CHAPTER 16

Genuine Assent and Contractual Capacity

Chapter Outline

Chapter Preview

In Chapter 13, it was noted that a contract has four elements: (1) offer and acceptance (the agreement), (2) consideration, (3) legal capacity, and (4) legal purpose. The first two were explained in the preceding two chapters. In this chapter, we ask whether the agreement that was entered into is genuine or whether that agreement is based on mistake, misrepresentation, undue influence, or duress. Often, one party creates an offer that is flawed, and the other party relies on the imperfect offer in the accepting. In such cases, the contract is avoidable by rescission because the consent given was not real or genuine.

This chapter also explores the third element of a contract: legal capacity. An otherwise properly created agreement may be rendered inoperative through the equitable remedy of rescission. When a party has the right to disaffirm or rescind a contract, that contract is said to be voidable. All parties must have the legal capacity to give their consent. Some parties—such as minors, insane persons, and intoxicated persons—do not have the legal capacity to assent to contract terms; they can undo (rescind) their contracts.

Business Management Decision

You are a sales manager for an automobile dealer. One of your salespeople wants to contract to sell a car to a sixteen-year-old who is going to make a $1,000 down payment and sign a promissory note in the amount of the remainder of the purchase price.

Should you approve this sale?

16.1 Genuineness of Assent

16.1a Nature of Assent

Our study of contracts in the world of business recognizes the importance of being able to use the law to enforce promises made within the context of an agreement. Businesses need to rely on promises made, whether they involve a contract a manufacturing facility enters into with a hospital to provide a multimillion-dollar laser for a surgical suite or a contract of employment between a brewpub and a chef for the chef to work five nights per week. In some situations, however, the common law recognizes there may be circumstances that allow individuals and entities to avoid the promises they have made under an otherwise proper agreement.

The notion that there is free assent to any contract was mentioned in Chapter 13. Voluntary and unimpeded agreement between the parties is central to the idea that society should provide a mechanism to enforce a private agreement. Therefore, it is entirely appropriate that we examine the *genuineness of the assent*.

Five situations demand our attention. First, contracts can be voided if there is a *mistake* when the contract is formed. Second, if one party *misrepresents* an important aspect of a contract, the law provides a remedy. In addition to these two, there are three categories that relate to a situation in which the assent is *not voluntary*. One involves the case of one party exerting *undue influence* over the other party. Another occurs when one party *forces* someone to enter into an agreement (duress), generally through the use of a threat of some type. The final type of involuntary assent is based on an adhesion contract (in which, because of *unequal bargaining power*, terms are imposed by one party on another). All five of these topics, which may be termed "defenses to formation of a contract," are addressed below.

16.1b Remedy of Rescission

Where a person or entity makes an agreement based on a mistake or a misrepresentation or enters into an agreement involuntarily (through undue influence or duress or by way of an adhesion contract), the law recognizes that there should be a way to void the agreement because consent was not genuine. In these situations, courts may indicate that the agreement is *voidable*. This means that the person who is found to have not provided true consent to an agreement because of the actions of the other party may rescind the agreement, or the party may agree not to rescind. The **power of rescission** results in the agreement being cancelled.

When the power of rescission is invoked, the law demands that the parties put themselves into the position they were in before the agreement was created. Thus, the party who is rescinding must return anything provided, and the same obligation must be satisfied by the other party.

Courts generally want a party who has the power of rescission to rescind the contract within a reasonable time and make clear to the other party that they are rescinding. The idea is that the party who is subject to one of the defenses to formation of the contract should move swiftly, if rescission is indeed in their best interest. Delay in pursuing a remedy based on equitable principles dims the prospect that one is truly worthy of avoiding the harshness of the common law and benefiting by the broad discretion judges in equity have to pursue fairness.

Power of rescission
The ability of a party to cancel an agreement

Keep in mind that the power of rescission does not have to be executed. A party who lacks genuine assent may decide it is to his/her benefit to perform, rather than rescind, in which case courts will acknowledge the contract is valid. As you consider these defenses to formation of a contract, the general rule is that the contract is deemed voidable at the option of the party who was the victim of a mistake or misrepresentation or who did not voluntarily agree to the terms of the contract.

16.2 Mistake

16.2a Definitions

A **mistake** is some unintended act, omission, or error that arises from ignorance, surprise, imposition, or misplaced confidence. A variety of mistakes may occur in forming a contract. They may involve errors in arithmetic, errors in transmitting the offer or acceptance, errors in drafting the written contract, or errors about existing facts. A court may or may not grant relief because of a mistake. A court may grant relief if the mistake shows that there is no real or genuine assent. The mistake must be a *material* one. The relief granted may be *contract reformation* (court changes contract to correct a mistake) or *contract avoidance* (court allows any party adversely affected by the mistake to avoid his/her contract). As a general rule, courts may grant relief when there has been a *bilateral mistake of material fact* (both parties mistaken), as contrasted with a *unilateral mistake* (only one party mistaken).

The law will only provide the possibility of a defense to formation of a contract in situations in which a mistake pertains to facts. Mistakes of judgment or value generally will not create a valid defense to enforcement of a contract because these are matters subjective in nature. Each party to a contract has its own set of criteria to apply as to whether a contract is "a good deal" or that the value of a product or service is worth a particular amount.

16.2b Bilateral Mistake

To have a bilateral or mutual mistake, all parties must have the same (identical) mistake. Before making a contract, a party usually evaluates the proposed bargain based on various assumptions regarding existing facts. The other party shares many of these assumptions. A bilateral mistake occurs when both parties are mistaken regarding the same assumption. Relief is appropriate where a mistake of both parties has a material effect on the agreed exchange of performances. Two examples may help illustrate when relief is appropriate.

A contract is voidable if both parties are mistaken as to the same assumption and if one of the parties is adversely affected by the material mistake. (iStock)

Example 1: Al contracts to sell and Barney agrees to buy a tract of land, the value of which has depended primarily on the timber on the tract. Both Al and Barney believe the timber is on the land; however, unknown to them, a fire destroyed the timber the day before they contracted. The contract is voidable by Barney because he is adversely affected by the material bilateral mistake. Note that the court could not reform the contract to correct the mistake.

Example 2: Al contracts to sell and Barney agrees to buy a tract of land for $500,000 that they believe contains 200 acres. In fact, the tract contains 205 acres. The contract is not voidable by either Al or Barney unless additional facts show that the effect on the agreed exchange is material.

In the transaction of business, it is often customary to dispose of property about which the contracting parties willingly admit that all the facts are not known. In such instances, the property is sold without regard to its quality or characteristics. Such agreements may not be rescinded if later the property appears to have characteristics that neither of the parties had reason to suspect or if it otherwise differs from their expectations. Under such conditions, the property forms the subject matter of the agreement, regardless of its nature. If shortly after a farm is sold, oil is discovered on it, the seller could not rescind the agreement on the grounds of a bilateral mistake.

Mistake
Some unintended act, omission, or error that arises from ignorance, surprise, imposition, or misplaced confidence

To illustrate and compare cases in which a mutual mistake may be a ground for rescission, consider the two following examples:

Example 1: A woman finds a yellow stone about the size of a bird's egg and thinks it might be a gem. She takes it to a jeweler, who honestly states that he is not sure what the stone is. Nonetheless, he offers her $15 for the stone, and she sells it. The stone is later discovered to be an uncut diamond worth $3,000. *Result*: No relief will be granted. There was no mistake of fact; only of value. Both parties bargained with the knowledge that they were consciously ignorant—both thereby assuming the risk that the stone might be worth nothing or might be a valuable gem. *Rule*: When the parties are uncertain or consciously ignorant of facts about the thing sold, there is no avoidance for mistake.

Example 2: A buyer and a seller both mistakenly believe a cow of excellent breeding stock to be sterile. In fact, the cow could breed and is already pregnant. The cow is sold for beef at a price far below what she would otherwise have brought for breeding purposes. *Result*: When the mistake became apparent, the seller could rescind. The parties were not negligent in being mistaken, nor were they consciously ignorant. Both parties thought they knew what they were buying and selling; however, what they bought and sold was, in fact, not what they contemplated buying and selling. A sterile cow is substantially different from a breeding cow. There is as much difference between them as between a bull and a cow. Since there is no good basis to place the risk of the mistake on either party, the contract is voidable for mutual mistake. *Rule*: A mutual mistake regarding the quality of the item sold—a quality that goes to its very essence—is grounds for avoiding a contract.

