTER 39

Corporations: Directors, Officers, and Shareholders 912

Case Opener

A Majority Shareholder and Her Son 912
 Importance of Regulating Interactions Among Directors, Officers, and Shareholders within a Corporation 913
 Roles of Directors, Officers, and Shareholders 913

Directors' Roles 914

Officers' Roles 915

Shareholders' Roles 915

Duties of Directors, Officers, and Shareholders 917

Duties of Directors and Officers 917

Duties of Shareholders 921

Case 39-1: Mccann v. Mccann 921

Liabilities of Directors, Officers, and Shareholders 922

Liability of Directors and Officers 922

Case 39-2: KDW Restructuring & Liquidation v. Greenfield 924

Liability of Shareholders 925

Rights of Directors, Officers, and Shareholders 925

Directors' Rights 926

Officers' Rights 926

Shareholders' Rights 927

Case 39-3: George T. Koshy v. Anupam Sachdev 929

Case Opener Wrap-Up: A Majority Shareholder and Her Son 932

Key Terms 933

Summary of Key Topics 933

Point / Counterpoint 934

Questions & Problems 935

CHAPTER 40

Corporations: Mergers, Consolidations, Terminations 938

Case Opener

Acquisitions as Horizontal Mergers 938
 Introduction to Mergers and Consolidations 939

Mergers 939

Consolidations 939

Procedures for Mergers and Consolidations 940

The Rights of Shareholders 941

Case 40-1: Parshall v. Hcsb Financial Corporation 942
Short-form Mergers 944
Appraisal Rights 944

Case 40-2: Shifan v. Morgan Joseph Holdings, Inc. 945

Purchase of Assets 947

Purchase of Stock 948

The Nature of Takeovers 948

Types of Takeovers 948

Response to Takeovers 949

Response To Termination 950

Dissolution 950

Case 40-3: Germain v. A.o. Smith Water Prods. Co 951
Liquidation 953

Case Opener Wrap-Up: Acquisitions as Horizontal Mergers 954

Key Terms 954

Summary of Key Topics 954

Point / Counterpoint 955

Questions & Problems 956

CHAPTER 41

Corporations: Securities and Investor Protection 960

Case Opener

The Martha Stewart Case 960

What Is a Security? 961

Case 41-1: Securities and Exchange Commission, v. Arcturus Corporation 961

Securities Regulation 963

The Securities and Exchange Commission 964

The Securities Act of 1933 965

Registration Statement 966

Prospectus 966

Periods of the Filing Process 966

Special Registration Provisions 967

Exemptions Under The 1933 Act 967

Violations and Liability 970

The Securities Exchange Act of 1934 971

Section 10(B) and Rule 10B-5 971

Insider Trading 972

Classic Case 41-2 Securities and Exchange Commission v. Texas Gulf Sulphur Co. 973

The Private Securities Litigation Reform Act of 1995 974

Outsiders and Insider Trading 975

Case 41-3: United States of America v. Matthew Kluger	976
Section 16(B)	978
Proxy Solicitations	978
Violations of the 1934 Act	978
Regulation of Investment Companies	979
State Securities Laws	980
Case Opener Wrap-Up: The Martha Stewart Case	980
Key Terms	981
Summary of Key Topics	981
Point / Counterpoint	983
Questions & Problems	983

Part Eight EMPLOYMENT AND LABOR RELATIONS

CHAPTER 42

Employment and Labor Law	986
Case Opener	
Madison and Save Right Pharmacy	986
Introduction to Labor and Employment Law	987
Fair Labor Standards Act	987
Family and Medical Leave Act	989
Remedies for Violations of FMLA	990
Unemployment Compensation	990
Workers' Compensation Laws	991
Benefits Under State Workers' Compensation	991
Case 42-1: Delgado v. Phelps Dodge Chino, Inc.	992
Advantages and Disadvantages of Workers' Compensation	993
Consolidated Omnibus Budget Reconciliation Act of 1985	993
Employee Retirement Income Security Act of 1974	993
Occupational Safety and Health Act of 1970	994
Penalties Under Osha	994
Employment-at-Will Doctrine and Wrongful Termination	994
Employee Privacy in the Workplace	996
Electronic Monitoring and Communication	997
Case 42-2: Moreno v. Hanford Sentinel, Inc. (2009)	998
Case 42-3: Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659 (Delaware 2013)	999
Privacy and Social Media Policy Guidelines	1000
Drug Testing in the Workplace	1001
Employer Rights and Responsibilities	
When Hiring Foreign Workers	1002

Labor Law	1003
The Wagner Act of 1935	1003
The Taft-Hartley Act of 1947	1004
The Landrum-Griffin Act of 1959	1004
The National Labor Relations Board	1004
The Collective Bargaining Process	1005
Strikes, Picketing, and Boycotts	1006
Case Opener Wrap-Up: Madison and Save Right Pharmacy	1006
Key Terms	1007
Summary of Key Topics	1007
Point / Counterpoint	1009
Questions & Problems	1009

CHAPTER 43

Employment Discrimination	1012
Case Opener	
Brad Gets Fired From "So Clean!"	1012
When May an Employee Be Fired?	1013
Federal Laws Governing Employers	1013
Civil Rights Act—Title VII	1014
Proving Disparate-Treatment Discrimination Under Title VII	1015
Proving Disparate-Impact Discrimination Under Title VII	1017
Sexual Harassment Under Title VII	1018
Case 43-1: Brennan v. Townsend & O'leary Enterprises, Inc.	1018
Harassment of Other Protected Classes Under Title VII	1021
Pregnancy Discrimination Act of 1987—An Amendment to Title VII	1021
Defenses to Claims Under Title VII	1021
Remedies Under Title VII	1023
Procedure for Filing a Claim Under Title VII	1024
Age Discrimination in Employment Act of 1967	1025
Proving Age Discrimination Under Adea	1025
Defenses Under Adea	1026
Americans with Disabilities Act	1026
Who Is Protected Under ADA?	1027
Enforcement Procedures Under ADA	1027
Remedies for Violations of ADA	1028
Equal Pay Act of 1963	1028
Defining Equal Work Under EPA	1028
The Impact of Extra Duties Under EPA	1029
Defenses Under EPA	1029
Remedies for Violations of EPA	1029

Discrimination Based on Sexual Orientation—Actionable? 1030

Case 43-2: Donald Baldwin, Complainant v. Anthony Foxx, Secretary, Dept. of Transportation (FAA), Agency 1031

