

Genuineness of Assent

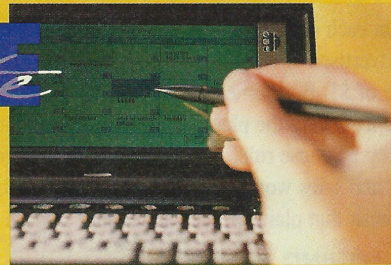
7-1 Duress and Undue Influence

7-2 Mistake, Misrepresentation, and Fraud

HOT DEBATE

Responding to an ad from the local electronics store, your friend buys a personal data assistant (PDA) for \$250, including a foldout keyboard and a portable printer. The keyboard and printer were shown with the PDA in the ad but noted as optional equipment.

In her excitement, your friend signs the credit card sales receipt, which is not itemized. She fails to note that the two items add an extra \$198 to the price. When the credit card statement listing the total purchase price of \$448 plus sales tax arrives, your friend objects.



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Where Do You Stand?

1. State two reasons why it would be fair to allow your friend to withdraw from the contract.
2. State two reasons why it would be fair for your friend to be bound to the contract.
3. Which reasons are more persuasive?

▼ GOALS

- Recognize when genuine assent is not present
- Identify the two key elements in undue influence

GENUINE ASSENT AND DURESS

WHAT'S YOUR VERDICT?

Cameron owned a promising race-horse that Link had offered to buy for undisclosed parties. When Cameron refused to sell, Link lowered his voice and slowly said, "Listen, the people I represent don't take 'no' for an answer. If you don't sell, they'll hurt you. They'll hurt your family. Like a good friend, I'm telling you to sell. You're getting a fair price, just sign the contract." Cameron, who had secretly recorded the conversation, sold. Then he called the police.

Can he now rescind and get his horse back?

Whether oral or written, an agreement will be treated as valid (legally binding and enforceable) as long as it meets all the proper legal requirements. One of the most important of these requirements is genuineness of assent. **Genuine assent** (true and complete agreement) is at times shown to be lacking in court. This is due to a variety of causes such as duress, undue influence, mistake, misrepresentation, and fraud. Without genuine assent a contract typically is **voidable**. This means that, if the injured party desires, that party can cancel their obligation under the contract and get back what they have already put into it. Such an action is referred to as a **rescission**.

To be effective, a rescission must be prompt. It must occur shortly after you discover that there is no genuine agreement. In addition, it must occur before you ratify the contract. **Ratification** is conduct suggesting you intend to be bound by the contract.

IN THIS CASE

Steven inspected a 5-year-old car with the intention of buying it. He asked the owner, Allan, how many miles were on the engine. Allan said, "As you can see from the odometer, it only has 30,000 miles on it, and I'm the only one who has ever owned it." A written contract was executed and Steven took the car to the local automobile dealer to be inspected. The dealer informed Steven that the car had often been serviced there, and that the odometer had been replaced at about 100,000 miles. This was fraud on Allan's part, making the contract voidable by Steven. However, if Steven continued to make his monthly payments to Allan after discovering the fraud, this would ratify the contract and Steven would lose his ability to rescind.

DURESS

Certainly, most parties are subject to duress in the form of apprehension and pressure when negotiating a contract. However, the law only allows a contract to be undone because of it in a few instances. Legal **duress** only occurs when one party uses an improper threat or act to obtain an expression of agreement. The resulting contract is voidable. Much of the law of duress focuses on the nature of the threat.

THREATS OF ILLEGAL CONDUCT The threat to engage in illegal conduct, such as a crime or tort, to win agreement is always duress. Committing an act of violence (for example, stabbing), threatening a crime (threatening to stab), committing a tort (for example, unlawful detention), or threatening a tort to obtain a signature on a written contract is duress. The actual crime or tort, or the threat, may be to the physical life, liberty, or property of the victim, the victim's immediate family, or the victim's near relatives. In *What's Your Verdict?* Cameron acted under duress in making the contract and therefore could rescind it.

THREATS TO REPORT CRIMES If you observe a crime, you have a duty to report it to the proper authorities. If you use a threat of reporting to force the criminal to contract with you, this is duress. It may also be the crime of extortion.

THREATS TO SUE The law encourages parties to settle conflicts without a suit. An important part of this process involves communicating a threat that you will sue if the other side doesn't settle. This happens frequently. When the threat to sue is really made for a purpose unrelated to the suit, this may be duress.

