9 Representations and Terms

Chapter Overview

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Objectives

After completing this chapter, you should be able to:

1. Identify pre-contractual and contractual statements.

2. Distinguish misrepresentations from other false statements made during contractual negotiations.

3. Identify the various circumstances when silence might amount to misrepresentation.

4. Explain the differences between innocent, fraudulent, and negligent misrepresentation.

5. Describe the legal effects of innocent, fraudulent, and negligent misrepresentation.

6. Outline the rules associated with proving the existence of express terms.

7. Summarize and apply the various judicial approaches to interpreting express terms.

8. Discuss when, how, and why a court might imply a term into a contract.

9. Describe the nature of ticket contracts.

10. Outline the advantages and disadvantages of standard form agreements and describe why a business should use plain language in contracts.

We have considered how a contract is formed. Now we will examine the legal effect of statements made or adopted by parties in connection with their contracts. First, we will investigate statements made by the parties during the negotiation of a contract. Second, we will consider what happens when those statements are false. Third, we will consider how terms can be incorporated into a contract. Fourth, we will consider standard form agreements in consumer transactions, including reasons to use plain language in contracts.

Pre-Contractual and Contractual Statements

Because the communication of an offer and its acceptance can be accomplished in a number of ways, it is sometimes difficult to identify which of the parties' statements are part of the negotiations and which are part of the actual contract. We therefore need to distinguish between *contractual terms* and *pre-contractual representation*.

Not every statement communicated during the negotiation process is a *contractual term*. A statement becomes a **contractual term** only if it is included in the agreement as a

legally enforceable obligation. A contractual term is, by its very nature, a *promissory statement*. The person who makes it voluntarily agrees to do something in the future..

a **contractual term** is a provision in an agreement that creates a legally enforceable obligation

In contrast, a **pre-contractual representation** is a statement one party makes by words or conduct with the intention of inducing another party to enter into a contract. By definition, it does not impose a contractual obligation. Although a pre-contractual representation may induce the creation of a contract, it does not form part of that contract. Figure 9.1 illustrates some of the differences between contractual terms and pre-contractual representations.

a **pre-contractual representation** is a statement one party makes by words or conduct with the intention of inducing another party to enter into a contract

[[Pick up Figure 9.1, including label text, from p. 75. Formerly Fig. 4.1.]]

Figure 9.1 Pre-Contractual Statements: Terms and Representations

Misrepresentation

The distinction between contractual terms and pre-contractual representations is especially important if a statement is false. If a non-contractual statement is false, we say that one of the parties has made a *misrepresentation*. When a contractual statement is not fulfilled, we say that one of the parties is in *breach of contract*. That distinction is important because misrepresentation and breach of contract have different legal effects. Pre-contractual representations may result in a form of legal liability, such as actionable misrepresentation, but not in an action for breach of contract. In this section we will focus on misrepresentation.

1. We consider the remedies for breach of contract in Chapter 12.

The Nature of Misrepresentation

A **misrepresentation** is a false statement of fact that causes the recipient to enter into a contract. As with other types of representations, it may induce a contract, but it does not form part of that agreement.

a **misrepresentation** is a false statement of fact that causes the recipient to enter into a contract

A misrepresentation is an incorrect statement of an *existing* fact. It is false when it is made. In contrast, a contractual term is not meant to describe an existing state of facts, but rather it provides a promise of *future* performance. Given its promissory nature, a contractual term cannot be false when it is given. Nor can a breach of contract occur as soon as such a promise is made. A breach occurs only when one of the parties fails to perform precisely as promised.

Misstatement of Fact

Not every misstatement during pre-contractual negotiations is a misrepresentation. A misrepresentation occurs only if the speaker claimed to state a *fact*. The difficulty with that requirement is that people often make *non-factual* statements during negotiations. For example, they sometimes state their own *opinions*. An **opinion** is the statement of a belief or judgment. For example, a person offers an opinion when they estimate the potential future revenue of an income-earning property. Opinions can range from carefree speculations to deliberate assessments based on a substantial body of evidence.

an **opinion** is the statement of a belief or judgment

A personal opinion is not usually a misrepresentation, even if it is false. There are, however, situations in which it is risky to offer an opinion. If you state an opinion in a way that leads me to think that it *must* be true, a court may find that your statement includes not only an opinion but also an implied statement of fact that can be treated as a misrepresentation. That is true especially if you offer an opinion within your area of expertise. It is also risky to offer an opinion if you have no reason to believe that it is actually true. Suppose you are trying to persuade me to buy a particular vehicle from

your used car lot. When I explain that I know nothing about gas consumption but am very concerned about fuel costs, you say, “I think that you’ll find this model to be very thrifty, indeed.” In fact, you know that the car in question is a notorious gas guzzler.

During pre-contractual negotiations, a person may describe how they (or someone else) will act in the future. A statement of **future conduct** is a second type of non-factual statement.. Such statements are not usually treated as misrepresentations. However, a statement of future conduct *is* a misrepresentation if it is made fraudulently or if the future conduct is described in terms of a present intention. For instance, to persuade me to buy your farm, you might say, “I certainly do not intend to sell the neighbouring land to Herb’s Sewage Treatment Facility.” That statement contains a indication of your *present* state of mind, and if it is false, it may be classified as a fraudulent misrepresentation.

a non-promissory statement as to a party’s **future conduct** is not usually treated as a misrepresentation

People sometimes discuss the law during pre-contractual negotiations. A misrepresentation does not arise merely because you inaccurately describe a particular *law itself*. We all are presumed to know the law. However, the court may find a misrepresentation if you inaccurately describe the *consequences of a law*, because those consequences are treated as a matter of fact rather than law. Suppose you are trying persuade me to buy your land. It is not a misrepresentation if you incorrectly tell me that zoning laws do not apply to the property. That is a matter of law. However, it may be a misrepresentation if you inaccurately tell me that zoning approval has been granted and that I therefore would be able to develop the land. That is a matter of fact.

2. Compare *Rule v Pals* [1928] 2 WWR 123 (Sask CA) and *Graham v Legault* [1951] 3 DLR 423 (BC SC).

3. *Hopkins v Butts* (1967) 65 DLR (2d) 711 (BC SC).

Concept Summary 9.1 shows that expressions of opinion, descriptions of future conduct, and statements of law—even when they are inaccurate and induce the creation of contracts—are not normally treated as misrepresentations. To prove misrepresentation in those circumstances, a party must prove that the speaker implicitly claimed to state some fact. It is often difficult to tell when a factual statement has been made. Consider the case in Business Decision 9.1.

Concept Summary 9.1

Types of Pre-Contractual Statements Inducing Contracts

Non-factual statements (not actionable as misrepresentation)	**Factual statements** (actionable as misrepresentation)
Opinion based on speculation	Expert opinion
Description of another's future intent	Description of one's present intent
Statement of law	Statement of legal consequences

Business Decision 9.1

Statement of Fact or Opinion?

An agent of Relax Realtors Inc is negotiating with a prospective purchaser of a strip mall. The purchaser is satisfied with the building, price, zoning restrictions, and closing date. The only unresolved issue is that one of the current tenants in the mall has a 10-year lease, which will remain in effect even if the building is sold. The purchaser is reluctant to enter into a relationship with an unknown tenant for that length of time and therefore asks the real estate agent a series of questions about the tenant. In response, the real estate agent describes the person as "a most desirable tenant" and says only good things about the tenant. Taking these statements on faith, the purchaser decides to buy the strip mall. Six months after completing the real estate transaction, the

purchaser finds out that the tenant's rent has been in arrears for several months and that the tenant was often in arrears.