16.2c Unilateral Mistake

When only one party is laboring under a mistake, it is said to be a *unilateral (one-sided) mistake*. Generally, a contract entered into because of some mistake or error by only one party affords no relief to that party. The majority of such mistakes result from carelessness or lack of diligence by the mistaken party and should not, therefore, affect the rights of the other party.

Because courts desire that the parties are careful when negotiating provisions that result in a contract, granting relief where only one party is mistaken is rare. However, there are three situations in which courts are increasingly deciding they will not enforce an agreement that includes a unilateral mistake.

The first situation where a unilateral mistake is recognized as a defense to formation pertains to *unconscionability*. The theory is that if a unilateral mistake creates a situation where enforcing the contract would leave the mistaken party in a significantly weakened condition, relief will be granted. Another occurs where a clerical error has occurred. Typical examples include mathematical errors of addition or subtraction in a bid. Finally, where the other party knew or should have known of the mistake, the contract may not be enforceable.

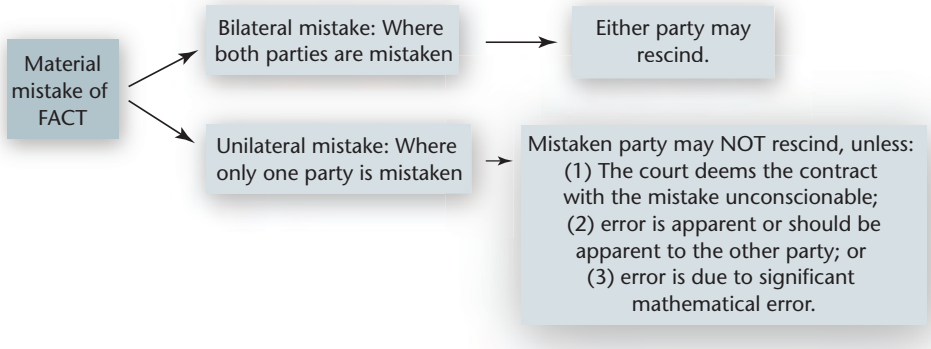

EXHIBIT 16–1
Bilateral and Unilateral Mistakes

The nature of the unilateral mistake doctrine is illustrated by Case 16.1.

CASE 16.1

Amerisourcebergen Drug Corp. v. Kohll's Pharmacy & Homecare, Inc.

2012 U.S. Dist. LEXIS 153885

United States District Court for the Eastern District of Pennsylvania (2012)

Opinion and Memorandum by Gene E. K. Pratter

Amerisourcebergen Drug Corporation ("ABDC") has sued Kohll's Pharmacy and Homecare, Inc. ("Kohll's") for breach of contract. The parties have filed cross-motion for partial summary judgment. Kohll's asks the Court to rule as a matter of law that a unilateral mistake occurred during the formation of its contract with ABDC, while ABDC argues that Kohll's breached the contract. For the reasons provided below, the Court denies the motion.

Factual Background

ABDC is a wholesale distributor of pharmaceutical products, while Kohll's is a retail pharmacy with an annual sales volume of $33 million. On December 27, 2005, Kohll's president, David Kohll, signed an Individual Purchase Agreement ("IPA"), which set forth terms and conditions regarding a business relationship between it and ABDC. The parties dispute the significance of this document, as ABDC contends that the IPA is merely a negotiation document, not a contract. Language in the IPA stated that "[e]ach party reserves the right to terminate this agreement with 60 days notice."

On January 23, 2006, ABDC and Kohll's executed a Prime Vendor Agreement (PVA). Under the PVA, ABDC agreed to provide products, including prescription and over-the-counter pharmaceuticals, to Kohll's. The parties agree that either party could terminate the PVA "for cause," but that the PVA did not allow Kohll's to terminate the agreement upon receipt of a more favorable offer from an ABDC competitor. The PVA established that the "term of agreement" would run from January 23, 2006 until January 31, 2012, and (unlike the IPA) it did not include language allowing either party to terminate the agreement upon 60 days of notice prior to January 31, 2012. The PVA also stated that "[i]n the event of a conflict between a prior document between the parties and this Agreement, this Agreement will control. This Agreement supersedes prior oral or written representations by the parties that relate to its subject matter other than the security interest[.]"

Critically, the PVA included a section entitled "Minimum Order Volume," which stated that:

> *Customer's minimum annual Net Purchase (total purchases less returns, credits, rebates, late payment fees and similar items) volume during Year 1 is $15,600,000. Year 1 is from the Effective Date to January 31, 2007. Subsequent contract years are the following twelve (12) month periods. Customer's Net Purchases during subsequent years are projected to increase at a rate of 5.00% per year during each year of the Term. Customer's aggregate Net Purchase volume over the life of this Agreement will be no less than $106,089,000.*

As discussed below, ABDC argues that this quoted language entitles it to partial summary judgment.

On January 6, 2009, Kohll's informed ABDC that it intended to terminate the PVA. Although ABDC's counsel objected to the termination, Kohll's ceased purchasing products from ABDC after January 2009. The parties agree that Kohll's did not terminate the PVA "for cause." On February 19, 2009, ABDC filed this action and alleged that Kohll's breached the PVA.

Kohll's argues that it should prevail because David Kohll made a unilateral mistake and signed the PVA believing that it contained the 60-day termination provision. A party seeking to reform a contract due to a unilateral mistake must show, by clear and convincing evidence, that the party against whom reformation is sought had such knowledge of the mistake as to justify an inference of fraud or bad faith.

Here, Kohll's fails to show that a reasonable fact finder would necessarily conclude that ABDC knew or should have known that Kohll's believed the PVA contained a 60-day termination provision. ABDC has presented evidence that Kohll's extensively negotiated the terms of the PVA in January 2009. Additionally, Greg Arnold has testified that he believed David Kohll was a "very smart" and "very tough" businessman who would have personally read the PVA before signing it. Based on these facts, a fact finder could conclude that ABDC possessed a good-faith belief that Kohll's knew the terms of the PVA, including its non-inclusion of a 60-day termination provision, and that ABDC thus lacked "such knowledge of [Kohll's] mistake as to justify an inference of fraud or bad faith."

For the foregoing reasons, the Court denies the parties' motions for partial summary judgment.

Case Concepts for Discussion

1. Why did the court fail to grant relief for the alleged unilateral mistake?
2. Why did the fact that Kohll was an astute member of the business community matter to the court? What if Kohll had not been sophisticated in the ways of business and had instead been a recent university graduate with a degree in religious studies and working on his first deal?

This general rule is subject to certain exceptions. An offeree who has reason to know of a unilateral mistake is not permitted to "snap up" such an offer and thereby profit. For example, if a mistake in a bid on a contract is clearly apparent to the offeree, the offeree cannot accept it. Sometimes the mistake is discovered prior to the bid opening, and the offeror seeks to withdraw the bid. Bids are often accompanied by bid bonds, which have the effect of making them irrevocable. Most courts will allow the bidder to withdraw the bid containing the error if (1) the bidder acted in good faith, (2) the bidder acted without gross negligence, (3) the bidder was reasonably prompt in giving notice of the error in the bid to the other party, (4) the bidder will suffer substantial detriment by forfeiture, and (5) the other party's status has not greatly changed and relief from forfeiture will work no substantial hardship on him/her. Courts clearly scrutinize the facts to make sure that all these requirements are met. It should be difficult for low bidders to claim an error in computation as the basis for escaping from a bid noticeably lower than the competition's. This is the bad-faith element of the aforementioned test.

16.2d Reformation of Written Contracts

In most instances, a written contract is preceded by negotiations between the parties, who agree orally on the terms to be set forth in the final written contract. This is certainly the case when the parties contemplate a written statement signed by both as necessary to a binding agreement—that is, the oral agreement itself was not to have a binding effect. Of course, the parties could intend otherwise. They could regard the oral agreement as binding without any writing, or they could regard the writing as simply a subsequent memorial of their oral agreement.

