Everyday Law For Agents
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THE COURT SYSTEM

In each of the states of this country there are two separate systems of law in force, namely, state law and federal law. Federal law operates uniformly throughout the United States, with few exceptions. State law, however, may vary considerably from state to state since each state has its own constitution, statutes and court decisions.

Both the national and state governments are controlled in what they can do by provisions in their respective constitutions. The fundamental difference between the two constitutions is that the Constitution of the United States is a grant of power to Congress, i.e., Congress has the power that has been expressly conferred upon it, whereas the state constitution is a limitation of power, i.e. the state legislature has the powers that have not been denied it. Thus, unless restricted by the federal or state constitution, the state legislature has any power it chooses to exercise.

As pointed out, there are two separate systems of law in force, namely federal law and state law. In certain types of proceedings the federal courts have exclusive jurisdiction; however, in most frequent situations where parties become involved in court action, the state courts have jurisdiction. An understanding of the court structure and the nature of judicial proceedings are essential for the agent to understand.

In most States, there are three systems that make up the State Courts System: Trial Courts (Small claims, municipal and superior), Appellate Courts and Supreme Court. Disputes are first heard at trial level and progress to Appellate and supreme based on the type of case and appeals that are made on decisions in the lower courts.

The following dollar amounts are typical guidelines in deciding which state court a claim may be entered.

- $5,000 or less -- Small claims court (excluding evictions)
- $25,000 or less -- Municipal court, including evictions, misdemeanor and criminal cases.
- Over $25,000 -- Superior court including divorces, adoptions,

Federal courts also have three tiers: Federal District Courts, Courts of Appeal and Supreme Court. In several types of cases, the federal courts have exclusive jurisdiction. These include actions involving bankruptcy and overall civil actions. Federal cases are commenced in the local United States District Court. The United States is divided into about 100 districts, each with its own district court.

The highest and "last resort" court is the Supreme Court of the United States. This court is made up of nine judges, appointed for life by the President. Most cases that reach the Supreme Court are on appeal from a lower federal court, or from state supreme court where a question of federal law is involved.

RISK & LIABILITY

A discussion of law must contend with the concepts of risk and liability since they represent the conditions leading to almost every legal event.

Risk

Risk is the uncertainty or chance of loss which can result in social as well as individual costs. Therefore, society and individuals are interested in how it is assumed and handled. **Insurance is considered the "first line of defense" in shifting the burden of risk.**

Risk may be assumed by written agreement, e.g., leases signed by apartment renters where the lease waive's the tenants right of action against the landlord and require the tenant to assume liability for others that might ordinarily be the landlord's responsibility.

Risk may also be presumed, e.g., a spectator at a hockey match is hit with a puck. Does he have cause of action? No, the presumption is that spectators assume this risk.

It can be said, that a majority of effort is spent by business and individuals finding legal methods to shift risks.

Hedging is a risk shifting technique that is accomplished by making commitments on BOTH sides of a transaction so the risks offset each other. An example might be a grain elevator operator. He buys grain from farmers for shipment to a central market. The farmer receives the prevailing price for grain the day it is purchased although it will not be shipped for sometime. No one knows what the price of grain will be until it arrives at the central market. The grain operator stands a chance it may be up or down. To "hedge" this, the operator shifts his risk to a grain speculator who buys and sells futures.

Subcontracting is another method of shifting risk. A building contractor shifts his risk by hiring subcontractors. Although the general contractor still has residual liability for losses, portions of the risk have been shifted to the subcontractors.

Hold harmless agreements allow liability risks to be shifted. One party agrees to assume the legal obligations of the other in a lawsuit for damages to a third party.

Incorporation is another method of shifting risk. Stockholders, if their shares of stock are fully paid, have no liability. Their losses are limited to their investment in the stock.

Liability

The legal basis for liability exposures are torts and contracts.

A **tort is a wrongful act** committed by one person against another that may result in civil action. The **wrongful act must cause bodily injury, property damage or personal injury**. Personal injuries may include a number of wrongs: defamation, false arrest, mental distress.

Tort claims result from three main actions: intentional interference, liability without fault and negligence. By far, most tort claims are based on negligence

Intentional Interference Torts

These torts involve actions against the person and actions against the property of others. A person may not be liable for intentional interference if the conduct was privileged. Mistakes and prior consent are events that may excuse liability and establish privilege.

Interference with the person includes events like:

Battery -- The intentional, unpermitted contact with the person of others. NO harm need be done nor any hostility intended. Only the absence of expressed or implied consent of the violated person is necessary to constitute battery.

Assault -- To attempt or threat physical violence against another. Assault involves threatened contact; battery requires contact. Intent is not a factor in assault, simply the belief that the threat may materialize is enough.

Defamation -- Actions that injure another's reputation. Acts may be either libel (written) or slander (oral).

To be actionable, the defamatory statements must be intentionally or negligently communicated to someone other than the defamed party and understood by the third party.

False Imprisonment -- The intentional restraint of another's freedom of movement. The restraint must be intended but does not have to malicious. Further, it need not be physical restraint but may consist of threats of force designed to intimidate someone into compliance.

Malicious Prosecution -- To knowingly institute groundless civil or criminal action against another party. Damages are usually based on the fact that there is no probable cause for the action.

Interference with the property of others includes trespass to real or personal property and "conversion".

Trespass -- The wrongful entry on the land of another or failure to remove property from another's land. Trespass includes the invasion of the area above and below the land as well as the surface. Trespass to personal property is the intentional interference with its possession or physical condition without legal justification. An innocent mistake is no defense against liability. However, proof of damage is usually required to establish liability for any trespass to personal property. Willful trespass to real property requires no proof of damages to establish liability.

Conversion -- The wrongful disposition and detention of the personal property of others. Conversion differs from trespass in that prior to conversion the converter was legally justified in possessing the property. An example might be a parking lot attendant taking a "joy ride" in a customer's car.

Liability without fault

This occurs when a person is held liable for injury to others even though the injury may be neither intentionally or negligently inflicted. Exposure for this liability typically arises from sources like dangerous instruments (explosives, wild animals, etc), hazardous operations (blasting and mining) and defective or unsafe products

Negligence

Virtually everyone is exposed to loss from negligence. The law imposes an obligation on all persons to use prudence in their actions so others will not suffer bodily injury or property damage. Failure to do so gives the injured party a right of action against the wrongdoer for damages.

Negligence is the act of an unreasonable and imprudent person. Often it results from carelessness, but it may be due to forgetfulness, bad temper, ignorance, bad judgment or stupidity. Negligence never involves intent.

The standard for what is reasonable is never clear. Often, where a judge believes the standard of care is clear, he or she will decide if negligence has occurs. Where there is room for disagreement, negligence issues are typically decided by jury.

There are many forms of negligence:

Presumed Negligence -- Three conditions establish presumed negligence:

1) The injury was caused by a defective object, 2) The injury could NOT have occurred without the defendant's negligence and 3) The object causing the injury was controlled by the defendant.

Presumed negligence causes typically arise in cases involving injuries where there are no witnesses, railroad and aviation injuries, medical malpractice claims and damages from defective products.

Imputed Negligence -- A person is responsible for the negligent acts of others. Examples include and

employer liable for the actions of his employees or the imputed liability a landlord has when his tenants cause injury from a negligent act.

Contributory Negligence -- A case where the plaintiff is also negligent and that negligent act contributed to the loss establishes this form of negligence. Once established that both defendant and plaintiff are responsible, recovery is denied the plaintiff.

Comparative Negligence--Where reasonable negligence can be determined among several parties, the court will levy damages according to comparative degrees of negligence.

Last Chance Negligence -- In some cases, a defendant can prove that the plaintiff had the last clear chance to avoid an accident. In this situation, the last clear change doctrine will assign contributory negligence to the plaintiff and thus deny him recovery.

Contract Liability

Liability may also be assumed under contract or arise from a breach of an expressed or implied warranty.

Assumed Liability -- A person may sign a contract and assume the whole or part liability of another, e.g., a tenant agrees to assume a landlord's liability for negligence. Risk-shifting clauses are standard practice in leases.

Breach of Warranty -- Compared to assumed liability, proof of negligence is not required for damages under a breach of implied warranty. The plaintiff need only prove that an implied promise was not fulfilled.

Tort and Contract Dual Liability

In some instances, damages may be sought for liability in the areas of BOTH tort and contract law. Typical events include:

Product Liability -- A person injured by a defective product may bring suit on an implied warranty basis, i.e., that the goods 1) were not fit for the purpose intended, 2) were not adequately packaged and labelled and 3) did not conform to the promises and statements made on the package or label.

In addition, a defective product claimant has two causes of tort action: negligence and liability without fault.

Professional Liability -- Professional persons and others may be held liable for breach of an implied warranty to render the agreed-upon service. Most cases here involve the failure of the professional to exercise reasonable care.

BUSINESS LAW

Contracts

In everyday law, a contract is an agreement or exchange of promises between two or more people that is enforceable by law. The important thing to remember is that **BOTH parties to a contract must promise something of value.** A promise to give someone a car for free does not create a contract because nothing of value was received by one of the parties -- there was NO consideration. Consideration can be an act or promise to do something, refrain from doing something or a legal benefit (money).

There must be an offer and acceptance in every contract with terms that are definite and certain. **It must also be proved that the offer was communicated** since someone cannot agree to something of which

he has no knowledge.

A contract can be in writing or it can be oral. Some contracts, MUST or SHOULD be in writing to be binding. Following are examples:

- Real estate sale contracts
- The sale of personal property or goods for $500+
- A lawyer's fee agreement
- An employment contract with agents
- Agreements that take longer than one year to complete

Without a written document, however, the burden to prove that a contract was made is very difficult.

Because contracts are consensual (mutually agreed) there needs to be a **"meeting of the minds"** to be enforceable. This requires contracts to be made under conditions with no duress (no pressure), no undue influence (full disclosures) and without fraud.

