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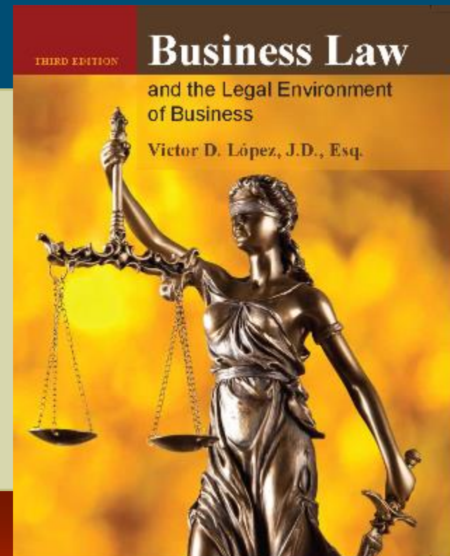

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About the Author:

Victor D. López is currently an Professor of Legal Studies in Business at Hofstra University's Frank G. Zarb School of Business. In the past he has served as an adjunct instructor at La Guardia Community College, SUNY at Farmingdale, Hartwick College and Broome Community College, a professor and Director of the Extended-day Program at Plaza Business Institute, a tenured Professor of Business at SUNY at Delhi for 12 years, and Dean of Business and Business Information Technologies at Broome Community College. He also served for a number of years on the consulting faculty of Excelsior College. Prior law-related published textbooks by Professor López include Business Law: An Introduction (Irwin/Mirror Press and McGraw Hill 1993), Legal Environment of Business (Prentice Hall 1997) and Case and Resource Materials for the Legal Environment of Business (Prentice Hall 1997). Current projects include Business Law: An Introduction 2E which is published by Textbook Media Press, and Copyrights, Patents and Trademarks: A Practical Guide published by McFarland and Co. in 2010.

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Preface

I began working on my first textbook for Irwin/Mirror Press, *Business Law: An Introduction*, as a newly minted assistant professor of business at SUNY Delhi. Having served as both a professor and dean for a number of years prior to that posting, I was familiar with the leading textbooks from the major presses and wanted to go in a very different direction to create a textbook that was both affordable and student-centered. At that time, textbooks were too expensive, as they are currently, due to factors that I document in one of my articles, "Legislating Relief for the High Cost of College Textbooks: A Brief Analysis of the Current Law and Its Implication for Students, Faculty and the Publishing Industry" (*Journal of Legal Studies in Business*, Vol. 15 p. 35 [2009]). One contributing reason for the high cost of college textbooks in the legal studies area is the overuse of pedagogical devices such as case studies, sidebars, definitions, case excerpts, and the myriad other devices intended to explain and expand on the ideas in the main text that, in my view, more often distract students than enlighten them and results in bloated, expensive textbooks. My preferred approach is very different: make the material accessible, relevant, and interesting for my students to actively engage them in the learning process. A textbook that students do not read or struggle to understand is of little use. I want students who are assigned my textbooks to want to read them and to successfully master the learning outcomes for the course. But I also want them to be challenged by the ideas they contain, the questions they raise, and the examples they use, and to understand on a personal level the interplay between law, politics, and ethics, and the impact of the regulatory environment on business, on the professions, and its role in helping to attain social justice. I want the experience of reading my textbooks to be memorable for students; I want their eyes to brighten rather than glaze over as they read the main text, answer questions or work on case briefs, and engage in class discussions that build upon their assigned readings. I want them to come to class prepared to ask questions, apply the law to business situations and participate in class discussions, especially when their professor stirs the pot in the devil's advocate role to challenge their assumptions or question established legal precedents.

Portions of this book were originally published in my *Legal Environment of Business* textbook (Prentice Hall, 1997). The original material was significantly edited, updated, and expanded, with numerous chapters excised and added, in the text's second edition. The third edition has once again been significantly revised and expanded to make this new textbook appropriate for one- and two-semester course sequences in business law, introduction to law, and the legal environment of business. Each unit now features select case excerpts suitable for briefing and class discussion: a new chapter on Constitutional Law in direct response to adopters' feedback.

This book is accompanied by an Instructor's Manual and a test-item file in Word. The test items are also available on a test CD-ROM (Diploma software by Blackboard). These materials are available to interested instructors upon request.

Acknowledgments

I would like to gratefully acknowledge the support of the Frank G. Zarb School of Business at Hofstra University for my research, publication, and professional development activities. I would also like to thank the chairs, deans, and provosts with whom I've served as well as

my colleagues in the Department of Accounting, Taxation, and Legal Studies in Business and at the Frank G. Zarb School of Business for their strong support and for making me feel welcome in my new academic home. I am especially grateful to my colleague and friend Eugene T. Maccarrone for chairing my tenure committee and for his collaboration on four published articles. Likewise, I am most grateful to Cheryl R. Lehman for chairing my ad hoc promotion committee to full professor as I write this.

It has been two decades since I began writing my first textbook, *Business Law: An Introduction* (Irwin/Mirror Press, 1993), and had the privilege to work with David Helmstadter, the president and publisher of Irwin's Mirror Press division, and Carla Tishler, my editor. I will never forget David's kindness, encouragement, and the time he dedicated to me as a fledgling writer during and after the publication of the book. He is a remarkable human being to whom I will always be grateful, and who is in no small part responsible for my continuing to pursue the writing of textbooks and scholarly books. I am very pleased to have come full circle in working with Ed Laube, the co-founder and publisher of Textbook Media Publishing, whose support and dedication to this project have brought me back to my first experience as a textbook author. I am enormously grateful for his support and that of Tom Doran, president and co-founder of Textbook Media Publishing, for the opportunity to join an enterprise devoted to making high-quality affordable textbooks available to all students. My thanks also to Victoria Putman for her patience and thoroughness during the production of this third edition.