Same-Sex Marriage 1032

May an Employer Discriminate Against a Smoker? 1032

May Employers Use Social Media in Employment Decisions? 1033

Use of Social Media in Hiring Decisions 1033

Use of Social Media in Firing Decisions 1034

Employment Discrimination Internationally 1035

Case Opener Wrap-Up: Brad Gets Fired from “So Clean!” 1036

Key Terms 1036

Summary of Key Topics 1036

Point / Counterpoint 1037

Questions & Problems 1038

Part Nine

GOVERNMENT REGULATION

CHAPTER 44

Administrative Law 1041

Case Opener

Does the EPA Have an Obligation to Regulate Automobile Emissions? 1041

Introduction to Administrative Law 1042

What is Administrative Law? 1042

Why and How are Agencies Created? 1042

Case 44-1: Doe v. United States Sec., 2011 U.S. Dist. Lexis 114384 1043

Federal and State Administrative Agencies 1044

Different Types of Administrative Agencies 1045

How do Agencies Operate? 1046

Informal Rule Making 1046

Formal Rule Making 1048

Hybrid Rule Making 1048

Exempted Rule Making 1049

Regulated Negotiation 1049

Problems Associated with Rule Making 1049

Other Administrative Activities 1050

Case 44-2: Yan Ju Wang v. George Valverde 1051

Limitations on Agency Powers 1052

Political Limitations 1052

Statutory Limitations 1052

Judicial Limitations 1052

Informational Limitations 1053

Case 44-3: Electronic Privacy Information Center v. National Security Administration 1053

Case Opener Wrap-Up: Does the EPA Have an Obligation to Regulate Automobile Emissions? 1056

Key Terms 1056

Summary of Key Topics 1057

Point / Counterpoint 1058

Questions & Problems 1058

CHAPTER 45

Consumer Law 1061

Case Opener

Deceptive Advertising and the Ultimate Weight-Loss Cure 1061

The Federal Trade Commission 1062

How the FTC Brings an Action 1062

Trade Regulation Rules 1063

Deceptive Advertising 1063

Case 45-1: Gotlin v. Lederman 1064

Bait-And-Switch Advertising 1066

Ftc Actions Against Deceptive Advertising 1067

Telemarketing and Electronic Advertising 1067

Tobacco Advertising 1070

Labeling and Packaging Laws 1070

Sales 1071

Door-to-Door Sales 1071

Telephone and Mail-Order Sales 1072

FTC Regulation of Sales in Specific Industries 1073

Credit Protection 1076

The Truth in Lending Act 1076

The Fair Credit Reporting Act 1078

The Fair Debt Collection Practices Act 1078

Case 45-2: Crawford v. LVNV Funding, LLC 1079

The Credit Card Fraud Act 1081

The Fair Credit Billing Act 1082

The Fair and Accurate Credit Transactions Act 1082

The Credit Cardholders' Bill of Rights Act 1082

Consumer Health and Safety 1083

The Federal Food, Drug, and Cosmetic Act 1083

Case 45-3: United States of America v. Michael Kaplan 1084

The Consumer Product Safety Act 1086

Case Opener Wrap-Up: Deceptive Advertising and the Ultimate Weight-Loss Cure 1087

Key Terms 1087

Summary of Key Topics 1087

Point / Counterpoint	1089
Questions & Problems	1090

CHAPTER 46

Environmental Law	1093
-------------------	------

Case Opener

Rogers Corporation's Hazardous Waste Debacle	1093
Alternative Means of Protecting the Environment	1094

Tort Law 1094

Government Subsidies 1095

Marketable Discharge Permits 1095

Green Taxes 1095

Direct Regulation 1096

The Environmental Protection Agency	1096
-------------------------------------	------

The National Environmental Policy Act	1096
---------------------------------------	------

Environmental Impact Statements 1097

Case 46-1: Brodsky v. United States Nuclear Regulatory Commission	1097
--	------

Regulating Air Quality	1098
------------------------	------

National Ambient Air Quality Standards 1098

Toxic or Hazardous Air Pollutants 1101

Enforcement of the Clean Air Act 1101

Regulating Water Quality	1102
--------------------------	------

Clean Water Act 1102

Safe Drinking Water Act 1103

Regulating Hazardous Waste	1104
----------------------------	------

Resource Conservation and Recovery Act 1104

Comprehensive Environmental Response, Compensation and Liability Act of 1980, as Amended by the Superfund Amendment And Reauthorization Act of 1986 1105

Case 46-2: Consolidation Coal Company v. Georgia Power Company, et al.	1106
---	------

Regulating Toxic Substances	1107
-----------------------------	------

Toxic Substances Control Act 1107

Federal Insecticide, Fungicide, And Rodenticide Act 1108

Case 46-3: Elvis Mirzaie, Edison Mirzaie, Romi Mirzaie v. Monsanto Company	1108
---	------

International Environmental Considerations	1110
--	------

Case Opener Wrap-Up: Rogers Corporation's Hazardous Waste Debacle	1111
---	------

Key Terms	1112
-----------	------

Summary of Key Topics	1112
-----------------------	------

Point / Counterpoint	1114
----------------------	------

Questions & Problems	1114
----------------------	------

CHAPTER 47

Antitrust Law	1117
---------------	------

Case Opener

Whole Foods Market Merger and Monopoly	1117
--	------

History of and Rationale for Antitrust Law	1118
--	------

The Need for Regulation 1118

Rationale for Antitrust Laws 1118

Recent Regulatory Attitudes 1119

Exemptions from Antitrust Law 1120

The Sherman Act	1120
-----------------	------

Jurisdiction of the Sherman Act 1122

Section 1 of the Sherman Act 1122

Case 47-1: United States v. Apple Inc.	1124
---	------

Classic Case 47-2 Continental T.V., Inc. v. Gte Sylvania Inc.	1128
--	------

Section 2 of the Sherman Act 1129

The Clayton Act	1131
-----------------	------

Section 2: Price Discrimination 1131

Section 3: Exclusionary Practices 1132

Section 7: Mergers 1134

Case 47-3: Federal Trade Commission v. Penn State Hershey Medical	1134
--	------

Section 8: Interlocking Directorates 1138

The Federal Trade Commission Act	1139
----------------------------------	------

The Robinson-Patman Act	1139
-------------------------	------

Enforcement of Antitrust Laws	1140
-------------------------------	------

Public Enforcement 1140

Private Enforcement 1141

Case Opener Wrap-Up: Whole Foods Market Merger and Monopoly	1141
---	------

Key Terms	1142
-----------	------

Summary of Key Topics	1142
-----------------------	------

Point / Counterpoint	1144
----------------------	------

Questions & Problems	1144
----------------------	------

CHAPTER 48

The Nature of Property, Personal Property, and Bailments	1148
--	------

Case Opener

Prisoners and Personal Property	1148
---------------------------------	------

The Nature and Classifications of Property	1149
--	------

Personal Property	1150
-------------------	------

Voluntary Transfer of Property 1150

Case 48-1: Campbell v. Robinson	1153
--	------

Involuntary Transfer of Personal Property 1155

Case 48-2: In Re: Nelson T. Rodriguez, Belinda
Georgeson v. Nelson T.
Rodriguez 1155