Recision

Even if someone signs a contract, in certain instances the law allows some time to reconsider and "back out" of the deal. Federal law, for example allows a 3-day Recision right on contracts involving door-to-door sales for more than $25 as well as sales made at locations other than the seller's store/office (a sale made at a convention hotel, outdoor exhibit, etc). Three business day recision is also allowed where home improvement loans and second mortgages are concerned.

Otherwise, the discharge of a contract can occur when something causes a binding promise to cease to be binding. This can happen by the acts of the parties involved or by operation of law.

Also, parties to a contract can rescind or terminate their respective duties my mutual Recision.

Breach

When someone doesn't keep a promise, a contract is broken or breached. There are many remedies for the damaged party including arbitration, mediation, a negotiated settlement or court. The person who is damaged must do two basic things:

1) Attempt to minimize his/her losses. An example might be a plumber who made a repair that later leaked. The damaged party should at least shut the water off so further damage won't occur. And,

2) Spell out exactly what he expected to get and how much was not done.

The damaged party has the right to claim action for damages which could include compensatory damages (putting him in the same position as though the defendant performed), nominal damages (damages even though a loss has not occurred), punitive damages ("punishment monies" in addition to normal compensation and/or liquidated damages (a fixed sum specified in the contract or by law). This is discussed more under claims.

If a contract was made that involved something illegal or extremely unfair to one of the parties the courts may not enforce the terms of the contract.

Claims

Consumer claims result when a dispute between two parties cannot be settled. Claims can be made by way of lawsuit or small claims. Anyone who is at least 18 years old and mentally competent can file a claim. Minors must have a parent or guardian sue for them. Also, businesses that require licenses or state registration must

legally hold these licenses and be registered with the State to bring action.

Venue

Under State law, the rules of venue and the amount of a claim determine where claims are first made. A suit can be filed in the district where someone lives, does business or where real estate is located. Damage or personal injury occurring in a district is also a determinant. The location where a contract was signed, performed or performed can further determine where a claim is filed.

Federal claims are limited to issues of federal law (civil rights, free speech), diversity (people who live in different states) or by special statute (bankruptcy, patents, copyrights).

Statute of Limitations

Time is still another factor in the ability to file a claim. A statute of limitation is a deadline for filing a claim or lawsuit. Following are some common time limits:

- Breach of oral contract -- two years from date broken
- Breach of written contract -- four years from date contract is broken.
- Property damage -- three years from date damaged
- Judgement debts -- ten years from judgement date
- Injury -- One year from first discovered

The court may refuse to hear a case if the statute of limitation has passed. Certain situations, however, may suspended for a period of time if a defendant is out of state, in prison, a minor or insane. Things would proceed when the condition no longer exists.

Another situation might be the death of a party to a claim. When this happens, the statute of limitation is extended while the proxies or heirs "carry the torch". The main condition is that these same people file papers within six months of the death.

Settlements

A claim may follow several courses on the way to being finally resolved. Settlements, agreements between two or more people to end a dispute, may occur at anytime. In fact, most lawsuits are settled without ever going to trial. If this occurs, the parties typically ask the court to enter a judgement for the amount of the settlement or dismiss the case. A request for **dismissal** should include the words "with prejudice" -- meaning the plaintiff agrees to not sue again.

A plaintiff has the right to have a case decided by the judge or a trial by jury. Decisions by either are decrees and a judgement of the court.

Even a case that has already been decided, an appeal may be filed. **An appeal is actually a request for a higher court to hear a case again** in hopes that the decision will be changed.

Debts

Laws pertaining to debt are important to this course because the creation and maintenance of debt is one of the most significant issues in society.

Debt is created everyday by actions as simple as signing loan documents and credit card charges. No one can

be jailed for not paying debt but there are legal recourses.

Bankruptcy

Some people and businesses find they can escape or relieve debt through Bankruptcy (discussed later in our report). Certain types of debt, however, still survive bankruptcy proceedings such as:

- Monies paid within 20 days of filing bankruptcy for $1,000 or more
- Damages caused while driving drunk
- Damages through embezzlement
- Fraud damages
- Willful personal injury damages
- Many federal, state and local taxes
- Child Support / Alimony
- Debts not listed in a bankruptcy
- Judgement fines levied for violations like traffic tickets

Collecting Debts

Actions to collect debts are given much attention under the law witness the passing of major state an federal laws such as the Federal Fair Debt Collection Practices Act (specifically for collection agencies).

Someone who is owed money must not use abusive methods to collect a debt like:

- Phone harassment
- Pretending to be an attorney
- Printing the debtors name in the paper
- Mail letters that have embarrassing "debt collection" language printed outside
- Threaten to take outrageous legal action
- Phoning a third party who may know where the debtor is but not disclosing the purpose of the call
- Threaten bodily harm
- Charging illegal interest or penalties not in the original contract or not allowed by law

Claims for Debt

When reasonable methods do not result in collection of the debt, the injured party may initiate a claim or lawsuit (discussed elsewhere in our report). The result of this action may be a judgement. The prevailing party is called the **judgement creditor** while the losing party is the **judgement debtor**.

Methods that a judgement creditor can use to collect a debt owed include Garnishment of Wages, Property Seizure and/or Liens. **A Garnishment of Wages can require an employer to withhold up to 25% of paychecks;** 50% if the judgement involved child support. Property Seizure can involve the legal takeover of just about anything a debtor owns (cash, real estate and personal property). Property that is specifically excluded from seizure however includes tools of trade, Government benefits like social security, household items necessary to live (appliances, chairs, cars worth less than $1,200) and specific benefits like life, disability and health insurance.

A lien is a legal claim placed against property or real estate owned by a debtor. They allow the judgement creditor to collect when a certain property of the debtor is sold or refinanced. The difference between liens and garnishment/seizure procedures is that **many liens do not require a court judgement in order to be levied**. Examples include mechanics liens, escrow liens, tax liens and child support liens.

Institutional Debt

Banks and other regulated lenders live by different debt disclosures and collection procedures. Federal Truth in Lending, for example, requires specific disclosures on interest rates, late fees, balloon payments and prepayment penalties of loans. Loan documents that include these same disclosures may also include certain debt collection powers that go beyond normal creditor rights. Where it is written in a signed loan agreement, for instance, lenders may be able to take money from a savings or checking account to pay a late loan payment. This is called a **setoff**. By the same loan document, a lender may automatically possess the right to assign wages or be awarded a judgement against a debtor without having to sue. Of course, lenders also have security interest which allows the right to repossess for nonpayment of a loan or debt.

FAMILY LAW

Marriage and Community Property issues will inevitably confront an agent considering our country's high divorce rate. A look at the formation of marriage and community property titling will provide the agent a valuable backdrop.

Marriage

What Constitutes a Marriage

In some states, a marriage is considered valid only by license and ceremony. Marriages of persons who move to another state are considered valid if the marriage is accepted in that state, even if it is a common law marriage (a marriage created by living long together). Also, the parties must be of opposite sex, at least 18 years (or have parents permission and a Superior Court Judge), competent to act, devoid of alcohol or drugs, not related, be physically able to consummate the marriage (unless past child bearing age), be unmarried and have a license, ceremony and witness.

Marriage Property Rights

The classification of property in marriage can be very complicated. Generally, property owned before marriage is considered **separate property**. Property acquired during marriage can be separate or community property (see Community Property). In common law states, the wages, pensions, business property and other sources of profit might **solely** belong to a husband or wife if he or she is the sole wage earner. Similarly, property placed in the name of just one spouse can be construed to be his or her separate property. What protects the un-named or non working spouse? In the case of divorce, very little. In the case of death, many common law states have "**Elective Share Statutes**" that prohibit the disinheritance of the non working spouse. The issue can be further complicated when a couple moves from a common law state to a community property state which does NOT have elective share rights. Here, a non working spouse could be totally disinherited. In community property states, most property, wages and pensions acquired during marriage is considered community property or equally owned by both spouses at all times. The exceptions are property bought during marriage which were bought with "sole and separate" income/proceeds. Also, gifts and inheritances received during marriage are still separate property.

Debts incurred during marriage in common law states are the responsibility of the specific party that signs the note. In community property states debts are mostly considered debts of the community property -- both spouse's are responsible. The exception might be where a lender limited his credit review and signature to only one spouse. In this case, only that spouse would be liable. Or, if the debt completely contrasted the marriage (a secret house rented to have an affair), one spouse can be held liable. A marriage partner is typically NOT responsible for a spouse's debt incurred before the marriage.

Breaking a Marriage

A marriage can be annulled if the person is under 18 and marries without parental consent. Other conditions include: being forced to marry, being defrauded into marriage, or a mentally impaired party. Divorce can be requested and granted for a myriad of reasons. It is not even necessary that one party be at fault. One spouse, however, must usually live in the state for at least six months before filing.

There are two types of divorce: **Summary dissolution and regular dissolution**. The summary divorce is much quicker and is limited to situations where there is no children, the wife is NOT pregnant, the couple have less than $5,000 in debts, owns less than $25,000 in joint or community property and less than $25,000 in separate property (cars not included). All that is needed is a property agreement and a six month waiting period.

During this six months either party can revoke the summary dissolution in favor of a regular. Regular dissolution divorce requires court appearances, more time and many legal papers. After divorce, it is the law that neither spouse can take children out of state without permission from the court and the other spouse.

There are many couples who will not divorce due to religious reasons or they must remain together for economic reasons. They may opt for a separation where all property, debts, custody, visitation and child support payments are legally divided. All debts and assets received after the separation are considered personal property.

Support Payments

Alimony is typically awarded in special circumstances based on age, income ability to support, past life-style, education, the duration of the marriage and the individual needs of each spouse. Spousal support is ended when the recipient remarries, dies or the specified period of support has passed.

Child support, on the other hand, is usually the legal obligation of both parents until the child reaches the age of 18 (19 if still attending high school full-time without a supporting job). A disability might require support beyond age 19.

The amount of child support is determined by the net income of both parents, the amount of time the parent spends with the child and the number of children supported. Usually, the more income a parent makes the higher his/her support payments. Further, a parent without custody will probably pay a greater portion of wages or a greater portion of total support payments since the court assumes a parent with custody to spend more on a child simply because he/she is with a child more often.