I also need to thank all of my friends and colleagues at the institutions I have served prior to joining the Hofstra University faculty in a variety of roles that included adjunct instructor, professor, consultant, and dean: Plaza Business Institute, LaGuardia Community College, SUNY at Farmingdale, MTI, SUNY at Delhi, Hartwick College, Excelsior College, and SUNY Broome. Among all my exceptional colleagues, I must single out one to whom I am especially grateful for his friendship, counsel, and strong, unconditional support of my academic and personal goals—Dr. William Raynor, Professor at Southern Wesleyan University (Adult & Graduate Studies Division). As I have told others numerous times, when the day comes and St. Peter stops me at the Pearly Gates and asks, "Why should I let you enter?" my best response will be, "Bill Raynor was my friend."

Finally, and perhaps most importantly, I need to thank my students—past, present, and future—in the urban, suburban, and rural colleges I have had the privilege to serve. You have brought me more fulfillment and happiness over the past quarter century than I could ever articulate or gratefully acknowledge. Ultimately, it is all about you.

About the Author

Victor D. López is currently a tenured Professor of Legal Studies in Business at Hofstra University's Frank G. Zarb School of Business. In the past, he has served as an adjunct instructor at LaGuardia Community College, SUNY at Farmingdale, Hartwick College, and SUNY Broome (while serving as Dean of the Business Division there), Academic Dean at MTI, a professor and director of the Extended-day Program at Plaza Business Institute, a tenured Professor of Business at SUNY at Delhi for 12 years, and Dean of Business and Business Information Technologies at SUNY Broome. He also served for a number of years on the consulting faculty of Excelsior College.

Prior law-related published textbooks by Professor López include *Business Law: An Introduction* (Irwin/Mirror Press and McGraw Hill, 1993), *Legal Environment of Business* (Prentice Hall, 1997), *Case and Resource Materials for the Legal Environment of Business* (Prentice Hall, 1997), *Business Law and the Legal Environment of Business,* 2nd edition (Textbook Media Publishing, 2010), and *Business Law: An Introduction,* 2nd edition (Textbook Media Publishing, 2011). He has also published *Intellectual Property Law: A Practical Guide to Copyrights, Patents, Trademarks and Trade Secrets* through Amazon and CreateSpace. His recent published and accepted articles include

- Victor D. López, "When Lenders Can Legally Provide Loans with Effective Annual Interest Rates Above 1,000 Percent, Is It Time for Congress to Consider a Federal Interest Cap on Consumer Loans?" *Notre Dame Journal of Legislation,* 42 J. Legis 101 (2016).
- Eugene T. Maccarrone & Victor D. López, *Medical Malpractice Limitations for New York Infants—Time for a Change of Time?*, 34 Buff. Pub. Int. L.J. 99 (2016).
- Victor D. López and Eugene T. Maccarrone, "Traffic Enforcement by Camera: Privacy and Due Process in the Age of Big Brother," *Law Journal for Social Justice* at Arizona State University (Vol. 5, Spring 2015 at 120).
- Victor D. López and Eugene T. Maccarrone, "Leading the World in the Wrong Direction: Is It Time for the U.S. to Adopt the World Standard Loser Pays Rule in Civil Litigation?" *North East Journal of Legal Studies*, Spring 2014 at 1.
- Victor D. López , "Dealing with Uninvited and Unwelcomed Guests: A Survey of Current State Legislative Efforts to Control Illegal Immigration within Their Borders," *International Journal of Public Law and Policy*, Vol. 3, No. 1 at 43 (2013, Geneva, Switzerland).
- Victor D. López , "Unauthorized Practice of Law in the U.S.: A Survey and Brief Analysis of the Law," *North East Journal of Legal Studies,* Vol. 26 at 60 (Fall 2011).
- Victor D. López, "Principled Leadership: Finding Common Ground among Divergent Philosophies," *University of Botswana Law Journal*, Vol. 11 at 153 (December 2010).
- Victor D. López, "State Homestead Exemptions and Bankruptcy Law: Is It Time for Congress to Close the Loophole?" *Rutgers Business Law Journal*, Vol. 7 at 143 (Spring 2010).

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- Victor D. López, "Legislating Relief for the High Cost of College Textbooks: A Brief Analysis of the Current Law and Its Implication for Students, Faculty and the Publishing Industry," *Journal of Legal Studies in Business*, Vol. 15 at 35 (2009).

Professor López was admitted to practice in New York State in 1984, is a member of the New York State Bar, the New York State Bar Association, the Academy of Legal Studies in Business (ALSB), and the North East Academy of Legal Studies in Business (NEALSB). He has previously served two terms as vice president and president of the North East Academy of Legal Studies in Business and as the program chair for two NEALSB annual conferences. He has also served as a reviewer for the *American Business Law Journal*, *North East Journal of Legal Studies*, and *Journal of Legal Studies in Business*.

UNIT 2

CONTRACTS

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Introduction

A contract can be defined as an agreement between two or more parties that is enforceable in the courts. To rise to the level of an enforceable contract, an agreement must meet certain criteria: there must be a valid offer and acceptance, the agreement must be supported by consideration, the parties must have the legal capacity to enter into a contract, the agreement must be genuinely assented to by the parties involved, and it must be for a legal purpose. In some cases, the agreement must also be evidenced by a signed writing. If one of these necessary elements is missing from an agreement, a valid contract will not be formed.