Suppose the written agreement that is finally executed by the parties contains a mistake. The signed writing does not conform to what the parties agreed to orally. Frequently, the draftsperson or typist may make an error that is not discovered prior to the signing of the contract, and the party benefiting from the error seeks to hold the other party to the agreement as written. For such situations, courts of equity provide a remedy known as *reformation,* and the court corrects (*reforms*) the contract.

The only remedy in cases of unilateral mistake apparent to the other party is rescission. Reformation is not an available remedy, since it can be used only to correct the written contract to reflect the actual intentions of both parties. Reformation is available only for a case of mutual mistake.

If the facts do not support a finding of mutual mistake, the remedy of reformation is not available.

16.3 Misrepresentation

16.3a Types of Misrepresentation

A contract is voidable if one party has been induced and injured by reliance on the other's misrepresentation of a material fact. The misrepresentation may be intentional, in which case the law considers the misrepresentation to be *fraudulent.* It may be based on a lack of due care, termed *negligent misrepresentation.* It may also be termed *innocent misrepresentation.* In all cases, the victim of the misrepresentation may rescind the contract.

In fraudulent misrepresentation, the victim is given the additional remedy of a suit for dollar damages, most often including punitive damages. Cases where negligent misrepresentation is shown will generally allow a plaintiff to recover contract damages only. For innocent misrepresentation, no damages are allowed.

The focus of the discussion in this section is directed to fraud, although references to the far less common actions for negligent misrepresentation and innocent misrepresentation are made when appropriate. While the elements of actionable fraud (intentional misrepresentation) are stated differently from state to state, the following are generally required:

1. ***Scienter***, or *intention to mislead*, which means knowledge of the falsity or statements made with such utter recklessness and disregard for the truth that knowledge is inferred
2. A *false representation or the concealment* of a material fact
3. *Justifiable reliance* on the false statement or concealment
4. *Damages* as a consequence of the reliance

While fraud requires the proof on all four elements, negligent and innocent misrepresentation do not require proof of *scienter,* but they do require proof of all the other elements of fraud. Negligent misrepresentation requires the additional element that the defendant failed to perform in a reasonable manner.

Scienter
Knowledge or deliberate disregard of the falsity of a representation

Rescission is permitted only in cases in which the defrauded party acts with reasonable promptness after learning of the falsity of the representation. Undue delay on the defrauded's part waives his/her right to rescind, thus limiting the defrauded party to an action for recovery of damages. A victim of fraud loses the right to rescind if, after having acquired knowledge of the fraud, he/she indicates an intention to affirm the contract. These principles result from the fact that rescission is an equitable remedy.

16.3b *Scienter*

The requirement of intent to mislead is often referred to as *scienter,* a Latin word meaning "knowingly." *Scienter* may be present in circumstances other than the typical false statement made with actual intent to deceive. *Scienter* may be found when there has been a concealment of a material fact. Moreover, a statement that is partially or even literally true may be fraudulent in law if it is made to create a substantially false impression.

Intention to mislead may also be established by showing that a statement was made with *reckless disregard* for the truth. An accountant who certifies that financial statements accurately reflect the financial condition of a company may be guilty of fraud if he/she has no basis for the statement. Perhaps the accountant does not intend to mislead, but his/her statement is so reckless that the intention is inferred from the lack of actual knowledge.

16.3c False Representation

To establish fraud, there must be an actual or implied **misrepresentation** *of a past or existing fact*. The misstatement of fact must be material or significant to the extent that it has a moving influence on a contracting party, but it need not be the sole inducing cause for entering into the contract.

False statements in *matters of opinion,* such as value of property, are not factual and usually are not considered actionable. For example, sales hype or puffery and promises about a sales item's future value generally do not constitute fraud. However, statements of opinion may be considered misrepresentations of fact in certain situations. An intentional misstatement even with regard to value may be fraudulent if the person making the statement has another opinion and knowingly states a false opinion. This concept is sometimes used when the person who is allegedly fraudulent is an expert, such as a physician, or when the parties stand in a **fiduciary** relationship (a position of trust) to each other. Assume that a doctor, after examining a patient for an insurance company physical, states that he is of the opinion that the person has no physical disability. If his actual opinion is that the patient has cancer, the doctor is guilty of fraud. He has misstated a fact (his professional opinion). The same is true if a partner sells property to the firm of which he/she is a member. The false statement of opinion concerning the value of the property will supply the misstatement of fact element. Each partner is a fiduciary toward fellow partners and the firm and must give honest opinions.

Misrepresentation
The affirmative statement or affirmation of a fact that is not true

Fiduciary
A person who occupies a position of trust or confidence in relation to another person or his/her property

A half-truth (or partial truth) that has the net effect of misleading may form the basis of fraud, just as if it were entirely false. A partial truth in response to a request for information becomes an untruth whenever it creates a false impression and is designed to do so. Case 16.2 presents perhaps the most famous case dealing with this aspect of fraud to have been decided in the past fifty years.

An intentional misrepresentation of existing local or state law by someone other than an attorney affords no basis for rescission because it is not a statement of fact in the technical sense. Statements of law are traditionally seen as assertions of opinion. Moreover, everyone is presumed to know the law; therefore, deception is not possible. In recent years, however, a few courts have held such statements about the law by attorneys to be factual or the equivalent of professional opinions and thus fraudulent.

CASE 16.2

Audrey E. Vokes v. Arthur Murray, Inc., A Corporation, J. P. Davenport, d/b/a Arthur Murray School of Dancing

212 So. 2d 906

Court of Appeals of Florida, Second District (1968)

Opinion by Judge Pierce

This is an appeal by Audrey E. Vokes, plaintiff below, from a final order dismissing with prejudice, for failure to state a cause of action, her fourth amended complaint, hereinafter referred to as plaintiff's complaint.

Defendant Arthur Murray, Inc., a corporation, authorizes the operation throughout the nation of dancing schools under the name of "Arthur Murray School of Dancing" through local franchised operators, one of whom was defendant J. P. Davenport and whose dancing establishment was in Clearwater.

Plaintiff Mrs. Audrey E. Vokes, a widow, 51 years of age and without family, had a yen to be "an accomplished dancer" with the hopes of finding "new interest in life." So, on February 10, 1961, a dubious fate, with the assist of a motivated acquaintance, procured her to attend a "dance party" at Davenport's "School of Dancing" where she whiled away the pleasant hours, sometimes in a private room, absorbing his accomplished sales technique, during which her grace and poise were elaborated upon and her rosy future as "an excellent dancer" was painted for her in vivid and glowing colors. As an incident to this interlude, he sold her eight 1/2-hour dance lessons to be utilized within one calendar month therefrom, for the sum of $14.50 cash in hand paid, obviously a baited "come-on."

Thus she embarked upon an almost endless pursuit of the terpsichorean art during which, over a period of less than sixteen months, she was sold fourteen "dance courses" totaling in the aggregate 2302 hours of dancing lessons for a total cash outlay of $31,090.45, all at Davenport's dance emporium. All of these fourteen courses were evidenced by execution of a written "Enrollment Agreement—Arthur Murray's School of Dancing" with the addendum in heavy black print, "No one will be informed that you are taking dancing lessons. Your relations with us are held in strict confidence", setting forth the number of "dancing lessons" and the "lessons in rhythm sessions" currently sold to her from time to time, and always of course accompanied by payment of cash of the realm.

These dance lesson contracts and the monetary consideration, therefore, of over $31,000 were procured from her by means and methods of Davenport and his associates which went beyond the unsavory, yet legally permissible, perimeter of "sales puffing" and intruded well into the forbidden area of undue influence, the suggestion of falsehood, the suppression of truth, and the free exercise of rational judgment, if what plaintiff alleged in her complaint was true. From the time of her first contact with the dancing school in February 1961, she was influenced unwittingly by a constant and continuous barrage of flattery, false praise, excessive compliments, and panegyric encomiums, to such extent that it would be not only inequitable, but unconscionable, for a Court exercising inherent chancery power to allow such contracts to stand.

