Rules of Consideration

LO 15-2 List the rules regarding consideration.

The key to understanding consideration is understanding the rules that govern it and their exceptions. We explore them below.

LACK OF CONSIDERATION

LO 15-3 Describe what promissory estoppel is and when it can be used.

A court will enforce one party's promise only if the other party promised some consideration in exchange. For example, in a bilateral contract (a promise for a promise), the consideration for each promise is a return promise. Suppose Maya's promises to pay Manuel $2,000 tomorrow for his car. Manuel promises to sell Maya his car tomorrow for $2,000. There is an oral contract between them. Maya's promise is her consideration to Manuel. Manuel's promise is his consideration to Maya. There has been a mutual exchange of something of value.

An example of a bilateral contract, or a promise for a promise, occurred when the US government seized control of insurance giant American International Group (AIG). The government agreed to lend AIG up to $85 billion in exchange for nearly 80 percent of AIG's stock. The consideration AIG received was the promise of up to $85 billion in US government loans. The consideration the government received was a promise of almost 80 percent of AIG's stock.[2]

In a unilateral contract (a promise for an act), one party's consideration is the promise and the other party's consideration is the act. Suppose your professor made the following statement in class: "If any student shows up at my house on Saturday and does the gardening, I will pay that student $100." You show up and do the gardening. The professor's consideration to you is the promise of the payment of $100 on completion of the gardening, and your consideration to the professor is the act of completing the gardening. Once again, there has been a mutual exchange of something of value.

See Exhibit 15-2 for an explanation of bilateral and unilateral contracts.

Exhibit 15-2 Type of Consideration Based on Type of Contract

TYPE OF CONTRACT	PROMISOR	PROMISEE
Bilateral	A promise	A promise
Unilateral	A promise	An act

Legal Principle: For a promise to be enforced by the courts, there must be consideration.

One exception to the rule requiring consideration is **promissory estoppel**. Promissory estoppel occurs when three conditions are met:

- One party makes a promise and either knows or should know that the other party will reasonably rely on it.
- The other party does reasonably rely on the promise.
- The only way to avoid injustice is to enforce the promise.

How does promissory estoppel work? Suppose upon graduation from college, Amanda receives a job offer across the country. She gives up her apartment, cancels all her other job interviews, and moves all her possessions. Upon arriving, she rents a new apartment and shows up for work. Amanda is then told there is no job! May she sue the employer? The answer in most states is yes, under the theory of promissory estoppel. Amanda may be able to recover her *reliance damages* (money she spent in "reliance" on the job offer). Promissory estoppel is not awarded regularly, but in the right case it can provide a remedy where no other remedy exists.

In a recent case, the Ninth Circuit Court of Appeals held that Yahoo's promise to remove a nude photo from its website was subject to a claim of promissory estoppel. In that case, the plaintiff learned that her ex-boyfriend, pretending to be her, had posted nude photos of her on Yahoo. He also included all her contact information and an invitation for men to contact her for sexual purposes.[3] The plaintiff contacted Yahoo (in accordance with its established policies) and requested that the photo be removed. Yahoo agreed but, despite repeated requests, did not remove the photo for six months. The court held that Yahoo's promise to remove the profile meant that Yahoo had a duty to the plaintiff. As such, the plaintiff's claim of promissory estoppel could be maintained. If the plaintiff is able to prove that she reasonably relied on Yahoo's promise to her detriment, she may well prevail on her claim for damages.

? BUT WHAT IF …

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Recall, in the Case Opener, that the attorney for the Upper Deck Company was a very wealthy attorney who invested $100,000 in the company for a 3 percent share. But what if the attorney was not very wealthy, invested in the company at extreme financial risk to himself, and was promised a quick return on the money, which did not get returned. If the attorney could prove that he reasonably relied on the promise of the company to his detriment, could promissory estoppel be awarded?

CASE: NUGGET

LACK OF CONSIDERATION

McLellan v. Charly 313 Wis. 2d 623, 758 N.W.2d 94 (2008)

The property in dispute is owned by Charly and located between the University of Wisconsin's Harlow Primate Psychology Laboratory and the Wisconsin National Primate Research Center. In July 2004, Rick Bogle, an animal rights activist, met with Charly to ask about purchasing the property. Bogle informed Charly he wanted to use the property for a National Primate Research Center Exhibition Hall, and Charly said he would sell the property to Bogle.

Meanwhile, Charly and McLellan executed a document titled "Option to Purchase" that granted McLellan the option of purchasing the property for $675,000 within 180 days. The agreement contained detailed provisions on the terms of the sale, including leaseback and repurchase provisions.

In June 2005, Bogle organized a rally at the property and posted a sign reading "Future Home of the National Primate Research Exhibition Hall," which contained a picture of a monkey with a device screwed into its skull. Charly had agreed the sign could be put up. Soon after the rally, a University representative called Charly to express its opposition to having the exhibition hall on the property and said the University was still interested in the property. Charly responded that he still wanted $1 million for the property.