*Other Means of Acquiring Ownership of
Property* 1157

Bailment 1158

Case 48-3: J&L Jewelry v. EPK Management 1158

Rights and Duties of the Bailor 1160

Rights and Duties of the Bailee 1161

Documents Related to Bailments 1162

Special Bailments 1163

Case Opener Wrap-Up: Prisoners and Personal
Property 1164

Key Terms 1165

Summary of Key Topics 1165

Point / Counterpoint 1165

Questions & Problems 1166

CHAPTER 49

Real Property 1169

Case Opener

Groundwater and Property Rights 1169

The Nature of Real Property 1170

Fixtures 1170

Extent of Ownership 1171

Interests in Real Property 1172

Fee Simple Absolute 1172

Conditional Estate 1172

Life Estate 1173

Case 49-1: Douglas Stolipher v. Estate of Charles A.
Rocheleau 1173

Future Interest 1174

Leasehold Estate 1175

Nonpossessory Estates 1175

Co-Ownership 1177

Tenancy in Common 1177

Joint Tenancy 1177

Tenancy by the Entirety 1177

Condominiums and Cooperatives 1178

Voluntary Transfer of Real Property 1178

Legal Requirements 1178

Sales Transactions 1180

Involuntary Transfer of Real Property 1181

Adverse Possession 1182

Condemnation 1182

Case 49-2: Kelo v. City of New London 1182

Restrictions on Land Use 1186

Restrictive Covenants 1186

Case 49-3: The Spur at Williams Brice Owners
Association, Inc. v. Sunil v. Lalla and
Sharan W. Lalla 1186

Zoning 1188

Other Statutory Restrictions on Land Use 1188

Case Opener Wrap-Up: Groundwater and Property
Rights 1189

Key Terms 1190

Summary of Key Topics 1190

Point / Counterpoint 1191

Questions & Problems 1192

CHAPTER 50

Landlord-Tenant Law 1194

Case Opener

Free to Choose? 1194

Creation of the Landlord-Tenant Relationship 1195

Types of Leases 1195

Fair Housing Act 1196

Case 50-1: Choices in Cmty. Living, Inc. v. Petkus 1197

*Rights and Duties of the Landlord and the
Tenant* 1199

Possession of the Premises 1199

Case 50-2: Linda K. Miller v. William Burnett 1200

Eviction 1202

Use of the Premises 1203

Maintenance of the Premises 1204

Rent 1206

Liability for Injuries on the Premises 1207

Landlord's Liability 1207

Tenant's Liability 1208

Case 50-3: Leonara Caruso v. Apts. Downtown,
Inc. 1209

Transferring Interests of Leased Property 1211

Landlord Transfer of Interest 1211

Tenant Transfer of Interest 1211

Termination of the Lease 1212

Breach of Condition by Landlord 1212

Forfeiture 1213

Destruction of the Premises 1213

Surrender 1213

Abandonment 1214

Case Opener Wrap-Up: Free to Choose? 1214

Key Terms 1215

Summary of Key Topics	1215
Point / Counterpoint	1216
Questions & Problems	1217

CHAPTER 51

Insurance Law	1221
---------------	------

Case Opener

The Obligation of Insurance Companies to Restore Property 1221

The Nature of the Insurance Relationship 1222

Risk 1222

Insurable Interest 1223

Case 51-1: Royal Capital Development LLC v. Maryland Casualty Company 1224

The Insurance Contract 1225

Application for Insurance 1225

Case 51-2: Equity Fire & Casualty Company v. Laurence Traver 1226

Important Elements of the Insurance Contract 1227

Case 51-3: Mellin v. Northern Security Insurance Company 1228

Canceling the Insurance Policy 1230

Insurer and Insured Obligations 1231

Insurer Duty to Defend the Insured 1231

Insurer Duty to Pay Sums Owed by the Insured 1231

Insured Duty to Disclose Information 1231

Insured Duty to Cooperate with the Insurer 1232

The Insurer's Defenses for Nonpayment 1232

Types of Insurance 1233

Liability and Property Insurance 1233

Life Insurance 1233

Case Opener Wrap-Up: The Obligation of Insurance Companies to Restore Property 1235

Key Terms 1236

Summary of Key Topics 1236

Point / Counterpoint 1237

Questions & Problems 1238

CHAPTER 52

Wills and Trusts	1241
------------------	------

Case Opener

The Danger of Preprinted Forms 1241

Estate Planning 1242

The Uniform Probate Code 1242

Tools of Estate Planning 1242

Why Individuals Engage in Estate Planning 1242

Case 52-1: In Re Certified Question From U.S. District Court for the Western District of Michigan 1243

Legal Issues Related to Wills 1244

Intestacy Statutes 1244

Requirements for a Legally Valid Will 1245

Grounds for Contesting a Will 1246

Case 52-2: Pace v. Steele 1247

Changing a Will 1248

Case 52-3: Bogar v. Baker 1249

Revoking a Will 1251

Settlement of an Estate 1251

Trusts as Estate Planning Tools 1252

How and Why Individuals Create Trusts 1252

Basic Kinds of Trusts 1253

How Trusts are Terminated 1254

End-of-Life Decisions 1254

Advance Directives 1254

Anatomical Gifts 1255

Choices about the Body after Death 1256

International Protection for Wills 1256

Case Opener Wrap-Up: The Danger of Preprinted Forms 1256

Key Terms 1257

Summary of Key Topics 1257

Point / Counterpoint 1259

Questions & Problems 1259

APPENDIXES

APPENDIX A

The Constitution of the United States of America A-1

APPENDIX B

Uniform Commercial Code B

APPENDIX C

Title VII of the Civil Rights Act of 1964 C-1

APPENDIX D

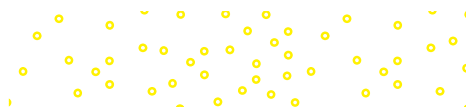
The Civil Rights Act of 1991 D-1

Glossary G-1

Name Index I-1

Subject Index I-4

List of Cases



CHAPTER 2: BUSINESS ETHICS

United States of America et al. ex Rel. Andrew Hagerty v. Cyberonics, Inc.	28
---	----

CHAPTER 3: THE US LEGAL SYSTEM

Hertz Corp. v. Friend	46
Atlantic Marine Construction Company, Inc. v. United States District Court For The Western District of Texas et al.	49
Timothy Tyrone Foster, Petitioner v. Bruce Chatman, Warden	62

CHAPTER 4: ALTERNATIVE DISPUTE RESOLUTION

AT & T Mobility LLC v. Concepcion	83
Maribel Baltazar v. Forever 21, Inc.	85
Equal Employment Opportunity Commission v. Waffle House, Inc.	89

CHAPTER 5: CONSTITUTIONAL PRINCIPLES

Christy Brzonkala v. Antonio J. Morrison et al.	105
Direct Marketing Association v. Barbara Brohl	109
David Leon Riley v. California and United States v. Wurie	121

CHAPTER 6: INTERNATIONAL AND COMPARATIVE LAW

It's Intoxicating, Inc. v. Maritim Hotelgesellschaft Mbh....	146
Fallhowe v. Hilton Worldwide, Inc.	149