She was incessantly subjected to over-reaching blandishment and cajolery. She was assured she had "grace and poise"; that she was "rapidly improving and developing in her dancing skill"; that the additional lessons would "make her a beautiful dancer, capable of dancing with the most accomplished dancers"; that she was "rapidly progressing in the development of her dancing skill and gracefulness," etc., etc. She was given "dance aptitude tests" for the ostensible purpose of "determining" the number of remaining hours of instructions needed by her from time to time.

At one point she was sold 545 additional hours of dancing lessons to be entitled to award of the "Bronze Medal," signifying that she had reached "the Bronze Standard," a supposed designation of dance achievement by students of Arthur Murray, Inc.

Later she was sold an additional 926 hours in order to gain the "Silver Medal," indicating she had reached "the Silver Standard," at a cost of $12,501.35.

At one point, while she still had to her credit about 900 unused hours of instructions, she was induced to purchase an additional 24 hours of lessons to participate in a trip to Miami at her own expense, where she would be "given the opportunity to dance with members of the Miami Studio."

She was induced at another point to purchase an additional 126 hours of lessons in order to be not only eligible for the Miami trip but also to become "a life member of the Arthur Murray Studio," carrying with it certain dubious emoluments, at a further cost of $1,752.30.

At another point, while she still had over 1,000 unused hours of instruction, she was induced to buy 151 additional hours at a cost of $2,049.00 to be eligible for a "Student Trip to Trinidad," at her own expense as she later learned.

Also, when she still had 1,100 unused hours to her credit, she was prevailed upon to purchase an additional 347 hours at a cost of $4,235.74, to qualify her to receive a "Gold Medal" for achievement, indicating she had advanced to "the Gold Standard."

(continues)

(CASE 16.2 continued)

On another occasion, while she still had over 1,200 unused hours, she was induced to buy an additional 175 hours of instruction at a cost of $2,472.75 to be eligible "to take a trip to Mexico."

Finally, sandwiched in between other lesser sales promotions, she was influenced to buy an additional 481 hours of instruction at a cost of $6,523.81 in order to "be classified as a Gold Bar Member, the ultimate achievement of the dancing studio."

All the foregoing sales promotions, illustrative of the entire fourteen separate contracts, were procured by defendant Davenport and Arthur Murray, Inc., by false representations to her that she was improving in her dancing ability, that she had excellent potential, that she was responding to instructions in dancing grace, and that they were developing her into a beautiful dancer, whereas in truth and in fact she did not develop in her dancing ability, she had no "dance aptitude," and in fact had difficulty in "hearing the musical beat." The complaint alleged that such representations to her "were in fact false and known by the defendant to be false and contrary to the plaintiff's true ability, the truth of plaintiff's ability being fully known to the defendants, but withheld from the plaintiff for the sole and specific intent to deceive and defraud the plaintiff and to induce her in the purchasing of additional hours of dance lessons." It was averred that the lessons were sold to her "in total disregard to the true physical, rhythm, and mental ability of the plaintiff." In other words, while she first exulted that she was entering the "spring of her life," she finally was awakened to the fact there was "spring" neither in her life nor in her feet.

The complaint prayed that the Court decree the dance contracts to be null and void and to be cancelled, that an accounting be had, and judgment entered against the defendants "for that portion of the $31,090.45 not charged against specific hours of instruction given to the plaintiff." The Court held the complaint not to state a cause of action and dismissed it with prejudice. We disagree and reverse.

The material allegations of the complaint must, of course, be accepted as true for the purpose of testing its legal sufficiency. Defendants contend that contracts can only be rescinded for fraud or misrepresentation when the alleged misrepresentation is as to a material fact, rather than an opinion, prediction or expectation, and that the statements and representations set forth at length in the complaint were in the category of "trade puffing," within its legal orbit.

It is true that "generally a misrepresentation, to be actionable, must be one of fact rather than of opinion," but this rule has significant qualifications, applicable here. It does not apply in the following circumstances: where there is a fiduciary relationship between the parties, where there has been some artifice or trick employed by the representor, where the parties do not in general deal at "arm's length" as we understand the phrase, or where the representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented. A statement of a party having superior knowledge may be regarded as a statement of fact although it would be considered as opinion if the parties were dealing on equal terms.

It could be reasonably supposed here that defendants had "superior knowledge" as to whether plaintiff had "dance potential" and as to whether she was noticeably improving in the art of terpsichore. It would, also, be a reasonable inference from the undenied averments of the complaint that the flowery eulogiums heaped upon her by defendants as a prelude to her contracting for 1944 additional hours of instruction in order to attain the rank of the Bronze Standard, thence to the bracket of the Silver Standard, thence to the class of the Gold Bar Standard, and finally to the crowning plateau of a Life Member of the Studio, proceeded as much or more from the urge to "ring the cash register" as from any honest or realistic appraisal of her dancing prowess or a factual representation of her progress.

Even in contractual situations where a party to a transaction owes no duty to disclose facts within his knowledge or to answer inquiries respecting such facts, the law is if he undertakes to do so, he must disclose the whole truth. From the face of the complaint, it should have been reasonably apparent to defendants that her vast outlay of cash for the many hundreds of additional hours of instruction was not justified by her slow and awkward progress, which she would have been made well aware of if they had spoken the "whole truth."

We repeat that where parties are dealing on a contractual basis at arm's length with no inequities or inherently unfair practices employed, the Courts will in general "leave the parties where they find themselves." In this case, from the allegations of the unanswered complaint, we cannot say that enough of the accompanying ingredients, as mentioned in the foregoing authorities, were not present which otherwise would have barred the equitable arm of the Court to her. In our view, from the showing made in her complaint, plaintiff is entitled to her day in Court.

It accordingly follows that the order dismissing plaintiff's last amended complaint with prejudice should be and is reversed.

Reversed.

Case Concepts for Discussion

1. Should Vokes be protected by the law from her decisions to enter into numerous contracts for dance lessons? Why or why not?
2. When do actions of a businessperson move beyond legal puffing to unacceptable misrepresentation?
3. When does opinion become fact under the law of fraud?

A misrepresentation may be made by conduct as well as by language. Any physical act that attempts to hide vital facts relating to property involved in the contract is, in effect, a misstatement. One who turns back the odometer on a car, fills a motor with heavy grease to keep it from knocking, or paints over an apparent defect asserts an untruth as effectively as if he/she were speaking. Such conduct, if it misleads the other party, amounts to fraud and makes rescission or an action for damages possible.

16.3d Silence as Fraud

Historically, the law of contracts has followed *caveat emptor* ("Let the buyer beware"), especially in real estate transactions. The parties to a contract are required to exercise ordinary business sense in their dealings. As a result, the general rule is that silence in the absence of a duty to speak does not constitute fraud.

In at least three situations, however, there is a duty to speak the truth, and failure to do so will constitute actionable fraud. First, there is a duty to speak when the parties stand in a *fiduciary* relationship (the trust that should exist among partners in a partnership, between a director and a corporation, or between an agent and a principal). Because such parties do not deal "at arm's length," there is the duty to speak and to make a full disclosure of all facts.

The second duty is based on justice, equity, and fair dealing. This duty typically arises when a material fact is known by one party but not by the other, who reasonably could not discover the fact; had the other party known the fact, there would have been no contract. For example, when there is a latent defect in property (such as termites in a home) that could not be reasonably discovered by a buyer, a seller who knows of the defect has a duty to inform the buyer. Failure to do so is fraudulent.

The third duty is that of a person who has misstated an important fact on some previous occasion and is obligated to correct the statement when negotiations are renewed or as soon as he/she learns about the misstatement. This is not a true exception to the silence rule because there is, in fact, a positive misstatement.

The gist of these exceptions is that one of the parties has the erroneous impression that certain things are true, whereas the other party is aware that they are not true and also knows of the misunderstanding. It, therefore, becomes the informed party's duty to disclose the truth. Unless he/she does so, most courts would hold that fraud exists. This does not mean that a potential seller or buyer has to disclose all the facts about the value of property he/she is selling or buying. The duty to speak arises only when the party knows that the other party to the agreement is harboring a misunderstanding on some vital matter.