For example, during divorce negotiations, a husband threatens to sue for custody of the children if the wife doesn't sign over valuable shares of stock. Because he doesn't really want custody of the children, this threat to sue makes the contract for the stock voidable. If the threatened suit is completely groundless, a resulting contract may be voidable for duress.

ECONOMIC THREATS Often when parties are bound by a valid contract, they will seek to modify it. Parties then are tempted to use the economic power they have over one another to negotiate a favorable modification or settlement. If a manufacturer has a contract to pay a supplier \$15 for a special computer part needed to maintain production, the supplier might threaten to withhold the parts unless the manufacturer agrees to a price of \$20 each. If a disruption in the flow of parts would cause substantial injury to the manufacturer, then the courts would find the agreement on the new price an economic threat voidable for duress.



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Explain under what circumstances a court might find a price increase in factory parts voidable due to duress.

In economic duress cases, the courts look at both the threat and the alternatives available to the threatened party. If the threatened party had no choice but to enter into or modify a contract, then duress exists.

CHECKPOINT

List the various forms of legal duress.

UNDUE INFLUENCE AND ASSENT

WHAT'S YOUR VERDICT?

Albert had cancer and was being treated by Dr. Bennington. He had carefully followed the doctor's advice, and the treatment had been successful. One day, during a periodic checkup, Dr. Bennington said to Albert, "To prevent the cancer from recurring, you need to reduce the stress in your life. Long drives in the country are great for that. Come to think of it, I'm selling my convertible right now. You should buy it." Without investigating, Albert followed the doctor's directions and contracted to buy the car. Later he found the price he'd agreed to pay was nearly double the market value.

Could Albert avoid the contract due to undue influence?

Undue influence occurs when one party to the contract is in a position of trust and wrongfully dominates the other party. The dominated person then does not exercise free will in accepting the contractual terms. The two key elements in undue influence are the relationship and the wrongful or unfair persuasion. When a contract arises because of undue influence, the contract is voidable by the victim.

THE RELATIONSHIP

A relationship of trust, confidence, or authority must exist between the parties to the contract. This relationship is presumed to exist between an

attorney and client, wife and husband, parent and child, guardian and ward, physician and patient, or minister and congregation member. In *What's Your Verdict?* the contract would be voidable by Albert. Although more difficult to prove when it is not present, a formal relationship is not necessary. The type of relationship necessary to prove undue influence could arise between a housekeeper and her elderly employer. It also could arise between a disabled person and his neighbor.

UNFAIR PERSUASION

Often the best evidence of unfair persuasion is found in the terms of the contract. For example, an elderly person, who is dependent on one child for daily care, may sell her home to that child for

half its value. This is strong evidence of lack of free will.

To prevent a claim of undue influence, the stronger party should act with total honesty, fully disclose all important facts, and insist that the weaker party obtain independent counsel before contracting. Persuasion or nagging do not necessarily mean undue influence exists. Whether action rises to the level of undue influence is a difficult question of fact for a jury.

CHECKPOINT

What are the key elements in undue influence?

7-1

Assessment

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THINK ABOUT LEGAL CONCEPTS

1. Rescission for duress must be timely and occur before ratification. **True or False?**
2. Contracts created or modified by duress are voidable. **True or False?**
3. Which of the following is a threat that can create duress? (a) threat to shoot the contracting party if she doesn't sign the contract (b) threat to sue (without grounds) the contracting party if she doesn't modify the contract (c) threat to report the contracting party to the IRS for tax evasion if she doesn't sign an agreement (d) all of the above
4. In economic duress cases the courts look at the ? and the victim's alternatives.
5. A formal relationship between parties to the contract must always be shown to prove undue influence. **True or False?**
6. Which of the following need not be done by the dominating party to prevent a claim of undue influence? (a) act with total honesty (b) fully disclose all important facts (c) insist the weaker party seek independent legal advice before contracting (d) submit the contract to a judge for review
7. If there is an offer and acceptance with no duress, undue influence, mistake, fraud, or misrepresentation, then there is ? assent.

THINK CRITICALLY ABOUT EVIDENCE

Study the situation, answer the questions, and then prepare arguments to support your answers.