CHAPTER 7: CRIME AND THE BUSINESS COMMUNITY

Salman v. United States	165
United States v. Park	172
Miranda v. Arizona	179

CHAPTER 8: TORT LAW

Joseph E. Hancock, Petitioner v. Easwaran P. Variyam, Respondent.....	200
Aaron Olson, Appellant v. Centurylink, Respondent ...	208
Mazda Motor Corporation v. Hurst	217

CHAPTER 9: NEGLIGENCE AND STRICT LIABILITY

Palsgraf v. Long Island Railroad Company	232
Swoboda v. Fontanetta	234
Swigart v. Bruno	239

CHAPTER 10: PRODUCT LIABILITY

Montemayor v. Sebright Products, Inc	248
Welge v. Planters Lifesavers Co.	257
Sperry–New Holland, A Division of Sperry Corporation v. John Paul Prestage and Pam Prestage	259

CHAPTER 11: LIABILITY OF ACCOUNTANTS AND OTHER PROFESSIONALS

Bily v. Arthur Young & Co.	278
Michael Williamson, et al., Plaintiffs, v. Recovery Limited Partnership, et al., Defendants	282
Matrixx Initiatives, Inc., et al. v. Siracusano et al.	286

CHAPTER 12: INTELLECTUAL PROPERTY

In Re Simon Shiao Tam	301
Itoys “R” Us, Inc. v. Canarsie Kiddie Shop, Inc.	303
Star Athletica, L.L.C., Petitioner v. Varsity Brands, Inc., et al.	307

CHAPTER 13: INTRODUCTION TO CONTRACTS

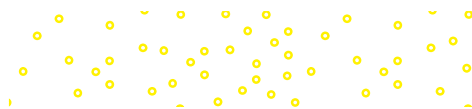
In Re Zappos.com Inc., Customer Data Security Breach Litigation	329
Trapani Const. Co. v. Elliot Group, Inc.	331
Reisenfeld & Co. v. The Network Group, Inc.; Builders Square, Inc.; Kmart Corp.	333

CHAPTER 14: AGREEMENT

Lucy v. Zehmer	347
Lawrence W. Shipley III v. Andrea Vasquez	351
Paul Ehlen v. John M. and Lynndee Melvin	358

CHAPTER 15: CONSIDERATION

Hamer v. Sidway	370
Thelma Agnes Smith v. David Phillip Riley	371
Jamil Blackmon v. Allen Iverson	374
Margeson v. Artis	375



CHAPTER 16: CAPACITY AND LEGALITY

Adrian Lopez, v. Kmart Corporation	385
King v. Riedl	394
Riley v. Iron Gate Self Storage	400

CHAPTER 17: LEGAL ASSENT

Simkin v. Blank	414
Fantastic Sams Salons Corp. v. Pstevo, LLC and Jeremy Baker	418
Garage Solutions, LLC, v. Monty J. Person.....	423

CHAPTER 18: CONTRACTS IN WRITING

Power Entertainment, Inc., et al. v. National Football League Properties, Inc.	435
Heritage Constructors, Inc. v. Chrietzberg Electric, Inc., and Richard Marc Chrietzberg.....	440
Barker v. Price	446

CHAPTER 19: THIRD-PARTY RIGHTS TO CONTRACTS

General Mills, Inc. v. Kraft Foods Global, Inc.	458
Tucker v. Tom Raper, Inc.,.....	466
Allan v. Nersesova	468
Juan Mendez, Jr., As Guardian of Juan Mendez, Sr. v. Hampton Court Nursing Center, LLC.....	471

CHAPTER 20: DISCHARGE AND REMEDIES

Mind & Motion Utah Investments, LLC, Appellee v. Celtic Bank Corporation.....	483
Hamilton v. State Farm Fire & Casualty Insurance Company.....	486
Hemlock Semiconductor Operations, LLC v. Solarworld Industries Sachsen GmbH	490

CHAPTER 21: INTRODUCTION TO SALES AND LEASE CONTRACTS

Isenbergh v. S. Chi. Nissan.....	511
Vanguard Energy Servs. v. Shihadeh	514
The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc., Plaintiffs v. Saint-Gobain Technical Fabrics Canada Limited, Formerly Known as Bay Mills, Defendant.....	520

CHAPTER 22: TITLE, RISK OF LOSS, AND INSURABLE INTEREST

Alcoa Materials Mgmt. v. Niagara Worldwide LLC, 2016-Ohio-8158.....	529
Deweldon, Ltd. v. Mckean	533
Pileri Industries, Inc. v. Consolidated Industries, Inc.....	538

CHAPTER 23: PERFORMANCE AND OBLIGATIONS UNDER SALES AND LEASES

XCBob, Inc. v. Ed Tucker Distrib., 2016 Pa. Dist. & Cnty. Dec. LEXIS 14205	551
Levista, Inc. v. Ranbaxy Pharmaceuticals, Inc.,.....	555
Dejesus v. Cat Auto Tech. Corp.....	557
Hubbard v. Utz Quality Foods, Inc.	561

CHAPTER 24: REMEDIES FOR BREACH OF SALES AND LEASE CONTRACTS

Badilla v. Wal-Mart Stores East Inc.....	570
Des Moines Flying Servs. v. Aerial Servs.	577
Almetals, Inc., Plaintiff v. Wickedder Westfalenstahl, GmbH, Defendant.....	578
Figgie International, Inc. v. Destileria Serralles, Inc.....	580

CHAPTER 25: WARRANTIES

Cannon v. Bodensteiner Implement Co., 2017 Iowa App. LEXIS 279.....	589
Priscilla D. Webster v. Blue Ship Tea Room, Inc.	593
Melissa Kahn v. Volkswagen of America, Inc.	596

CHAPTER 26: NEGOTIABLE INSTRUMENTS: NEGOTIABILITY AND TRANSFERABILITY

Reger Development, LLC v. National City Bank	610
Amplify Federal Credit Union v. Garcia	613
Athanasios Valsamis v. Néstor González-Romero.....	616

CHAPTER 27: NEGOTIATION, HOLDER IN DUE COURSE, AND DEFENSES

Dennis Walker v. John Probandt and John Raynor.....	626
Michael J. Kane, Jr. v. Grace Kroll.....	634
Wawel Savings Bank v. Jersey Tractor Trailer Training, Inc.	638

CHAPTER 28: LIABILITY, DEFENSES, AND DISCHARGE

Heartland State Bank v. American Bank & Trust.....	654
Igs Industries, Inc. v. Discover Financial Services, Inc.....	657

Halliburton Energy Services, Inc. v. Fleet National Bank.....	662
John A. Colfax v. Jpmorgan Chase Bank, N.A.....	665

CHAPTER 29: CHECKS AND ELECTRONIC FUND TRANSFERS

Doe v. Bank of America.....	685
Aliaga Medical Center, S.c. v. Harris Bank N.A., A/K/A Bmo Harris Bank, N.A.	688
Merisier v. Bank of America.....	690

CHAPTER 30: SECURED TRANSACTIONS

1St Source Bank v. Wilson Bank & Trust.....	706
The Four County Bank v. Tidewater Equipment Co.	710
Price Auto Sales, Inc. v. Sanders.....	718