Community Property

Nine states follow community property law: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Some that don't, may recognize community property rights of incoming residents.

Community property began among the common folk of Europe at a time when both husband and wife contributed to the economic welfare of the family. Certain states, have adopted community property laws while others continue to use a common law property system where property may be held by one spouse separately and apart from that of the other.

The concept of community property stems from the legal interpretation that while one spouse's earnings may be the immediate source of a couple's income and property acquisitions, the efforts of BOTH spouses contribute during the marriage. So, a husband and wife each own a present, undivided, vested and equal interest in every community asset.

Community property is a form of concurrent ownership that may exist ONLY between husband and wife. However, not all marital property is community property. Generally speaking, if something is acquired before marriage by any method, or after marriage by gift, devise or descent, it is separate property; otherwise it is community property. There are two exceptions: Property purchased with separate funds, even during the marriage, is still separate property and community property that has been partitioned by law, in the case of divorce, becomes separate property.

How is Property Classified as Community Property or Separate Property

When a couple gets married in OR moves to a community property state, special rules may govern the management, control and disposition of their property. The classification of assets as separate or community is an important part of these rules. Property acquired during marriage or owned at the time of dissolution of the marriage, is always presumed to be community property regardless of whether title to the property was taken in the name of one or both spouses. The community property presumption may be refuted by clear and convincing evidence presented by the departing spouse.

More important than the legal title of property, **the law is more concerned on the timing of its purchase and the source of funds as a determinant of whether it is community or separate property.**

In cases where the separate and community property are highly commingled and the determination of separate property is impossible, the property is treated as community.

The character of property acquired in a community property state does NOT change if a husband and wife move to a common law state. Each spouse's vested interest continues to be one half even if its title must be change to joint tenancy. If a couple move to another state, and the property they acquired outside the state would have been community property if they had been living in the previous state, that property could be treated as community property when they move to the new state. This is referred to as quasi-community property.

Control of Family Property

The issue of management and control of community property and separate property can be the impetus for many conflicts.

A property classified as separate is under the single control of its owner. The control of community property, however, is equal between husband and wife.

Equal management by spouses over community property has resulted in many statutes that specify certain transactions must be a joint action by both husband and wife. The most common example is the purchase of real estate.

The equal management theory is slightly modified when it comes to a business interest. A spouse who operates or manages a business which is community personal property has the sole management control of the business even though it is community.

Disposition of Family Property

A separate property owner is free to sell or gift his or her property at will.

Under community property laws, however, one spouse is prohibited from making a gift of community property without the consent of the other spouse. Concerning death transfers of community property each spouse has the power to will one half of the community property because each owns an undivided one half interest

in every community asset.

Sometimes, community property is sold or divided by spousal agreement as in a divorce. The process of converting community property to separate property and vice-versa is know as transmutation.

ESTATE LAW

In recent years, estate planning has evolved beyond the avoidance probate to the preservation of wealth. The consumate estate planner is dedicated to limiting conflicts and tax burdens that could "chip away" at this wealth. He is equally concerned with "asset depleting" issues like terminal medical problems and an inability to care for oneself long term. Then, there are certain moral considerations.

Advanced planning

In his arsenal, the estate planner relies on many protection tools: insurance, trusts, wills, strategic titling of property and much more. These are discussed throughout this book. Underscoring everything, however, is the need for **advanced planning.**

For example, when the time arrives that a person has slipped into unconsciousness by the grip of a terminal disease or gradually deteriorated to advanced stages of Alzheimer's, it will be too late to make personal choices as to who will be in charge of medical decisions, finances and other moral issues. A conservatorship may be the only option.

A **conservatorship** is a legal arrangement whereby another person is authorized by the courts to oversee the personal care and property of an adult considered incapable of managing alone.

Conservators can be limited to specific tasks like health care only, finances only etc.

Instead of drastic measures like conservatorship, It would be preferable for a person to make his or her own choices for an overseer. That is why "advanced thinking" legal and financial planning professionals recommend everyone draft a durable health care power and durable financial power.

The **durable health care power** authorizes another person to make medical decisions for a person who is unable to do so. Typically, these document "spring" into action when a person becomes incapacitated. Some people prepare these documents to prevent artificial means from keeping them alive when their wishes are otherwise. These documents can help greatly in situations where family members may disagree on "pulling the plug".

A **living will** is somewhat similar with the exception that a persons wishes are directed to medical personnel, whoever they may be. However, living wills only take effect when a person has an incurable and irreversible condition diagnosed by two or more physicians and has no effect if the patient is pregnant.

Similar to the health care power, a durable power of attorney for finances can "spring" into action when a person is considered incapable of managing on his or her own. The person given the authority to act on behalf of another is called an "attorney-in-fact". Typically, they would handle property and finance decisions like paying bills, making deposits, collecting insurance, etc.

Advanced planning logically extends to the preparation of wills, trusts and, of course insurance.

Asset protection

An increasing emphasis by estate planners invoves the tools and concepts surrounding asset protection. The

idea of using legal vehicles to head-off economic catastrophes has more chance to grow than ever before. Face it, despitean insurance agent's best efforts to provide safe, appropriate levels of coverage, out country's expanding liability policy guarantees that something will be missed along the way. Just think about the thousands of legal decisions made each year based on **precedents.** Each legal precedent sets the stage for the next step of expansion. This, coupled with the willingness of judges and juries to allow this expansion established uncertainty and a whole new round of claims we could only imagine.

Current asset protection planning is designed to "plug the holes" insurance fails to cover. Gaps such as punitive damages or gross negligence, exposure beyond policy limits, new and exotic enironmental liabilities and even a client's inability or forgetfullness to pay premiums. Some think of it as "doomsday planning" but every asset protection attorney has an arsenal or horror stories about smart and financially secure people who purchased insurance yet lost everything over a technicality or an unforseen claim beyond the scope of the policy.

Their solution is a combination of sophisticated "titling" strategies like Nevada corporations with matching "lines of credit", family limited partnerships, off-shore trusts, etc, designed to make a potential creditor or plaintiff stop and think . . . perhaps opening the door to a more reasonable settlement of the differences at hand.

The essence of this legal tinkering is the assumption that "**the whole is worth more than the sum of its parts**". Therefore, an estate that is divided into many small parts is less attractive to pursue than a nice, fat estate with commonly titled assets.

Good attorneys will be the first to admit that these measures may provide mere "roadblocks" in front of potential creditors . . . nothing is foolproof. These measures are reinforced, however, when asset protection is treated like a vaccine, not a cure. And like most vaccines, for best results it should be started early, before the illness (lawsuit / claim) strikes while the legal waters are calm. Critics also point to volumes of law known as **fraudulent conveyance** which can void a transfer of property if it is done without adequate consideration and with intent to avoid creditors.

Inheritance

A person has a choice in determining who can inherit his or her property. Without clear, written instructions, state law determines how property will be distributed.

When one thinks of inheritance documents, wills and trusts immediately come to mind. There are, however, other ways to directly pass property to loved ones, including joint tenancy titling, beneficiary CD's, beneficiary type vehicles and trusts.

Probate

The Superior Courts are typically given jurisdiction by the state constitution over all matters of probate and administration of estates.

The "probate court" is no more than a department of the Superior Court. Probate proceedings may be either domiciliary or ancillary. If a person dies and leaves property in more than one state, administration proceedings may be necessary in each state. The original proceedings are typically brought in the state where the deceased person lived, and accordingly are know as **domiciliary proceedings**. The proceedings in other states where property is found are known as **ancillary proceedings**.

Despite best intentions of writing wills and using probate-avoidance devices like living trusts, most estates still require a probate since there always seem to be property to distribute that has been contested or left out of specific instructions.

As a matter of fact, property left through a will cannot be transferred to beneficiaries without passing through probate.

Probate is very costly and time consuming --about seven months (longer for complicated estates) and about 5 percent or more of the value of the estate.

Ways to avoid or minimize probate include the use of living trusts, holding title in joint tenancy, designating a beneficiary on all bank accounts ("in trust for . . . "), life insurance and annuity proceeds and other beneficiary type funds like IRA's, Keogh's, etc,

A major probate is also avoided for all property that is left, without restriction, to a surviving spouse. All that is necessary is for the surviving spouse to submit an affidavit for community property real estate (40 days after death) and a Spousal Property Order. If no one objects, the court approves an official transfer of ownership to the surviving spouse. This process takes about one month.

Wills

A valid will can be made by anyone who is 18 years or older. The best method is to type, date and sign in front of a witness. A will designates what should be done with property and who will do it at the death of its author. A will can also designate a guardian to care for minor children left behind.

The person designated by will to be in charge of the estate is called the **executor**. The executor is charged with the following duties: acquiring certified death certificate copies, inventory the deceased assets, find beneficiaries, notify benefit agencies (social security / medicaid/medi-cal), collect insurance proceeds, file tax returns, pay debts, transfer properties and handle probate.

One issue that surfaces at death, even where a will is involved, is **marriage property rights**. In community property states, each spouse legally owns half of the marriage property acquired during marriage and is free to leave it to whomever he or she pleases without claim by the remaining spouse. Separate property may also be left to a beneficiary other than the spouse.

What happens in a common law state or when a spouse is inadvertently omitted from a will because a person forgot to change his will after marriage? To protect the surviving spouse, the law allows what is called a statutory share or an **elective share right**. In essence, this permits the surviving spouse to claim the deceased spouse's share of separate property. If the deceased intentionally indicated a wish to disinherit a marriage partner by saying so in a will, the "statutory share" claim could be blocked.

Minor children may inherit up to $5,000 worth of property without any special arrangements. Over this amount, however, a guardian must be appointed. If this is not specified in the will, the court will appoint one. Ways to avoid a court-appointed guardian include the following:

- Designate an adult in the will
- Designate a guardian for the children and a custodian for the money
- Create a child's trust and designate an adult to run it

Death Without A Will

If there is no will and no executor designated, the court will appoint an **administrator** who has the same duties as an executor. Typically, the surviving spouse is the first choice, then the children.