Shortly thereafter, Charly took the agreement he and McLellan had signed to another attorney. In a letter to McLellan on Charly's behalf, the attorney stated that the option was "voidable and void due to lack of consideration" and offered to enter into an option with different terms. McLellan declined to do that.

On August 1, 2005, Charly received a proposed option to purchase from the University under which the University had the option of purchasing the property for $1 million. On August 12, 2005, McLellan attempted to exercise his option to purchase the property, but the envelope was returned to him unopened. Through counsel, Charly informed McLellan there was no enforceable option and he declined to sell the property to him.

> On appeal Charly contends the circuit court erred in determining the leaseback and repurchase provisions were adequate consideration for the option. Among other reasons, he asserts the consideration required to make an option a binding contract must be separate from the consideration for the sale and therefore cannot be satisfied by the terms negotiated for the sale....
>
> With respect to the claims for breach of the option, we conclude that, in order to make the option a binding contract, consideration is required that is separate from the consideration for the sale. We further conclude that the leaseback and repurchase provisions are not consideration separate from the consideration for the sale.... Charly was therefore free to revoke the option.

A second exception to the rule requiring consideration is a *contract under seal.* In the past, contracts were sealed with a piece of soft wax into which an impression was made. Today, sealed contracts are typically identified with the word *seal* or the letters *L.S.* (an abbreviation for *locus sigilli*, which means "the place for the seal") at the end. Consumers may also purchase contract forms with a preprinted seal. The parties using them are presumed, without evidence to the contrary, to be adopting the seal for the contract. States in the United States no longer require that contracts be under seal. However, 10 states still allow a contract without consideration to be enforced if it is under seal.

Legal Principle: **Promissory estoppel and contracts under seal are two exceptions to the common law rule requiring consideration.**

ADEQUACY OF CONSIDERATION

The court does not weigh whether you made a good bargain. Suppose Donna purchases a flat-screen TV from Celia, a friend in her business law class. Donna pays $500 for the TV but later realizes it is worth less than $100! May Donna sue Celia? Typically, the answer is no. It is Donna's responsibility to do her research and determine what price she should pay. The court will not set aside the sale because she made a bad deal. Conversely, if the court believes fraud or undue influence occurred, the court may look at adequacy of consideration. (For example, suppose a person divests himself of all his assets for pennies on the dollar and then declares bankruptcy—the court would likely review the consideration paid to determine whether there was fraud by the debtor against the creditors.)

CASE: NUGGET

PROMISSORY ESTOPPEL

Ruzicka v. Conde Nast Publishing 999 F.2d 1319 (1993)

Claudia Dreifus wrote an article for Glamour magazine relating to therapist-patient sexual abuse. She promised she would not reveal the identity of the subject, Jill Ruzicka, whom she interviewed for the article. Ruzicka argued that Dreifus promised that she would not be "identified or identifiable" in the article. Dreifus refuted this, claiming that she only vaguely promised to do some masking. The article was published with Ruzicka's surname changed to **"Lundquist,"** but included other information that made her "identifiable."

In order to prevail on a claim for promissory estoppel, the plaintiff must prove (1) that the promise was clear and definite; (2) that the promisor intended to induce reliance on the part of the promisee and that such reliance occurred to the promisee's detriment; and (3) that the promise must be enforced to prevent injustice. The district court granted motion for summary judgment against plaintiff, finding that the term "identifiable" was vague, and therefore holding that the promise was not "clear and definite" enough to support recovery under promissory estoppel.

On appeal, the Eighth Circuit held that, to be enforceable under promissory estoppel, a promise need not be as definite with respect to all details as promises forming conventional contracts. The appellate court also pointed out that Ruzicka approved an early draft of the article, but what was ultimately published revealed several identifying facts that Ruzicka had not provided to Dreifus. The Eighth Circuit Court of Appeals ruled in favor of Ruzicka. The court further opined that, based on US Supreme Court precedent, enforcing the promise would not be unfair to the media defendant: "Where the press feels disclosure of [the] identity of a confidential source is valuable to the story and thus disregards its promise, the payment of compensatory damages is . . . simply a cost of acquiring newsworthy material to be published at a profit."

? BUT WHAT IF ...

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Recall, in the Case Opener, that the company attorney Passante invested $100,000 into the Upper Deck Company so that it could produce hologram baseball cards. In return, Passante received a 3 percent share of the company. What if the hologram baseball cards were not successful and the company filed for bankruptcy? If Passante made a bad investment and did not receive a return on his money, could he sue the company for damages?

CLASSIC CASE 15-1

HAMER v. SIDWAY

COURT OF APPEALS OF NEW YORK 124 N.Y. 538 (1891)

Plaintiff sought to enforce against the defendant estate a promise made by his now-deceased uncle to pay Plaintiff a sum of money if Plaintiff refrained from the use of alcohol and tobacco for a period of years. Plaintiff so refrained and sought recovery of the sum promised.

J. PARKER In 1869, William Story, 2d, promised his nephew that if he refrained from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he was 21 years of age, then he would pay him the sum of $5,000. William Story, the nephew, agreed and fully performed.