In this unit, we examine the types of contracts (Chapter 9) and each element of a valid contract (Chapters 10 through 15). We also explore the rights of persons with regard to contracts that affect them directly but to which they are not parties (Chapter 16). We then examine the various means by which parties can discharge their contractual obligations and learn about the consequences that can result when a contract is breached (Chapter 17). Finally, we explore the remedies available to compensate parties who suffer a breach (Chapter 18).

General Introduction to Contracts

CHAPTER 9

Chapter Outline

Classification of Contracts

As previously noted, a contract is an enforceable agreement between two or more parties. All of us enter into numerous binding contracts on a daily basis without any conscious awareness that we do so. If you bought a cup of coffee before class; rode a bus, subway, or trolley car to get to campus earlier today as a commuting student; bought a ticket to an upcoming concert online; ate breakfast or lunch at a university restaurant or cafeteria; or bought a copy of your local newspaper, you have entered into a valid contract that gives rise to certain rights and responsibilities to you and to the other parties involved. We may not think of casual business transactions as contracts because such transactions are almost always completed to the mutual satisfaction of the parties involved, and there is seldom a reason to give them a second thought. You pay the agreed-upon fee for your choice of concert tickets and subsequently enjoy the performance, drink the coffee after paying for it, hop on the bus and eventually reach your destination (more or less on time), and live to enjoy the comforts of the food court another day. The significance of these contracts is important only in the rare case when parties do not perform as promised. The salad served at your favorite university eatery, for example, contains peanuts that cause a dangerous and potentially lethal allergic reaction in you, even though your server assured you that peanuts are not used in the salad. It is at these exceptional times that we need to be concerned about whether or not an underlying contract existed, and to examine the rights and responsibilities of the parties involved.

Although all contracts contain enforceable promises, not all promises rise to the level of a contract. While we may have a moral obligation to honor our promises, only promises that meet certain requisite criteria gain the special status of a contract. For a valid contract to be formed, each of the following criteria must be present:

1. There must be a valid offer and a valid acceptance to enter into a contract;
2. There must be valid consideration (something of legal value given and received by each party to the contract);
3. Each party to the contract has to have the mental capacity (or legal ability) to enter into a contract;
4. Each party has to freely give her consent to enter into the contract;
5. The contract must be for a legal purpose;
6. And, in certain cases, there must be written and signed evidence of the intent to enter into a contract for the contract to be enforceable.

In the chapters that follow, we examine each of these prerequisites to a valid contract in turn. For now, suffice it to say that if even one necessary criterion is missing, the underlying agreement will not rise to the level of a binding contract and will not be enforceable in the courts. A few brief examples will illustrate:

- John promises to give Ellen his stereo next week after he buys a new one. Ellen agrees to accept the gift. John then changes his mind and gives the stereo to Rachel. Ellen will not be able to successfully sue John for breach of contract because John's promise was not supported by consideration, and thus no contract was formed by Ellen's acceptance of his promise to give her a gift. (Ellen had not agreed to give anything of legal value in exchange for receiving the stereo.)
- Chuck agrees to turn over his Rolex watch to Tina in exchange for $100. Chuck makes the promise while Tina holds a gun to his head. No contract is formed (Chuck's assent to enter into the contract is not freely given; rather, it is the result of duress, and no valid contract is formed for lack of his genuine assent.)
- Ben, who has been judicially declared to be incompetent, orders 100 Napoleon Bonaparte costumes from a local supplier. The agreement is invalid, and no contract is formed, because Ben lacks the capacity to enter into a valid contract.

A popular misconception about contract law is that agreements between parties need to be expressed in writing in order to be enforceable. This has never been true. In fact, with limited exceptions to be covered in Chapter 15, verbal agreements are just as binding as written ones. In fact, it is possible to enter into a binding contract without either party uttering a single word. The intent to enter into a contract can be implied from the actions of the parties as well as from their oral or written words. What is crucial in contract law is the intention of the parties to enter into a binding agreement. Precisely how that intention is expressed is largely irrelevant to the validity of the underlying agreement.

Classification of Contracts

Contracts can be classified as express, implied, unilateral, bilateral, simple, and formal. Each of these classifications is examined next.

Express Contracts

Express contracts are formed when contracting parties specify the terms of their agreement orally or in writing. In an express contract, the *offeror* (the person who makes an offer to enter into a contract) articulates the terms of the offer to the *offeree* (the person to whom the offeror makes an offer to enter into a contract) either orally or in writing.

- Allison promises to install new windows in Bernie's home in exchange for Bernie's promise to pay her $8,000. The parties execute a signed agreement specifying when the work will be done and how payment is to be made. This is a typical express written contract.
- Frank verbally offers to mow Wendy's lawn for $10 an hour. Wendy verbally accepts Frank's offer. This is a typical express oral contract.

Implied in Fact Contracts

While most people usually specify contractual terms in some detail, it is possible to enter into a binding contract without uttering a single word if the action of the parties clearly indicates their intention to enter into a binding contract. In these situations, the resulting contract is said to be implied in fact, as the following example illustrates:

- Lenore walks into Barbara's bakery on a particularly busy day. She is in a hurry, so she grabs a loaf of Italian bread from the counter and waves it at Barbara, who nods in her direction and continues serving other customers.

In the preceding example, a binding implied in fact contract exists between Lenore and Barbara for the purchase of the bread on credit. Lenore will be obligated to pay Barbara the selling price of the bread within a reasonable time. If Lenore is a regular customer who purchases bread at the bakery every day, it will be presumed that she will pay for it tomorrow.