Question for Discussion

1. Was Relax Realtor's description of the leaseholder as "a most desirable tenant" a statement of fact or opinion? Explain your answer.

4. *Smith v Land & House Property Corp* (1885) 28 ChD 7 (CA).

Silence as Misrepresentation

As a general rule, parties are not required to disclose material facts during pre-contractual negotiations, no matter how unethical non-disclosure may be. Suppose a company director is negotiating to buy shares from a shareholder. The director does not have to reveal that he knows certain information that will cause the value of the shares to increase within a few months. There are, however, at least four occasions when the failure to speak will amount to misrepresentation:

5. *Prudential Insurance Co Ltd v Newman Industries Ltd* [1981] Ch 257.

when silence would distort a previous assertion

when the contract requires a duty of utmost good faith

when a special relationship exists between the parties

when a statutory provision requires disclosure

When Silence Would Distort a Previous Assertion A party's silence sometimes has the effect of falsifying a statement that was previously true. When a change in

circumstances affects the accuracy of an earlier representation, the party that made that statement has a duty to disclose the change to the other party. Failure to do so amounts to a misrepresentation.

A misrepresentation may also occur if a party tells half the truth and remains silent on the other half. Despite the right to remain silent, a party cannot give a *partial* account if the unspoken words would substantially alter the meaning of the actual statement, even if the actual words are literally true. Suppose you take your cotton shirts to the dry cleaner. You are asked to sign a claim ticket, which, the cleaner tells you, “excludes liability for damage caused to silk and crushed velvet during the dry cleaning process.” That is true. But the ticket *also* excludes liability for any other damage to any kind of fabric. The half-truth is a misrepresentation.

6. *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805.

When the Contract Requires a Duty of Utmost Good Faith By their very nature, some contracts require a party to make full disclosure of the material facts. These are known as *contracts of utmost good faith*. The requirement of utmost good faith arises when one party is in a unique position to know the material facts. The best example involves insurance contracts. In order to assess the risk that a particular type of loss might occur, and to determine how much to charge for coverage, an insurance company needs to know as much as possible about the situation. Of course, the only person who has that information is the customer. The law therefore imposes an obligation of good faith that requires the customer to disclose all of the relevant facts. A breach of that obligation is usually treated as a misrepresentation that allows the insurance company to avoid the contract.

Ethical Perspective 9.1

Misrepresentation and Silence

Johnny Grievor has always wanted to be a firefighter but he is functionally blind in his left eye. Knowing that the city of Ottawa would not hire him if it knew about his visual impairment, Grievor applied to be a firefighter but did not mention his disability. He also remained silent about the fact that he had arranged a friend to take the required medical examination. On the basis of his résumé and the results of his friend's medical examination, the city offered Grievor a position.

One day, while responding to a fire alarm, the fire truck that Grievor was driving collided with a van, killing two people. A short time later, the fire chief received an anonymous tip that Grievor was blind in his left eye. As a result, the city persuaded Grievor to resign and then had charges pressed against him under the *Criminal Code*. Although he had resigned from the fire department, Grievor relied on a clause in his old employment contract that required the city to pay for "any and all damages or claims for damages or injuries or accidents done or caused by [him] during the performance of [his] duties." He therefore argued that, since the accident had occurred while he was working, the city was required to pay any legal fees that arose during the criminal proceedings. The city responded by arguing that Grievor had misrepresented the facts regarding his eyesight and that it consequently did not incur liability under the agreement.

The court held that the failure to disclose his visual impairment amounted to a misrepresentation that *would have* justified Grievor's dismissal. But the court also said that since the city accepted Grievor's resignation, rather than terminating his contract, it was obliged to pay his legal fees.

Questions for Discussion

1. Do you agree that Grievor had a duty to disclose his disability? Would these facts have given rise to misrepresentation if Grievor had not used a friend to pass his medical examination? Explain your answer.

2. Do you agree that the city should be required to pay Grievor's legal fees? What if circumstances were different and money was owing to the families of the car crash victims? Should the city be required to pay the families if Grievor cannot? Explain your

answer.7. *Ottawa (City) v Ottawa Professional Fire Fighters* (1985) 52 OR (2d) 129 (Div Ct).

8. You may want to review the discussion of vicarious liability that we presented in Chapter 3.

When a Special Relationship Exists Between the Parties When the relationship between two parties is one of trust, or when one of the parties has some other form of special influence over the other, a duty of disclosure may arise. Suppose your accountant is selling her cottage. If she sells it to a stranger, she is not obliged to disclose information about its structural defects if the purchaser does not ask the relevant questions. But she cannot remain silent if she is selling it to you. Because you would otherwise trust her on the basis of your special relationship, she has to fully disclose all material facts, whether or not you asked questions about the building's structure.

When a Statutory Provision Requires Disclosure Some statutes require the disclosure of material facts in a contractual setting.

Insurance legislation in many provinces contains statutory conditions that are deemed to be part of every insurance contract and must be printed on every policy. Many provinces have statutes that automatically insert certain conditions into every insurance contract. One of those conditions requires the disclosure of relevant information by those seeking insurance. If a customer does not satisfy that obligation, the contract may be unenforceable.

Some financial officers have a duty to disclose material facts. For instance, an officer or director has to speak up if they (or someone close to them) have an interest in a contract with their own company. If they fail to do so, the company may be entitled to set aside the contract. The same holds true for some Crown corporations. A similar disclosure requirement arises in the securities law.

Many provinces have legislation regulating the formation of domestic contracts. If a party failed to disclose significant assets or significant liabilities that existed when the domestic contract was made, the court can set aside the agreement or a provision in it.

9. *Securities Act*, RSO 1990, c S.5, s 75 (Ont); RSA 1981 c S-6.1, s 119 (Alta); RSBC 1996, c 418, s 85 (BC); RSM 1989, c S50, ss 50, 72 (Man).

10. For example, *Insurance Act*, RSBC 1996, c 226, s 126 (BC); RSO 1990, c I.8, s148 (Ont).

11. For example, *Bank Act*, SC 1991, c 46, s 206 (Can); *Credit Unions and Caisses Populaires Act*, *1994*, SO 1994, c11, s 148 (Ont); *The Credit Union Act*, *1985*, SS 1985, c C-45.1, s 74 (Sask).

12. *Financial Administration Act*, RSC 1985, c F-11, s 118 (Can).

13. For example, *Family Law Act*, RSO 1990, c F.3, s 56 (Ont); SNWT 1997, c 18, s 8 (NWT).

Inducement

For a statement to be actionable as a misrepresentation, the deceived party must prove that the false statement induced the contract. In other words, the statement must have misled its recipient into creating the contract. The statement does not have to be the *only* inducing factor. A party can claim relief for misrepresentation even if other factors were also influential. However, a statement will not be actionable if it did not affect the recipient's decision, even if the other party made the representation with an intention to deceive. Nor will a statement be actionable if the recipient conducted an independent inquiry into the matter. In that situation, the contract is induced by the results of the party's own investigation, rather than the other party's representation.

What happens if the recipient of a false representation has an opportunity to test its accuracy, but fails to do so? Should that failure to investigate preclude a claim of misrepresentation? Consider the situation in You Be the Judge 9.1.

You Be the Judge 9.1

Failure to Investigate a Misrepresentation

Hurd saw Redgrave's advertisement for the sale of a suburban residence and a share in a local law practice. Hurd requested information about the earning potential of the practice. Redgrave indicated that the annual income of the practice was £400. In support of that claim, he produced business summaries from the previous three years indicating receipts of about £200 per year. When asked about the source of the remaining income, Redgrave produced boxes of papers and letters relating to additional business and allowed Hurd to inspect all of the accounts at his leisure. Despite the opportunity to do so, Hurd never bothered to inspect the documents. Relying instead on Redgrave's representations, Hurd agreed to buy the house and practice for £1600. Shortly after moving in, Hurd realized that the practice was utterly worthless.