The defendant (the deceased uncle's estate) now contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the nephew, by refraining from the use of liquor and tobacco, was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the nephew was benefited, the contract was without consideration. This contention, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement.

Such a rule could not be tolerated, and is without foundation in the law. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future. Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. He abandoned that right for a period of years based upon the promise of his uncle that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement. Now, having fully performed the conditions imposed, it makes no difference whether such performance was actually a benefit to the promisor, and the court will not inquire into it. Even if it were a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. It is deemed established for the purposes of this appeal, that on January 31, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5,000. All concur.

The order reversing the trial court judgment in favor of plaintiff is reversed on the grounds that plaintiff's promise to abandon his legal right to use tobacco and alcohol was sufficient consideration to enforce the contract.

CRITICAL THINKING

What difference would it have made in this case had the nephew not had the legal right to drink or smoke? Why is this question crucial to the decision?

ETHICAL DECISION MAKING

William Story, 2d, may well have thought that he should win the case on moral grounds. He is applauding his nephew's behavior in recognition that the behavior the nephew stopped was behavior that was harming his nephew. So, since his nephew is now in better condition than he was before their exchange of views, why does the court put itself in the position of requiring William Story, 2d, to pay the $5,000?

COMPARING THE LAW OF OTHER COUNTRIES

WHERE IS ENFORCING CONTRACTS EASIEST?

Every year, the World Bank publishes its Doing Business Rankings,[4] which rate countries by ease of doing business. In the category “Enforcing Contracts,” the United States is ranked number 17. Compare that with Bangladash, which is ranked 189 or China, ranked number 5. The rankings consider overall ease of enforcing contracts, which includes the time and cost for resolving a commercial dispute through a local first-instance court, the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality, and finally, efficiency of the court system.

EASIEST	RANK
Singapore	1
Korea	2
Norway	3
Kazakhstan	4
China	5
Australia	6
Lithuania	7
Estonia	8
United Arab Emirates	9
Austria	10
***United States**	**17**
***Bangladesh**	**189**

ILLUSORY PROMISE

LO 15-4 Define illusory promise.

What is an illusory promise? Suppose Shawn offers to sell Molly his skis for $300. Molly responds, “I’ll look at them in the morning, and if I like them, I’ll pay you.” At this point, Molly has not committed to doing anything. The law considers this an illusory promise–it is not a promise at all.

Legal Principle: An illusory promise is not consideration.

Legal Principle: **An illusory promise is not consideration.**

BUT WHAT IF ...

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say that, in the Case Opener, Passante was approached by executives of the Upper Deck Company and they asked him to invest money into their company so that they could purchase hologram baseball cards. In response, Passante told them, "That sounds like a good idea. I'll have my financial adviser call you for more details." Is Passante making a contractual promise to the company? What is the term for his type of response in this situation?

PAST CONSIDERATION

For a court to enforce a promise, both sides must offer consideration. Imagine you graduate from college and get a great job. After five years, your boss says to you, "Because you have done such a great job the last five years, I am going to give you 5 percent of the company stock." Six months later, you still have not received the stock. May you sue your boss to enforce the promise? The answer is no. For a promise to be enforceable, there must be bargaining and an exchange. Because your work has already been performed, you have given nothing in exchange, and the court will not enforce the promise. A promise cannot be based on consideration provided before the promise was made. You are at the mercy of your boss's goodwill.

Legal Principle: **Past consideration is no consideration at all.**

As you have probably guessed by now, there is an exception to this rule. Under the Restatement (Second) of Contracts (a persuasive, though not binding, authority), promises based on past consideration may be enforceable "to the extent necessary to avoid injustice." In some cases, if past consideration was given with expectation of future payment, the court may enforce the promise.

In **Case 15-3**, the court must decide whether a husband's promise to pay his wife's sisters a share of a life insurance policy for caring for her while she was sick was compensable when the promise was made after the death of his wife.

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In **Case 15-3**, the court must decide whether a husband's promise to pay his wife's sisters a share of a life insurance policy for caring for her while she was sick was compensable when the promise was made after the death of his wife.

CASE 15-3 STATE v. BLAKE

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY 2015 OHIO 4762 (2015)

Defendant Kenneth Blake was married to Charlene Hinton-Blake, who died in 2012. Three of Hinton-Blake's sisters, including Yvonne Hinton, assisted her with day-to-day care during a four-year period of illness preceding her death. Following Hinton-Blake's death, it was discovered that Blake was to receive $260,000 from a life insurance policy. Blake agreed to give Hinton-Blake's three sisters half of the insurance proceeds to be divided equally among themselves. To this end, Blake and the sisters prepared a notarized document to evidence their agreement. Yvonne Hinton stated that Blake chose to share the insurance proceeds with the sisters because he knew they had helped care for Hinton-Blake prior to her death. Blake received the insurance proceeds in June 2012 and wrote two checks to himself for $100,000 each. He then wrote checks to Yvonne Hinton in the amounts of $22,000 and $100,246. The $22,000 check cleared but the $100,246 check was returned due to insufficient funds. Blake was criminally charged and pled guilty to one count of passing bad checks and was referred for a presentence investigation report. At sentencing, the trial court ordered Blake to pay restitution in the amount of the bad check, $100,246, and imposed a 180-day jail term along with five years of community control sanctions. Blake appeals, challenging only the order of restitution.