8. Manuela rented an apartment and later discovered that the roof leaked. She asked the landlord to make repairs, but he refused. Manuela said that she would move out unless the landlord either made the repairs or lowered the rent. The landlord lowered the rent. Does Manuela's conduct make the modification to the contract voidable due to duress?
9. Evelyn was 86 years old and of sound mind. However, she relied upon her nephew Jamal,

an accountant, to advise her in business matters. During one of Jamal's visits, he persuaded her to sell him a valuable painting for about 80 percent of its true value. Evelyn agreed and signed a contract. Then she had the painting appraised and learned its true value. She continued with the transaction by accepting payment for the painting. About a year later she died. Her estate sued for rescission of the contract. Jamal defended by claiming that Evelyn had ratified by accepting payment after learning of the value of the painting. Who prevails, Evelyn's estate or Jamal?

Mistake, Misrepresentation, and Fraud

▼ GOALS

- Recognize the types of mistakes that can make a contract voidable or void
- List the criteria for a statement to be treated as a misrepresentation
- Define fraud and describe the remedies for it

WHAT ARE THE TYPES OF CONTRACTUAL MISTAKES?

WHAT'S YOUR VERDICT?

Bugliosi saved more than \$25,000 to buy the new car of his dreams. At the dealership, the sales staff convinced him to purchase option after option until his \$25,000 was totally exhausted. When he went to register the vehicle, he found that the state expected him to pay an 8% sales tax on the purchase price. Bugliosi thought the \$2,000 in sales tax had been included in the \$25,000 paid at the dealership, just as it is with purchases at other retail stores.

Is the contract voidable by Bugliosi because of his mistake?

Generally, mistakes are categorized as either unilateral or mutual. A **unilateral mistake** occurs when only one party holds an incorrect belief about the facts related to a contract. Generally, this does not affect the validity of the contract. In *What's Your Verdict?* Bugliosi alone was mistaken, so the contract is valid.

A mistake from failure to read a contract before signing is a unilateral mistake. So is a misunderstanding from a hurried or careless reading. Similarly, signing a contract written in language you don't understand will bind you even if you are mistaken about some of the contract's content.

When there is a **mutual mistake** (also called a *bilateral mistake*) both parties have an incorrect belief about an important fact. Important facts that influence the parties' decisions about a contract are called **material facts**. If a mutual mis-

take of fact occurs, the contract is **void** (without legal effect). For example, suppose both a buyer and seller think that a property is 41 acres in size and they contract for the sale based on this belief. Later they learn that it is only 28 acres. This is a mutual mistake of fact. Their agreement is not binding.

When the mutual mistake is about the applicable law, the contract is still valid. For example, if both parties to a sale of raw land mistakenly believe that local zoning laws permit construction of duplexes on the lot, the contract would be valid though there was a mutual mistake and the duplexes could not be constructed. This is because all persons are presumed to know the law. Similarly, unilateral mistakes of law (such as Bugliosi's in *What's Your Verdict?*) generally have no effect upon the contract rights of the parties.

IN THIS CASE

Falkhausen, who lived in Indianapolis, owned a Formula One racing car that he kept in Miami. On March 18, he sold the car to Firenzi. When they concluded their contract that day, neither party knew that the car had been destroyed on March 17 when the parking garage in which the car was stored burned to the ground. Because of the mutual mistake as to the existence of the car, there was no contract.

CHECKPOINT

Name the types of mistakes that can make a contract voidable or void.

WHAT IS MISREPRESENTATION?

WHAT'S YOUR VERDICT?

Nutri-Life offered a dietary supplement for sale. The package contained a statement that clinical studies at Harvard University had shown the drug reduced the risk of cancer by more than 30 percent if taken regularly. This statement was untrue.

Can customers get their money back if they learn of the deception?

In many contract negotiations, the parties make statements that turn out to be untrue. For example, in the sale of a car, a seller, unaware that a previous owner replaced the odometer, might say that it has 70,000 miles on it when in fact it has 150,000 miles on it. This is an **innocent misrepresentation**. If the seller had known the statement was untrue, the seller would have engaged in **fraudulent misrepresentation**. In both of these situations the contract that results is voidable by the party to whom the misrepresentation is made. Statements are treated as misrepresentations by the law only if

1. the untrue statement is one of fact or there is active concealment, and
2. the statement is material to the transaction or is fraudulent, and
3. the victim reasonably relied on the statement.