Questions for Discussion

1. From a business perspective, do you think that it was reasonable for Hurd to rely on Redgrave's representations about the income earning potential of the practice?

2. If you were the judge, would you allow Hurd to claim misrepresentation even though he did not bother to inspect the documents?

3. Would your decision be any different if Redgrave intentionally deceived Hurd and buried the actual accounts in boxes of irrelevant documents?14. *Redgrave v Hurd* (1881) 20 Ch D 1 (CA).

The Legal Consequences of Misrepresentation

There are two possible consequences of an actionable misrepresentation. The deceived party may receive:

the remedy of rescission

the right to damages

Rescission is the only *contractual* consequence of misrepresentation.

Rescission

Rescission is the cancellation of a contract with the aim of restoring the parties, to the greatest extent possible, to their pre-contractual state. It can be done by the parties or, if necessary, through the courts. However, it is often difficult to know in advance whether a court will grant rescission because it is a *discretionary remedy*, one that is not available *as of right*. The remedy is awarded on the basis of the court's judgment about what is best according to the rules of reason and justice.

15. *Wrights Canadian Ropes Ltd v Minister of National Revenue* [1946] 2 DLR 225 (SCC).

rescission is the cancellation of a contract by the court with the aim of restoring the parties, to the greatest extent possible, to their pre-contractual state

The remedy of rescission is often accompanied by an order for *restitution*. **Restitution** involves a giving back and taking back on both sides. Suppose you manufacture snowboards and need to order a steady supply of waterproof paints. A supplier represents that it has waterproof paints to sell but insists that you agree to purchase four shipments over the next two years to take advantage of a special rate. You agree to those conditions, requisition a cheque, and send it to the supplier. When the first shipment arrives, you discover that the paint is not waterproof and is therefore useless to you. You ask for your money back, but the supplier refuses. Assuming that the

shipments of paint are worth thousands of dollars, it might be wise to seek an order of rescission from the courts rather than simply disregard the contract. Merely setting aside the contract will not be sufficient. You paid thousands of dollars that you will want back. Likewise, the supplier delivered a truckload of paint that it will want back. Restitution is therefore the appropriate remedy. The court will try to restore the pre-contractual situation by allowing you to recover the money at the same time that it allows the supplier to recover the paint.

restitution involves a giving back and taking back on both sides

16. We will discuss restitution in more detail in Chapter 12 under the heading of "Unjust Enrichment."

The victim of a misrepresentation may be barred from rescission in certain circumstances. First, if the misled party *affirmed* the contract, then rescission is not available. **Affirmation** occurs when the misled party declares an intention to carry out the contract or otherwise acts as though it is bound by it. To continue the earlier example, suppose you discover that the first shipment of paint is not waterproof but do nothing about it. Six months pass, and the next shipment arrives. You then complain that neither shipment contained waterproof paint. The six-month *lapse of time* suggests you affirmed the contract.

17. *Leaf v International Galleries* [1950] 2 KB 86 (CA).

affirmation occurs when the misled party declares an intention to carry out the contract or otherwise acts as though it is bound by it

Second, rescission may be barred if restitution is impossible. If the parties cannot be substantially returned to their pre-contractual positions, a court is reluctant to grant rescission. The more that has been done under the contract, the less likely a court is to grant rescission. To further continue our example, if you used a substantial portion of the paint supply before discovering that it was not, in fact, waterproof, restitution is not

possible in a strict sense. Since you cannot give the paint back, rescission may not be available.

Third, rescission may be unavailable if it would affect a third party. In this case, it is the rights of a third party that make restitution impossible. Suppose you buy a strip mall on the basis of certain representations about its earning potential. You lease portions of the mall to tenants but are unable to earn enough to pay down your mortgages on the building, let alone make anywhere near the profits you were promised. If you seek an order for rescission against the vendor of the mall, you would probably fail. The tenants have acquired a right to occupy the premises. Those third-party rights therefore preclude the court from forcing the vendor to give back your purchase price in exchange for an empty shopping mall.

Damages

A court may respond to a misrepresentation by awarding *damages* against the party that made the statement. In this situation, **damages** are intended to provide monetary compensation for the losses that a person suffered as a result of relying upon a misrepresentation. It is important to understand the precise reason for those damages. As we will see in Chapter 12, damages may be awarded for a breach of contract. Nevertheless, if damages are awarded for a misrepresentation, the plaintiff's claim arises not in contract, but rather in tort. (That is true even though the plaintiff is complaining that the misrepresentation induced the creation of a contract.) As Part 2 of this book explained, tort law is based on the principle that "a person who by his or her fault causes damage to another may be held responsible." There are many types of tort. The one that is relevant for present purposes depends upon the nature of the misrepresentation.

damages are intended to provide monetary compensation for the losses that a person suffered as a result of relying upon a misrepresentation

18. *Canadian National Railway v Norsk Pacific Steamship* (1992) 91 DLR (4th) 289 (SCC).

Types of Misrepresentation

The law distinguishes between three types of misrepresentation: innocent, fraudulent, and negligent. The rules are somewhat different for each.

Innocent Misrepresentation

An **innocent misrepresentation** is a statement a person makes carefully and without knowledge of the fact that it is false. If the speaker is innocent of any fraudulent or negligent conduct, the general rule is that the deceived party is not entitled to recover damages. The only legal remedy available for innocent misrepresentation is rescission, and rescission is available only when there is a substantial difference between what the deceived party had bargained for and what was, in fact, obtained.

an **innocent misrepresentation** is a statement a person makes carefully and without knowledge of the fact that it is false

Negligent Misrepresentation

Even a person who acts honestly may *carelessly or unreasonably* make a statement that is inaccurate and that induces the creation of a contract. The party making the statement does not need to know that it is false in order to be liable. Such statements are known as **negligent misrepresentations**. Until recently, the law did not distinguish between innocent misrepresentations and negligent misrepresentations. In either event, the only possible remedy was rescission. However, the courts have now recognized that a negligent misrepresentation may also amount to a tort that supports an award of damages.

19. Chapter 6 covers the tort of negligent misrepresentation.

a **negligent misrepresentation** is a false, inducing statement made in an unreasonable or careless manner

Fraudulent Misrepresentation

A **fraudulent misrepresentation** occurs when a person makes a statement that they know is false *or* that they have no reason to believe is true *or* that they recklessly make without regard to the truth. Liability will arise under the tort of deceit.Fraud is, of course, very serious matter, especially in the business world. A person who is held liable for fraud will find it difficult to attract investors, partners, or customers. For that reason, the courts require an allegation of fraud to be supported by very clear evidence. At the same time, however, if fraud is proven, then the courts are particularly eager to award damages.

20. *Derry v Peek* (1889) 14 App Cas 337 (HL).

21. The tort of deceit was discussed in Chapter 5.

22. In order to discourage improper allegations of fraud, the courts often award costs against people who fail to prove such claims. The concept of costs was discussed in Chapter 2.