Bilateral Contracts

A bilateral contract is formed by the mutual exchange of promises between the contracting parties. In a bilateral contract, both parties make enforceable promises to each other as part of their contractual agreement. Consequently, a bilateral contract has two *promisors* (persons making contractual promises) and two *promisees* (persons to whom a contractual promise is made). To put it another way, bilateral contracts involve the mutual exchange of promises of present or future performance by the contracting parties, as the following examples illustrate:

- Jan agrees to purchase Rick's guitar for $75.
- Marie agrees to update the web pages for Jerry's law practice in exchange for Jerry drafting her will.
- Dawn agrees to create a client database for Glen's business for a $500 fee.

The preceding three examples all involve bilateral contracts since there is a mutual exchange of promises by both parties to each contract. Jan promises to pay $75 in exchange for Rick's promise to turn over his guitar to her; Marie promises to update Jerry's web pages in exchange for Jerry's promise to draft a will for her; Dawn agrees to create a database for Glen in exchange for Glen's promise to pay her $500. As with all bilateral contracts, these examples show that each contract contains two promisors and two promisees. Once the contract arises, there are two *obligors* (persons obligated to perform contractual promises) and two *obligees* (persons entitled to receive the benefit of the obligor's performance in a contract).

Unilateral Contracts

A unilateral contract is formed when one party exchanges a promise of future performance to induce another party to take some specific action. In other words, a unilateral contract is an exchange of a promise for an act. Unlike a bilateral contract, where there is a mutual exchange of promises making each party to the contract both a promisor/obligor and a promisee/obligee, a unilateral contract contains only one promisor/obligor. The promisor in a unilateral contract makes a conditional promise to the promisee to induce him to undertake some action. Note the following typical examples:

- Pamela Promisor tells Pepe Promisee that she will pay him $100 if he installs a security light in her backyard over the weekend.
- Pascuale Promisor tells Paula Promisee that he will pay her $250 if she will repair his deck over the next week.
- Peter Promisor tells Patricia Promisee that he will tune up her car if she cleans out his garage.

In the preceding three examples, unilateral promises are made by Pamela, Pascuale, and Peter, who are trying to induce some specific performance by Pepe, Paula, and Patricia.

The obligation of these promisors will come into existence only if the promisees undertake the desired action. Once the promisees complete the performance in question, the promisors will be obligated to perform as promised. But the promisees are not under any obligation to perform; it is completely up to them whether or not to accept the agreement offered by the promisors by beginning the requested performance.

Note that whether a contract is unilateral or bilateral depends on the terms offered by the promisor. If the promisor is seeking acceptance through the promisee's performance (a promise in exchange for an act), then the contract is unilateral; but if the promisor is seeking a present commitment for future performance by the promisee (a mutual exchange of promises), then the contract is bilateral.

Simple Contract

A simple contract is any agreement that need not follow a specific format to be enforceable. Simple contracts can be oral, written, express, or implied in fact. The vast majority of contracts entered into by businesses and individuals are simple contracts.

Formal Contract

At common law, the most common type of formal contract was one that needed to be in writing, signed, witnessed, and sealed by the parties. Today, most jurisdictions have abolished the significance of the seal for most contracts, and Article 2 of the Uniform Commercial Code (UCC) abolishes the significance of seal in all states for contracts involving the sale of goods, but the law still recognizes a number of formal contracts that are required to be in a specific form and contain certain specific language to be enforceable. They include negotiable instruments such as checks, drafts and notes, letters of credit (a promise to honor a demand instrument when it is presented for payment), and *recognizances* (formal acknowledgments of indebtedness made in court).

Questions

1. What is the basic definition of a contract?
2. What are the basic elements of a valid contract?
3. Is it true that oral contracts are unenforceable? Explain.
4. What is an implied in fact contract?
5. What is a bilateral contract?
6. What is a unilateral contract?
7. What is a formal contract?
8. Are most contracts simple or formal?

Hypothetical Cases

1. Dominic tells Rey, "I'm tired of eating mediocre food every day. If you prepare one of your gourmet dinners for me tomorrow, I'll gladly pay you $200." Rey does not respond.
   A. Is Dominic's offer to Rey for a unilateral or bilateral contract?
   B. Assuming that Rey wants to accept the offer under Dominic's terms, what must he do? Explain.
2. Chris tells John, "If you agree to provide me with all the firewood I need for next winter, I will agree to take care of all your gardening needs this spring and summer." John promptly accepts Chris's offer.
   A. Assume that a valid contract is formed. Is it express or implied in fact?
   B. Is this an offer for a unilateral or a bilateral contract? Explain.
3. Jane agrees to tutor Tom in accounting for three hours per week at $20 per hour throughout the semester. Both parties reduce their agreement to a writing that each signs in turn.
   A. Is this a simple or formal contract?
   B. Is it a bilateral or unilateral contract?
   C. Is this an express or an implied contract?
4. Joan, while browsing at a busy flea market, sees a vase she likes. The proprietor is busy several feet away, but she manages to get her attention by waiving a $5 bill and pointing to the vase. The proprietor nods in her direction, and she takes the vase, leaving $5 on the table, in clear view of the proprietor. The proprietor smiles at her and waves.
   A. Under the facts given, was a contract formed?
   B. Is this a simple or formal contract?
   C. Is this an express or an implied in fact contract?

Unit II—Cases for Further Study

DOUGLASS V. PFLUEGER HAWAII, INC

Supreme Court of Hawaii

110 Haw. 520 (Haw. 2006)

This appeal concerns the sole question whether plaintiff-appellant Adrian D. Douglass, a minor at the time he was hired by defendant-appellee Pflueger Hawai`i, Inc. dba Pflueger Acura (Pflueger), is contractually bound by an arbitration provision set forth in Pflueger's Employee Handbook. Douglass appeals the December 30, 2003 order of the Circuit Court of the First Circuit, the Honorable Victoria S. Marks presiding, granting Pflueger's motion to stay action and to compel arbitration of the claims asserted by Douglass in his complaint.