CHAPTER 31: OTHER CREDITORS' REMEDIES AND SURETYSHIP

Sharp v. Horton	732
Alcantar v. Sanchez	734
Beal Bank v. Biggers	739

CHAPTER 32: BANKRUPTCY AND REORGANIZATION 746

In Re Arkuszewski.....	750
Rousey v. Jacoway.....	756
Margaret Kawaauhau v. Paul W. Geiger.....	762

CHAPTER 33: AGENCY FORMATION AND DUTIES

Ackerman v. Sobol Family Partnership, Llp.....	778
Glenn v. Gibbs	783
City of Binghamton v. Whalen	787

CHAPTER 34: LIABILITY TO THIRD PARTIES AND TERMINATION

In Re Estate of Kurrelmeyer	799
Doe v. Uber Technologies, Inc.....	804
Jerry A. Mais, et al., v. Allianz Life Insurance Company of North America.....	810

CHAPTER 35: FORMS OF BUSINESS ORGANIZATION

Meyer v. Christie	833
Live Cryo, LLC v. Cryousa Import And Sales, LLC.....	835
Patterson v. Domino's Pizza LLC	837

CHAPTER 36: PARTNERSHIPS: NATURE, FORMATION, AND OPERATION

Leoff v. S&J Land Co.	849
Floyd Finch v. Bruce Wayne Campbell	853
Wd 80283 Cons Wd 80317	853
Robert Law, on Behalf of the Robert M. Law Profit Sharing Plan v. Ronald Zemp	858

CHAPTER 37: PARTNERSHIPS: TERMINATION AND LIMITED PARTNERSHIPS

Urbain v. Beierling.....	872
Jack A. Kahn and Denise W. Kahn v. Stewart Mesher and Lieselotte Mesher	874
William C. Styslinger III v. Brewster Park, LLC, et al.	879

CHAPTER 38: CORPORATIONS: FORMATION AND FINANCING

Protect My Check, Inc. v. Craig C. Dilger, John Steffen ...	888
King v. American Family Mutual Insurance Company; American Standard Insurance Company of Wisconsin.....	895
Wachovia Securities, LLC v. Banco Panamericano.....	901

CHAPTER 39: CORPORATIONS: DIRECTORS, OFFICERS, AND SHAREHOLDERS

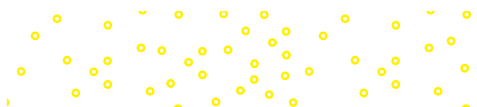
Mccann v. Mccann	921
Kdw Restructuring & Liquidation v. Greenfield	924
George T. Koshy v. Anupam Sachdev	929

CHAPTER 40: CORPORATIONS: MERGERS, CONSOLIDATIONS, TERMINATIONS

Parshall v. Hcsb Financial Corporation.....	942
Shiftan v. Morgan Joseph Holdings, Inc.	945
Germain v. A.O. Smith Water Prods. Co.....	951

CHAPTER 41: CORPORATIONS: SECURITIES AND INVESTOR PROTECTION

Securities and Exchange Commission, v. Arcturus Corporation	961
Classic Case 41-2 Securities and Exchange Commission v. Texas Gulf Sulphur Co.....	973
United States of America v. Matthew Kluger	976



CHAPTER 42: EMPLOYMENT AND LABOR LAW

Delgado v. Phelps Dodge Chino, Inc.....992
 Moreno v. Hanford Sentinel, Inc. (2009).....998
 Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2D 659 (Delaware 2013).....999

CHAPTER 43: EMPLOYMENT DISCRIMINATION

Brennan v. Townsend & O’leary Enterprises, Inc. 1018
 Donald Baldwin, Complainant v. Anthony Foxx, Secretary, Dept. of Transportation (Faa), Agency 1031

CHAPTER 44: ADMINISTRATIVE LAW

Doe v. United States Sec, 2011 U.S. Dist. Lexis 114384 1043
 Yan Ju Wang v. George Valverde 1051
 Electronic Privacy Information Center v. National Security Administration 1053

CHAPTER 45: CONSUMER LAW 1061

Gotlin v. Lederman 1064
 Crawford v. LVNV Funding, LLC..... 1079
 United States of America v. Michael Kaplan 1084

CHAPTER 46: ENVIRONMENTAL LAW

Brodsky v. United States Nuclear Regulatory Commission 1097
 Consolidation Coal Company v. Georgia Power Company, et al. 1106
 Elvis Mirzaie, Edison Mirzaie, Romi Mirzaie v. Monsanto Company..... 1108

CHAPTER 47: ANTITRUST LAW

United States v. Apple Inc. 1124
 Classic Case 47-2 Continental T.v., Inc. v. Gte Sylvania Inc..... 1128
 Federal Trade Commission v. Penn State Hershey Medical..... 1134

CHAPTER 48: THE NATURE OF PROPERTY, PERSONAL PROPERTY, AND BAILMENTS

Campbell v. Robinson 1153

In Re: Nelson T. Rodriguez, Belinda Georgeson v. Nelson T. Rodriguez 1155
 J&L Jewelry v. Epk Management..... 1158

CHAPTER 49: REAL PROPERTY

Douglas Stolipher v. Estate of Charles A. Rocheleau..... 1173
 Kelo v. City of New London..... 1182
 The Spur at Williams Brice Owners Association, Inc. v. Sunil v. Lalla And Sharan W. Lalla..... 1186

CHAPTER 50: LANDLORD-TENANT LAW

Choices in Cmty. Living, Inc. v. Petkus..... 1197
 Linda K. Miller v. William Burnett..... 1200
 Leonara Caruso v. Apts. Downtown, Inc..... 1209

CHAPTER 51: INSURANCE LAW

Royal Capital Development LLC v. Maryland Casualty Company..... 1224
 Equity Fire & Casualty Company v. Laurence Traver..... 1226
 Mellin v. Northern Security Insurance Company..... 1228

CHAPTER 52: WILLS AND TRUSTS

In Re Certified Question From U.S. District Court for the Western District of Michigan..... 1243
 Pace v. Steele 1247
 Bogar v. Baker 1249

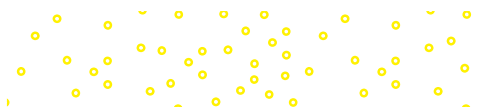
APPENDIX A THE CONSTITUTION OF THE UNITED STATES OF AMERICA A-1

APPENDIX B UNIFORM COMMERCIAL CODE B

APPENDIX C TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 C-1

APPENDIX D THE CIVIL RIGHTS ACT OF 1991 D-1

Glossary G-1
 Name Index I-1
 Subject Index I-4



An Introduction to Dynamic Business Law

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LEARNING OBJECTIVES

- 1-1** Define business law.
- 1-2** Relate the functional areas of business to the relevant areas of business law.
- 1-3** Recall the purposes of law.
- 1-4** Distinguish among types of law.
- 1-5** Differentiate between sources of the law.
- 1-6** Identify the various schools of jurisprudence.