23. A court may award not only compensatory damages, but also punitive damages. The concept of punitive damages was discussed in Chapter 3.

a **fraudulent misrepresentation** occurs when a person makes a statement they know is false *or* that they have no reason to believe is true *or* that is reckless

Concept Summary 9.2

Types of Misrepresentation and Their Legal Effect

	Elements of proof	**Available remedies**
Innocent misrepresentation	• false statement of fact or misleading silence	• rescission of contract

	• inducing contract	
Negligent misrepresentation	• false statement • made in an unreasonable or careless manner • inducing a contract • causing a loss that is not always sufficiently remedied by rescission	• rescission of contract • damages in tort
Fraudulent misrepresentation	• false statement or misleading silence • made without honest belief in its truth • made with intent to induce contract • inducing contract • causing a loss not always sufficiently remedied by rescission	• rescission of contract • damages in tort

Contractual Terms

Having considered pre-contractual statements, we can now turn to statements that actually become part of a contract. Unlike representations and misrepresentations,

contractual terms arise from statements that actually impose obligations under the contract. We will consider two types of contractual terms: terms expressed by the parties and those that are implied by a court or statute.

Express Terms

An **express term** is a statement made by one of the parties that a reasonable person would believe was intended to create an enforceable obligation.

an **express term** is a statement made by one of the parties that a reasonable person would believe was intended to create an enforceable obligation

Proof of Express Terms

When the contract is formed on the basis of an oral agreement, it is first necessary to determine what words were actually spoken. That is primarily a question of evidence. Written contracts produce different difficulties. For example, what if the formation of a contract involves the exchange of several conflicting documents? Perhaps even more difficult is the situation that arises when a combination of written and spoken words are used during the formation of a contract. We consider each of these situations.

24. In Chapter 7, we discussed the possibility of the “battle of forms.”

It is often difficult to prove the terms of a contract that was created orally. When an agreement is unwritten and unwitnessed, a court is required to determine whose version of events is more believable. Still, as long as there is no formal writing requirement and all of the other conditions of contract formation have been met, oral agreements are binding. As a matter of risk management, however, it is usually a good idea for a business person to “get it in writing.” Aside from issues of proof, the writing process encourages the parties to contemplate the terms more carefully.

If an agreement is written, oral evidence generally cannot be used to add to, subtract from, qualify, or vary the terms of the document. That is known as the *parol evidence*

rule. **Parol evidence**, in this context, refers to evidence that is not contained within the written contract. Knowledge of that rule is an important element of risk management. Business people often sign a written agreement on the assurance that some of its terms will not be enforced, or on the assurance that certain items discussed during negotiations are part of the deal even though they are not mentioned in the written document. One should be extremely suspicious of such oral assurances. The parol evidence rule generally means that they are unenforceable.

parol evidence is evidence that is not contained within the written contract

25. *Goss v Lord Nugent* (1833) 110 ER 713 at 715.

There are several exceptions to the parol evidence rule. Parol evidence is admissible:

to rectify or fix a *mistake* in a contractual document

to prove that a contract was *never really formed* or is somehow *defective*

to *resolve ambiguities* in the document

to demonstrate that a document does not contain the parties' *complete agreement*

There is one other way around the parol evidence rule. A statement may be characterized as a *collateral contract* that independently exists alongside the main contract. A **collateral contract** is a separate agreement one party makes in exchange for the other party's agreement to enter into the main contract. Suppose you want to buy oil of a certain quality. The seller's standard written contract contains a clause indicating that it *does not* warrant the quality of its oil. You therefore offer to enter into a contract for the purchase of oil under the seller's standard form contract, but only if the seller enters into a collateral contract that *does* warrant the quality of the oil. You have

avoided the parol evidence rule. The seller's promise regarding the quality of the oil is inadmissible under the main contract but it is enforceable as a separate agreement.

26. *LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (A'asia) Ltd* (1956) 56 SR (NSW) 81 at 94.

a **collateral contract** is a separate undertaking one person makes to another in consideration of that other person's entry into a formal contract

Concept Summary 9.3

Exceptions to the Parol Evidence Rule

Parol evidence is admissible to rectify a mistaken contractual document.

Parol evidence is admissible to prove that a contract was never formed or is defective.

Parol evidence is admissible to resolve contractual ambiguities.

Parol evidence is admissible to demonstrate an incomplete agreement.

Parol evidence rule is not applicable to collateral contract.

Interpretation of Express Terms

Even if the parties agree on particular terms and write them into a document, they may disagree on the interpretation of those words. Consider Business Decision 9.2.

Business Decision 9.2

Contractual Interpretation

It was Julia's twenty-fifth birthday, and she was about to be married to Robert. Just before the ceremony, Robert's wealthy mother, Fiona, handed Julia a one-page document, which contained this offer: "If you promise to go through with this today, I promise to pay you $1 000 000 on your thirty-fifth birthday, as long as the two of you do not remarry." Julia smiled and signed the document. She knew that the offer was a serious one. The marriage lasted only five years. Shortly after Julia's thirtieth birthday, Robert divorced her and went to "find himself" somewhere in the Himalayas.

Three years later, Robert found himself back in his hometown and saw a woman from across the bar and fell in love with her on the spot. It was Julia. They began dating again and decided to get remarried. Three weeks after exchanging their vows, Julia turned 35. Julia approached Fiona about her contractual promise to pay $1 000 000. Fiona refused to pay, arguing that Julia and Robert had breached the terms of the agreement.Julia and Fiona agree that their contract contains the term "as long as the two of you do not remarry." However, they each have a different view of what that means. The term is **ambiguous**, having more than one plausible meaning. That is quite common. A great deal of contractual litigation turns on differences in interpretation. In resolving such disputes, the courts ask how a reasonable business person in the parties' position would have interpreted the relevant clause. Nevertheless, the issue can still be difficult.

an **ambiguous** term has more than one plausible meaning

Fiona would likely take a **literal approach** to the words in the document and stress their *ordinary meaning*. She would argue that the contract plainly stated payment was due only if Julia and Robert did not remarry. By divorcing and then marrying each other again, they broke that condition.

the **literal approach** assigns words their ordinary meaning

Julia would interpret the contract somewhat differently. She would take a *contextual approach*. The **contextual approach** goes beyond the four corners of the document by

looking at the parties' intentions and their circumstances. Julia would argue that her mother-in-law wanted to make sure that she and Robert stayed married *to each other*. On that view, the term "as long as the two of you do not remarry" was meant to discourage Robert and Julia from marrying *other* people. And since they were married to each other on Julia's thirty-fifth birthday, they fell within the meaning of the contract.

the **contextual approach** goes beyond the four corners of the document by looking at the parties' intentions and their circumstances

Which of those two approaches is more plausible? If you are inclined to side with Fiona, you should also consider the *golden rule* of interpretation. According to the **golden rule**, words will be given their plain, ordinary meaning unless to do so would result in absurdity. If we were to adopt a strict, literal reading of the term "so long as the *two* of you do not remarry," a strange result would follow. We would be forced to conclude that Julia should be paid even if she abandoned Robert and married someone else, as long as Robert remains unmarried on Julia's thirty-fifth birthday. Given Fiona's intention at the time she made the offer, such an interpretation would seem absurd. In this case, the golden rule suggests that we avoid a strict, literal interpretation.

the **golden rule** says that words will be given their plain, ordinary meaning unless to do so would result in absurdity

27. *Suncor Inc v Norcen Int Ltd* (1988) 89 AR 200 (QB).

Another possible reason for finding against Fiona is the *contra proferentem* rule. The ***contra proferentem* rule** ensures that the meaning that is least favourable to the author will prevail. That rule is justified by the fact that the author, in this case Fiona, is in the best position to create a clear and unambiguous term.

the ***contra proferentem* rule** ensures that the meaning least favourable to the author will prevail

Implied Terms

Even if the parties carefully write out their agreement, that document may not contain all of the relevant terms. A contract may contain both express terms and *implied terms*. An **implied term** arises by operation of law, either through the common law or under a statute.

an **implied term** arises by operation of law, either through the common law or under a statute

Terms Implied by a Court

Unlike representations and express terms, implied terms do not arise from the parties themselves. They are inserted into a contract by the law. And since people are generally entitled to create their own agreements, a court will normally not imply a term unless that term is necessary in order to implement the parties' presumed intentions. An implied term is "necessary" in this context if (i) it is an obvious consequence of the parties' agreement, or (ii) it is required for the purpose of business efficacy.