16.3e Justifiable Reliance

Before a false statement can be considered a misrepresentation, the party to whom it has been made must *reasonably believe* it to be true and must act on it, to his/her damage. If the party investigates before acting on it and the falsity is revealed, no action can be brought for fraud. Cases are in conflict concerning the need to investigate. Some courts have indicated that if all the information is readily available for ascertaining the truth of the statements, blind reliance on the misrepresentation is not justified. In such a case, the party is said to be negligent in not taking advantage of the facilities available for confirming the statement.

If a party inspects property or has an opportunity to do so and if a reasonable investigation would have revealed that the property was not as it had been represented, the party cannot be considered misled. However, some courts deny that there is any need to investigate. They hold that one who has misrepresented facts cannot avoid the legal consequences by saying, in effect, "You should not have believed me. You should have checked whether what I told you was true." Generally, reliance is justified when substantial effort or expense is required to determine the actual facts. The standard of justified reliance is not whether a reasonably prudent person would be justified in relying, but whether the particular individual involved had a right to rely. When the provisions of a written contract are involved, most people cannot be defrauded by its contents because the law charges the parties with actual knowledge of its contents.

TOUCHSTONE

Independent Investigations of Statements

When is there a duty to conduct an independent investigation of statements before one reasonably relies on those statements?

Consider the case of James. He had conversations with Williams and Associates about coming to work for them. James alleges that Williams and Associates told him that they were a full-service financial company dealing not only with insurance but also with real estate, securities, gold, silver, and annuities. Further, James indicated that the firm promised him a job as an investment counselor in all of these areas. Relying on these statements, James quit his job and went to work for Williams and Associates. The written contract James signed limited his employment to selling insurance, and he discovered that Williams and Associates was not authorized to provide investment services beyond the sale of insurance.

James sued Williams and Associates, alleging fraud (intentional misrepresentation). In court documents, James stated that he was deprived of income he might have earned selling a broader range of investments. It was only after James began working at Williams and Associates that he became aware that it was, in fact, only an insurance agency.

The trial court sided with Williams and Associates, finding that James had failed to demonstrate that his reliance was reasonable because James never conducted an independent investigation of the claims made by Williams and Associates. The appellate court disagreed. Generally, one is not required to make an independent investigation of allegations offered. Indeed, it is only when the facts would lead a reasonable person to investigate that the obligation to investigate arises. Therefore, the appellate court could not find as a matter of law that James was unreasonable in his reliance on the misrepresentations made by Williams and Associates. Further, while James signed a written contract limited to the sale of insurance, the court stated that James was relying on verbal statements by Williams and Associates that his training on other types of investments would begin later. Again, the appellate court could not find that James's reliance was unreasonable as a matter of law.

The situation involving James illustrates the lengths a court will go to allow a plaintiff to proceed to a jury to determine whether reliance on misrepresentations was reasonable. It also illustrates that an independent investigation of statements is often not needed. That said, in this case, would it have been fairly easy—and perhaps reasonable—for James to discover whether Williams and Associates was registered to conduct any type of business other than the sale of insurance?

Source: *Conder v. A. L. Williams* and Associates, 739 P. 2d 634 (Utah Court of Appeals, 1987).

16.3f Injury or Damage

To prevail, the party relying on the misstatement must offer proof of resulting damage. Normally, resulting damage is proved by evidence that the property in question would have been more valuable had the statements been true. Injury results when the party is not in as good a position as he/she would have been had the statements been true.

In an action for damages for fraud, the plaintiff may seek to recover damages on either of two theories. The plaintiff may use the "benefit of the bargain" theory and seek the difference between the actual market value of what he/she received and the value if he/she had received what was represented. A plaintiff may also use the "out of pocket" theory and collect the difference between the actual value of what was received and its purchase price.

Perhaps the most significant aspect of a suit for dollar damages is that the victim of fraud may be entitled to punitive damages in addition to compensatory damages. If the fraudulent representations are made maliciously, willfully, wantonly, or so recklessly that they imply a disregard of social obligations, punitive damages as determined by a jury may be awarded.

16.4 Lack of Voluntary Consent

16.4a Undue Influence

Equity allows a party to rescind an agreement that was not entered into voluntarily. The lack of freewill may take the form of undue influence. A person who has obtained property under such circumstances should not in good conscience be allowed to keep it. A person may lose freewill because of the subtle pressure of *undue influence,* whereby one person overpowers the will of another by use of moral, social, or domestic force as contrasted with physical or economic force. In those cases where freewill is lacking, some courts hold that the minds of the parties did not meet.

All contracts are formed based on some degree of persuasion. It is only when the extent of the persuasion reaches a point at which it is unfair that a court will set aside the agreement. Courts often look to the relationship between the parties to determine whether there is a relationship of trust and confidence. Cases of undue influence may involve accountants, lawyers, and physicians where someone with *professional stature* influences a client or patient to enter into a contract that

unfairly benefits the professional. In another set of cases, it is not a matter of professional standing but one in which there is *perceived weakness*. These types of cases often involve the elderly.

16.4b Duress

A party may also lose freewill because of *duress*—some threat to his/her person, family, or property. Under early common law, duress would not be present when a courageous person would have possessed a freewill despite a threat; modern courts, however, do not require this standard of courage or firmness as a prerequisite for the equitable remedy. If the wrongful pressure applied affected the individual involved to the extent that the contract was not voluntary, there is duress. If a person has a free choice, there is no duress, even though some pressure may have been exerted on him/her. A threat of a lawsuit made in good faith is not duress that will allow rescission. Economic pressure may constitute duress if it is wrongful and oppressive.

Touchstone

Is Economic Duress Difficult to Prove?

Perhaps not surprisingly, courts are reticent to find economic duress. While there are situations in which a party is coerced to enter a contract due to extreme business necessity, courts are, in general, more likely to simply find that a contract was valid because only ordinary business pressures were involved. In those rare cases where economic duress is found to be a proper defense to formation of a contract because freewill is lacking, there must be a clear threat and inadequate alternatives.

Whether the threat is connected to an illegal act actually is not necessary, but it certainly assists a court in finding this type of duress. At the very least, the threat must be wrongful. Therefore, where one party enters into a contract knowing the other party "is in immediate need of goods" for their business to survive, a threat to deny such goods might be deemed wrongful. Similarly, financial distress asserted by a party seeking to use this defense to formation of a contract must be severe, bordering on financial ruin, and must be caused (or contributed to) by actions of the party who is forcing the other party to perform. Economic necessity, by itself, is insufficient to constitute economic duress.

Is it sensible to make it difficult for a party to prove economic duress? What would happen if the doctrine were easy to establish? Source: *Chouinard v. Chouinard,* 568 F.2d. 430 (United States Court of Appeals for the Fifth Circuit, 1978).

16.4c Adhesion Contracts and Unconscionability

Modern courts are increasingly prone not to enforce contracts that are deemed to be adhesion contracts. This type of contract generally consists of a printed form presented to a party possessing considerably less bargaining power on a "take it or leave it" basis. Under the common law, enforcement of private agreements by courts was an acceptable practice of government, because the parties came to the negotiating table as equals and were able to bargain terms freely. However, where bargaining power between parties is unequal and where there is no negotiation, then courts begin to question whether the power of government should be employed to enforce the contract.

Just being a party to an adhesion contract is not enough for one to establish a defense to formation of a contract. While a standard-form contract and unequal bargain power are important criteria, courts also require a showing that enforcement of the entire contract or a specific clause in the contract would be obviously unfair and oppressive. Usually this requirement is couched within the notion of unconscionability.

Code provision (2-302) provides that a court has the power to refuse to enforce an entire contract for the sale of goods or a specific provision of a contract for the sale of goods if it finds an entire contract or a specific provision of the contract unconscionable. Although courts have applied the doctrine of unconscionability to consumer contracts for years, they are increasingly recognizing this defense to formation of a contract is applicable in contracts between merchants.