LO 1-1

Define business law.

This book is for future managers, especially those who wish to be leaders. Preparation for that career requires, in part, an awareness of the legal issues arising in business. The law provides the framework within which leaders must innovate and manage. Businesses need to finance capital growth, purchase inputs, and hire and develop employees. They must sell to consumers, please owners, and comply with government rules. All these activities are full of potential legal conflicts. Appendix 1A explains the role of critical thinking in resolving these conflicts.

LO 1-2

Relate the functional areas of business to the relevant areas of business law.

Business law consists of the enforceable rules of conduct that govern commercial relationships (“commercial” meaning “for the purpose of making a profit”). For example, a firm is required by law to obey the antitrust laws when it considers merging with another firm. In other words, buyers and sellers interact in market exchanges within the rules that specify the boundaries of legal business behavior. Constitutions, legislatures, regulatory bodies, and courts spell out what market participants may and may not legally do. These rules and responsibilities provide the stability required in a thriving market economy.

Business behavior must follow legal guidelines. All contracts, employment decisions, and payments to a supplier are constrained and protected by business law. Each of the six functional areas of business—management, production and transportation, marketing, research and development, accounting and finance, and human resource management—sits on a foundation of business law, as Exhibit 1-1 illustrates.

Law and Its Purposes

LO 1-3

Recall the purposes of law.

As individuals, few of us can impose rules on others, but a majority of citizens in a democracy can agree to permit certain authorities to make and enforce rules of behavior in their community. These rules are the *law*, and they are enforceable in the courts the community maintains. Exhibit 1-2 lists just a few of the many purposes fulfilled by the law.

Each is important, but taken together they remind us why we are proud to say we are a society of laws. The respect we give the law as a source of authority is in part our recognition that in its absence we would rely solely on the goodwill and dependability of one another. But these cooperative values exist side by side with self-interest and the profit motive. Business law is the place where these conflicting forces are resolved.

Classification of the Law

LO 1-4

Distinguish among types of law.

There are many ways to distinguish among types of law: national versus international law, federal versus state law, and public versus private law. **Private law** regulates disputes between private individuals or groups. If a store owner is delinquent in paying rent to the landlord, the resulting dispute is governed by private law. **Public law** controls disputes between private individuals or groups and their government. If a store dumps waste behind its building in violation of local, state, or federal environmental regulations, public law will resolve the dispute.

Another distinction we make is between civil and criminal law. (See Exhibit 1-3.) **Civil law** lays out the rights and responsibilities implied in relationships between persons and between persons and their government. It also identifies the remedies available when someone’s rights are violated. For example, in 2009 Mississippi Valley Silica Co. was ordered to pay a plaintiff \$9 million because the court ruled that it sold sand to plaintiff’s employer with the knowledge that using that sand on a regular basis would expose a worker to a form of cancer. Yet Mississippi Valley did not alert its customers of the risk.

Criminal law, in contrast, regulates situations in which someone commits an act against the public as a whole. There are several business activities that can be considered criminal, such as money laundering, bribery, mail fraud, racketeering, price fixing, insurance fraud, embezzlement, and theft of trade secrets. One form of business crime that is particularly hard to control is conducting insider trading on the stock exchange. Insider trading occurs

FUNCTIONAL AREA OF BUSINESS	RELEVANT AREAS OF BUSINESS LAW
Corporate management	International and comparative law White-collar crime Contracts Corporate law Antitrust law Administrative law Agency law Insurance law Employment law
Production and transportation	Tort law Contracts Environmental law Consumer law
Marketing	Tort law Contracts Antitrust law Consumer law Intellectual property
Research and development	Product liability Intellectual property Property law Consumer law
Accounting and finance	Liability of accountants Contracts Negotiable instruments and banking Bankruptcy White-collar crime
Human resource management	Agency law Contracts Employment and labor law Employment discrimination

Exhibit 1-1

Business Law and the Six Functional Areas of Business

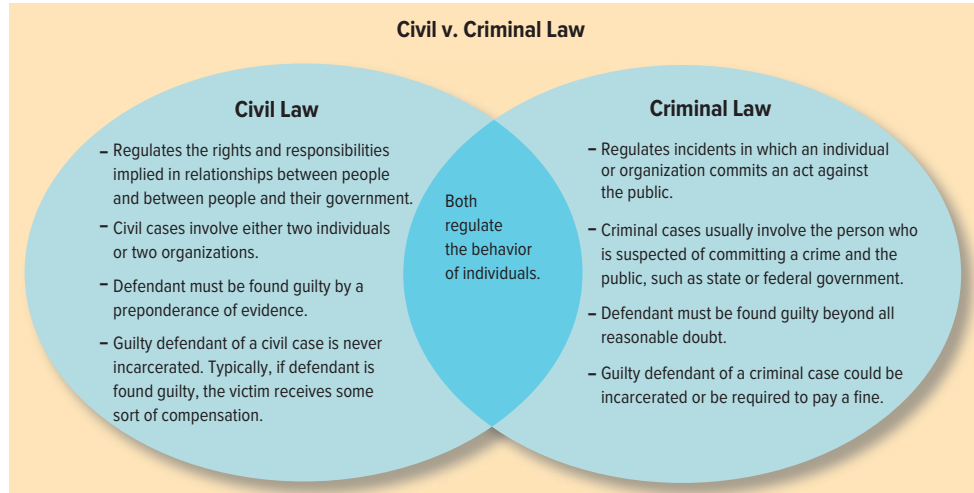
- Providing order such that one can depend on a promise or an expectation of obligations.
- Serving as an alternative to fighting.
- Facilitating a sense that change is possible, but only after a rational consideration of options.
- Encouraging social justice.
- Guaranteeing personal freedoms.
- Serving as a moral guide by indicating minimal expectations of citizens and organizations.

Exhibit 1-2

Purposes of the Law

Exhibit 1-3

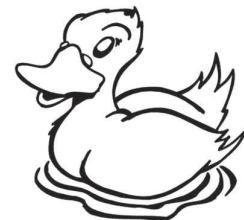
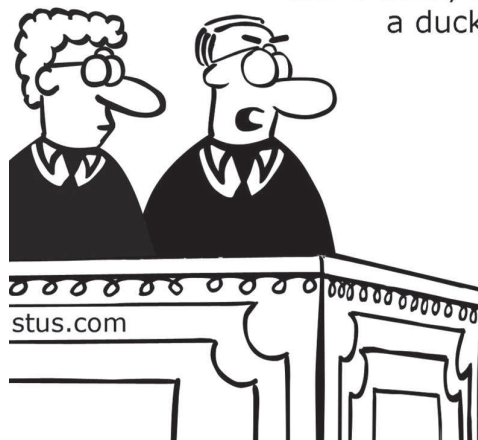
Civil versus Criminal Law



when an individual uses insider, or secret, company information to increase her or his own finances or those of family or friends. Several years ago, an IBM secretary allegedly told her husband, who in turn told several other people, that the company was going to take over operations of Lotus Development. The leaked information spread among a number of individuals, 25 of whom bought stock that increased greatly in value following IBM's public announcement of the takeover. The Securities and Exchange Commission filed charges against them for creating an unfair trading environment for the public. Criminal law cases are prosecuted not by individuals but by the state, federal, or local government.