Those two criteria often overlap. Suppose you are in the business of leasing equipment. A customer returns some leased equipment to you on time but in damaged condition. What if your contract did not expressly say anything about the condition of the equipment? That sort of term was presumably intended by both parties. After all, the whole point of a rental agreement is that the thing must be returned at the end of the lease. Consequently, a court will imply a term that requires the equipment to come back in the same condition in which it went out, subject to reasonable wear and tear.

28. *Con-force Prods Ltd v Luscar Ltd* (1982) 27 Sask R 299 (QB).

Courts will not imply a term simply because it is reasonable or would improve the contract. To the contrary, a term generally will be implied only if it is reasonable, necessary, capable of exact formulation, and clearly justified having regard to the parties' intentions when they contracted. Of those considerations, the last one is the most important. A contract may also contain an implied term that reflects a standard

practice that has evolved within in a particular field, as long as that term would not be inconsistent with the parties' express intentions. Return to our example in which you created a lease with a company that regularly rents equipment. Even though your contract is silent on the point, it may contain a term that people in your trade habitually include in their agreements.

29. *Canadian Helicopters Ltd. v. Interpac Forest Products Ltd.*, 2001 BCCA 39.

30. *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303.

The courts sometimes imply a term on the basis of a contract's legal characteristics. Certain kinds of agreements, by their very nature, involve certain obligations, even if the parties did not intend them. The Supreme Court of Canada, for example, has held that an employment contract contains a term that requires the employer to provide reasonable notice before dismissing the employee, even if a contract is silent on the issue or even if the agreement expressly says that the employee can be dismissed without notice.

31. *Machtinger v HOJ Industries* (1992) 91 DLR (4th) 491 (SCC). Employment contracts are discussed in Chapter 26.

Terms Implied by Statute

Terms are often implied by statute. In Chapter 13, we will see several examples that arise under the *Sale of Goods Act*. Likewise, consumer protection laws in Manitoba, the Northwest Territories, and the Yukon imply a term that the goods being sold are new and unused, unless otherwise described. Whenever a statute implies a term into a contract, the term is incorporated automatically without judicial intervention. If a dispute comes before the courts, the term is treated as if the parties expressly created it. In some cases, however, a statutory term will not apply if the parties have expressly excluded it.

32. CCSM c C200, s 58 (Man); RSNWT 1988, c C-17 s 70 (NWT); RSY 2002, c 40, s 58 (Yuk).

Standard Form Agreements

The terms of many business transactions are dictated by *standard form agreements*. **Standard form agreements** are mass-produced documents, usually drafted by the party in an economic position to offer certain terms on a “take-it-or-leave-it” basis. Standard form agreements are most often used for transactions that occur over and over again. A bank, for instance, does not want to negotiate a completely new contract every time it lends money to a customer. As a matter of risk management, it is better to avoid the risk of trouble by using a model that has been refined and tested over the years. Furthermore, it would be time consuming and expensive to allow each customer to negotiate new terms. Those additional costs would, of course, translate into higher interest rates. The same general principles apply to any business that enters into similar agreements on a repetitive basis.

standard form agreements are mass-produced documents usually drafted by a party who is in an economic position to offer those terms on a “take-it-or-leave-it” basis

There is, however, a downside to standard form agreements. Such contracts are often so long and complex that few customers actually read and understand them. Furthermore, because they tend to be offered on a take-it-or-leave-it basis, customers have no realistic opportunity to bargain for better terms. In a sense, the customer is at the mercy of the other party. If they refuse to accept to the standard terms, they cannot purchase the goods or services in question.

One type of term that customers are often required to accept in standard form agreements is an **exclusion clause**, or *limitation clause*, or *waiver*. For example, an outdoors adventure company might try to use an exclusion clause to preclude the risk of being sued by customers who are injured during their expeditions. Such a term is perfectly legitimate if the following three things can be demonstrated:

exclusion clause is a contractual term that seeks to protect one party from various sorts of legal liability

First, the term must have been drafted in clear, *unambiguous language*. If an exclusion clause is ambiguous, it will be interpreted as strictly and as literally as possible, and it will be given the meaning that is least favourable to its author.

Second, the party against whom the exclusion clause is meant to operate must be given *reasonable notice* of the term and its effect.

Third, it must be shown that the party against whom the exclusion clause is meant to operate *agreed* that the exclusion clause is part of the contract. A signature is usually the best evidence of that agreement.

An exclusion clause will not be invalidated merely because one party was in a stronger bargaining position than the other. A judge will, however, consider such an imbalance when deciding whether the weaker party truly did agree to the clause.

Ticket Contracts

Standard form agreements sometimes take the form of a ticket or receipt. As a business person, you might try to incorporate certain terms, including exclusion clauses, into your contract by having them printed on the back of a ticket you issue to your customers. Whether those clauses are valid depends on how they are presented. As with exclusion clauses, the general rule is that the terms must be brought to the customer's notice either before or when the contract is made. As usual, the question is not whether the customer actually read those terms, but whether they were given *reasonable notice*. If the reasonable person would not have known about the printing on the back of the ticket, then the customer probably will not be bound by those terms. On the other hand,

if the customer knew that the back of the ticket contained terms, those terms will be incorporated into the contract even if the customer chose not to read them.

Business Decision 9.3

Standard Form Agreements

Friedrich has a small book store. He registered an Internet domain name and hired a consultant to help him set up his page for e-commerce. Because he will now be offering books for sale worldwide, Friedrich wants to be sure that his standard purchase contract includes a “no refund” policy and a requirement that all payments are to be made in Canadian currency. Friedrich’s consultant has offered him a choice of three design layouts for an electronic catalogue that would be the equivalent of 19 pages in a paper document.

The first layout is a very long, one-page catalogue. Rather than having page breaks signifying the end of each paper page equivalent, the customer scrolls through the electronic catalogue by clicking on the scroll bar. The “no refund” policy and the Canadian currency requirement are found somewhere in the middle of the catalogue. At the bottom of the catalogue is an electronic order form, which allows the customer to enter the desired book titles. Once the customer has completed the form, all that is left to do is click on the “order now” button, at which point the purchase request is sent to Friedrich electronically. With this layout, the customer has the opportunity to view the “no refund” policy and the Canadian currency requirement but could, accidentally or on purpose, miss them entirely and place an order without being aware of those terms.

The second layout has a much more elegant design. It has the appearance of an all-in-one page design, but the entire catalogue is accessible from a single screen and does not require the customer to scroll through the document. Instead, access to all of the same text is available through hyperlinks. By clicking on specific icons, the customer can choose which information to view. One icon in this layout is labelled “terms & conditions.” If the customer clicks on it, the “no refund” policy, the Canadian currency

requirements, and the other key terms appear on the screen. Another icon is the “order now” button. Customers can order whether or not they have clicked on the terms and conditions hyperlink.

The third layout is similar to the second except that it is more cumbersome. It requires customers to click on the “terms & conditions” icon. It also requires them to answer “yes” when asked, “Have you read the terms and conditions and do you agree to them?” Once they have done so, they are then required to answer “yes” a second time when asked, “Are you sure?” That mechanism makes it virtually impossible for customers to place orders without being aware of the existence of Friedrich’s terms and conditions.

Questions for Discussion

1. Which of these layouts will ensure that Friedrich’s terms will be incorporated into the contract? Explain your answer.