However, legal commentators have termed 2-302 "the most controversial section in the entire Code" because the term *unconscionable* does not lend itself to being defined with precision. Touchstones offered by courts attempting to define the term, such as "conduct that shocks the conscience" or "bargains of a type that no person in their senses would make," provide little guidance. While the greatest advantage of section 2-302 is its flexibility to be applied where necessary, the nebulous definition of the term is also its greatest drawback. Giving courts great flexibility to employ the unconscionability doctrine with little restraint means that courts apply 2-302 inconsistently; therefore, the business community has little guidance as to how unconscionability should be appropriately applied.

16.5 Incapacity to Contract

16.5a Types of Incapacity

Incapacity refers to the mental state of a party to a contract. Capacity-to-contract issues generally involve minors; occasionally, however, they pertain to mental incompetents, intoxicated persons, and drug addicts. Incapacity that makes a contract voidable may be permanent or temporary. Minors and insane persons are presumed to lack capacity to contract.

While the remaining materials under this heading primarily involve minors, it is appropriate to mention briefly those types of incapacity recognized by the law that are not the product of status as a minor. We first consider a person who has not been judged insane. A party without *mental capacity* to contract but who has not been adjudicated insane can avoid the contract or defend a suit for breach of contract on the grounds of lack of mental capacity. The contract is *voidable* only by the incapacitated party. In this situation, the party who lacks the capacity is in a unique position: He/she may allow the contract to be enforced or may have the contract voided. No other party may raise the issue. If an insane person disaffirms a contract, the general rule is that he/she must return all the consideration or benefit received, assuming the other party has treated him/her in good faith. However, if the contract is unconscionable or the other party has unfairly overreached, the incapacitated party can rescind by returning whatever he/she has left of the consideration received. A person who is insane, however, is responsible for the reasonable value of necessaries—a doctrine that is explored in Section 16.5b, dealing with minors.

However, if a court has judged a person insane, the contract made by that person after being judged insane is void, not merely voidable. In this situation, a guardian is appointed, and the insane person functions under the guardianship. The test of insanity for avoiding a contract is different from the test of insanity for matters involving criminal intent, making a will, commitment to a mental institution, or other purposes. In contract law, the test is whether the party was capable of understanding the nature, purpose, and consequences of his/her acts at the time of contract formation. A party is incompetent if unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of this condition.

TOUCHSTONE

Should a Parent Be Able to Waive Liability for a Child?

Normally, contracts involving minors find the minor is a fifteen-, sixteen-, or seventeen-year-old youth. In those situations, as described in this textbook, the minor has the right to avoid the contract. Under the common law, however, it was recognized that infants—generally minors under the age of seven—lacked any capacity to contract. In these special and very rare situations, a minor simply could not contract. Therefore, any attempt to contract was void—not voidable at the option of the minor.

Consider the following situation that involves an infant, not merely a minor. Five-year-old Trent's parents had a party at Bounce Party, an indoor play area containing inflatable play equipment. Trent's father signed a liability waiver on Trent's behalf. Trent was injured while playing on the equipment, and his mother sued Bounce Party on behalf of Trent for damages.

Bounce Party stated that the liability waiver signed by the father barred the claim. The court disagreed. In the opinion, the court found that Trent, a five-year-old, lacked the capacity to contract under common law. So, if Trent had signed the waiver, it would be unenforceable.

Moreover, the court found that a parent could not contractually bind their minor children, regardless of whether the minor child is an infant. The court again referenced the common law for the proposition that a third party, including a parent, cannot enter into contracts for another unless legal authority for such action has been created.

The court then returned to the facts of the case. From a social policy standpoint, changing the common law so that parental preinjury waivers would be enforceable might have the negative affect of discouraging owners of recreational equipment from taking all steps to make sure the equipment was properly maintained. Because the waiver of liability by the father was not enforceable, Trent was able to sue Bounce Party.

The first issue addressed by the court is sensible: Five-year-olds should not have the ability to contract for themselves under any circumstances. A fifteen-year-old, on the other hand, should have the right to contract, subject to the notion that the right is voidable. What about the other aspect of the case dealing with parental waivers? Does the rationale of the court make sense? Why?

Source: *Woodman v. Kera,* LLC, 785 N.W. 2d 1(Michigan Supreme Court, 2010).

16.5b Minors' Contracts

The age of majority and capacity to contract has been lowered to eighteen years old in most states; however, the statutory law of each state must be examined to determine the age of majority for contract purposes. Just as there are several definitions of *insanity*, there are numerous laws that impose minimum age requirements.

A person below the age of capacity is called a *minor*. Minors have the right to avoid contracts. The law grants minors this right to promote justice and to protect them from their presumed immaturity, lack of judgment and experience, limited willpower, and imprudence. An adult deals with a minor at the adult's own peril. A contract between a minor and an adult is voidable only by the minor. The right to disaffirm exists, irrespective of the fairness of the contract and whether or not the adult knew he/she was dealing with a minor.

Legislation in many states has, in a limited way, altered the right of minors to avoid their contracts. Purchase of life insurance or contracts with colleges or universities entered into by a minor are binding, and some states take away the minor's right to avoid contracts after marriage. A few states give the courts the right to approve contracts made by emancipated minors.

16.5c Avoiding Contracts by Minors

A minor has the right to *disaffirm* contracts. Yet, until steps are taken to avoid the contract, the minor remains liable. A minor can disaffirm a purely executory contract by directly informing the adult of the disaffirmance or by any conduct that clearly indicates intent to disaffirm. If the contract has been fully or partially performed, the minor also can avoid it and obtain a return of his/her consideration. If the minor is in possession of consideration that is passed to him/her, it must be returned to the other party. The minor cannot disaffirm the contract and retain the benefits at the same time.

The courts of various states are in conflict about when a minor cannot return the property in the same condition in which it was purchased. The majority of the states hold that the minor may disaffirm the contract and demand the return of the consideration with which he/she has parted if the minor returns the property that remains. A few courts, however, hold that if the contract is advantageous to the minor and if the adult has been fair in every respect, the contract cannot be disaffirmed unless the minor returns all the consideration received.

TABLE 16–1 Obligation of a Minor to Disaffirm

Majority of states	Minor must return remaining property (if any) as a condition of disaffirming a contract.
Minority of states	Contract can be disaffirmed only if *all* property is returned.

The minor may avoid both executed and executory contracts at any time during the minority and for a reasonable period of time after majority. What constitutes a reasonable time depends on the nature of the property involved and the specific circumstances. Many states establish a maximum period, such as one or two years.

16.5d Ratification

Ratification means "to approve and sanction, to make valid, or to confirm." It applies to the approval of a voidable transaction by one who previously had the right to disaffirm. When applied to contracts entered into by minors, it refers to conduct of a former minor after majority—conduct that indicates approval of or satisfaction with a contract. It eliminates the right to disaffirm.

Generally, an executed contract is *ratified* if the consideration is retained for an unreasonable time *after majority*. Ratification also results from acceptance of the benefits incidental to ownership, such as rents, dividends, or interest. A sale of the property received or any other act that clearly indicates satisfaction with the bargain made will constitute ratification. In general, a contract that is fully executory is disaffirmed by continued silence or inaction after the minor reaches legal age, but ratification is presumed to occur when a reasonable time for disaffirmance passes after a minor joins the majority and continues to accept or utilize the benefits of the bargain. However, ratification is not possible until the minor reaches legal age, because prior to that date the contract can always be avoided.

16.5e Liability for Necessaries

The law recognizes that certain transactions are clearly for the benefit of minors and hence are binding upon them. The term *necessaries* is used to describe the subject matter of such contracts. A minor is not liable in contract for necessaries; the liability is in quasi-contract. The fact that the liability is quasi-contractual has two significant features: (1) Liability is not for the contract price of necessaries furnished but rather for the reasonable value of the necessaries. And (2) There is no liability on executory contracts; only for necessaries actually furnished.

What are necessaries? In general, the term includes whatever is needed for a minor's subsistence as measured by his/her age, station in life, and all his/her surrounding circumstances. Food and lodging, medical services, education, and clothing are the general classifications of necessaries. The question of whether emergency medical services are a necessary for a minor still living with his parents is addressed in Case 16.3.