While some new laws have been adopted to regulate the kinds of activities businesses can now conduct online, **cyberlaw** is based primarily on existing laws. Laws governing contracts, for instance, are essentially the same in all situations, yet adaptations are necessary because contracts can now be made and signed online through retailers such as Amazon and eBay. Activities by companies such as YouTube have raised the question of whether and when the copying of certain intellectual property, such as music and video, constitutes theft.

I don't care if your
enterprise exists only in cyberspace—
you walk like a duck and quack
like a duck, so you're
a duck.



Used by permission of Stu Rees, Stu's Views.

Sources of Business Law

How is law created, and where do we look to find the laws? The sources of law are discussed below.

LO 1-5

Differentiate between sources of the law.

CONSTITUTIONS

The United States Constitution and the constitution of each state establish the fundamental principles and rules by which the United States and the individual states are governed. The term constitutional law refers to the general limits and powers of these governments as stated in their written constitutions. The US Constitution is the supreme law of the land, meaning that it overrules all federal, state, and local laws that conflict with it, and is the foundation for all laws in the United States. It is the primary authority to study when trying to identify the relationship between business organizations and government.

STATUTES

The assortment of *statutes*, or rules and regulations put forth by legislatures, is what we call **statutory law**. These legislative acts are written into the United States Code when they are passed by Congress or into the appropriate state codes when they are enacted by state legislatures. The codes are a collection of all the laws in one convenient location.

Business managers must also be familiar with the local city and county ordinances that govern matters not covered by federal or state codes. These ordinances address important business considerations such as local taxes, environmental standards, zoning, and building codes. If you wish to open a Krispy Kreme franchise in Santa Fe, New Mexico, you must follow local guidelines regarding where you may build your store, the materials you may use, and the state minimum wage you must pay employees making donuts. The regulations will be different if you wish to open your franchise in Toledo, Ohio, or Seattle, Washington.

While they are not a source of law in the same sense as constitutions and statutory law, **model** or **uniform laws** serve as suggestions for statutory law at the state level. Business activity is made more difficult when laws vary from state to state. To prevent such problems, a group of legal scholars and lawyers formed the National Conference of Commissioners on Uniform State Laws (NCC). The NCC regularly urges states to enact model laws to provide greater uniformity. The response is entirely in the hands of the state legislatures. They can ignore a suggestion or adopt part or all of the proposed model law.

The proposals of the NCC, while not laws themselves, have been adopted on more than 200 occasions by state legislatures. Paired with the publications of the American Law Institute, it became the source of the *Uniform Commercial Code (UCC)*. The UCC is a body of law so significant for business activities that it will be the focus of several chapters of this text. The UCC laws include sales laws and other regulations affecting commerce, such as bank deposits and collections, title documents, and warranties. For example, these laws govern the different types of warranties that companies such as Microsoft, Sony, and Honda provide with their products.

CASES

Constitutions, legislatures, and administrative agencies encourage certain behaviors and prevent others. But laws are seldom self-explanatory and often require interpretation. **Case law**, also called **common law**, is the collection of legal interpretations made by judges. These interpretations are law unless revoked later by new statutory law.

Case law is especially significant for businesses that operate in multiple legal jurisdictions. Courts in two different business locations may interpret similarly worded statutes differently.

Courts issue judicial decisions that often include interpretations of statutes and administrative regulations, as well as the reasoning they used to arrive at a decision. Such reasoning depends heavily on **precedent**, past decisions in similar cases that guide later decisions, thereby providing greater stability and predictability to the law.

Business managers must pay attention to changes in the law and cases in which new precedents are set and take them into account when making business decisions. After a woman was severely burned by very hot coffee, McDonald's was found negligent for failing to provide a warning label on its hot-beverage cups. Now many retailers provide warning labels on their beverage cups because of the precedent set by this case.

When courts rely on precedent, they are obeying the principle of **stare decisis** ("standing by their decision"), in which rulings made in higher courts become binding precedent for lower courts. When an issue is brought before a state court, the court will determine whether the state supreme court has made a decision on a similar issue, which creates a binding precedent or pattern of law the lower court must follow. If there is no binding decision, both state courts need to look for other rulings on similar cases.

They are not bound by each other's decisions and might decide differently on the same issue. Decisions in lower courts can be appealed to the state appeals court, however, and the appeals court's decision can be appealed to the state supreme court. If the state supreme court rules on the case, its decision is binding for the state in that and future cases but does not affect earlier decisions made by state courts.

Perhaps the most well-known case associated with stare decisis is *Roe v. Wade*.¹ This landmark case, decided in 1973, made a decision on the issue of abortion. The US Supreme Court decided that until a fetus is "viable," a woman may terminate her pregnancy for any reason. The Court went on to define *viable* as the ability of the fetus "to live outside the mother's womb, albeit with artificial aid." The Court added that such a capability could occur around 24 weeks, although usually around 7 months. The decision in *Roe v. Wade* has been upheld in cases since. The precedent still stands today, despite attempts to overturn it. In 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*² used the decision to determine that a woman has a constitutional right to have an abortion, although the standard for restricting abortions was lowered.

Another case that has been used in accordance with stare decisis as a binding precedent is *Brown v. Board of Education*,³ which abolished discriminatory policies for individuals of different racial backgrounds. In *Regents of the University of California v. Bakke*,⁴ the plaintiff, a white male, had applied to the University of California at Davis medical school two years in a row and been denied admittance. He alleged the admissions process was discriminatory because 16 of 100 slots were reserved for members of minority races. The US Supreme Court found the school's admissions policy was not lawful, referencing *Brown* and stating that the basic principle behind it and similar cases was that individuals could not be excluded on the basis of race or ethnicity. The Court wrote, "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."

Another US Supreme Court case that relied in part on *Brown v. Board of Education* was *Wygant v. Jackson Board of Education*.⁵ The Board of Education and teachers' union in

¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ 347 U.S. 483 (1954).

⁴ 438 U.S. 265 (1978).

⁵ 476 U.S. 267 (1986).

Jackson, Michigan, had agreed that if teachers were laid off, those with more seniority would be retained and the minority teachers' percentage of the layoffs would not be higher than their percentage of all teachers employed by the school district at the time of the layoffs. When layoffs did occur, nonminority teachers were laid off and minority teachers with less seniority were retained. The nonminority teachers sued. When the case was brought before the Supreme Court, the Court ruled that the layoff policy was not lawful because "[c]arried to the logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*." Again in accordance with *Brown*, the Court ruled that singling people out on the basis of race was not lawful.