2. From a business perspective, which layout would you recommend to Friedrich? Why?

3. Are there any other terms that Friedrich should incorporate into the standard contract to help the success of his new worldwide business venture?Signed Forms

As a general rule, people who sign standard form agreements are bound by all of the terms expressed in them, even if they have not actually read or understood those terms. There is a rationale for this rule. By signing a document, a customer indicates a willingness to be bound by its terms, and the other party receives some assurance that the agreement is enforceable.

Many standard form agreements are, however, extremely long and complicated. A judge therefore may apply an exception to the general rule if the customer is required to quickly sign the document without enjoying a reasonable opportunity to study its terms. In such circumstances, there is an onus on the party relying on the document to prove that the customer was given reasonable notice of its relevant terms. That exception

prevents a more powerful party from burying onerous or unusual terms in the small print of a difficult document.

Case Brief 9.1

Tilden Rent-a-Car Co v Clendenning (1978) 83 DLR (3d) 400 (Ont CA)

While filling out a car rental application at the Vancouver airport, Mr Clendenning was asked by the rental agent whether he wanted to purchase collision insurance for an additional, modest fee. After agreeing to pay extra, Clendenning was handed a complicated rental contract. Being in a hurry, he signed the document without reading it. The rental agent neither asked him to read the contract nor mentioned that it included an unusual term that excluded insurance coverage if the driver had consumed *any* amount of alcohol.

During the rental period, Clendenning got into an accident and damaged the vehicle. He admitted to drinking a small quantity of alcohol that day, but it was unclear exactly how much he had consumed. Not having read the agreement, Clendenning was unaware of the term that excluded coverage if *any* alcohol was consumed. That term did not appear on the face of the contract; but it was found on the back in small print. Clendenning claimed he was led to believe that the insurance provided complete coverage. Tilden, on the other hand, argued that Clendenning's signature was sufficient to bind him to the terms of the contract. Tilden also claimed that Clendenning's previous dealings with Tilden provided him with ample opportunity to read the terms of the contract despite the fact that he signed it that day in a hurry.

The Court of Appeal held that Clendenning's signature did *not* represent a true acceptance of the terms in the contract. Because the relevant term was onerous and unusual, Tilden was required to provide Clendenning with reasonable notice of it as well as a reasonable opportunity to understand and appreciate what he was signing.

The clause that was contained in the standard form contract that Mr Clendenning signed is an example of a *boilerplate clause*. A **boilerplate clause** is a clause that is used repeatedly without any variation. As we have seen, businesses often use boilerplate clauses to quickly and efficiently allocate contractual risks, manage exposure to liability, and highlight the need to purchase insurance (among other things). The Companion Website for this chapter contains a survey of some of the more significant types of boilerplate clauses.

a **boilerplate clause** is a clause that is used repeatedly without any variation

33. The source of the phrase is not entirely clear. It may refer to sheets of metal that were used by newspapers in the first half of the twentieth century. Those sheets were very strong and very durable.

Using Plain Language in Contracts

Contracts and other legal documents can sometimes be difficult to understand, particularly if they contain complex legal terminology. That is particularly a problem with standard form contracts. Fortunately, there is now a movement away from legalistic jargon and obscure Latin phrases, and toward *plain language*. By using plain language, governments and businesses can increase the likelihood that their documents will be understood by everyone, including people who do not have legal training.

As one example, the official *Communications Policy of the Government of Canada* requires the use of plain language in all government communications, both internally within government and externally to the public. The Canadian Bankers Association aims to ensure that mortgage documents are written in understandable plain language. Some laws even make it mandatory to use plain language in certain circumstances.

34. *Communications Policy of the Government of Canada*.

35. Canadian Bankers Association.

36. See for example, the *Bank Act* [1991, c. 46], 459.1(4.1): “A bank shall disclose the prohibition on coercive tied selling set out in subsection (1) in a statement in plain language that is clear and concise, displayed and available to customers and the public at all of its branches . . .”.

The use of plain language in contracts is clearly a consumer protection issue, as discussed in Chapter 19. However, businesses can also benefit from the use of plain language in contracts and other documents by reducing employee training (regarding the meaning of different business documents), improving communication with customers, and reducing time spent answering customer questions arising from confusion about documents. These effects can lead to tremendous cost-savings and improved customer relations.

37. Cheryl M. Stephens *Plain Language Legal Writing*.

Concept Summary 9.4

Managing Risk in Association with Standard Form Contracts

Use standard form contracts that have been tested and have a proven record of use, over a period of years if possible.

Use clear, unambiguous language for onerous terms and consider using plain language throughout the contract.

Give reasonable notice of onerous and unusual terms, and instruct staff to draw customers’ attention to such terms.

Require customers to clearly indicate their agreement to be bound by onerous or unusual terms, perhaps by requiring their initials in a box next to the term itself.

Chapter Summary

Not every statement made during pre-contractual negotiations becomes a contractual term. Pre-contractual representations are assertions of fact made with the intention of inducing another party to enter into a contract, but do not form part of the contract. Contractual terms, on the other hand, are provisions in an agreement that create legally enforceable obligations. If necessary, a court will determine whether a statement is a representation or a term, based on how a reasonable person would have understood the statement and the parties' intentions.

A misrepresentation is a false pre-contractual statement that induces the recipient of the statement into a contract. Inaccurate expressions of opinion, descriptions of future conduct, and statements of law are normally not treated as misrepresentations. To prove misrepresentation in those circumstances, a party must prove that the speaker implicitly claimed to state some fact. Silence can amount to misrepresentation in certain circumstances.

For a false statement to be actionable misrepresentation, the deceived party must be able to prove that it induced the contract. The two possible consequences of an actionable misrepresentation are (i) the remedy of rescission, and (ii) the right to damages. The remedy of rescission usually coincides with restitution, requiring a giving back and taking on both sides. Its aim is to return the parties to their pre-contractual state. Rescission may be barred if (i) the misled party ultimately affirms the contract, (ii) restitution is not possible, or (iii) a third party’s rights are affected. Damages are an award of money meant to compensate the loss suffered by the misled party due to the misrepresentation.

An innocent misrepresentation involves a statement made carefully and without knowledge that it is false. A negligent misrepresentation is a false statement made in an unreasonable or careless manner. A fraudulent misrepresentation is made without any belief in its truth or with reckless indifference. All three types of misrepresentation can give rise to rescission. Only fraudulent and negligent misrepresentation can give rise to tort damages.

An express term, whether oral or written, is a statement intended to create a legally enforceable obligation. When an agreement has been reduced to writing, the parol evidence rule states that oral evidence is inadmissible to vary or qualify the written contract unless it meets certain requirements. Parol evidence can also be used to demonstrate the existence of a collateral contract.

Courts use several approaches to resolve business disputes over the interpretation of contractual terms. The literal approach assigns words their ordinary meaning. The contextual approach takes into account the parties' intentions, as well as the surrounding circumstances. The golden rule suggests that words be given their plain meaning unless doing so would result in absurdity. Courts imply a term only if it is necessary to implement the parties' presumed intentions. Some statutes imply certain terms into particular types of contract.

Standard form agreements are mass-produced documents drafted by the party who is in an economic position to offer those terms on a take-it-or-leave-it basis. A person who signs a standard form agreement is generally bound by its terms, whether or not they ever read or understood those terms. Courts require that the existence of onerous or unusual terms in a standard form agreement be brought to the attention of the other party. Businesses should use plain language in their contracts with consumers. Plain language helps ensure that consumers understand contracts and can result in cost-savings and improved customer relations for businesses.

Review Questions

1. Distinguish between a pre-contractual representation and a contractual term, giving examples of each. Why is that distinction important?