UNTRUE STATEMENT OF FACT

In misrepresentation, the statement must be one of fact rather than opinion. Therefore the statement must be about a past or existing fact. If someone says, "This car will suit your needs well for at least the next year," this is a statement about the future and therefore must be an opinion. It cannot be the basis for misrepresentation. A seller's statement that, "I'm sure land values will increase at least 15 percent a year for the next three years," is a statement of opinion.

Opinions also can be distinguished from facts based on how concrete they are. Saying, "it really

runs well," is a statement of opinion about the condition of the car. Statements like "This is the best tasting cola on the market" are mere sales talk. In contrast, if the seller said, "the engine was rebuilt 7,000 miles ago," this is the expression of a concrete fact. It is a misrepresentation if untrue.

When experts express an opinion, the law will treat the statement as a statement of fact which can be the basis for misrepresentation. If an expert auto mechanic says, "The engine is in A-1 shape," and this is not true, it is a misrepresentation and the buyer could rescind. The packaging of the Nutri-Life dietary supplement in *What's Your Verdict?* involved an expert's opinion that constituted misrepresentation.

ACTIVE CONCEALMENT Active concealment is a substitute for a false statement of fact. If the seller of a house paints the ceiling to cover stains which indicate the roof leaks, this is active concealment. Similarly, if a seller places the price sticker on the TV screen to cover a wide scratch, this is active concealment.

SILENCE While in many situations the seller may remain silent about defects, there are three important situations where disclosure is required. The first is where a statement about a material fact omits important information. If a seller says, "I only drove this car once a week," then the seller also must disclose that this occurred while



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With what you just read about active concealment, what would you do if you were interested in buying the vehicle in this picture?

racing the car at the local drag strip. Half-truths cannot be used to conceal or mislead.

The second duty to break silence arises when a true statement is made false by subsequent events. A seller says, "No, the roof doesn't leak." Later that night, it begins leaking and the seller ends up sleeping under an umbrella. This seller must break silence and disclose the defect to correct the buyer's misimpression.

The third situation arises when one party knows the other party has made a basic mistaken assumption. For example a buyer may assume that a foundation is solid, but the seller knows of a defect allowing water to flood the basement each spring. The seller knows repairs will cost 25 percent of the sale price. This mistaken assumption must be corrected.

MATERIALITY

There are three ways an untrue statement can be determined to be material. First, a statement is material if the statement would cause a reasonable person to contract. Statements about total miles on a car and the number of miles since an engine was rebuilt probably would cause a reasonable person to complete the contract. A statement that a star's signature on a baseball card is his authentic autograph, when in fact it is a forgery, is a statement that would be material to a reasonable person.



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You are told by a jewelry store salesperson that the diamond you are looking at is a perfect stone. Then you learn from an appraiser that it is not. If you purchase the diamond, did you rely on the salesperson's statement? Did a misrepresentation occur?

Second, a statement can be material if the defendant knew this plaintiff would rely on the statement. Suppose a seller says the oil in the car was changed every 3,000 miles when it was only changed every 4,000 miles. This slight discrepancy would probably not be material to a reasonable person. If, however, a buyer says that the frequency of oil changes is very important to her, then statements about the frequency of oil changes would be material.

Third, if the defendant knew the statement was false, this makes the statement material. Therefore, if a seller lies about an otherwise non-material fact, this is material. If a seller says, "I always had the car serviced at the local Chevrolet dealership," when in fact he had it serviced at the local gas station, this statement would be material.

REASONABLE RELIANCE

Even though the statement is material, there is no misrepresentation unless the victim reasonably relied on it. A buyer may be told by an art gallery owner that an oil painting was created by "one of the great masters of the Renaissance era." She then learns from an art appraiser that it is a mere imitation. If the buyer still completes the sale, the buyer isn't relying upon the statement. If a car dealer says the tires are new, but the buyer responds, "Two are as bald as you," there is no reliance.



Law Brief

American contract law is built on the principle that individuals can take care of themselves when contracting, but still advises "let the buyer beware." The American approach generally allows silence as to material facts the seller knows that might adversely affect his or her bargaining position. It is up to the buyer to ask the seller about specific product attributes. Then, out of the seller's answer, if factually inaccurate, the basis for active concealment, fraud, and the potential avoidance of the contract is laid. If the buyer does not ask, the bargain generally will stand even when problems present themselves later.