Without a will (intestate), property of a deceased is usually distributed as follows:

The **surviving spouse, if any, inherits all community property and 1/3 of the separate property** if there are surviving children and other close relatives. The remaining 2/3 of separate property goes to these children and relatives. If only a spouse and children survive, the separate property is divided equally. For unmarried people, surviving children inherit all: If none, the relatives.

To inherit property from a deceased person who has no will, the person who is in line to inherit must survive the deceased for at least 120 hours.

Trusts

Few financial tools have impacted estate planning like the Trust. Advisors have guided many a family to establish living trusts and irrevocable life insurance trusts nationwide. As a tool to handle financial affairs the utility of trusts is honorable. And with the possibility of tax legislation pushing toward higher estate taxes, the tax-saving provisions of wills and trusts will continue their role as a valuable estate planning device.

A relationship created where the legal title to property is frequently held by one person while the right to the use and the benefit of the same property is enjoyed by another is a trust.

Each trust has a creator, a trustee and a beneficiary. Except for the requirement that a sole beneficiary may not be a sole trustee, these positions may be held by the same person. The establishment of a trust may arise by a voluntary and express act of a person or it may be decreed by law.

The person who sets up a trust is known by several names, most frequently as the grantor or settlor. Any person who is legally capable can make a trust and no particular words are necessary, provided that the intent of the creator to establish a trust is unmistakable.

Consideration is not essential to an enforceable trust. Without it, however, it is not always clear whether a person has by his actions created a trust or promised to create a trust.

The subject matter of a trust must be specific. In other words, a trust cannot be created around property that does not exist.

The principal of the trust is known as the corpus.

Nature of a Trust

Most of the uses of a trust center on the fact that its principal or the income that it generates is insulated from the person who has created the trust.

A trust that must distribute all of its income currently without any discretion on the part of the fiduciary, is a **simple trust**. Any other trust, such as one where the trustee is empowered to accumulate income or to exercise certain discretion is a complex trust.

If the grantor may terminate a trust it is ***revocable.*** If he lacks this power, it is an ***irrevocable trust***. Where a trust agreement provides that under specific conditions or after a given period of time, the corpus goes back to the grantor, this is a reversionary trust.

The Trustee: Duties and Powers

Anyone legally capable of dealing with property may be a trustee of a trust. In addition, he must accept the position of trustee. Once done, there are three primary duties:

1) Carry out the purpose of the trust -- The trustee is charged with following the direction of the trust creator as to the manner of administration of the estate and the distribution of the property to the beneficiaries.

2) Act with prudence and care -- A safe course would be the conservation of capital and realization of income.

3) Loyalty toward the beneficiary -- The trustee in all his dealings with the trust property, the beneficiary and third parties must always act in the exclusive benefit of the beneficiary.

The **powers of a trustee** are determined by the rules of law in the jurisdiction the trust is established and the authority granted him by the creator of the trust. State law affecting the power of trustees have their greatest impact upon the investments a trustee may make with trust funds. However, it is within the power of the grantor to give the trustee wide discretion as to investments and, in such event, the trustee is not bound by statute requirements. Wide discretion in a trust instrument does not, nevertheless, relieve a trustee from his general duty of prudence and care.

The Beneficiary

There are few restrictions on who (or what) may be a beneficiary. Individuals, pets, charitable organizations and corporations may be beneficiaries.

In the absence of a spendthrift clause in a trust instrument, a beneficiary's interest may be attached by his creditors, the beneficiary may sell his interest and, upon his death, if held more than a life estate in the trust, his estate will pass to his heirs in the case of real estate and his personal representative is the trust consisted of personal property.

Termination of a Trust

Unless the power of revocation is reserved by the grantor, the general rule is that a trust, once validly created, is irrevocable.

Normally, a trust has a termination date in the instrument and the trust ends simply without complication. A period of years may be specified or the grantor may provide that the trust continue for the life of a named individual. The death of the trustee or beneficiary does not terminate the trust if neither of their lives is a measure of the duration of the trust. A court may also decree a trust terminated if the beneficiary acquires the legal title.

Types of Trusts

"The Complete Book of Trusts" by Martin Shenkman lists over 50 types of trusts, each with a specific purpose and result. Some of them have distinguishing characteristics.

Implied Trusts -- Here, the courts actually impose a trust upon a property because the acts of the parties appear to call for it.

Charitable Trusts -- Virtually any public purpose which will contribute to education, science or knowledge or the improvement of
mankind.

Spendthrift Trusts -- Where a beneficiary's normal right to receive income and principal is restricted because the grantor believed that a beneficiary was not reliable. Doing so also **limits creditor's ability to attack the corpus of the trust.**

Precatory Trusts -- A trust agreement is implied when the grantor leaves the property to person X, in full confidence and hope that he will care for person Y.

Grandfather Trusts -- A trust set up by an individual for the benefit of someone he is not legally obligated to support

ByPass Trusts -- A trust that entitles a current beneficiary rights to income and use of trust assets without personal legal title of these same assets. Of course, if the beneficiary doesn't own these assets they won't be counted as part of her estate thus "bypassing" estate taxes.

The list goes on and on and the choice varies with the intention of the trustor, his assets and legal exposure. Obviously, this is no place for amateurs. The advice of an estate planning specialist is critical.

PERSONAL INJURY LAW

Liability for personal injury is based on the following principles:

- Someone was negligent or unreasonably careless
- An employer is generally responsible for his employees actions while working.
- An owner is responsible for dangerous conditions, even though he did not create them.
- A manufacturer and seller are liable for defective products no matter who created the condition.

Occurrences where liability is doubtful include:

- Where the injured party was not supposed to be (a burglar is injured by a surprised owner)
- Where the injured party knew a risk was possible (a spectator at a ball game gets hit by a ball).
- Where a person is injured someone by the actions of a 3rd party (the person committing the injury may be partially liable).

AGENCY LAW

If the law required that every party to a contract or business transaction deal or participate directly, business enterprise would be extremely limited. Doing business as a corporation would be impossible, because a corporation is an artificial legal entity that can only act through its agents, officers and employees. All partners in a partnership would have to be present at every deal and individuals, who through agents now enter 100 to 500 business transactions each year, might have to negotiate every contract personally.

For these reasons, the creation and law of "agency" is an important area of business.

Agency is the relationship between two persons whereby one of them is authorized to act for and on behalf of the other. The person who is authorized and consents to act is the agent. The one for whom he acts is the principal.

The **law of agency** states that the authorized acts of the agent bind the principal and create legal rights and duties when dealing with third parties.

Creation & scope of Agency

An agency can created by contract or agreement between the principal and agent. This is the most common method and typically involves the mutual consent of both agent and principal.

Agency may also result, however, from one person giving direction to another to act for or on his account. The relationship or principal and agent may exist even though the element of consideration is lacking. This is **creation by estoppel**.

As general rule, whatever a person may do personally he may do through an agent. It also stands, that whatever he CANNOT legally do himself he cannot authorize another to do for him. Also, a person having an adverse interest to that of the principal is not allowed at act as his agent.

Capacity of Agents

For agency to exist, there must be capacity of the principal. Thus, contracts entered into by a principal who is a minor or an insane person are voidable.

Capacity of an agent is not so clear cut. The incapacity of an agent because he or she is insane or a minor may void the contract between the agent and principal, but it does not mean that the contract between a third party and the principal is void.

Types of Agents

Agents may be actual or ostensible. An **actual agent** is one whom the principal has given express or implied authority. An **ostensible agent** is one to whom the principal has given no authority but by conduct has induced others to reasonably believe that he or she has the authority to act.

Agents may also be classified as general or special. A **general agent** is one employed to transact all of the business of his principal. A **special agent** is one employed to act for his principal only in a specific transaction or only for a particular purpose.

A subagent is a person employed by an agent with the knowledge and consent of the principal to assist the agent in transacting the affairs of the principal. The subagent possesses authority to bind the principal.

Agent Duties & responsibilities

The Law of Agency requires agents to fulfill certain duties for their principal.

- Duty of Care and Skill -- Use standard care and skill
- Duty of Good Conduct -- Act so as to not bring disrepute to principal.
- Duty to Give Info -- To communicate with principal and third parties
- Duty To Keep Accounts -- To keep an account of money
- Duty to Act As Authorized -- To act in accordance to principals consent
- Duty to be Practical -- To not attempt the impossible which will subject principal to exposure
- Duty to Obey -- To comply with principal's directions

Beyond these duties insurance agent/broker generally assumes duties normally found in any agency relationship. The primary obligation here is to ***select a company and coverage and bind the coverage*** (if the agent has binding authority, i.e., property/casualty agents). However, since clients typically ***request*** coverage, the basic duty may expand to include the agent deciding whether the requested coverage is ***available*** and whether the insured ***qualifies*** for it **(Harnett, Responsibilities of Insurance Agents - 1990)**.

The mere existence of an agency relationship, or the simple selling of insurance, imposes no duty on the

agent/broker to ***advise*** the insured on specific insurance matters **(Jones vs Grewe - 1987)**. Duty also DOES NOT require the broker/agent to secure ***complete*** insurance protection against any conceivable loss the insured might incur, but there may be a duty to explain policy options that are ***widely available at a reasonable cost*** **(Southwest Auto Painting vs Binsfield - 1995)**. An agent's duty to provide correct coverage is not triggered by a client's request for "full coverage" because that request is NOT a specific inquiry about a specific type of coverage **(Small vs King - 1996)**. In other words, just because a client asks for full coverage an agent may not be liable to provide it. However, if a client requests a ***specific type of coverage***, the agent is responsible to see if it is available and determine if the client qualifies.

An insured is entitled to rely on an agent/broker's advice on the meaning of policy provisions. In **Stivers vs National American Insurance - 1957**, it is suggested that client reliance may sometimes be unjustified, as when the advice given by the agent "is in patent conflict with the terms of the policy".

It is a clear legal responsibility of agents to understand the difference between two products that he is attempting to sell (**Benton vs Paul Revere Life - 1994)**. Whether an agent has an affirmative duty to inform a client of possible ***gaps in coverage*** depends on the relationship of the parties, specific requests of the client and the professional judgement of the agent **Born vs Medico Life Insurance Co - 1988)**.