I. Background

On or about November 29, 2001, Douglass was injured on the job when a coworker sprayed him on the buttocks area with an air hose. Subsequently, on May 2, 2002, Douglass filed a complaint with the Hawai`i Civil Rights Commission (HCRC). In response to his request to withdraw his HCRC complaint and pursue the matter in court, the HCRC, on September 25, 2002, issued a right-to-sue letter to Douglass, pursuant to HRS § 368-12 (1993). Thereafter, on December 17, 2002, Douglass filed an action against Pflueger in the circuit court. The complaint essentially asserted that: (1) Douglass was sexually assaulted in an attack in which his supervisor at Pflueger's car lot "took an air hose, held it against and/or in close proximity to his buttocks, and unleashed a blast of compressed air"; (2) Douglass' anus, rectum and colon were instantaneously penetrated, inflated, and dilated by the force of the blast; (3) Douglass was treated at the Emergency Department of the Kapiolani Medical Center for Women and Children; and (4) he was admitted to the hospital overnight for further observation and treatment. In his complaint, Douglass alleged five employment law claims: (1) Hostile, Intimidating and/or Offensive Working Environment; (2) Unsafe Working Environment; (3) Sexual Assault and Sexual Discrimination; (4) Negligent Training (of its Supervisor); and (5) Negligent Supervision.

III. Discussion

A. The Infancy Doctrine

Hawai`i has long recognized the common law rule—referred to as "the infancy doctrine" or "the infancy law doctrine"—that contracts entered into by minors are voidable. *See, e.g., Jellings v. Pioneer Mill Co.,* 30 Haw. 184 (1927); *Zen v. Koon Chan,* 27 Haw. 369 (1923); *McCandless v. Lansing,* 19 Haw. 474 (1909). Under this doctrine, a minor may, upon reaching the age of majority, choose either to ratify or avoid contractual obligations entered into during his or her minority. *See* 4 Richard A. Lord, *Williston on Contracts* § 8:14 (4th ed. 1992); *see also* Restatement (Second) of Contracts, §§ 7, 12, and 14 (1979); 7 Joseph M. Perillo, *Corbin on Contracts* § 27.4 (2002 ed.). Traditionally, the reasoning behind the infancy doctrine was based on the well-established common law principles that the law should protect children from the detrimental consequences of their youthful and improvident acts. As the California Court of Appeals explained in *Michaelis v. Schori,* 20 Cal.App.4th 133, 24 Cal.Rptr.2d 380 (1993):

> The rule has traditionally been that the law shields minors from their lack of judgment and experience and under certain conditions vests in them the right to disaffirm their contracts. Although in many instances such disaffirmance may be a hardship upon those who deal with an infant, the right to avoid his contracts is conferred by law upon a minor for his protection against his own improvidence and the designs of others. *It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant. Any loss occasioned by the disaffirmance of a minor's contract might have been avoided by declining to enter into the contract.*
>
> *Id.* at 381; *see also Dodson v. Shrader,* 824 S.W.2d 545,547 (Tenn. 1992) ("[T]he underlying purpose of the infancy doctrine . . . is to protect minors from their

lack of judgment and from squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace." [citation omitted]).

The rule that a minor's contracts are voidable, however, is not absolute. An exception to the rule is that a minor may not avoid a contract for goods or services necessary for his health and sustenance. *See* 5 Richard A. Lord, *Williston on Contracts* § 9:18 (4th ed. 1993); *see also Creech v. Melnik,* 147 N.C.App. 471, 556 S.E.2d. 587, 590-91 (2001); *Garay v. Overholtzer,* 332 Md. 339, 631 A.2d 429, 443-45 (1993). Such contracts are binding, even if entered into during minority, and a minor, upon reaching majority, may not, as a matter of law, disaffirm them. *See Muller v. CES Credit Union,* 161 Ohio App.3d 771, 832 N.E.2d 80,85 n. 4 (2005) (stating that contracts for the purchase of necessities, which "are food, medicine, clothes, shelter or personal services usually considered reasonably essential for the preservation and enjoyment of life[,]" are valid exceptions to the general rule) (citation and internal quotation marks omitted); *see also Yale Diagnostic Radiology v. Estate of Harun Found.,* 267 Conn. 351, 838 A.2d 179, 182 (2004). As the Maryland Court of Appeals summarized in *Schmidt v. Prince George's Hospital,* 366 Md. 535, 784 A.2d 1112 (Ct.App. 2001):

> *By the common law, persons, under the age of twenty-one years, are not bound by their contracts, except for necessaries, nor can they do any act, to the injury of their property, which they may not avoid, when arrived at full age. . . .*
>
> *They are allowed to contract for their benefit with power in most cases, to recede from their contract when it may prove prejudicial to them, but in their contract for necessaries, such as board, apparel, medical aid, teaching and instruction, and other necessaries, they are absolutely bound, and may be sued and charged in execution; but it must appear that the things were absolutely necessary, and suitable to their circumstances, and whoever trusts them does so at his peril, or as it is said, deals with them at arms' length.*
>
> *Their power, thus[,] to contract for necessaries, is for their benefit, because the procurement of these things is essential to their existence, and if they were not permitted so to bind themselves they might suffer.* [citation omitted].

It is apparent that the Hawai`i Legislature has, through the enactment of several statutory provisions codified the principle that contracts relating to medical care, hospital care, and drug or alcohol abuse treatment are contracts for "necessaries" (*i.e.,* medical aid). These statutes explicitly provide that minors who enter into contracts for the medical services described therein cannot later disaffirm them by reason of their minority status.