PRESIDING JUDGE EILEEN A. GALLAGHER We review an order of restitution under the abuse of discretion standard. An abuse of discretion means more than a mere error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. [The criminal statute] authorizes a trial court to impose restitution as part of a felony sentence "in an amount based on the victim's economic loss." [It] defines "economic loss" as any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense. Blake argues that the act of passing a bad check cannot proximately result in economic loss to the victim when that check does not clear. We disagree. This court has previously upheld restitution in the amount of a bad check pursuant to a conviction for passing bad checks where economic loss was established.

Although the act of passing a bad check can result in economic loss, we find that the trial court abused its discretion in ordering restitution in this instance because the victims suffered no economic loss as their agreement with Blake was not enforceable due to a lack of consideration and that Blake's act of passing the bad check did not result in a completed gift.

[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. The record from the trial court's sentencing hearing reflects that there was no consideration to support the underlying agreement between Blake and the victims. The victims' actions in caring for Blake's wife prior to her death cannot satisfy the consideration element because past consideration, having already occurred, cannot be a bargained-for benefit or detriment.

We hold that the trial court abused its discretion in ordering restitution in this instance because Blake's agreement with the victims was not supported by consideration and his passing of the bad check did not complete a gift. Therefore, the victims did not suffer the type of economic loss required under [the criminal statute] to support an award of restitution. The judgment of the trial court is reversed, and the order of restitution is vacated.

PREEXISTING DUTY

There are two parts to the **preexisting duty** rule. *Performance of a duty you are obligated to do under the law is not good consideration.* Part of a police officer's sworn public duty is catching suspected criminals. If someone offers a reward for the capture of a suspect, the police officer may not collect it, as he or she was already obligated to apprehend the suspect. Moreover, *performance of an existing contractual duty is not good consideration.* Gene decides to have a pool built in his backyard. Under the existing contract, the pool is to be completed by June 1, just in time for summer. The pool contractor then explains that due to a shortage of workers, the completion date cannot be met; however, if Gene were to pay an extra $5,000, additional workers could be hired and the pool completed on time. Gene tells the contractor he will pay the $5,000. On June 1, the pool is completed and the contractor asks for the additional payment. Is Gene legally obligated to pay? The answer is no. The pool contractor had a preexisting contractual duty to complete the pool by June 1. Gene is under no obligation to pay the additional money.

Legal Principle: **A promise to do something that you are already obligated to do is not valid consideration.**

BUT WHAT IF …

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Recall that, in the Case Opener, Passante agreed to invest $100,000 in the Upper Deck Company so that he could own 3 percent of it. But what if the company told Passante that its sales were sinking and that if he didn't agree to invest another $50,000, the company would go bankrupt and Passante would receive no return on his investment? Suppose Passante agrees. If a month later the company came to collect the $50,000, does Passante legally have to pay the extra money because he told the company he would?

Exceptions to the Preexisting Duty Rule

There are exceptions to the preexisting duty rule: unforeseen circumstances, additional work, and UCC Article 2 (sale of goods).

If *unforeseen circumstances* cause a party to make a promise regarding an unfinished project, that promise is valid consideration. Suppose the pool contractor has been building pools in Gene's neighborhood for the last 20 years and has never had any problem with rocks–until now. While bulldozing the hole for the pool in Gene's backyard, the pool contractor hits solid rock. It will cost an additional $5,000 to clear the rock with jackhammers, possibly even dynamite. The contractor says unless Gene agrees to pay the additional money, he will not be able to finish the pool. Gene agrees to pay. When the pool is completed, the contractor asks for the additional $5,000. Will a court enforce Gene's promise? The answer is yes. Even though the contractor is completing only what he was obligated to do under the contract, neither party knew of the solid rock. The contractor has given additional consideration (removal of the rock) and Gene will be held to his promise to pay the additional money.

If a party to a contract agrees to do *additional work* (more than the contract requires), the promise to do it is valid consideration. If the contractor asks Gene for an additional $10,000 but agrees to add a waterfall and a deck to the pool, the promise to do the additional work is consideration. If Gene agrees to pay the $10,000, that is his consideration. Both parties are now bound.

Partial Payment of a Debt

LO 15-5 Differentiate between liquidated debt and unliquidated debt.

Partial payment of a debt may or may not be valid consideration, depending on whether the debt is liquidated or unliquidated. In a **liquidated debt**, there is no dispute that money is owed or how much. Natalie calls her credit card company and explains she is a poor student and cannot afford to pay the entire $3,000 she owes. The credit card company agrees to accept $2,000 as payment in full. The following month, Natalie receives her new credit card statement showing she owes the remaining $1,000. May the credit card company collect the additional $1,000? Yes! A creditor's promise to accept less than owed, when the debtor is already obligated to pay the full amount, is not binding.