Once a policy is issued, traditionally theories of legal conduct provide that an agent does not have the duty to ferret out, at regular intervals, information which brings the policyholder within provisions of a policy **(Gabrielson vs Warnemunde - 1988)**. In essence, it seems the courts have been more concerned about general agent duties to inform clients of appropriate coverage ***at the time of sale***. Recent departures from this opinion include a case where an agent was found liable for failing to determine that the insurance policy was no longer needed by the client **(Grace vs Interstate Life - 1996)**. In another example, an agent assured his client that the limits of the policy continued to meet his needs when they actually fell short **(Free vs Republic Insurance - 1992)**, i.e., agent duties may also include informing clients their coverage is appropriate ***after the sale***. Although each case stands on its own, the underlying determinant of "after sale" duty may be the "special relationship" that exists between client and agent, e.g., an agent handling the client's business for an extended period of time may assume a higher standard of care.

These are the basic agent responsibilities. Agents are not precluded from assuming additional responsibility, which they normally do in most client transactions. When a lawsuit arises, however, it is the client's burden to show that **greater duty** is the result of an express or implied agreement between agent and client **(Jones vs Grewe - 1987)** where the agent has taken more responsibility. In most instances, the facts of the particular case determine whether the court finds a greater duty has been assumed.

AGENTS AS FIDUCIARIES

In addition to the duties above, the agent has **fiduciary duty**. The fiduciary duty of the agent prevents him from competing with the principal concerning the subject matter of the agency or from making a "secret profit" other than what is stipulated or agreed as commission.

New legal theories are continually attempting to establish an agent selling an insurance contract as a principal fiduciary and therefore a probable "deep pocket". A fiduciary is defined as someone who is held in trust or complete confidence. Compared to an agent's contractual duty, which requires negligence or tort action, **fiduciary duty is intrinsic to his business**. In other words, an agent's liability as a fiduciary simply comes with the territory . . . ***it's part of selling insurance***. In recent years, cases of fiduciary duty are more prevalent. The most obvious fiduciary responsibility of agents is to protect and safeguard client monies **Glenn vs Leaman - 1983)**. Other fiduciary related liabilities relate to an agent's duty of care. These cases even rear-up in a one-time business transaction, i.e., **you don't have to be a longstanding advisor to be liableas a fiduciary**. More often than not, the issue of fiduciary exposure surfaces where an agent proposes a "full coverage" policy but failed to describe a certain provision or exclusion that existed in the written policy **(Eddy vs Sharp - 1988)**. In addition, fiduciary problems are launched by special agent relationships where the insurance contract is established as a collateral issue of some greater purpose such as an insurance agent

claim to have special "expertise" where the client is unsophisticated **(Sobotor vs Prudential Insurance -1984)** / **Kurtz vs Insurance Communicators -1993)**, or when an agent promises to provide "complete coverage" **(Magnavox Co of Tennessee vs Boles & Hite - 1979)** The exposure also seems to exist where the agent is the "exclusive" insurance provider for clients or in cases where the client, over time has come to be totally dependent on insurance decisions made by the producer. **(Glenn vs Leaman & Reynolds - 1983)**.

Duties of the Principal (insurer)

The Law of Agency requires principals to fulfill certain duties for their agents.

- Duty to Perform -- Abide by agent's contract
- Duty to Furnish Work -- Not to interfere with agent's opportunity to work
- Duty to Not Interfere -- Refrain from interfering with work
- Duty To Give Info -- Inform agent about risks and more
- Duty to Keep Accounts -- Keep track of commissions owed
- Duty of Good Conduct -- Keep agent's reputation from harm
- Duty of Indemnity -- Reimburse expenses & damages
- Duty To Pay -- To pay commissions as promised

Binding of Agents & Principals

If someone represents himself to be an agent, but is not, the third party is not liable unless the principal ratifies the contract. Ratification occurs when the principal agrees to a contract performed on his behalf by another without his authority. The express or implied acceptance by a principal binds him as though it was originally authorized. Casualty agents have the power to bind since they are contract writing agents. Life and health agents do not since they are **soliciting agents**.

An agent who acts as an agent for a fictitious or non-existent principal is personally liable on a contract entered into with a third person.

An agent who enters into a contract with a third person on behalf of a principal who died prior to making the contract is personally liable unless the third party knew of the principal's death.

If an agent with authority to collect money owing his principal receives payment from a third party but fails to remit it to the principal, the third party has no right of action against the agent. His debt or payment owed to the principal, however is discharged when payment was made to the authorized agent.

An agent is liable to a third party for fraudulent representations which he makes to such person as well as other false statements upon which the third person relied.

Termination of Agency

Termination of an agent's authority may take place by: 1) mutual agreement of the parties; 2) fulfillment of the purpose of the agency; 3) revocation by the principal; 4) renunciation by the agent; 5) bankruptcy of the principal or agent; 6) death of the principal or agent; 7) insanity of the principal or agent; 8) change in business conditions; 8) loss or destruction of the subject matter; 9) loss of qualification of principal or agent; 10) disloyalty of the agent; 11) change of law whereby the exercise of the authority is illegal; 12) outbreak of war which impacts the agreement.

The principal may revoke the authority of the agent and terminate the agency by notice to the agent.

However, the power of the agent to bind the principal by contract to third persons will continue until the third person has knowledge of the termination.

EMPLOYMENT LAW

There are volumes of rules and laws that supervise the actions of employers. The reader is encouraged to consult state and federal agencies and codes such as:

- Various State Department of Fair Employment & Housing
- Health & Safety Codes
- Federal & State Fair Labor Standards Acts
- The Civil Rights Act of 1964 Title VII
- The Federal Equal Pay Act
- Employee Polygraph Detection Act
- State Labor Codes -- 230.7 & 230.8
- The Federal Pregnancy Discrimination Act
- Health Insurance Portability & Accountability Act of 1996

Violations of Employment Law

We have summarized some of the most popular employee violations of employer/employee law below to aid agents in their practices. Always consult an attorney before imposing or enforcing any kind of employee rule.

1. If an employer is found to train, pay by the hour, set hours of work, work at your office, pay travel expenses, furnish work tools and materials he has hired employees not independent contractors.

2. It is illegal to discriminate by refusing to hire by race, religion, political affiliation, previous arrest record (no conviction), age, sex, disability or because an applicant is pregnant. Also, unless the task involves a clear and compelling need, it is illegal to discriminate against non-english speaking candidates.

3. Children under 14 years of age may not be employed. Fourteen and fifteen year olds may work restricted hours ONLY.

4. A company with 15 or more employees cannot refuse to hire an Aid's or HIV infected applicant. Firing of same is also prohibited. Testing for AIDs / HIV also prohibited.

5. **Testing employees for drugs is prohibited** unless behavior or performance on the job is critical. Testing job applicants is illegal unless they are aware it is part of the job review.

6. The firing of any employee requires an employer to hand them a paycheck and all vacation pay immediately.

7. It is against the law to fire an employee unless they have violated defamation rules (false statements about someone else) or public policy (health/OSHA rules) or an employment contract.

8. An employer cannot threaten or fire an employee for not taking a lie detector test unless the position requires security and drug handling.

9. An employer **must not prohibit a parent from taking reasonable time off** to deal with a child's school or illness.

10. It is illegal to refuse to hire or promote and otherwise fire on the basis of pregnancy. As long as the

employee is able to perform duties she can work. Up to four months unpaid pregnancy leave can be requested by your employee. Her position must be held open four months.

11. The invasion of an employees privacy by requiring medical exams, divulging confidential information from an application, monitor comings and goings when off work, monitor phone calls without notice, search employees possessions or use criminal record of employee in employment decisions is illegal.

12. Attorney's advise employer's should not keep personal remarks in an employees files. They can be viewed by them any time if the employee requests it.

13. The use of psychological testing to ask applicants about sexual orientation is prohibited.

14. The offer **sick leave or vacation time** to one employee and not another is illegal. There should be a set policy.

15. A 40 hour work week is all that can be required of employees unless the employer offers an equivalent value in time off or pay at the rate of 1.5 times the normal rate for overtime.

16. Employer group health plans cannot deny coverage or apply pre-existing condition exclusions to individuals who had prior health ocverage for at least 12 months.

Employer Duties

In addition to many of these duties, an employer owes certain tort duties to his employees. Among these is the duty to provide reasonably safe conditions of employment, and to warn the employee of any unreasonable risk involved. A employer is also liable to his employees for damage caused by conduct of other employees doing work for him to the same extent as he is to a third persons. The duty of an employer as to working conditions for his employees extends to the maintenance, inspection and repair of the premises under his control and of the tools which his employees use. Where an employee understands the risks of employment and voluntarily enters or continues, an employer may not be liable for harm or injury. Employers are also under a duty to supply competent supervisors and enforce suitable rules for safety.

OWNERSHIP LAW

Property

In the United States, the concept of "property" is highly valued. While a large part of our rules on property stem from English law, property in America occupies a unique status because of its protection granted by the Federal and State Constitutions.

By itself, property is difficult to define because it encompasses a bundle of rights. For example, there is the right to use a piece of land or sell it. and to say to whom it pass when you die.

Under the law, it can better be expressed that property is not so much defined as a thing capable of physical possession as it is an interest or group of interests, that will, at any given time be honored by society.

Types of Property

Courts frequently get involved in classifying property. Four primary types to discuss include tangible, intangible, real and personal.

Tangible property refers to physical objects: a 40 acre farm, a chair, a household pet are all tangible property.

Intangible property is property that has a legal reality but may not be capable of physical possession. A stock certificate, a promissory note or a right-of-way grant deed are examples of intangible property.

Far more legal issues center around real and person property. Briefly, **Real property** might simply be defined as land and all interest therein. Every other thing or interest can be identified as **Personal property**.

Personal property brought onto land may still remain as personal but may also become real property. For example, materials used to build a building come onto the land as personal property. But, worked into the building as its construction progresses from the foundation up, they become real property because buildings are part of the land.