2. Define "misrepresentation" in your own words. Can a statement be a misrepresentation if neither party is aware that the statement is false? What must one be able to demonstrate to prove misrepresentation?

3. What is the difference between a misrepresentation and a breach of contract?

4. Name three types of false statements that are often made during the course of negotiations that are not misrepresentations. Give an example of each.

5. Provide examples of the four circumstances in which the failure to speak will amount to misrepresentation.

6. What are two possible legal consequences of an actionable misrepresentation? Which of those possibilities provides a contractual remedy?

7. What is meant by the term “rescission”?

8. List three circumstances that may preclude the victim of a misrepresentation from seeking restitution. Why is restitution unavailable in these circumstances?

9. What is an express term? Why is it sometimes difficult to determine the meaning of an express term?

10. What is meant by the term “parol evidence”?

11. Why is it important for business people to know and understand the parol evidence rule?

12. When is a contractual term ambiguous? Describe how courts resolve disputes over ambiguous terms.

13. What is the difference between the literal approach and contextual approach to contractual interpretation?

14. State and explain the golden rule of interpretation.

15. State and explain the *contra proferentem* rule.

16. What is an implied term?

17. When will a court find that a contract contains an implied term? When will a court be reluctant to do so?

18. Briefly describe the significance of the standard form agreement in modern commercial transactions.

19. When is it irrelevant that a standard form agreement was signed?

20. When might it be appropriate for a business to design and use a ticket contract? Why should a business use plain rather than legalistic language on the ticket?

Cases and Problems

1. Seymour is a supplier of custodial cleaning products. While negotiating a contract to sell a crate of floor wax, Seymour makes the following statements. Categorize each statement as (i) a pre-contractual representation, (ii) a mere opinion, (iii) a contractual term, or (iv) a collateral contract. Give reasons for your answer and describe the legal effect of each statement.

a. ”This floor wax is the best made anywhere in the world.”

b. ”I personally truly believe this floor wax is the best made anywhere in the world.”

c. ”Studies have shown that this floor wax is the best made anywhere in the world.”

d. ”If, after trying this floor wax, you don’t agree that it is unquestionably the best made anywhere in the world, I’ll come and polish your floors myself for a month.”

e. ”If, after trying this floor wax, you don’t agree that it is unquestionably the best made anywhere in the world, I’ll eat my hat.”

2. Marc recently arrived in Vancouver to go mountain biking on Vancouver's famous North Shore mountains, the birthplace of extreme mountain biking. Up to that time, Marc had only ridden his bike in Manitoba where there were no extreme mountain bike trails. Marc thought it would be a good idea to have an experienced guide take him to the North Shore trails because he was not familiar with the level of difficulty on the different trails. The guide Marc hired had been riding the North Shore for ten years and was a very experienced biker. Before signing a contract with the guide to take him on five specific trails on the North Shore, Marc asked the guide how difficult the trails were. The guide told Marc, "I don't find them difficult myself." On the basis of this statement, Marc signed the contract to hire the guide.

On the first trail that Marc rode with the guide, Marc found that he was in way over his head. The trail was much more difficult than Marc ever imagined and he ended up walking most of the trail because he was so scared. After the first trail, Marc decided that he didn't want to ride any of the other trails. He demanded his money back from the guide, claiming that the guide had made a misrepresentation about the difficulty of the trails in order to induce Marc to enter the contract. Do you think Marc will be successful in proving that the guide made a material misrepresentation that induced the contract?.

3. Ziggy purchased some farmland and a small farmhouse with the aim of growing tobacco. After a very successful first season, he realized that he should insure his business. He contacted Farmers Choice Insurance Ltd. Simone, a broker for Farmers Choice, appraised Ziggy's farm and set up the policy. Ziggy paid for the entire year's insurance upfront. Two months after the policy took effect, a fire destroyed the entire crop. Although the cause of the fire could not be determined, Ziggy put in a claim for the damage incurred. After its investigation, Farmers Choice refused to pay Ziggy's insurance claim, stating that it was previously unaware of these facts:

a. Ziggy had suffered a previous loss by fire.

b. Ziggy's wife had previously been convicted of fraud and had served time in a penitentiary.

c. A fire insurance policy issued by another insurance company had previously been cancelled prior to its expiration date.

d. Ziggy's wife admittedly had enemies and there was therefore a danger of arson.

e. Ziggy was a chronic alcoholic and, although never proven, it was suspected that the previous fire had been caused by a still exploding in Ziggy's basement.

Simone admits that she did not specifically ask Ziggy any questions pertaining to those facts. Will Farmers Choice be able to avoid its contract with Ziggy altogether? Should the original contract stand even if no payment is to be made on this particular claim?

4. Navinder decided to list her summer cottage for sale at a price of $130 000. Nancy, a prospective purchaser, asked Navinder whether she knew anything about its current market value. Navinder indicated that although it had not recently been appraised, the cottage was originally built for $50 000 on land for which she paid $25 000. She indicated that a professional builder had made a number of improvements to the cottage, thereby increasing its value. These included a second-storey loft with two bedrooms and a new bathroom. Navinder stated that the addition added $25 000 to the resale value of the cottage. She also mentioned that a professional landscaper had been hired at a cost of $2500 to finish the property and that she had purchased one acre of undeveloped land on either side of the property at a total cost of $30 000. On that basis, Navinder claimed that the cottage was worth $132 500. Although Nancy loved everything about the cottage, she was somewhat skeptical of Navinder's valuation. Nancy hired Al's Appraisals to determine the value of the property. Al provided a written appraisal at $129 750. Nancy decided to buy the cottage at the listed price. A few months later, Nancy's insurance company reappraised the house for insurance purposes at $82 000. Nancy was astounded. She hired a third appraiser, who provided a detailed report proving beyond the shadow of a doubt that

the entire property was worth no more than $85 000. Can Nancy successfully sue Navinder for misrepresentation? Is there any other possible legal means for Nancy to recoup her losses?

5. Antonio and Susanna have decided to leave the big city. They arrange to purchase a large country inn from Jay Jonah Investments Inc. According to the terms of their contract, Antonio and Susanna agree to transfer ownership of their house in the city and to pay Jay Jonah Investments an additional monthly mortgage of $2000 for 24 months in exchange for the country inn. Several months after the deal closed, Antonio and Susanna learned that the representations made about the potential earnings of the country inn were clearly false. They therefore refuse to make any further mortgage payments. In the meantime, Jay Jonah had demolished their house to build a condominium complex. Assuming that Antonio and Susanna can prove that they were induced to contract by misrepresentation, what remedy do you think that a court should grant?

6. Mac's Machines Ltd, an importer of high-tech German industrial equipment, had an ongoing shipping arrangement with Take Care Tankers Inc. According to Clause 4 of Take Care Tankers' standard form agreement:

> Subject to express instructions in writing given by the customer, Take Care Tankers reserves to itself complete freedom in respect of means, routes, and procedures to be followed in the handling and transportation of the goods.

Although the parties had done business before on several occasions, a representative from Mac's telephoned Take Care Tankers to request that a particular shipment of machines be stored below deck. Although the machines were usually transported in waterproof plastic containers that were amenable to deck transportation, the shipment in question was packaged in wooden crates and was therefore susceptible to rust if left on deck. The shipping manager at Take Care Tankers assured the Mac's representative over the phone that the special arrangement would be no problem. Despite that promise, the shipment was inadvertently stored on deck. During the voyage, the crate fell overboard, and the machines were lost at sea. On the basis of the telephone call,

Mac's claims that Take Care Tankers was not merely negligent but also in breach of contract. Relying on Clause 4 of its standard form agreement, Take Care Tankers claims that the oral assurances made over the telephone were not part of the contract. Leaving aside the issue of negligence, apply your understanding of the parol evidence rule to determine how a court would resolve the contract issue in this case.