However, the case *Plessy v. Ferguson*⁶ is an interesting circumstance in regard to stare decisis. In this case, the court decided that separate accommodations for blacks and whites were acceptable as long as such separation was "separate but equal." This case essentially made the legal acknowledgment of a difference between blacks and whites, and different treatment, acceptable. Interestingly, in 1954, *Brown v. Board of Education* did not follow the precedent established by *Plessy v. Ferguson*. In fact, the ruling established in *Plessy* was overturned. The Supreme Court determined that segregation of blacks and whites violated the equal protection clause of the Fourteenth Amendment of the Constitution. Thus, the court overturned the precedent and created a new one, one that has been used in decisions made by courts ever since.

Just as state statutes have been strongly influenced by the suggestions of the NCC, common law evolves with the assistance of a mechanism called **Restatements of the Law**. These are summaries of the common law rules in a particular area of the law that have been enacted by most states. The American Law Institute prepares these Restatements for contracts, agency, property, torts, and many other areas of law that affect business decisions. While the Restatements are not themselves a direct source of business law, judges frequently use them to guide their interpretations in a particular case.

In addition to the Restatements, many influences are at work in the minds of judges when they interpret constitutions, statutes, and regulations. Their own values and social backgrounds function as lights and shadows, moving the judges toward particular legal decisions.

Courts in one jurisdiction need not obey precedents in other jurisdictions, but they may be influenced by them. At least two current Supreme Court justices are using law in other countries as a basis for rethinking certain laws in the United States. The logic of this reliance on precedent is based on respect for those who have already wrestled with the issue and provided us guidance with their earlier decision.

ADMINISTRATIVE LAW

Constitutions and statutes never cover all the detailed rules that affect relationships between government and business. The federal, state, and local governments have dozens of administrative agencies whose task is to perform a particular government function. For example, the Environmental Protection Agency (EPA) has broad responsibilities to enforce federal statutes in the area of environmental protection. The Occupational Safety and Health Administration (OSHA) oversees health and workplace safety and makes sure working conditions are not hazardous.

In 2015, to illustrate the implications of OSHA for business managers, Walmart was fined \$7,000 when a store in Valley Stream, New York, did not "furnish a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazards of asphyxiation or being struck

⁶ 163 U.S. 537 (1896).

Exhibit 1-4Major Federal
Administrative Agencies

INDEPENDENT AGENCIES	EXECUTIVE AGENCIES
<ul style="list-style-type: none"> Commodity Futures Trading Commission (CFTC) http://www.cftc.gov/ Consumer Product Safety Commission (CPSC) http://www.cpsc.gov/ Equal Employment Opportunity Commission (EEOC) http://www.eeoc.gov/ Federal Trade Commission (FTC) http://www.ftc.gov/ Federal Communications Commission (FCC) http://www.fcc.gov/ National Labor Relations Board (NLRB) http://www.nlr.gov/ National Transportation Safety Board (NTSB) http://www.nts.gov/ Nuclear Regulatory Commission (NRC) http://www.nrc.gov/ Securities and Exchange Commission (SEC) http://www.sec.gov/ 	<ul style="list-style-type: none"> Federal Deposit Insurance Corporation (FDIC) http://www.fdic.gov/ Occupational Safety and Health Administration (OSHA) http://www.osha.gov/ General Services Administration (GSA) http://www.gsa.gov/ National Aeronautics and Space Administration (NASA) http://www.nasa.gov/ Small Business Administration (SBA) http://www.sba.gov US Agency for International Development (USAID) http://www.usaid.gov/ National Science Foundation (NSF) http://www.nsf.gov/ Veterans Administration (VA) http://www.va.gov/ Office of Personnel Management (OPM) http://www.opm.gov/

due to crowd crush, crowd surge or crowd trampling.” Walmart’s managers and employees failed to provide effective prior crowd management training and did not use appropriate crowd management techniques to safely manage a large crowd of approximately 2,000 customers.

Administrative law is the collection of rules and decisions made by a huge number of administrative agencies. Just glance at Exhibit 1-4 to get a sense of the scope of a few of the major federal administrative agencies.

TREATIES

A **treaty** is a binding agreement between two states or international organizations. It may be an international agreement, a covenant, an exchange of letters, a convention, or protocols. In the United States, a treaty is generally negotiated by the executive branch. To be binding, it must then be approved by two-thirds of the Senate.

A treaty is similar to a contract in two important ways. Both treaties and contracts are attempts by parties to determine rights and obligations among themselves, and when a party fails to obey a treaty or a contract, international law imposes liability on it.

EXECUTIVE ORDERS

The president and state governors can issue directives requiring that officials in the executive branch perform their functions in a particular manner. The Code of Federal Regulations (CFR) contains all the executive orders created by the president.⁷ Presidents claim the power to issue such orders on the basis of their Article II, Section 1, constitutional power to “take care that the laws be faithfully executed.” President George W. Bush issued 284 executive orders during the eight years of his presidency.

⁷ <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CPD>

An especially controversial executive order is Order 9066, issued by President Franklin Roosevelt during World War II, which sent Japanese-Americans on the West Coast, as well as thousands of Italian-American and German-American families, to internment camps for the duration of the war.

Exhibit 1-5 summarizes the various locations where you can find particular laws.

SCHOOLS OF JURISPRUDENCE

When legislators or courts make law, they do so guided by certain habits of mind and specific beliefs about human nature. Beliefs are deeply rooted within a person's emotions and habits, and thus they are sure to guide one's opinions and decisions. Such beliefs may be commonly held and thus create various schools of thought.

Once we determine what schools of thought influence certain types of decisions and opinions, we can better understand such decisions. This section briefly describes several of the more common guides to legal interpretation.

Natural Law. The term **natural law** describes certain ethical laws and principles believed to be morally right and "above" the laws devised by humans. Under natural law, individuals have not only basic human rights but also the freedom to disobey a law enacted by people if their conscience goes against it and they believe it is wrong. Dow Chemical wants its suppliers to conform to US environmental and labor laws, not just the local laws in the supplier's country, where regulations may not be as stringent. This policy reflects the beliefs that people have a right to be treated fairly in their jobs and a right as human beings to have a clean environment.

Legal Positivism. The concept of **legal positivism** sees our proper role as obedience to duly authorized law. That law is quite distinct from morality, and moral questions

LO 1-6

Identify the various schools of jurisprudence.

Exhibit 1-5 Where to Locate the Law

SOURCE BY LEVEL OF GOVERNMENT			
TYPE OF LAW	FEDERAL	STATE	LOCAL
Statutes	United States Code (USC) United States Code Annotated (USCA) United States Statutes at Large	State code	Municipal ordinances
Administrative law	Code of Federal Regulations (CFR) <i>Federal Register</i>	State administrative code	Municipality administrative regulations
Common law	United States Reports (U.S.) United States Supreme Court Reporter (S. Ct.) Federal Reporter (F. F.2d) Federal Supplement (F.Supp.)	Regional reporters State reporters	Check the clerk's office at the local courthouse
Executive order	Title 3 of Code of Federal Regulations Codification of Presidential Proclamations and Executive Orders	See state government website	n/a
Treaty	See https://www.state.gov/s//treaty/text/	n/a	n/a