Conflicting claims of ownership often center around fixtures. Many fixtures are brought onto real property such as heating, lighting and air conditioning systems, cooking appliances, cabinets, window coverings, awnings, etc. These items may be so firmly attached that they have lost their character as personal property and become real property.

As between landlords and tenants, a presumption exists that the tenant is entitled to all of the fixtures installed by him, provided that they may be removed without material injury to the landlord's property. It is probably more common, however, that leases require that all personal property affixed to the real estate accrues to the landlord.

Degrees of Ownership

When a person speaks of "owning property", many things come to mind: a piece of land, a stock certificate or a personal possession. In any of these cases, full and complete ownership is anticipated.

There are likewise situations, where "owning property" may mean less than full ownership: A mortgage holder has a property interest in the mortgaged property but the legal ownership is with the person who secured the debt.

Real Estate Ownership

Real property may be owned by a sole owner, or it may be owned jointly by two or more persons. A person who is the sole owner of real property is said to be the owner thereof in severalty. Where there are more owners than one, their ownership is referred to as co-ownership. There are several ways to co-own real estate:

Joint ownership usually occurs in four ways -- joint tenancy, tenancy in common, tenancy in partnership and community property. Each type of co-ownership has distinct characteristics, and a knowledge of the legal effects of the different forms of ownership is essential to anyone acquiring real property.

Joint tenancy, is regarded as a single estate held by two or more persons jointly, such joint tenants holding as though they collectively constituted but one person, a fictitious unity. The main characteristic of joint tenancy is the **right of survivorship**. When a joint tenant dies, his interest in the land is terminated, and the estate continues in the name of the survivor or survivors. When there is only one survivor, the estate becomes an estate in severalty, and upon the death of this last survivor, title vests in his or her heirs.. The usual method of creating joint tenancy is a deed describing the grantee as follows: "To A and B as joint tenants". The words "with right of survivorship" are often added but not necessary since the right is an incident of any joint tenancy. If one of the grantees in a joint tenancy deed is a minor or incompetent person, and funds of the minor or incompetent person are used in the purchase of the property, the joint tenancy is

questionable. An agreement by the minor or incompetent to take title in joint tenancy would be void or voidable under the usual rules governing contracts of persons under disability.

Problems frequently arise regarding the true character of ownership by a husband and wife who record a deed as joint tenants. Joint tenancy and community property are separate and distinct forms of ownership. However, it has been held that where a husband and wife elect to take title as joint tenants, this establishes an agreement between them that the property in question shall NOT be held as community property but instead as a joint tenancy with all the characteristics that apply.

A joint tenancy may be terminated by express agreement. For example, an agreement that "if the joint tenant dies, the interest of that one shall go to a third party" destroys the element of survivorship and terminates the joint tenancy. In this case, title would vest in the parties as tenant in common.

Joint tenancies have advantages and disadvantages. The main advantage is, of course, the incident of survivorship, eliminating the time and expense of probate proceedings. Disadvantages as compared with other methods of holding title include the following: 1) the possibility that the joint tenancy may be severed at any time by a transfer, voluntarily or by operation of law, 2) the fact that the joint tenant who dies first has no power of disposition over his or her property, 3) as between married joint tenants, the fact that a divorce court cannot award the true joint tenancy property to the innocent spouse, 4) the tax consequences, both as estate and income taxes, may be unfavorable, and 5) no provision exists for administering the estate of a joint tenant who has been missing for seven years and who is presumed dead.

A **tenancy in common** is characterized by only one unity, that of possession. The co-tenants in a tenancy in common own undivided interests, but unlike a joint tenancy, these interests need not be equal in quantity or duration. Also, there is NO right of survivorship, each tenant owns an interest which on his death vests in his heirs. A tenancy in common is created whenever property, real or personal, is transferred, whether by conveyance, descent, or by operation of law, to several persons in their own right, UNLESS acquired by them in partnership, declared to be joint tenancy or by community property. Where it is desired to specifically be established as a tenancy in common, the deed should recite: "To A and B, as tenants in common, each as to an undivided one-half interest". If the amount of the interest is not specified, such as one-half or one-third, there is a presumption that their interests are equal. As in the case of joint tenancy, the interest of a tenant in common may be transferred, either voluntarily or by operation of law. So, if A owns one-third undivided interest in a piece of property and B owns two thirds, when A transfers or sells his interest to C, the new grantee "C" owns one-third interest as tenants in common with B.

Community Property states assign BOTH husband and wife a present, equal and existing interest in any property they acquire with community property funds. In determining whether property is separate or community property, the recorded title is not necessarily the controlling issue. For example, property may be community property even though the record title stands in the names of the husband and wife as tenants in common or as joint tenants. Evidence may be submitted by either party that the intention was to take or own the property as community property even though it was assumed as joint or tenants in common. The basic presumption is that all property acquired during marriage by either husband or wife, or both, other than by gift, bequest or descent is community property. Whether property of a husband and wife is separate property or community property is extremely important, as different rules apply in various actions or proceedings affecting the property of a married person. In the case of a divorce, for example, the laws of succession distinguish between separate and community property. The power to award property is dependent upon the character of the property being community property or homestead property, and does NOT extend to separate property.

Partnerships may own property in the name of the partnership, since a partnership is considered an entity capable of acquiring title to real property. Title may also be acquired in the names of one or more of the individual partners, with or without reference to the partnership. A judgment against an individual partner is not a lien upon the partnership property or the partner's interest. Upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners. The interest of the deceased partner

is his or her right to an accounting and a share in the profits and surplus of the property. The surviving partner has the title to the partnership property and the exclusive right of management of the partnership business, but only for the purpose of winding up the partnership and accounting to the state of the deceased partner.

Joint ventures result from an agreement of two or more persons to jointly conduct a business enterprise for profit. The principal difference between a joint venture and a partnership is that a joint venture is ordinarily formed to conduct a single enterprise. The persons who may associate to form a joint venture are considered to be the same as those who may become partners. There are no statutory or legal requirements or authorization for filing or recording any certificate or statement to establish the existence of a joint venture. For title insurance purposes, the preferred method of titling a joint venture is: "A and B, doing business as X Company, a joint venture".

A corporation qualified to do business in a particular state may acquire, dispose of, or otherwise contract with respect to property in that state, subject to limitations on its powers contained in its charter or articles of incorporation. The authority of an officer to execute a conveyance or contract affecting real property of a corporation must ordinarily be evidenced by a resolution of the board of directors.

PARTNERSHIP AND CORPORATION LAW

Partnerships

As distinguished from the conduct of a business by a single individual, a partnership is generally defined as the association of two or more persons for the purpose of carrying on a business as co-owners for a profit.

A partnership is a relationship or association of persons which has the quality of oneness buy it cannot be legally described as a legal entity but as an aggregation of individuals. Unlike a corporation, a partnership is not an artificial person having a distinct legal existence separate from its members. This was the prevailing theory at common law and is the view adopted by the Uniform Partnership Act.

As a result of the legal characterization of a partnership as an association of individuals, it necessarily follows that **a partnership can neither sue or be sued in the firm name**. And since a partnership is not a legal entity, the **debts of the partnership are the debts of the individual partners**, and any one partner may be held liable for the partnership's entire indebtedness.

Even though a **partnership is not a legal entity**, it is nevertheless an entity and clearly recognized in the following respects:

1. For bookkeeping purposes, assets liabilities and business transactions of the firm are treated as those of a business unit and are considered separate and distinct from the individual assets, liabilities of the member partners.

2. In the marshalling of assets, creditors of the partnership have prior right to partnership assets, while creditors of the individual members have prior right to assets of the individual.

3. Title to real estate may be acquired in the partnership name and conveyed in the partnership name.

4. A bankruptcy may involve the partnership without involving the individual members.

5. Income tax of a partnership is paid by the individual partners although the partnership must file an information return each year.

A partnership is a highly personal relationship. Because of this, partnerships must be based on mutual trust and confidence. Occasionally a person may be chosen as a partner because of his ability to make a needed capital contribution, the mutual choice of partners is based largely on desirable personality, good business ability, sound judgment, good reputation and integrity. Whatever the criteria, the important issue is that a person has the right to choose his partners. This principle is called delectus personae.

Each partner has a right to take part in the management of the business, to handle partnership assets and act as agent of the partnership.

Co-ownership of alone does not establish a partnership. For example, a group of farmers who purchase a threshing machine for their mutual use and agree to rent the machine to others and divide the profits is not a partnership. In order for a partnership to exist there must be an agreement to share in or contribute to the losses of the business and the exercise of the power of management and control.

Formation of Partnerships

Persons become partners by associating themselves in business together as co-owners. The association may result from an oral or written agreement between the parties, or it may be such an informal arrangement that the agreement is not definitely articulated but left to subsequent expression.

Naturally, in the interest of a better understanding of the terms and scope of a partnership, it is preferable to have a contract between the parties reduce to writing. The written agreement creating a partnership is referred to as articles of partnership. Important items contained in these articles include:

- The firm name and the identity of the partners
- The nature and scope of the Partnership
- Duration of the partnership
- The capital contributions of the partners
- The division of profits and sharing of losses
- The time each partner will devote to the business
- Provision for salaries, if desired
- Restrictions of authority
- The right for a partner to withdraw
- Provisions to continue partnership of one partner dies

While articles of Partnership are not necessary to the formation or existence of a partnership, the advantage of having a written contract tailored to meet the requirements of a particular situation and encompassing the full understanding and agreement of the partners is obvious.

Partner Ownership Rights

A partner's ownership interest in any specific item of partnership property is not that of an individual owner. Following are the principle characteristics of a tenancy of partnership:

1) Each partner has an equal right with his co-partners to possess partnership property for partnership purposes.

2) A partner may not make an individual assignment of his right in specific partnership property.

3) A partner's interest in partnership property is not subject to attachment his individual creditors.

4) Upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners.

Partnership Rights & Duties

Partners are fiduciaries and therefore owe each other a duty of good faith and utmost loyalty. Partners have a right to share in the profits and losses of the business and to be repaid any capital contributions when the partnership terminates.