Inasmuch as none of the parties to this appeal contend that Douglass' employment was "a necessary," it would appear that under the well-recognized infancy doctrine, Douglass would be entitled to disaffirm his employment contract, including the purported arbitration agreement. However, a review of Hawaii's child labor law—specifically HRS § 390-2 (1993 Supp. 2005)—evinces the legislature's intent to incorporate the rationale underlying the common law infancy doctrine—that is, to protect children from the detrimental consequences of their youthful and improvident acts—into the statutory scheme and impose upon the Department of Labor and Industrial Relations (DLIR) the responsibility of promulgating rules and regulations to effectuate such intent.

Prior to 1969, *all* minors seeking employment were required to obtain a certificate of employment, which, as previously noted, requires the signature of a parent or guardian of the minor, as well as information from the employer as to, *inter alia,* the hours of work and the nature of the employment. [But] . . . since 1969, sixteen- and seventeen-year-olds are no longer required to secure parental consent, and the DLIR does not require any information from the employer; sixteen- and seventeen-year-olds are merely required to present his or her certificate of age to a prospective employer, which the minor obtains from the DLIR after producing an acceptable proof of age document.

With respect to contracts of employment, it is apparent that, by relaxing the requirements for sixteen- and seventeen-year-olds to obtain employment, the legislature clearly viewed minors in this particular age group—being only one to two years from adulthood—as capable and competent to contract for gainful employment and, therefore, should be bound by the terms of such contracts. Similarly, inasmuch as the parent or guardian of a minor under sixteen is required to sign the application for a certificate of employment, which contains specific information regarding the nature and conditions of that employment, before entering into an employment contract, any such contract is equally binding on said minor. However, consistent with the policy of protecting minors until they attain the age of majority, the legislature provided an additional safeguard by authorizing the DLIR to "suspend, revoke or invalidate" any certificate of employment or age previously issued if the minor's employment is later found to be detrimental to the minor. *See* HRS § 390-4 [citation omitted]. Thus, based on the foregoing reasoning, we conclude that, inasmuch as the protections of the infancy doctrine have been incorporated into the statutory scheme of Hawaii's child labor law, the general rule that contracts entered into by minors are voidable is not applicable in the employment context.

In applying the foregoing discussion to the circumstances of the instant case, we recognize that the record does not indicate whether Douglass had, in fact, obtained an age certificate prior to his employment with Pflueger. However, even if he did not, Douglass should, nevertheless, be bound by the terms of his employment contract with Pflueger. First, there is nothing in the statutory scheme of the child labor law that renders Douglass' employment invalid or illegal based on his failure to obtain an age certificate. Second, it is undisputed that Douglass was, at the time he was hired, a seventeen-year-old high school graduate, who was only four months away from majority. And, third, there is nothing in the record to suggest that "the nature or condition of [Douglass'] employment [as a lot technician was] such as to injuriously affect [his] health, safety or well-being . . . or contribute towards [his] delinquency" so as to trigger the suspension, revocation, or invalidation authority bestowed upon the DLIR director pursuant to HRS § 390-4. In other words, whether Douglass did or did not obtain an age certificate is irrelevant; it does not change the fact that Hawaii's child labor law provides for the protections of the infancy doctrine and renders inapplicable the general rule that contracts entered into by minors are voidable in the employment context. To conclude otherwise would be inconsistent with the clear legislative policy that sixteen- and seventeen-year-old minors do not, in accordance with the common law infancy doctrine, have an absolute right to disaffirm their employment contracts.

Accordingly, we hold that the circuit court properly rejected Douglass' argument that he is entitled to disaffirm his employment contract, including the arbitration provision, by reason of his minority status. *Mossman v. Hawaiian Trust Co., Ltd.,* 45 Haw. 1, 15-16, 361 P.2d 374, 382 (1961) (agreeing with determination of the trial court, but for different reason); *see also Ko`olau Agric. Co., Ltd. v. Comm'n on Water Res. Mgmt.,*83 Hawai`i 484, 493, 927 P.2d 1367, 1376 (1996) (same).

Optional Assignments

1. Brief the preceding abbreviated version of the case in a one-page, single-spaced brief (with double spaces between paragraphs) that contains the following four sections: (1) The basic facts of the case [Facts]; (2) The legal issue the court is being asked to decide [Issue]; (3) The holding of the court (how it decides the legal issue before it) [Holding]; and (4) The rationale the court uses to support its decision [Rationale]. If your instructor asks you to brief the case, she will give you additional instructions.
2. In the omitted portion of the case, the court examines the validity of the arbitration clause in the employment contract and concludes that the clause is valid. Because it treats the employment contract containing the clause as a "necessary" that precludes the minor from disaffirming the contract, the court goes on to order that the case must be decided by arbitration and dismisses the appellant minor's appeal. Do you think this is a just decision? Explain.

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT CLARK COUNTY
Ayres v. Burnett
2014 Ohio 4404
[2014]

FAIN, J.,

Plaintiffs-appellants Diana and Richard Ayres appeal from a judgment of the Clark County Court of Common Pleas rendered upon their complaint against defendants-appellees Diana and David Burnett. They contend that the trial court erred by considering parol evidence of modification of the lease agreement between the parties. Alternatively, they contend that there was no consideration for any modification.

We conclude that the trial court erred to the extent that it considered evidence of conversations extrinsic to the lease before February 2004, because that evidence is barred by the parol evidence rule. We further conclude that the evidence of conversations concerning the modification made in February 2004 is not barred by the parol evidence rule. We conclude that the trial court erred in finding that there was evidence of consideration for modification as of that date. Finally, we conclude that there is competent, credible evidence upon which the trial court could rely in finding that in August 2006, the parties orally agreed to modify the monthly rent under the lease agreement as of August 2006, and that the modification of the rent amount was supported by sufficient consideration.

Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

V. The Lease

The Ayreses are the owners of a commercial building at 89 East Clark Street, North Hampton, Ohio. On October 2, 2002, they executed an "Offer to Lease" with the Burnetts, which provided for monthly rent in the amount of $1,950. The Burnetts opened a day-care business in the property in July 2003. A lease was executed between the parties on October 13, 2003. The lease had an effective period from July 2003 through June 30, 2006. The lease contained the provision for monthly rent as the Offer to Lease—$1,950. No rent payments were made until February 2004, when the Burnetts began paying $1,500 per month. On September 1, 2006, the Burnetts began paying $1,650 per month for rent, until April 2007, when they vacated the premises.

The Ayreses brought this action against the Burnetts for unpaid rent, as well as damages to the building. At trial, Mr. Burnett testified that Mr. Ayres agreed to accept the sum of $1,500 as full rent. He further testified that the parties agreed to the sum of $1,650 beginning September 2006. Mr. Burnett testified that Ayres gave them receipts for the monthly payments and never indicated that there was an underpayment.

Mrs. Burnett testified that Mr. Ayres approached her about using his building for a daycare business. She testified that Mr. Ayres prepared a business plan for her, but did not include an amount for rent. According to Mrs. Burnett, Mr. Ayres told her that the rent would "probably [be] between $800 or $900." Tr. p. 316-317. The business opened in July 2003. She testified that Mr. Ayres told her that she and her husband should get the business going and they would discuss the rent payments later. Ayres did not contact her again until October 2003, when he brought the written lease agreement to them for signature. Mrs. Burnett testified that she told Mr. Ayres that the rent payment set forth in the lease agreement was not the amount agreed upon; he told her not to worry about it, that he had already had his attorney prepare the lease and they would "take care of it in a few months and see what the rent would be."

Mrs. Burnett testified that she next discussed the matter with Ayres in early February 2004, when he came to the daycare to discuss the rent. She testified that he asked her how much she could pay, and she told him that she could afford to pay $1,500 per month. Mrs. Burnett testified that Mr. Ayres agreed to that amount. She also testified that he agreed to accept their business tax refund as payment for past rent. She testified that she personally gave him a check for $8,500, which he accepted for the past rent. Mrs. Burnett testified that in August 2006, when the lease term expired, Mr. Ayres told her that he wanted the sum of $2,200 as rent. She testified that they agreed to the sum of $1,650, which she and her husband paid through March 2007. They vacated the premises in April 2007.

Mr. Ayres, who is an accountant, testified that the building had previously been used for a daycare business and that he marketed it to the Burnetts for that use. He testified that he never agreed to a reduction in rent. He testified that he accepted the $1,500, and later the $1,650 in rental payments from the Burnetts, but that the "balance was never forgiven. It was deferred." He testified that the receipts he gave the Burnetts did not indicate any balance due in the section used for showing deficiencies, and that he did not present them with an invoice for the balance. He further testified that he did not take any steps to evict or to sue the Burnetts during the time they occupied the premises. He filed suit in August 2008.

II. The Course of Proceedings

Following trial, the magistrate found that the parties had modified the terms of the lease. The magistrate's decision stated, in pertinent part, as follows:

> *The [Ayreses] and the [Burnetts] entered into an Offer to Lease dated June 26, 2002 and a lease agreement for the lease of 89 East Clark Street, North Hampton, Ohio on or about October 13, 2003. The lease, by its terms, was to have commenced on July 1, 2003 and was to end on June 30, 2006. The [Burnetts] possessed the option to renew the lease for an additional three years providing certain conditions were met. The option to renew the lease for an additional three years was to have been memorialized by a writing and, in the absence thereof, the tenant was to be considered as holding over and a tenant at will. The Court finds that the [Burnetts] continued to occupy the leased premises into April, 2007 with the agreement of the [Ayreses] but that they were tenants at will.*
>
> *The Court finds that, based on their course of dealing as evidenced by the testimony and exhibits, the [parties] agreed that the rent for the premises, after June 30, 2006 was to be $1,650.00 per month which the [Burnetts] paid through March, 2007. Prior to that date, the parties, by their course of dealing, as evidenced by the testimony and exhibits, had agreed this rent would be reduced to $1,500 per month. The consideration for such amendments was the continued occupancy of [the Burnetts] on [the Ayreses] premises. The [Burnetts] vacated the premises in April, 2007 but agreed to pay*

the [Ayreses] April rent but failed to do so. The Court, therefore, finds that the [Ayreses are] due that rent as well as the ten percent (10%) penalty provided for under the lease for a total of $1,715.00.

The Court further finds that, as to [the Ayreses'] claim for rent due from the inception of the lease until the termination of the initial three-year term, that the parties subsequently modified the lease terms to provide for a lesser amount of monthly rent than that originally provided for and the parties' course of conduct over the three years of the original term was probative of their modification. Accordingly, the Court finds in favor of the [Burnetts] upon the claim of the [Ayreses] for unpaid rent during the [Burnett's] occupancy of the premises during the initial three-year term [citation omitted].

The Ayreses filed objections to the magistrate's decision, which the trial court overruled. From the judgment rendered by the trial court, the Ayreses appeal.

III. [Held:] The Trial Court Erred by Considering Parol Evidence of a Modification of the Lease Agreement Before August, 2006

Agreements Unsupported by Consideration

The Ayreses contend that evidence of any modification of the rental amount set forth in the lease is barred by the parol evidence rule. Alternatively, they contend that any finding of modification is improper, because no consideration was given for a reduction in the amount of rent.