CHECKPOINT

What are the three criteria for a statement to be treated as a misrepresentation?

FRAUD AND REMEDIES FOR FRAUD

WHAT'S YOUR VERDICT?

Grafter sold a used car to Camacho for \$16,000. Grafter told her that the car had been driven only 50,000 miles, had never been in an accident, and had the original paint. In fact, Grafter had stolen the car, set back the odometer from 90,000 miles, and repainted the exterior in the original color. Grafter stood between Camacho and the right rear end of the car to prevent her from seeing a crudely repaired fender that had been damaged in the accident. Later Camacho learned the truth.

What remedies are available to Camacho?

Fraud is based on misrepresentation. All the elements of misrepresentation must be proven to show fraud plus two additional elements: intent and injury. If a victim can show fraud, courts will grant the victim assistance beyond the rescission available for misrepresentation.

THE MISREPRESENTATION MUST BE INTENTIONAL OR RECKLESS

Fraud clearly exists when a person deliberately lies or conceals a material fact. Fraud also exists if a person recklessly makes a false statement of fact, without knowing whether it is true or false. To constitute fraud, in addition to intending to deceive, the misrepresentation also must be intended to induce the victim to contract.

THE MISREPRESENTATION OR CONCEALMENT MUST INJURE

To establish fraud, there must be proof of injury. If there is an intentional misrepresentation, but no injury, there is no liability for fraud. Suppose

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Access lawxtra.swlearning.com and click on the link for Chapter 7. Read the article entitled "Material Misrepresentation to the Federal Government." What does the author of the article suggest that you do if and when you are questioned by the federal government?

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you are looking at an antique motorcycle. The seller says, "It is a 1938 Indian." The seller knows it is a 1937 Indian but intentionally lies, thinking the newer bike is more valuable. If you buy it for \$9,000 and it turns out to be worth \$14,000, you haven't suffered an injury. While you could rescind based on misrepresentation, you could not establish fraud.

REMEDIES FOR FRAUD

If a seller innocently misrepresents a material fact, the buyer may rescind. This remedy also is available for fraud. If a victim can establish fraud, courts also will allow recovery of actual damages and punitive damages.

In *What's Your Verdict?* Grafter was a criminal who intentionally lied about the car and actively concealed the damaged rear fender. The deception



A QUESTION OF ETHICS

Paul, a tax protestor, refused to pay income taxes. Although he only had a daughter, he listed so many children as dependents that his employer did not withhold any federal taxes from Paul's paycheck. Each April 15, Paul would appear on local TV holding up a blank 1040 Internal Revenue Service form and state his belief that the income tax was only intended for corporate income. He would then cite Congressional debate at the time of the passage of the Constitutional amendment allowing the income tax in support of his position. Is Paul's behavior illegal, unethical or both?

injured Camacho because the car was not worth \$16,000. Accordingly, as Camacho could establish fraud, she could have her contract rescinded and be awarded compensatory and punitive damages.

RESCISSION As mentioned, contracts entered into as a result of misrepresentation or fraud are voidable by the injured party and can be rescinded. Normally when you rescind, anything you received must be returned. A deceived party who has performed part of the contract may recover what has been paid or given. A deceived party who has done nothing may cancel the contract with no further obligation. If sued on the contract, the deceived party can plead fraud or misrepresentation as a defense.

DAMAGES Damages are available if fraud is proven. The party defrauded may choose to ratify the agreement rather than rescind. Then either party may enforce the contract. However the defrauded party who ratified may seek damages for loss created by the fraud. In *What's Your Verdict?* Camacho could recover the difference in value for a car with 50,000 miles on it (the fraudulent misrepresentation) and one with 90,000 miles on it (the truth). Note that, under the UCC, damages are available when there is only an innocent misrepresentation in a sale of goods (tangible personal property).



LEGAL RESEARCH

Elect a class representative to contact your local police department and inquire as to whether any fraudulent schemes have occurred in your area. Possibilities include "con games" such as the pigeon-drop scenario as well as the techniques of short-change artists, pickpockets, and others. Discuss the findings in class.