The exception to the rule regarding liquidated debt occurs when the debtor offers different performance. Suppose Natalie offered the credit card company her car in full settlement of the $3,000 debt. If the credit card company accepts, regardless of the value of the car, the debt is paid in full and the credit card company may not sue Natalie for any additional money.

LO 15-6 Describe the concept of accord and satisfaction.

In an **unliquidated debt**, the parties either disagree about whether money is owed or dispute the amount. They can settle for less than the full amount if they enter into an **accord and satisfaction**, which must meet three requirements to be enforceable:

1. The debt is unliquidated (the amount or existence of the debt is in dispute).
2. The creditor agrees to accept as full payment less than it claims is owed.
3. The debtor pays the amount they have agreed on.

Under these circumstances, the debt is fully discharged. The *accord* is the new agreement to pay less than the creditor claims is owed. The *satisfaction* is the debtor's payment of the reduced amount. It pays to keep your word: If the debtor fails to pay the new amount, the creditor may sue for the full amount of the original debt. **Exhibit 15-3** clarifies the accord-and-satisfaction process.

LEARNING OBJECTIVES

18-1 Describe the purpose of the statute of frauds.
18-2 Recognize the types of contracts that require a writing to satisfy the statute of frauds.
18-3 Recognize what a writing must contain to satisfy the statute of frauds.
18-4 Describe the purpose of the parol evidence rule.

CASE OPENER

Admissibility of an Oral Contract in Court

Monroe Bradstad borrowed $100,000 from his aunt, Jeanne Garland, to purchase farmland. Both parties subsequently signed a promissory note stipulating that interest would be accrued prior to or on January 1, 1992. After that, payments and interest would be made on January 1 of each following year, with the final balance due on January 1, 2010. The land was used as security for the note; thus, Branstad executed a mortgage. Branstad paid a total of $33,000 from 1993 to 1997. In 1998, Branstad and Garland had a falling out, and Garland served Branstad with a notice to pay $43,998 in past-due interest. However, Branstad and his wife claimed that they had made a subsequent oral agreement with Garland that they would manage and spend money on her other properties in lieu of paying interest. Garland argued that there was no oral agreement and that any oral evidence would be inadmissible in court due to the parol evidence rule. Branstad argued that the oral agreement was made after the written contract was created, not before or during, and thus the oral contract was a separate contract and not subject to the parol evidence rule.

1. Does it matter when the oral contract was made in relation to when the written contract was created?

2. Why might it be ethically important for the court to hear the subsequent oral agreement made between Branstad and Garland?

The Wrap-Up at the end of the chapter will answer these questions.

BUT WHAT IF ...

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say that Branstad buys a tractor from Garland. Branstad makes an agreement to pay Garland back in full, but his father makes a promise to pay for the tractor in case Branstad fails to complete his payments. Garland says that there needs to be a written contract explaining the father's promise according to the statute of frauds. Is Garland correct?

CONTRACTS RELATED TO AN INTEREST IN LAND

Within the statute of frauds, "land" encompasses not only the land and soil itself but anything attached to the land, such as trees or buildings. Because the statute requires a writing as evidence of the contract, a claim to an oral contract for the sale of land is not enough to prove such a contract existed.

Contracts transferring other interests in land are also within the statute of frauds. Mortgages and leases are within the statute because they are considered transfers of interest in land.

Determining exactly what constitutes an "interest in land" within the statute of frauds is difficult. A number of things that seem as if they are interests in land do not fall within the statute. For example, promises to sell crops annually, agreements between parties for profit sharing from the sale of real property, and boundary disputes that have been settled through the use of land are all outside the statute of frauds and, therefore, do not require evidence in writing. The nearby Case Nugget presents a case related to land in which the parties disagreed as to whether a writing was needed.

CONTRACTS FOR THE SALE OF GOODS TOTALING MORE THAN $500

Agreements for a sale in which the total price is $500 or more are required by the UCC, Section 2-201, to be recorded in a written contract or a memorandum. This writing need only state the quantity to be sold; buyer, seller, price, and method of payment do not need to be included. In fact, terms other than quantity can be inexact or left out of the writing as long as what is written does not contradict the parties' agreement about them. The contract will be enforceable for the stated quantity and not a unit more. Furthermore, for the contract to be enforceable, both the UCC and the statute of frauds require that the party against whom action is sought must have signed the written document.

Suppose Donnie and Gretchen enter into a sales contract. Donnie wrote the agreement, and Gretchen was the only party to sign. Later, Donnie attempts to enforce the agreement against Gretchen for the agreed-to quantity. Because Gretchen signed it, Donnie can bring suit against her. However, because Donnie did not sign the agreement, Gretchen can neither sue nor countersue him.

Other situations under the UCC that require contracts in writing are the lease of goods and the sale of securities[5] and personal property6 if the price is greater than $5,000.

PARTIAL PERFORMANCE

Although the statute of frauds requires a writing for sales of interests in land, under the **partial-performance** exception, if the buyer in an alleged contract for the sale of land has paid any portion of the sale price, has begun to permanently improve the land, or has taken possession of it, the courts will consider the contract partially performed and this partial performance will amount to proof of the contract.