"As a rule of substantive law, the parol evidence rule provides that extrinsic evidence is not admissible to contradict or vary the terms of an unambiguous contract." Mangano v. Dawson, 7th Dist. Columbiana No. 93-C-72, (June 13, 1995). "The rule results from the presumption that the intent of the parties to a contract resides in the language they choose to employ in the agreement." Id. "The rule 'operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form [.]' " Bellman v. Am. Internatl. Group, 113 Ohio St.3d 323. "The parol evidence rule does not apply to evidence of subsequent modifications of a written agreement or to waiver of an agreement's terms by language or conduct." Star Leasing Co. v. G & S Metal Consultants, Inc., 10th Dist. Franklin No. 08AP-713 [citation omitted].

In this case, the lease did not contain a clause prohibiting oral modification of the lease. There is evidence that the parties engaged in general discussions, prior to, and contemporaneous with, the signing of the lease, to the effect that the monthly rent would be less than $1,000. This evidence is barred by the parol evidence rule. However, we conclude that there was competent, credible evidence upon which the magistrate could rely in finding that the parties engaged in conversations in February 2004, after the execution of the lease, that could serve to modify the amount of rent subsequent to the execution of the lease. The parol evidence rule is inapplicable to those discussions.

We must determine whether there was any consideration to support an oral modification of rent as a result of the discussions in February 2004. "Leases are contracts and are subject to traditional rules of contract interpretation." EAC Properties, LLC v. Brightwell, 10th Dist. Franklin No. 10AP-853. "A tenancy is possession or occupancy of land by right or title, especially under a lease, which is a contract by which an owner or rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usually rent." Kanistros v. Holeman, 2d Dist. Montgomery No. 20528 [citation omitted].

"Oral modification of a written contract must be supported by new and distinct consideration." Coldwell Banker Residential Real Estate Services v. Sophista Homes, Inc., 2d Dist. Montgomery No. 13191 (Oct. 26, 1992). "It is elementary that neither the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party." Id. quoting Rhoades v. Rhoades, 40 Ohio App. 2d 559 (1st Dist. 1974). "The pre-existing duty rule prohibits one from being forced to modify a contract whereby one is already bound to perform without adding some additional consideration." O'Brien v. Production Engineering Sales Co., 2d Dist. Montgomery No. 10417 [citation omitted] (Jan. 8, 1988). "The burden of proving consideration is on the party who seeks to prove modification." Coldwell Banker, supra. The existence of consideration is a question of fact. Id. In a civil case, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." C.E. Morris Co. v. Foley Constr. Co., 54 Ohio St.2d 279 (1978).

In this case, the Burnetts were already bound by the lease to rent the premises for a term of three years at the rate of $1,950 per month. The mere fact that the Burnetts promised to pay, and did pay, a lesser sum than they were required to pay does not constitute consideration sufficient to create a new contract. Lawhorn v. Lawhorn, 2d Dist. Montgomery No. 11914 [citation omitted] (Sept. 7 1990). "[A] mere agreement by the lessor to accept less rental than that provided in the lease, is without consideration and, therefore, not binding." Adams Recreation Palace, Inc. v. Griffith, 58 Ohio App. 216 (2d Dist. 1937). However, as of August 2006, the initial three-year lease term had expired, and the Burnetts became tenants at will, holding over under the lease. As stated above, there is evidence that the parties orally agreed, in August, that the rental amount would be $1,650. The trial court was free to credit the Burnetts' testimony over that of Mr. Ayres regarding the modification. We do not find the Burnetts' testimony unworthy of belief. This modification was supported by sufficient consideration, in that the Burnetts continued in possession of the premises, enabling the Ayreses to continue to earn income, after the expiration of the original lease term. Thus, we conclude, based upon the facts found by the trial court, that from August 2006 until the parties vacated the premises, the agreed-upon monthly rent was $1,650, which the Burnetts paid.

We conclude that the trial court erred to the extent that it permitted the use of parol evidence to support a finding of modification prior to the February 2004 conversations between Mr. Ayres and the Burnetts. Thus, the finding of modification prior to that date was improper. Furthermore, there was no consideration for a modification before the expiration of the lease term in 2006. We conclude that there was evidence of conversations suggesting a modification as of February 2004; however, again the record does not demonstrate consideration sufficient to support an agreement to modify. We conclude that the trial court's finding of modification was, therefore, error with regard to the period from February 2004 until August 2006. The trial court did not err in finding consideration sufficient to support the claimed modification for the period from August 2006, during the holdover period until the premises were vacated.

The trial court's decision with regard to modification prior to August 2006 is not supported by the record. The decision finding both modification with sufficient consideration following August 2006 is supported by the evidence. Thus, the sole assignment of error is sustained in part and overruled in part.

I. Conclusion

The sole assignment of error being sustained in part and overruled in part, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

Optional Assignments

1. Brief the preceding abbreviated version of the case in a one-page, single-spaced brief (with double spaces between paragraphs) that contains the following four sections: (1) The basic facts of the case [Facts]; 2. The legal issue the court is being asked to decide [Issue]; (3) The holding of the court (how it decides the legal issue before it) [Holding]; and (4) The rationale the court uses to support its decision [Rationale]. If your instructor asks you to brief the case, he will give you additional instructions.
2. It is a well-established principle of law that modifications to a contract made without additional consideration to support them are invalid because they run afoul of the pre-existing duty rule. One cannot renegotiate a contract that has one of the parties give more or less consideration than they originally promised unless some additional consideration is given to that party to justify the change. Nevertheless, the Article 2 of the Uniform Commercial Code (UCC) changed the common law rule that still generally applies to other contracts and permits good faith modifications to sales contracts agreed to by the parties to be effective even without additional consideration being given. Which do you think is the better rule? Why?