CASE 16.3

Yale Diagnostic Radiology v. Estate of Harun Fountain, et al.

267 Conn. 351; 838 A.2d 179

Supreme Court of Connecticut (2004)

Borden, J.

The sole issue in this appeal is whether a medical service provider that has provided emergency medical services to a minor may collect for those services from the minor when the minor's parents refuse or are unable to make payment. The defendants, the estate of Harun Fountain, an unemancipated minor, and Vernetta Turner-Tucker (Tucker), the fiduciary of Fountain's estate, appeal from the judgment of the Superior Court following an appeal from an order of the Probate Court for the district of Milford. The Probate Court had denied the motion of the plaintiff, Yale Diagnostic Radiology, for distribution of funds from the estate. The trial court ordered recovery of the funds sought by the plaintiff. The defendants claim that the trial court improperly determined that they are liable to the plaintiff for payment of Fountain's medical expenses. We affirm the judgment of the trial court.

The following facts and procedural history are undisputed. In March 1996, Fountain was shot in the back of the head at point-blank range by a playmate. As a result of his injuries, including the loss of his right eye, Fountain required extensive lifesaving medical services from a variety of medical services providers, including the plaintiff. The expense of the services rendered by the plaintiff to Fountain totaled $17,694. The plaintiff billed Tucker, who was Fountain's mother, but the bill went unpaid; and, in 1999, the plaintiff obtained a collection judgment against her. In January 2001, however, all of Tucker's debts were discharged pursuant to an order of the Bankruptcy Court for the District of Connecticut. Among the discharged debts was the judgment in favor of the plaintiff against Tucker.

During the time between the rendering of medical services and the bankruptcy filing, Tucker, as Fountain's next of kin, initiated a tort action against the boy who had shot him. Among the damages claimed were "substantial sums of money [expended] on medical care and treatment." A settlement was reached, and funds were placed in the estate established on Fountain's behalf under the supervision of the Probate Court. Tucker was designated the fiduciary of that estate. Neither Fountain nor his estate was involved in Tucker's subsequent bankruptcy proceeding.

Following the discharge of Tucker's debts, the plaintiff moved the Probate Court for payment of the $17,694 from the estate. The Probate Court denied the motion, reasoning that, pursuant to General Statutes § 46b-37(b), parents are liable for medical services rendered to their minor children, and that a parent's refusal or inability to pay for those services does not render the minor child liable. The Probate Court further ruled that minor children are incapable of entering into a legally binding contract or consenting, in the absence of parental consent, to medical treatment. The Probate Court held, therefore, that the plaintiff was barred from seeking payment from the estate.

The plaintiff appealed from the decision of the Probate Court to the trial court. The trial court sustained the appeal and rendered judgment for the plaintiff, holding that, under Connecticut law, minors are liable for payment for their "necessaries," even though the provider of those necessaries "relies on the parents' credit for payment when [the] injured child lives with his parents." The trial court reasoned that, although parents are primarily liable, pursuant to § 46b-37(b)(2), for their child's medical bills, the parents' failure to pay renders the minor secondarily liable. Additionally, the trial court relied on the fact that Fountain had obtained money damages, based in part on the medical services rendered to him by the plaintiff. This appeal followed.

The defendants claim that the trial court improperly determined that a minor might be liable for payment for

(continues)

(CASE 16.3 continued)

emergency medical services rendered to him. They further claim that the trial court, in reaching its decision, improperly considered the fact that Fountain had received a settlement, based in part on his medical expenses. We disagree with both of the defendants' claims.

Connecticut has long recognized the common-law rule that a minor child's contracts are voidable. Under this rule, a minor may, upon reaching majority, choose either to ratify or to avoid contractual obligations entered into during his minority. The traditional reasoning behind this rule is based on the well-established common-law principles that the law should protect children from the detrimental consequences of their youthful and improvident acts and that children should be able to emerge into adulthood unencumbered by financial obligations incurred during the course of their minority. The rule is further supported by a policy of protecting children from unscrupulous individuals seeking to profit from their youth and inexperience.

The rule that a minor's contracts are voidable, however, is not absolute. An exception to this rule, eponymously known as the doctrine of necessaries, is that a minor may not avoid a contract for goods or services necessary for his health and sustenance. 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.

Thus, when a medical service provider renders necessary medical care to an injured minor, two contracts arise: the primary contract between the provider and the minor's parents; and an implied in law contract between the provider and the minor himself. The primary contract between the provider and the parents is based on the parents' duty to pay for their children's necessary expenses, under both common law and statute. Such contracts, where not expressed, may be implied in fact and generally arise both from the parties' conduct and their reasonable expectations. The primacy of this contract means that the provider of necessaries must make all reasonable efforts to collect from the parents before resorting to the secondary, implied in law contract with the minor.

The secondary implied in law contract between the medical services provider and the minor arises from equitable considerations, including the law's disfavor of unjust enrichment. Therefore, where necessary medical services are rendered to a minor whose parents do not pay for them, equity and justice demand that a secondary implied in law contract arise between the medical services provider and the minor who has received the benefits of those services. These principles compel the conclusion that, in the circumstances of the present case, the defendants are liable to the plaintiff, under the common-law doctrine of necessaries, for the services rendered by the plaintiff to Fountain.

The present case illustrates the inequity that would arise if no implied in law contract arose between Fountain and the plaintiff. Fountain was shot in the head at close range and required emergency medical care. Under such circumstances, a medical services provider cannot stop to consider how the bills will be paid or by whom. Although the plaintiff undoubtedly presumed that Fountain's parent would pay for his care and was obligated to make reasonable efforts to collect from Tucker before seeking payment from Fountain, the direct benefit of the services, nonetheless, was conferred upon Fountain. Having received the benefit of necessary services, Fountain should be liable for payment for those necessaries in the event that his parents do not pay.

Furthermore, in the present case, we note, as did the trial court, that Fountain received through a settlement with the boy who caused his injuries funds that were calculated, at least in part, the costs of the medical services provided to him by the plaintiff in the wake of those injuries. Fountain, through Tucker, brought an action against the tortfeasor and in his complaint cited "substantial sums of money [expended] on medical care and treatment." This fact further supports a determination of an implied in law contract under the circumstances of the case. The judgment is affirmed.

Affirmed.

Case Concepts for Discussion

1. Is the result in the case fair to the minor? Why?
2. Would the logic of the opinion apply to cases where emergency medical care was not involved? Why?

16.5f Third-Party Rights

If a minor sells goods to an adult, the adult obtains only a voidable title to the goods. The minor can disaffirm and recover possession from the adult buyer. In the common law, even a **good-faith purchaser** of property formerly belonging to a minor could not retain the property if the minor elected to rescind. This rule has been changed under the Code. It provides that a person with voidable title has power to transfer a good title to a good-faith purchaser for value [2-403]. The common-law rule, however, is still applicable to sales of real property by minors. If a minor sells his farm to an adult, who in turn sells the farm to a good-faith purchaser, the minor may avoid the original contract and regain the title to the farm against the good-faith purchaser. You may think that is unfair. However, remember that the minor's name appears in the record books and is in the chain of title. The minor must return all remaining consideration to the adult. This adult, in turn, may be liable to the good-faith purchaser for failing to convey clear title.

Good-faith purchaser
A buyer who pays value honestly believing he/she has the legal right to acquire valid title to the item purchased

Chapter Summary: Genuine Assent and Contractual Capacity

Genuineness of Assent

Nature of Assent

1. Parties are assumed to have entered into a contract based on freewill, and their assent to the terms of the contract is based on a proper set of assumptions

Remedy of Rescission

1. If a defense to formation is established, the party who has established the defense has the power to rescind.

Mistake

Bilateral Mistake

1. Bilateral mistake occurs when all parties have the identical misconception of a material fact or of the contract terms.
2. Bilateral mistake negates the element of mutuality of contract and allows either party to rescind or reform the contract.