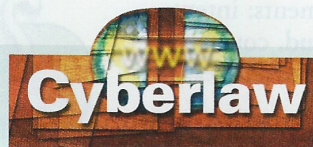
PUNITIVE DAMAGES If fraud is proven, then punitive damages also become available. Punitive damages are a form of punishment. For instance, a judge might award a victim \$5,000 in addition to actual damages as a way to punish the party who committed fraud.

CHECKPOINT

What are the remedies available for fraud?

Fraud is one of the fastest-growing threats facing consumers today. Because many consumer

transactions now take place over the Internet, consumers also face the prospect of online fraud. In 1996, the National Consumers League started the Internet Fraud Watch project and the National Fraud Information Center web site. Consumers can access the web site to get tips on how to avoid scams and fraud 7 days a week, 24 hours a day. Many of the scams involve travel fraud. Travel fraud is growing quickly and involves bargain vacation packages, travel vouchers, and prize trips "for a small fee." In Operation Trip-Up, the Federal Trade Commission and 12 other



law enforcement agencies brought 36 separate actions against travel-related scams.

Attorneys general in many states have established special task forces to handle Internet fraud. To curb Internet fraud, education is the key to protection. Before you purchase, check it out!

THINK ABOUT IT

Type "National Fraud Information Center" into an Internet search engine to check out this web site. Click on "Internet Fraud" and then "Internet Fraud Tips." Choose one tip that you think is especially helpful to share with your class.

THINK ABOUT LEGAL CONCEPTS

1. Which type of mistake gives both parties the right to rescind? (a) unilateral mistake (b) bilateral mistake
2. Unilateral mistakes of law generally have no effect on the rights of the parties under the resultant contract. **True or False?**
3. A statement of opinion by an expert be treated as fact. (a) will (b) will not
4. Misrepresentation is an element in both innocent misrepresentation and fraud. **True or False?**
5. For misrepresentation, which of the following elements need not be proven? (a) a false statement of fact (b) the fact must be material (c) the statement must be relied upon (d) all of the above must be shown
6. Which of the following remedies is not available for an innocent misrepresentation? (a) rescission (b) damages if the transaction is governed by the UCC (c) punitive damages

THINK CRITICALLY ABOUT EVIDENCE

Study the situation, answer the questions, and then prepare arguments to support your answers.

7. Anne was shopping for a used washing machine. She found one she thought was in good condition. She asked the seller what shape it was in and the seller replied, "It is in great shape." In fact it needed major repairs. Is the seller's statement a misrepresentation?
8. Chip was shopping for a used computer. He found one and asked the seller if the processor's speed was greater than 2 megahertz. The seller said, "Yes, it runs at 2.5 megahertz." In fact it was a much slower chip. Is the seller's statement a misrepresentation?
9. Glenna found a computer she wanted. While describing all the components, the seller said it had a fast modem. Glenna said modem speed was very important to her and asked how fast it was. The seller said, "It's 56K," but she didn't really know how fast it was. In fact, it was a much slower modem. Has this seller committed misrepresentation? Has this seller committed fraud?
10. For years, Salazar, the lead mechanic at the Pull On In gas station, saved his money and eventually bought the business. Two weeks after the purchase, he found out that, a month previous, the Environmental Protection Agency had passed a regulation that would make the dispensing of petroleum-based fuels within a mile of a drinking water reservoir illegal. The station was only a few blocks from such a reservoir. Salazar also discovered that the previous owners knew of the regulation when they sold but did not inform him. Can he get the transaction rescinded?



PREVENT LEGAL DIFFICULTIES

In making contracts...

1. Research important transactions before entering into them. Verify claims of the seller by outside means or through firsthand personal experience.
2. Do not rush into a decision. Take time to review and understand the advantages and disadvantages of the proposed contract. Legitimate proposals will usually survive a delay.
3. Do not hesitate to ask questions about vague or uncovered issues. Forcing the other party to make statements about them may lay the groundwork for proving fraud or misrepresentation later.
4. If the other party does not properly answer your questions, proceed with great caution or abandon the negotiations.
5. If you believe you have been defrauded, act promptly to rescind the contract.

Chapter 7 Assessment

CONCEPTS IN BRIEF

7-1 Duress and Undue Influence

1. One of the most important legal requirements for a valid contract is genuineness of assent.
2. Genuine assent is at times shown to be lacking in court due to a variety of causes such as duress, undue influence, mistake, misrepresentation, and fraud.
3. Duress consists of either an improper act or threat that induces the victim to make an unwanted contract. Such contracts are voidable by the victim.
4. Undue influence exists when one person, with trust, confidence, or authority, uses that power over the victim to obtain an unfavorable contract. The contract is voidable by the victim who acted without free will.