Accordingly, partial performance can override the statute's requirement for a written agreement. The logic here is that the actions of both parties demonstrate the existence of their agreement, so the agreement no longer needs to be in writing to be enforceable. Under similar sections of the UCC, an oral contract is enforceable by the buyer or seller to the extent that he or she accepts payment or delivery of the goods in question.[10]

BUT WHAT IF ...

WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT?

Let's say that Branstad bought land from Garland. Although such an agreement requires a writing, the two parties made only an oral agreement. Shortly after the agreement, Branstad began making payments and fixing up the land. Garland subsequently denied any agreement being made. Could some of Branstad's actions following the agreement be proof of the agreement? Could the court recognize the oral agreement as a valid contract?

PROMISSORY ESTOPPEL

Under certain circumstances, when a party relies on an oral contract that within the statute of frauds is required to be in writing, the reliance can create a situation in which the contract is nevertheless enforceable. **Promissory estoppel** is the legal enforcement of an otherwise unenforceable contract due to a party's detrimental reliance on the contract.

For promissory estoppel to be in effect, the party's reliance must be to her own detriment. Furthermore, the reliance must have been reasonably foreseeable; that is, the party who did not rely on the contract should have known the other party was going to rely on it.[11]

Suppose you enter into a contract to buy a house after having accepted an offer on your current house. The new house costs more than the price you are getting for your old house, and the person from whom you are buying knows about the sale of your old house and the difference in prices. To come up with the price difference, you sell your collection of rare coins. Unfortunately, however, you forget to create a written contract for your purchase of the new house, and the other person refuses to sell it to you. You are now homeless and have sold off your only real assets. Because the other person reasonably should have known you were relying on the contract, and because you did so to your own detriment, under promissory estoppel you could win performance of the sales contract.

This argument is not an easy one to make, however. For example, when Cheesecake Factory tried to argue that it should have been entitled to rely on a bank's oral representation that a loan would be approved, the court said that the firm's reliance on such representations was not reasonable. Further, the time between the representation and the firm's discovery that it would not receive the loan was so brief that the reliance could not have been that detrimental.[12]

EXCEPTIONS UNDER THE UCC

Exceptions also exist under the UCC. For instance, oral contracts between merchants need not be in writing to be enforceable. If one merchant agrees to sell goods to another, the contract is enforceable even if it is not in writing.

Capacity

LO 16-1 Recall the legal effect of lack of capacity on a person's ability to enter into a contract.

Capacity is the third element of a legally binding contract. A person who has legal capacity has the mental ability to understand his or her rights and obligations under a contract and therefore, presumably, to comply with the terms. *Incapacity*, or *incompetence* as it is sometimes called, is the possession of a mental or physical defect that prevents a natural person from being able to enter into a legally binding contract. Depending on the nature and extent of the defect, a person may have either no capacity, the complete inability to enter into contracts, or limited capacity, the ability to form only voidable contracts.

Historically, people with limited or no capacity included married women, minors, and insane persons. Other categories were added by statutes, such as people for whom guardians had been appointed, including habitual drunkards, narcotic addicts, spendthrifts, the elderly, and convicts. Today, married women have been removed from the category of those lacking contractual capacity, although in a few states their capacity to enter into certain kinds of contracts is still limited. In this section of the chapter, we explain the current law limiting the capacity of some categories of persons to enter into legally binding agreements.

LO 16-2 Recognize circumstances wherein a party would have limited capacity to enter into a contract.

MINORS

One of the oldest limitations on capacity is the fact that minors may enter into only voidable contracts. Today, in all but three states, a *minor* is someone under the age of 18.[2] In most states, however, a person is given full legal capacity to enter into contracts when he or she becomes emancipated before reaching the age of majority. *Emancipation* occurs when a minor's parents or legal guardians give up their right to exercise legal control over the minor, typically when the minor moves out of the parents' house and begins supporting himself or herself. Often, the minor will petition the court for a declaration of emancipation. In most cases, when a minor marries, that minor is considered emancipated.

Legal Principle: **As a general rule, any contract entered into by a minor is voidable by the minor until the minor reaches the age of majority or a reasonable time thereafter.**

Disaffirmance of the Contract

Because their contracts are voidable, minors have the right, until a reasonable time after reaching the age of majority, to disaffirm or void their contracts. Note that it is only the minor who has the right to disaffirm, never the adults with whom the minors entered into agreements. No formalities are required to disaffirm the contract; the minors need only show an intention to rescind it, either by words or actions. However, the minors must void the entire contract; they cannot choose to disaffirm only a portion of it. **Case 16-1** below provides an illustration of how the court sometimes grapples with the issue of whether to allow a minor to disaffirm a contract.

The minor's obligations on disaffirmance vary from state to state. Traditionally, most states simply required the minor to notify the competent party and return any consideration received, regardless of its condition. If the consideration had been damaged or destroyed, the other party had no recourse against the minor. For instance, if Rafael, a minor, purchased a flat-screen TV from Sound Systems, Inc., under a six-month contract and dropped the TV a week after taking it home, Rafael could return it in its broken condition and tell the store owner he wished to rescind the contract. Rafael would be entitled to the return of his down payment and would owe no further obligations to the store.