Unilateral Mistake

1. Unilateral mistake is not grounds for rescission unless the other party knew or should have known of the mistake.

Reformation of Written Contracts

1. Reformation occurs when courts correct a written contract to reflect the parties' actual intent.
2. Reformation is not an available remedy for unilateral mistake.

Misrepresentation

Types of Misrepresentations

1. *Scienter*
2. False material representation
3. Justifiable reliance on the representation
4. Injury caused by such reliance

Scienter

1. *Scienter* is the intent to mislead. It is supplied by proof of knowledge of the falsity.
2. *Scienter* is also established by proof that the statement was made with a reckless disregard for the truth.

False Representation

1. There must be a misstatement of a material existing fact.
2. Statements of opinion are not factual unless made by an expert or unless the actual opinion is not as stated.
3. Misstatements of applicable laws are not statements of fact.
4. Misstatements may be by conduct as well as by language.

Silence as Fraud

1. In the absence of a duty to speak, silence is not fraud.
2. Duty to speak arises (1) from a fiduciary relationship or (2) when equity and justice so demand or (3) to correct a prior misrepresentation.

Justifiable Reliance

1. A party must reasonably believe the statement to be true and must act on it.
2. There is no duty to take extraordinary steps to investigate the accuracy of statements.

Injury or Damage

1. A plaintiff is entitled to the benefit of the bargain theory in some cases and to use the out-of-pocket theory in others.
2. Punitive damages may be awarded in addition to compensatory damages.

Lack of Voluntary Consent

Undue Influence

1. One party exerts undue influence on another to compel a contract.
2. Undue influence normally occurs when a fiduciary or close family relationship exists.

Duress

1. Duress is compulsion or constraint that deprives another of the ability to exercise freewill in making a contract.
2. Physical threats are generally required, but economic duress is recognized in a few states, especially when a party is responsible for the economic necessity of the other party.

Adhesion Contracts and Unconscionability

1. Just being in an adhesion contract does not, generally, provide grounds for rescission.
2. If the contract is unconscionable, a court may grant the remedy of rescission.
3. Under Code section 2-302, courts can find a contract for the sale of goods or a clause in such a contract unconscionable and unenforceable.

Incapacity to Contract

Types of Incapacity

1. A party is declared to lack capacity to contract if he/she is unable to understand the rights under the contract, the purpose of the agreement, or the legal effect of the contract.
2. Examples of parties who may be temporarily or permanently incapacitated include minors, mental incompetents, intoxicated persons, and drug addicts.
3. Contracts made before a person is adjudged incompetent are voidable. Contracts entered into after one of the parties is declared incompetent by a court generally are void.
4. If the competent party is unaware of the other party's incompetence, the incompetent party must make restitution before the contract is voidable.

Chapter Summary: Genuine Assent and Contractual Capacity

Minors' Contracts

1. In most states, everyone below the age of eighteen is considered to be a minor.
2. Minors' contracts generally may be disaffirmed by the minor but not by the competent adult party.

Avoiding Contracts by Minors

1. To disaffirm, a minor must communicate his/her desire to avoid contractual liability.
2. This communication must be made to the competent adult party in writing, by spoken words, or by the minors' conduct.
3. To void a contract, the minor must return all the consideration received that he/she still has.

Ratification

1. Ratification of a contract occurs when the party who was incompetent becomes competent and affirms or approves of the contract.
2. Ratification can be by a manifestation of intent to be bound or by retaining the consideration for an unreasonable time after majority.
3. After reaching majority, a minor must disaffirm within a reasonable time or be held to have ratified the contract.

Liability for Necessaries

1. If a contract is for necessaries, the minor is bound to pay for the reasonable value of these items instead of the contract price. (Of course, in many situations, the contract price is a very good indication of the reasonable value of the items involved.)
2. What is a necessary often must be determined from the facts of each case.

Third-Party Rights

1. A minor cannot avoid a contract if a competent adult party has transferred the personal property involved to a good-faith purchaser for value.
2. This rule does not apply to real property. In other words, a minor can always rescind a contract involving land even when a third party is involved.

Review Questions and Problems

1. Match each term in Column A with the appropriate statement in Column B.

	A		B
1.	Ratification	a.	Minor must pay for their reasonable value
2.	*Scienter*	b.	Rescission not allowed unless other party has knowledge of it
3.	Concealment	c.	A fiduciary or someone in close family relationship exerts pressure
4.	Mutual mistake	d.	What minor may choose to do upon reaching majority
5.	Necessaries	e.	Upon reaching majority, minor keeps consideration and does nothing more
6.	Undue influence	f.	Rescission granted if a duty to speak is not performed
7.	Unilateral mistake	g.	Physical threats usually required
8.	Duress	h.	Misconception of material fact by all parties
9.	Disaffirmance	i.	Intent to defraud
10.	Reformation	j.	Court rewrites contract to make contract conform to parties' intent

2. Beachcomer, a coin dealer, sues to rescind a purchase by Boskett, who paid $50 for a dime both parties thought was minted in San Francisco. In fact, it was a very valuable dime minted in Denver. Beachcomer asserts a mutual mistake of fact regarding the genuineness of the coin as being minted in San Francisco. Boskett contends that the mistake was as to value only. Explain who should win.
3. Brawner Contracting was the low bidder for construction of the Marine Service Building. After the award of the contract to Brawner, it discovered an arithmetical error of $10,000 in its bid based on a similar error of like amount in a quotation made to it by a subcontractor. Correction of the error would not have caused Brawner's contract price to equal or exceed that of the next lowest bidder. Is Brawner entitled to reformation of the contract? Why or why not?
4. After making a visual inspection, buyer bought property from seller and proceeded to build a home. When the possibility of soil slippage soon became apparent, construction was halted. Buyer sued seller to rescind the sale. A soil expert testified that the property was not suitable for the construction of a residence. Seller was unaware of the stability hazard of the soil when the sale was transacted. Could buyer rescind? Why or why not?
5. Janet Van Tassel met Charles Carver, president of McDonald Corporation, a subfranchisor of Baskin-Robbins Ice Cream Company. To induce her to become an ice-cream store operator in a Michigan mall, Carver told Van Tassel the following:
   a. The proposed location was a gold mine.
   b. It would not be long before she would be driving a big car and living in a big house, and she would do all right if she stuck by him.
   c. He would not steer her wrong because he liked her.
   d. This was the right store for her, and all she would be doing is playing golf and making bank deposits.
   e. She was not going to lose money, and this would be the best thing that would happen to her.

   Van Tassel invested in the franchise, but it failed to meet Carver's predictions of success. Van Tassel filed suit, seeking to reclaim her investment. Did the representations constitute fraud? Why or why not?
6. A representative for a data processing company bought a computer after the computer salesperson assured her that the machine would be adequate for her purposes. The data processing representative was aware of the specifications of the computer, but she later discovered that its printout was too slow for her company's needs. She seeks to rescind the contract on the basis of misrepresentation. Should she succeed? Explain.
7. Bill, under guardianship by reason of mental illness, buys an old car from Larry for $2,000, giving a promissory note for that amount. Subsequently, Bill abandons the car. Is Bill liable on the note? Would it make any difference if the car were a necessary? Explain your answers.
8. Youngblood, a minor, sold a wrecked Ford to Blakensopp, an adult, for $350. Blakensopp took possession of the car. Unknown to Blakensopp, Youngblood took the car back and sold it to another purchaser for $400. Youngblood was charged with theft. Was Youngblood guilty of stealing the car from Blakensopp? Explain.
9. Halbman (a minor) bought a used Oldsmobile from Lemke (an adult). About five weeks after the purchase and after Halbman had paid $3,100 of the $4,250 purchase price, the connecting rod in the engine broke. Halbman, while still a minor, disaffirmed the purchase contract and demanded all the money he had paid defendant. Is he entitled to a full refund even though the car is now damaged? Why or why not?
10. Leon, a minor, signed a contract with Step-Up Employment Agency, in which Leon promised to pay a fee if Step-Up secured him a job as a pianist. Step-Up did find suitable employment, but Leon refused to pay the $500 fee since he was a minor. Can Step-Up recover the fee? Why or why not?