7-2 Mistake, Misrepresentation and Fraud

5. Generally a unilateral mistake of fact does not affect the validity of a contract.
6. Generally a mutual or bilateral mistake of material fact makes the agreement void.
7. Generally a unilateral or mutual mistake concerning applicable law leaves the contract valid.
8. Misrepresentation occurs if a victim reasonably relied on a material or fraudulent misstatement of fact or a material fact was actively concealed. Misrepresentation leaves the contract voidable by the victim.
9. Fraud exists when there is a deliberate false representation or a deliberate concealment of a material fact which influences the decision of the other party, causing injury. Contracts induced by fraud are voidable by the victim.
10. If a contract is voidable, the injured party must rescind shortly after the discovery that there is no genuine agreement. The injured party also must not engage in any activity that might ratify the contract.

YOUR LEGAL VOCABULARY

Match each statement with the term that it best defines. Some terms may not be used.

1. Of no legal effect
2. Consent or agreement not clouded by fraud, duress, undue influence, or mistake
3. Contract in which the injured party can withdraw from the transaction
4. One party holds an incorrect belief about the facts related to a contract
5. Deliberate false representation or concealment of a material fact, which is meant to and which does induce another to make an unfavorable contract
6. Approval of a voidable contract
7. Overpowering of another's free will by taking unfair advantage to induce the person to make an unfavorable contract
8. Use of an improper act or threat to obtain an expression of agreement
9. To offer to give back what you received via a contract while demanding return of what you gave

- a. duress
- b. fraud
- c. fraudulent misrepresentation
- d. genuine assent
- e. innocent misrepresentation
- f. material fact
- g. mutual mistake
- h. ratification
- i. rescission
- j. undue influence
- k. unilateral mistake
- l. void
- m. voidable

REVIEW LEGAL CONCEPTS

10. Describe the concept of mutual mistake.
11. Distinguish the effect of the passage of time on the potential for rescission versus the potential for ratification.
12. What does reliance mean?
13. Explain all the elements that must be proven to establish fraud.
14. How is innocent misrepresentation different from fraud?

WRITE ABOUT LEGAL CONCEPTS

15. Write a short paragraph explaining why undue influence would be presumed in certain cases, such as the attorney and client relationship, but not in others.
16. Describe in writing a scenario where a mutual mistake of a material fact might cause a contract to be void.
17. Write a paragraph describing a television ad that could be the basis for misrepresentation if the statement made were untrue.
18. **HOT DEBATE** Write a letter for your friend to the credit card company. In the letter argue that the amount billed for the PDA was incorrect and should be changed.

MAKE ACADEMIC CONNECTIONS

19. **ENGLISH** Read Frank Abagnale's book, *Catch Me If You Can*. Prepare a report on the nature and level of complexity of his fraudulent schemes. What, in your opinion, made them so successful?

THINK CRITICALLY ABOUT EVIDENCE

Study the situation, answer the questions, and then prepare arguments to support your answers.

20. In negotiations for the purchase of a ranch, Adler (the seller) discussed water rights with Folt, the buyer. Adler never mentioned an ongoing dispute she had over such rights with a neighboring rancher. After the purchase, Folt realized that he had "bought a lawsuit" when his neighbor sued him over the water rights. In turn, he therefore sued Adler for rescission of their contract. Who will prevail, and why?
21. During negotiations for the sale of a well to be used to water animals, Hutton said the well was free of gypsum and brine (salty water). In fact, the well did contain gypsum, although there was no brine. The gypsum made the well unusable for watering animals. Curry, the purchaser, refused to pay, claiming the contract was voidable because of misrepresentation. Was it?
22. Ashbery, a salesperson, told Gelman that a new computer and its accounting software should do the work of at least five employees. Relying on this statement, Gelman bought the products. When Gelman found that he could eliminate only three employees but needed a new specialist, he claimed fraud. Was fraud committed?
23. Moser had no automobile liability insurance, although it was required by state law. She negligently collided with Chang's car. Chang threatened to sue if Moser failed to pay \$1,000 for pain and suffering and \$2,000 for car repairs. Moser gave Chang a check for \$3,000. Then she stopped payment on it, claiming duress. Was it duress?