The traditional rule makes sense if we view minors as innocents in need of protection from competent adults who would otherwise take advantage of them. However, it is not going to encourage competent parties to enter into contracts with minors, and some argue that it allows a knowledgeable and unethical minor to take advantage of a competent party. Thus, a number of states have modified the duty of the minor on disaffirmance, holding that the minor has a duty of restitution, requiring that she or he place the competent party back in the position that party was in at the time the contract was made. In these states, Rafael would have a duty of restoration that would require him to compensate the store owner for the difference between the value of the TV when he got it and when he returned it.

The disaffirmance must occur before or within a reasonable time of the minor's reaching the age of majority. What constitutes a reasonable time is determined on a case-by-case basis. But even when the courts scrutinize the cases individually, the laws created to protect minors from being victimized by competent adults do not necessarily protect competent adults from being taken advantage of by knowledgeable and unethical minors. Thus, individuals operating or working in businesses subject to laws requiring that their customers be the age of majority or older must familiarize themselves with the laws pertaining to minors, because, often, the responsibility of making sure that a business is dealing with people who are of legal age falls on the employees and the owner. However, since some minors use false identification or misrepresent themselves as adults, it is difficult for business owners and employees to recognize which customers are truly of age.

For example, as CEO of Girls Gone Wild (GGW), Joe Francis runs a business that requires he be familiar with the laws surrounding minors. In fact, Francis has said that GGW has very specific procedures in place to prevent filming underage girls and even teaches its camera crew ways to ensure that the girls the crew is selecting to appear in GGW spring break videos are of age. During the selection procedure, the GGW camera crew is required to check the IDs of girls wanting to be filmed, obtain signed written release forms in which the girls give their consent to be filmed, and videotape the girls' IDs as well as the actual process of signing the release forms. Regardless of the company's strict policies, Francis found himself in the middle of a heated legal battle in 2003 when seven girls claimed that they were underage when the GGW camera crew filmed them on vacation in Panama City, Florida. Francis fought back, saying that the girls misrepresented themselves, knowingly sought out the GGW crew, and wanted to exploit the company in order to obtain a monetary settlement. After four years of court proceedings and intense media coverage, Francis reached an undisclosed settlement with the women, who reportedly wanted a total of $70 million.[3]

CASE: NUGGET

A MINOR'S ABILITY TO AVOID A BINDING ARBITRATION CLAUSE

Cherdak v. ACT, Inc. 437 F. Supp. 3d 442 (D. Md. 2020)

When you sign up for the ACT online, you must agree to its terms and conditions. You must also affirm the agreement on the answer sheet itself during the test. The ACT's test-taking terms include an agreement to arbitrate all disputes with ACT. But is the arbitration agreement enforceable if the test taker was a minor when he registered and took the test?

In December 2017, Harrison Cherdak took the ACT and earned a 24 out of 36. Cherdak retook the test in April 2018 and scored a 32. Five months later, ACT informed Cherdak they were conducting an Individual Score Review (ISR) because of apparent irregularities in his April 2018 test. Among other reasons, ACT stated that Cherdak's eight-point increase was atypical. Cherdak sent documentation to support his score and even took a private retest, but the ACT did not accept the April 2018 test's validity. At this point, Cherdak had reported his scores for college admissions and had already received a scholarship.

Cherdak filed a lawsuit seeking a court order to prevent ACT from canceling the April 2018 score. ACT removed the case to Maryland and moved to compel arbitration under the FAA. At issue was whether the arbitration clause was voidable because Cherdak was a minor. The court cited Maryland caselaw that stated minors may void "contracts entered into by them with adults under the presumption that unequal bargaining power always exists between the two…" Under Maryland law, children can cancel any contract while still being liable for services, clothes, or medical treatment already rendered.

ACT argued that even though Cherdak was a minor when he registered, he was still bound by it because the registration process asked if an adult assisted him. The court scoffed at that argument and dismissed ACT's motion to compel arbitration, stating "[h]ad ACT wanted a binding arbitration clause that was not voidable under Maryland law, it would have required a parent or legal guardian to sign with or on behalf of the underaged test taker."

Exceptions to the Minor's Right to Disaffirm the Contract

The minor's right to disaffirm is designed to protect the minor from competent parties who might otherwise take advantage of him or her. But primarily for public policy reasons, in most states, courts or state legislatures have determined that the minor should *not* have the right to disaffirm contracts for life insurance, health insurance, psychological counseling, the performance of duties related to stock and bond transfers and bank accounts, education loan contracts, child support contracts, marriage contracts, and enlistment in the armed services.