Partners have a right to participate in management and are entitled to full information on all partnership matters including an inspection of partnership books at any time.

Also, because partners are considered agents for the partnership a partner may bind the partnership on transactions that within the scope of the partnership. If the act is not apparently within the scope of the partnership business then the partnership is bound only where the partner had actual authority and the third person dealing with the partner assumes the risk of existence of such actual authority.

Dissolution of a Partnership

Upon an application by a partner, a court will order a dissolution of a partnership if it finds 1) a partner is insane or suffers some other incapacity 2) a partner has willfully breached the partnership agreement 3) the business can only be carried on at a loss 4) other circumstances render it infeasible for the partnership to continue.

Corporations

A corporation is a body established law and existing separate and distinct from the individuals whose contributions of initiative, property and continuing control make it possible for it to function.

A corporation is a legal entity **separate and apart** from its members or shareholders with rights and liabilities entirely distinct from theirs. It may sue or be sued, or contract with, any one of its members.

The corporate entity may be disregarded whenever it is used to justify wrong, protect fraud, promote crime or circumvent the law. This is frequently referred to as piercing the corporate veil or going behind the corporate entity and holding accountable the individuals who are attempting to utilize the corporation to insulate themselves from the consequences of their wrongdoing.

Formation of a Corporation

Several steps are required in the formation of a corporation:

1) State issuance of a corporate charter
2) Assembling subscribers to but stock
3) Execution of Articles of Incorporation
4) Organization meetings
5) Recording of the Certificate of Incorporation

The incorporators of a corporation are the persons who execute the articles of incorporation. They are required to be twenty-one years old and subscribers to the stock of the corporation to be organized.

Corporate Powers

Every corporation organized under general statute has all the general powers granted by the statute, which may include:

- To sue and be sued in the corporate name

- To have a corporate seal
- To buy, lease, own, hold and use real and personal property
- To sell, convey, mortgage and dispose of its assets
- To lend money to its employees other than offices and directors
- To buy, sell or dispose of shares of other partnerships and corporations.
- To make contracts and incur liabilities
- To invest surplus funds
- To elector appoint officers and agents
- To make and alter by-laws
- To ceas activities and surrender it corporate franchise.

Corporate Liability

A corporation is liable for the torts and crimes committed by its agents and employees in the course of their employment. A corporation may also be found guilty of fraud, malicious prosecution, libel and other torts.

Officers and directors of a corporation are not liable for causing the corporation to do any act or engage in any activity in excess of its powers where they acted in good faith. However, where directors and officers acted in utter disregard for charter limitations and apply corporate funds for unauthorized purposes, they become individually liable for any loss sustained by the corporation.

Dissolution of a Corporation

The life of a corporation is terminated by dissolution which may be brought about in many ways:

- Act of legislature by the State
- Expiration of the period of time for which the corporation was formed
- Voluntary action by all shareholders
- Voluntary action by the corporation by board of director resolution and a two-third ote of all shareholders.
- Decree of the court for franchise tax violations or fraud

REAL ESTATE LAW

Real property, unlike personal property is subject to the laws of the state within which it is located. A major part of the law relating to real property is contained in statutes enacted by the state legislature. Most of these statutes are contained in numerous codes, including the Civil Code, the Probate Code, the Corporations Code, the public Resources Code and the Government Code to name of few. In addition, there are many local codes affecting real property through zoning ordinances and building codes.

Elements of Real Property

The term real property applies not just to the land itself, but to the rights or interest an owner has in the land. Further, the nature of property may change from one class to another. For example, land in place is immovable and is definitely real property, but when it is removed it becomes movable and therefore personal property. Similarly, personal property becomes real property when it is attached with the intention of making it a permanent part of the land.

The Civil Code defines real property as the ground or soil and the things attached to it, whether by course

of nature, such as trees and other vegetation, or by artificial means, such as the construction of a house or other structure. Real property also includes things that are incidental to the use of the land, such as an easement or right of way. It includes not only the surface of the land, but everything under it and above it (mineral rights and airspace).

Acquisition & Transfer of Real Property

The word title has been defined as the "evidence of ownership", i.e., the method by which an owner's right to property is established or evidenced. There are many different ways of acquisition and transfer of title to real property.

The most familiar method of transfer of title to real property is by deed. This includes voluntary transfers by the act of the parties and involuntary transfers by act of the law. A **deed** is described briefly as a written instrument, executed and delivered, by which the title to real property is transferred from one person, called the grantor, to another person, called the grantee.

There are two types of deeds in general use. They are the grant deed and the quitclaim deed. The main distinction between a grant deed and a quitclaim deed is that grant deeds contain implied covenants and warranties. Grant deeds also convey the rights after acquired title. A quitclaim deed, on the other hand, transfers only such interest as a grantor may have at the time the conveyance is executed.

Trust deeds are also commonly used in many states, but not primarily for the purpose of conveying title from one person to another; rather, they are used to create a lien on real property. Another form of deed, called the reconveyance deed, may used to convey the title from the trustee in a transaction to a trustor when the debt secured by the trust deed has been paid.

The requisites of a valid deed are as follows: 1) a competent grantor, 2) a grantee capable of holding title, 3) a sufficient description of the property, 4) operative words of conveyance, 5) due execution by the grantor, 6) delivery and 7) acceptance. Nonessential matters include consideration, a date, acknowledgment and recording -- although it is common practice to record deeds for title insurance purposes.

Any form of written instrument that contains sufficient words of conveyance, such as "grant", "transfer" or "convey" is usually sufficient to pass title to land. There is no fixed and absolute form.

A deed must designate a grantor, whose name must appear in the body of the deed. A person may assume any name he chooses when he obtains title to property. With assumed names, however, the difficulty most often occurs in connection with the statement of identity required by a title company where the person taking title under an assumed name has insufficient proof that he or she is in fact the same person.

A deed must designate a grantee to whom the title passes. The grantee must be named or designated in such a way as to be ascertainable, and must be a person or entity capable of taking title. A deed to a dead person or a fictional person is void. Grantees, on the other hand can be infants, insane or incompetent persons.

A deed must be executed by the grantor or his attorney-in-fact. Usually a grantor writes his name in ink in longhand. However, signatures by mark (a person making an "x") is valid as long as two witnesses are present. Also, the grantor's name may be written for him or her by another person at the grantor's request and in his presence.

A deed must also be delivered to be effective. In some cases delivery is presumed if a deed is found in the possession of the grantee or if it has been recorded. Otherwise, manual delivery is the best evidence of delivery. This can be accomplished by "handing" the deed to the grantee or where it is understood, by agreement, that the deed will be delivered to the grantee or a third party for benefit of the grantee.

So far, the discussion of real property transfers has been limited to voluntary acquisitions. A surprising number

of transfers, however, occur by involuntary means. Examples of this method include:

Adverse possession is a means of acquiring title to real property based on continued use for a certain period of time. Specifically, a person who openly and in a manner hostile to the owner takes possession of a property, pays its taxes for a period of five continuous years may claim title to this property under adverse possession.

Condemnation is the method by which cities, counties, states and other government agencies can acquire real property. The right to do so is called the power of eminent domain. To be legal, there must be a reason to take the land e.g., streets, drainage, necessary easements and other public uses.

Accession is still another method of acquisition of title through annexation, accretion or reliction. ***Annexation*** occurs when a person affixes his property to the land of another without an agreement permitting him to remove it. The manner in which an item is affixed determines if it belongs to the owner of land. ***Accretion*** is defined as the process of additional land is formed along rivers and streams where the action of water has washed up sand, earth or other materials. ***Reliction*** is the opposite effect where land has been worn away from the action of the water.

Still other methods of involuntary transfers of property include escheat (where a person dies without leaving a will and without heirs -- the land reverts to the state), alienation (where the operation of law such as a judgement or tax lien forces a transfer), estoppel (where a true owner permits another person to appear to be the owner an innocent third party may actually acquire title) and forfeiture (where a transfer takes place as a consequence of a default -- a lender foreclosure)

Ownership of Real Property

Once the transfer of real property has been enacted, an owner enjoys certain rights and is subject to various duties and responsibilities -- a breach thereof, may create liability to third parties.

As a general rule, an owner of real property may make lawful use of his property as he sees fit as long as he does not injure others. An owner has the right to remove trees and brush growing on his land and cannot be restrained from cutting trees. However, the felling of trees into a stream such that the flow of water is restricted to a downstream owner is illegal. In a similar vein, an owner cannot divert surface or storm waters onto the land of another that were not there before.

Owners must be careful to avoid trespassing on adjoining landowners. An encroachment occurs when a projection of a building or other structure rests in part on an adjoining land. As long as a claim is brought within three years, the person who has trespassed can be required to remove the structure or pay damages. Additional nuisances included, unlawful obstructions to a neighbors free use of his property. This might include polluting adjoining streams, fencing his access road, negligent excavation such that rains cause mud slides or undermine a neighbor's foundation.

Liability is another incident of ownership. An owner owes to persons who come on his land a duty of care. Normally, these duties do not extend to persons outside the land, e.g., someone on adjacent land or on the highway. Interestingly, streets and sidewalks that are in dangerous condition should not represent a liability to an owner. If a city notifies an owner to make repairs, however, and an owner refuses to do so, he may be liable to pay for repairs or reimburse the city, but not to pay damages for an individual for injuries incurred. Where the owner builds something that extends into the street or constructs a well in the sidewalk, he is under duty to keep them in repair and is typically liable to third parties who are injured as a result of his failure to make necessary repairs.