ANALYZE REAL CASES

24. Olga Mestrovic, the widow of the successful artist Ivan Mestrovic, died. 1st Source Bank was the representative of her estate. It entered into a contract for the sale of Olga's home to the Wilkins. There was a lot of personal property in the home including a stove, dishwasher, and other items. The contract of sale provided that these items of personal property also were being sold to the Wilkins. When the Wilkins took possession of the realty, they found it in a cluttered condition which would require substantial cleaning. When they complained to the bank, it sent a bank officer to the scene. That person offered the Wilkins two options: Either the bank would pay to have the rubbish removed or the Wilkins could remove it and, "keep any items of personal property they wanted." No one thought there were any works of art on the property. The Wilkins accepted the latter option and later found eight very valuable drawings by Ivan Mestrovic. Was there a mutual mistake? Was there a mistake about the subject matter of the transaction? (*Wilkin v. 1st Source Bank*, 548 N.E. 2d 170, Ind. Ct. App.)
25. Using a smuggled-in .38 caliber pistol, Gorham and Jones took control of their cell block in a District of Columbia (Washington, D.C.) jail. They and other prisoners released by them ultimately took several hostages and demanded to be freed. One hostage was Kenneth Hardy, the Director of Corrections for the District of Columbia. The hostages were threatened with violence and used as human shields. Ultimately the authorities reestablished control of the cell block. Gorham and Jones were then transferred to the maximum security part of the prison from which, with the use of smuggled-in hacksaw blades, they later escaped. After their recapture, they appealed their subsequent criminal convictions (on 22 counts) of charges relating to their efforts. They said that the transfer to maximum security was in violation of the agreement they had extracted from Hardy while he was a hostage. They said he promised they would not be punished for their first attempt at jailbreak. Should the court recognize the agreement as binding and overturn the convictions? (*United States v. Gorham and Wilkerson (a/k/a Jones)*, 532 F. 2d 1088)
26. Treasure Salvors, Inc. located a Spanish ship on the ocean bottom in 55 feet of water about 46 miles off the Florida coast. The ship, the Nuestra Señora de Atocha, sank in a hurricane while heading from Havana to Spain in 1622. It was carrying "a treasure worthy of Midas: 160 gold bullion pieces, 900 silver ingots, more than 250,000 silver coins, 600 copper planks, 350 chests of indigo and 25 tons of tobacco." On the mistaken assumption that the seabed where the Atocha lay was state land, Treasure Salvors made a series of contracts with Florida whereby the state was to receive 25 percent of all items recovered. After the U.S. Supreme Court, in another case, had decided that the continental shelf where the ship rested was federal land, Treasure Salvors sued to rescind its contract with Florida and to recover all items as the exclusive owner of the Atocha. Should Treasure Salvors be able to rescind? Why or why not? (*Florida v. Treasure Salvors, Inc.*, 621 F.2d 1340)
27. Snap-On manufactures and sells hand tools such as wrenches to professional mechanics. It sold a distributorship to Eulich, but he was not successful and encountered significant financial difficulties. In Eulich's view his sales territory was too small. As a result Eulich terminated the dealership agreement. That agreement included a clause stating that on termination of the agreement, Snap-On might buy back any new tools owned by the distributor. Eulich attempted to turn in his tools but Snap-On delayed. Eulich's financial situation deteriorated to the point where he was unable to pay his personal bills and his wife needed to be hospitalized, though he had no medical insurance. Snap-On knew this. Finally, Snap-On accepted the tools. Before paying for the tools, Snap-On asked Eulich to sign an agreement promising not to sue Snap-On for claims arising out of the distributorship. He signed but later sued. What factors do you think the court considered in deciding whether the agreement not to sue was based on duress? (*Eulich v. Snap-On Tool Corp.*, 853 P.2d 1350)



Distinguishing Fraud & misrepresentation

Fraud

- Intentional
- Can claim for damage
- Contract can be avoided

Misrepresentation

- Innocent
- No claim for damages
- Contract can not be avoided in all cases



GENUINE ASSENT

- Entering a contract under your “Own Free Will”
- NOT being forced (Duress)
- NOT being misled (Misrep or Fraud)
- NOT holding an incorrect belief about what you are entering into (Mistake)