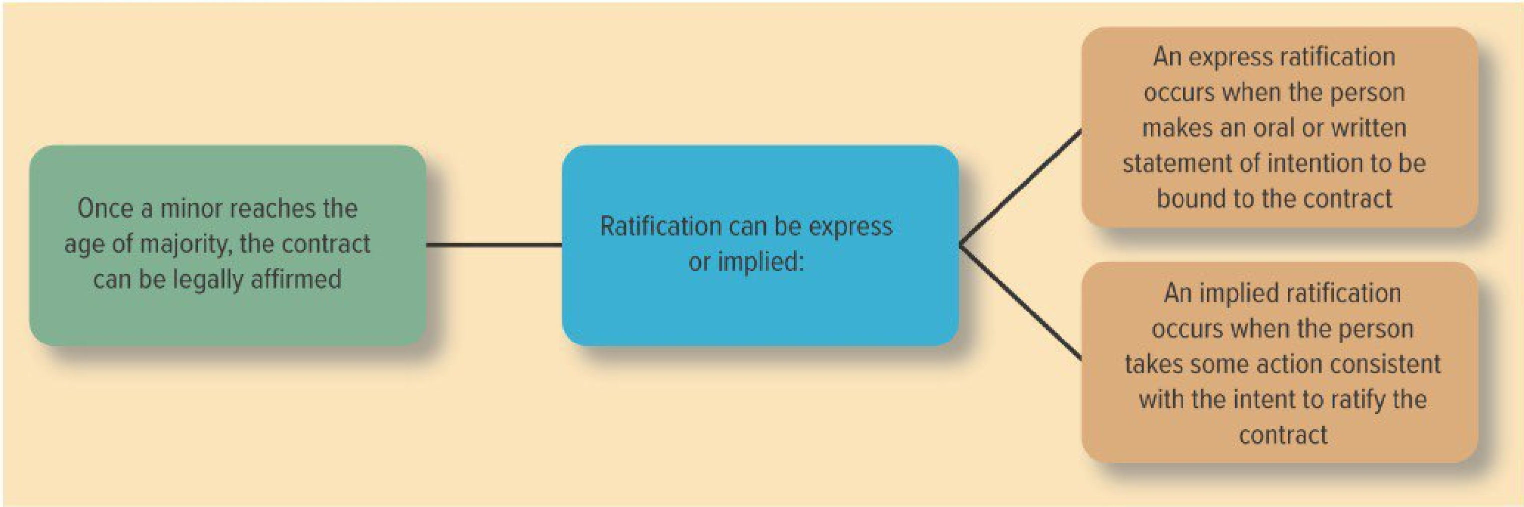
Most of these exceptions apply in most, but not all, states. Another issue on which the states disagree is what should happen when a minor misrepresents his or her age. While the majority rule is that a minor's misrepresentation of age does not affect the minor's right to disaffirm the contract, some states hold that when a minor who appears to be of the age of majority misrepresents his or her age and a competent party relies on that misrepresentation in good faith, the minor gives up the right to disaffirm the agreement and can be treated as an adult. One justification for this rule is that any minor who is going to misrepresent his or her age does not need the protection that disaffirmance is designed to provide.

Food, clothing, shelter, and basic medical services are clearly necessaries, but it is sometimes difficult to determine whether something is in fact a necessary. Some courts define a necessary as what a minor needs to maintain his or her standard of living and financial and social status, but this can lead to a problem when an item considered a necessary for a child of upper-income parents is a luxury to a child of lower-income parents. Whether an item is considered a necessary also depends on whether the minor's parents are willing to provide it. Clearly, the games in the opening scenario would not be considered necessaries!

Ratification

Once a person reaches the age of majority, he or she may ratify, or legally affirm, contracts made as a minor. Once ratified, the contract is no longer voidable. Ratification may be either express or implied (see **Exhibit 16-1**).

Exhibit 16-1 Ratifying a Contract



An *express ratification* occurs when, after reaching the age of majority, the person states orally or in writing that he or she intends to be bound by the contract entered into as a minor. For example, when she is 17, Marcy enters into an agreement to purchase an automobile from Sam for 10 monthly payments of $1,000. After making the fifth payment, Marcy turns 18 and decides to move out of state. She emails Sam and tells him not to worry because, even though she is moving, she still intends to make her monthly payments to purchase the car. Marcy has expressly ratified the contract.

An *implied ratification* occurs when the former minor takes some action after reaching the age of majority consistent with intent to ratify the contract. Going back to the previous example, if the day after she turns 18 Marcy enters into an agreement with Joe to sell him the car in six months, that action is obviously consistent with intent to finish purchasing the car, so she has impliedly ratified the contract with Sam. Most courts find that continuing to act in accordance with the contract, such as continuing to make regular payments after reaching the age of majority, constitutes ratification. So, if (without the agreement with Joe) Marcy continued using the car and making payments on it for several months after reaching the age of majority, the courts would probably find that she had ratified the contract.

Parents' Liability for Their Children's Contracts, Necessaries, and Torts.

As a general rule, parents are not liable for contracts entered into by their minor children. Thus, merchants are often reluctant to enter into contracts with minors unless some competent person is willing to cosign and become legally bound to perform if the minor no longer wishes to live up to the terms of the contract. Parents do, however, have a legal duty to provide their children with the basic necessities of life, such as food, clothing, and shelter. Thus, they may be held liable in some states for the reasonable value of necessaries for which their children enter into contracts.