7. Sperry Rand makes farm machinery. To promote its products, Sperry published a sales brochure that includes the following representations:

> You'll fine-chop forage to one centimetre season after season! You'll harvest over 45 tonnes per hour with ease. Under test conditions, the big New Holland harvesters have harvested well over 60 tonnes per hour. And Micro-Shear cutting action gives you a choice of crop fineness—from one to six centimetres.

Induced by the brochure, John decided to buy one of Sperry's machines from a third-party dealer. As a result of the failure of the machine to live up to its description in the brochure, John lost his entire season's crop. Aiming to recover damages for breach of contract, John attempted to sue the dealership. Unfortunately the dealership had gone bankrupt. John decided that he would try to sue Sperry Rand. Assume that his contract with the dealership excluded any possible tort liability against Sperry Rand. Does John have a contractual remedy against Sperry? Is the parol evidence rule relevant to your determination?

8. Paula's Pets has developed a standard form agreement for its employees. Having had problems in the past with employee absenteeism, Paula's Pets has included a term in its employment contracts stating that an employee shall not miss more than five work days per year subject to statutory holidays, illness, and the like. Another clause in the agreement provides for a leave of absence in the case of a death in the family:

> All full-time employees of Paula's Pets are entitled to a compassionate leave of absence for the bereavement of a loved family member.

Randall, a full-time employee, decided to take a week off work after his dog was hit and killed by a train. In response to the employer's charge of absenteeism, Randall stated that his employment contract provides for a compassionate leave for "the bereavement of a loved family member." Randall believed that this included his dog; his employer claimed that the contractual term applies only to human family members. Using the various approaches to interpretation, build the best possible argument in favour of each interpretation.

38. You may wish to reconsider your answer in the context of bereavement and other leaves of absence pursuant to employment standards legislation as discussed in Chapter 26.

9. Clinton was 14 years old when his mother entered into a written agreement with the town library on his behalf. According to the agreement, Clinton would obtain full borrowing privileges and his mother would become "responsible for any fines, loss or damage occasioned by the use of the library card." Shortly after Clinton lost his library card, a stranger used it to borrow more than 30 items. Those items were never returned. The library issued a bill to Clinton's mother for $1570, the replacement value of those items. Do you think Clinton's mother should have to pay? How might the library have better managed its affairs?

10. The Upper Crust Academy, an exclusive boarding school, has inserted the following clause into its standard form agreement:

> The parents of _____ hereby authorize the Principal to ensure that said child shall receive a proper social and academic education in accordance with the highest standards of personal conduct and that said child will be kept free from danger while in the custody of Upper Crust Academy.

Like everyone else whose child attended the academy, Manjunath's parents signed the agreement. One evening, Manjunath was returned to the academy by the local police after he was found stealing pylons off the street. In addition to the mischief he caused in the streets, Manjunath was in breach of the curfew rule at the academy. After

unsuccessfully attempting to contact Manjunath's parents by phone, the principal decided to sentence Manjunath to 20 hours of peeling potatoes in the academy kitchen to dissuade him from repeating such inappropriate behaviour. When his parents found out that the potato peeling had caused Manjunath to develop unsightly calluses on his hands, they quickly removed their darling son from the academy. The principal of the academy responded by issuing a bill for the remainder of the year's tuition plus an additional fee for boarding. The academy claims that the disciplinary action taken by the principal was within its contractual rights. Manjunath's parents disagree. Given that the agreement makes no specific mention of discipline, how could the principal persuade a court to side with the academy? Explain your reasoning.

11. Don wanted to do something special for his birthday. He decided that he would rent a high-performance sports car for a day and cruise the city with his friends with the top down. When he went to rent the car from High-Performance Auto Rentals (HPAR), he was presented with HPAR's standard form rental agreement. Because it was a beautiful Friday afternoon, there was a long line of customers waiting to rent cars. The salesman who served Don was anxious to help other customers and to close the shop for the day so he could go away for the weekend. The salesman presented the standard form contract to Don and told him to sign it quickly. When Don turned over the contract to read the fine print on the back, the salesman became irritated and told Don not to bother reading all the fine print because it just dealt with what time he had to return the car and that he had to fill the tank with gas. Don signed the contract without reading it.

That afternoon, Don drove the high-performance car into a concrete wall, causing significant damage to the vehicle. When he contacted HPAR to let them know what had happened, HPAR told him that it would take 30 days to fix the car because the parts had to be imported from Italy. HPAR also told Don that he had to pay the full daily rental rate ($900 per day) for every day the car could not be rented while it was in the shop being repaired. This would total $27 000. HPAR claimed that this obligation to pay was contained in the fine print on the back of the standard form contract that Don Justino had signed and been provided a copy of. Don disputed that he was required to pay because he never saw that clause and because the salesman told him not to read the

fine print. Would a court find Don liable to pay the $27 000 pursuant to the HPAR standard form contract? How might HPAR have avoided this dispute?

12. You work at a company called CuddleTech ("CT"). CT operates a website where users can play 3-D interactive video games online. When users create an account for the CT website, they are required to agree to a standard form contract. You have been assigned the task of reviewing and rewriting this contract. Under the contract, users are required to disclose any physical disabilities or medical conditions that might cause them to react negatively in CT's online 3-D game environment. CT is concerned that users with certain medical conditions may be prone to negative reactions in the 3-D game environment. This obligation to disclose any disabilities applies continuously so long as the user continues to use their account to play games at the CT website. You have been asked to ensure that CT's standard form contract contains a term which gives CT the right to immediately terminate the account of any user who does not comply with this disclosure obligation. You have been presented with the following two options for this clause. Which option would you recommend CT use in its contracts and why?

Option 1:

> If at any time the user intentionally or unintentionally, or fraudulently, or negligently or otherwise fails in any direct or indirect manner to comply with their obligation to disclose any and all physical disabilities that might in any direct or indirect way cause them to react negatively in CT's 3-D gaming environment, then CT shall have the right and be entitled to declare that this contract is null, void and unenforceable immediately or at any time in its sole discretion.

Option 2:

> CT is concerned about your health. Throughout the duration of your account with CT, you must disclose to CT any physical disability or medical condition that might cause you to react negatively in CT's 3-D game environment. If at any time

you do not disclose such a condition or disability to CT, CT may immediately terminate your account.

WWWeblinks

Contract Law

www.duhaime.org/ca-con1.htm

This page provides an introduction to various areas of contract law, including offer and acceptance, privity, mistake, misrepresentation, breach, and remedies. The site also offers summaries of leading case law.

Contracts Canada

http://contractscanada.gc.ca/en/index.html

This site offers information on how the federal government conducts business with its suppliers, including government purchasing and government contacts.

Industry Canada Consumer Information

http://strategis.ic.gc.ca/sc_consu/engdoc/homepage.html?categories=e_con

This website provides information to consumers on such matters as recalls, consumer law, and awareness.

The Plain Language Association International (PLAIN)

www.plainlanguagenetwork.org/

This site provides information about international plain language initiatives, including those in Canada. This site also provides detailed information about ways to effectively write legal and other documents in plain language.

Additional Resources for Chapter 9 on the Companion Website (www.pearsoned.ca/mcinnes)

In addition to self-test multiple-choice, true-false, and short essay questions (all with immediate feedback), three additional Cases and Problems (with suggested answers), and links to useful Web destinations, the Companion Website provides the following resources for Chapter 9:
Boilerplate Terms
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