The degree of liability an owner may possess depends on the how the injured party came to cross the property. For example, the least duty owed by a landowner to a person entering his property is the duty owed a trespasser. A trespasser is one who enters or remains on the land of another without privilege or consent. As a general rule, the owner is not under a duty to maintain his property in safe condition for the

reception of trespassers. Exceptions to this rule include intentional traps and certain attractive nuisances like an unguarded or unfenced swimming pool that attracts a child who drowns. A licensee is a person who enters the property of another by consent or permission, but usually for his own purposes. An owner has a responsibility to notify a licensee that a condition of the land or property represents a hazard or potential risk of injury. An invitee enters at the express or implied invitation of an owner or occupant for mutual benefit, or in connection with the business of an owner. In addition to warning an invitee of potential risks, an owner must exercise ordinary care to keep the premises in a reasonably safe condition. The fact that an owner has no actual knowledge of the dangerous condition is not a defense; he has an affirmative duty to inspect the premises or take care unsafe conditions.

LANDLORD & TENANT LAW

Tenancy

The relationship of landlord (lessor) and tenant (lessee) is the result of a contract known as a lease. A lease imports the giving, for a consideration by the owner of the property, of the possession and use of his property with a reversion to the owner at the end of the term. The lease has a dual character, being BOTH a contract and a conveyance.

Creation of Tenancy & Lease Terms

A lease may be either verbal (oral) or written, but a lease for longer than one year must be in writing and signed by the lessor, under most state Statute of Frauds. An oral agreement for a one-year lease to be annually renewed for one year terms at the desire of the tenant violates the statute of frauds.

A lease need only be signed by the lessor and not by the lessee, because the lessee's acceptance is sufficient and acceptance may be indicated by taking possession or paying rent. Ideally, however, all leases should be written and signed by both parties, whether the term is fixed or month to month. Both husband and wife, as well as any other adults or employed minors, should sign the contract. Either spouse may request the other to sign for both, e.g. John Doe by Jane Doe or simply Jane Doe, Tenants.

Where an agent or manager of the owner signs the contract for the owner, the following form should be used: John Roe, Owner, By Ruth Gray, Manager. If, however, a lease is for longer than one year and is signed by the manager of the lessor, the lease is invalid unless the authority of the agent or manager is in writing.

A **written lease must be delivered** to be legally executed. The usual method of delivery is manual -- handing the lease to the tenant. Although this is the best method, delivery may also be constructive. Constructive delivery is implied from the acts of the parties and their intentions. Thus, there would be a valid delivery where the manager left the lease in the prospective tenant's room with the intent that the tenant should take it when moving in.

While there is no particular form for a lease, the written instrument must be intended as a lease, and give the names of the parties, description of the premises and the term. It is essential that the document also establish a relationship of landlord and tenant.

The term of the lease should be stipulated. If not, it is presumed to be month to month tenancy. If a lease provides a specified term for which the tenancy is to run, as for six months, one year, three years, etc, this is called a fixed term tenancy. If a lessee of real property remains in possession of the premises after the expiration of the lease and the lessor accepts rent from him, the parties are presumed to have renewed on the same terms. The term, however, reverts to month to month and the tenancy changes from a fixed term tenancy to periodic tenancy.

In common law days, there is no limitation on the term for which a lease can be created. The complications that can develop when a lease runs 500 years, however, has prompted most states to adopt lease limitations. California, for example, now has statutes providing that a lease for a term longer than 99 years is invalid. For the most part, this applies to town or city lots and mineral leases. In the case of agricultural properties, the legal limit for some state leases is 51 years. Government buildings are usually limited to 55 year leases, while recreational lands are allowed 99 year limits.

Any alteration of a lease must be in writing and the lease cannot be changed by mutual oral agreement unless these agreements have been fully performed. An example might be a landlord who temporarily accepts a lower lease payment than what is written in the contract. This constitutes an oral agreement that has already been performed.

A landlord who sells his property or land in the middle of a lease term conveys his rights, as original lessor, to the person he sold to -- the vendee. Exceptions to this occur often in the case where the lease contains a provision that a sale of the land or property prior to the expiration of the leasehold term shall terminate the lease.

A tenant may assign or sublease all or part of his leased premises subject to any restrictions in the lease against assignment or subletting. Whether a transfer is an assignment or a sublease is important since the respective rights and liabilities of the parties vary. In the case of an assignment, for example, the assignee must take precisely the same estate that the assignor has in the property. If the assignee defaults the lease and abandons the premises, the lessee may sue to recover the rent to the same extent as though the assignee had been the original lessee. In the case of a sublease, a sublessee is ordinarily ONLY liable to the sublessor and not the original lessor, since he does not acquire the whole estate but only a portion of the unexpired term.

In a lease to a husband and wife, community property laws determine who is liable for ultimate payment of the contract. Where the property is leased by the husband and wife by a written instrument in which they are described as husband and wife, the presumption is that the community property is liable for the lease. The law has even determined that the community property is responsible for lease contracts of either spouse made after & prior to marriage if said contracts were made after January 1, 1975.

Termination of the Lease

A lease will expire upon its termination. Additionally, a lease may be lawfully terminated prior to the expiration of the term on several grounds. A lease may be terminated by the tenant for violation of the landlord's duty to place him in possession, or for violation of the landlord's duty to repair, or upon eviction by the landlord. The lease may be terminated by the landlord if the premises are used by the tenant for an unauthorized or illegal purpose. Either party may terminate the lease upon breach of a condition of the lease by the other party, or upon the destruction of the premises if there is no covenant to repair.

A lease may also be terminated by the surrender of the lease premises by the lessee where the lessor accepts such surrender. In such case, the lessee is released from all further liabilities under the lease.

Condition of Premises

As a general rule, a lessor owning land is not liable for injuries resulting from a defective condition of the land. Liability for injuries is placed upon the one who is in control of the land, which is the lessee. Where injuries result from a defective condition of a building where the lessor or landlord is in control -- stairs, common hallways, etc -- the lessor is liable and not the lessee. However, a liability may not arise where the defect is so obvious that anyone could have predicted their own injury or damages. As such, the duty of the landlord is to use reasonable care in the maintenance of property under his or her control.

Where premises are leases as a dwelling, there are statutory duties placed upon the landlord to keep it fit for human occupancy. To be habitable, a residential rental should be weatherproof and free of rodents. Each unit

should include a toilet, bath or shower, kitchen with sink, hot water, adequate heat, natural light, a smoke detector, adequate garbage removal and electricity if it is available.

If a unit is not habitable because a landlord has failed to make repairs necessary to the health and safety of the tenant, a tenant corrective actions may move out, withhold rent, call the building department, sue the landlord or make the necessary repair and deduct it from next months rent. Before any of this can be done, however, the landlord must have reasonable notice of the repairs, repairs cannot cost more than one month's rent and the problem must not have been caused by the tenant or his guest.

Landlord notifications to tenants should include such items as asbestos and any shared utility arrangements.

Deposits

A security deposit should be exactly what it sounds like: Security . . . for the landlord. It is one of the most powerful means of control a landlord has over tenants and the way they take care of the property. Federal fair housing laws prohibit apartment owners from discriminatory practices related to security deposits. For example, an owner who requires a larger security deposit from tenants because they have children would be violating the law. Security preferences must allow the same treatment for all potential tenants. Legal restrictions may also effect security deposits applied to damages, refund procedures, payment of interest and keeping security deposits in interest-bearing accounts.

No matter what the security deposit is called -- last month's rent, security deposit, cleaning deposit -- the law limits the amount a landlord may charge to no more than two month's rent for an unfurnished unit or three month's rent for a furnished unit. It is unlawful for the security deposit to be "non-refundable", but the law does allow landlords to retain part or all of the deposit under certain circumstances. Deposits collected on rentals are refundable so long as the tenant moves out leaving the premises clean and undamaged. Deposits may not increase during the term of the lease unless the agreement specifies or it is a month-to-month agreement and the landlord has given 30 days notice. Interest does not need to be paid on deposits, but they must be refunded within three weeks of the tenant vacating the premises. Deposit funds can only be used for overdue rent, repairs on damages caused by tenant, cleaning and replacement of personal property (landlord furniture).

The most common disagreement between landlords and tenants is about the refund of security deposits after the tenant leaves the rental. For this reason, California law specifies a procedure that a landlord must follow if he or she wants to keep all or any part of the security deposit. Within 21 days after the tenant moves, the landlord must either send a full refund of the security deposit, or an itemized statement that lists the reasons for and amounts of any deductions from the deposit, wit a refund of any amount not deducted.

When a building is sold, the selling landlord must do one of two things: either return the security deposit to the tenants following the sale or transfer the deposits to the new landlord. The selling landlord may deduct amounts from the security deposit just as if the tenants had moved from the rental unit (for example, to cover unpaid rent or damage to the rental). If the selling landlord makes deductions from the security deposit, he or she must return the balance of the deposits to the tenants or transfer the balance to the new landlord. In any case, the selling landlord must account to the tenants for any deductions. If the selling landlord transfers the security deposits to the new landlord, the selling landlord must notify the tenants of this in writing. The written notice must also tell the tenant the name, address and telephone number of the new landlord. If a selling landlord fails to follow this procedure, BOTH he and the new landlord are legally responsible to the tenants for the security deposits.

A new landlord cannot charge a new security deposit to current tenants simply to make up for security deposits he or she failed to obtain from the selling landlord. But if the security deposits have been returned to tenants, the new landlord may collect new security deposits. Also, if the tenants cause damage to the rental unit that costs more to repair than the amount of the security deposit, the new landlord can recover this excess from them.

If a tenant feels that a security deposit refund is deserved but has not been received, and pursues the collection in court, and wins a judgment that the refusal to refund was unreasonable (in "bad faith"), the court has the option of ordering the landlord to pay the amount of the improperly withheld deposit plus up to $200 in punitive damages, as well as interest at the rate of 2% per month from the date the refund was due until it was paid. These additional amounts can be recovered if a landlord who has purchased the building makes a "bad faith" demand for replacement of security deposits. Whether a tenant can collect attorney's fees in such a suit will depend on what is stated in the original rental agreement. If attorney's fees are provided for in the agreement, the tenant can claim such fees as part of the judgment, even if the original agreement stated that only the landlord can claim such fees.

In recent years, certain cities and municipalities have initiated their own security deposit rules, particularly with reference to interest paid on these accounts. In Los Angeles, for example, a landlord must pay a current rate of interest on security deposits held over one year. Payments need only be made every five years or when the tenant moves out. In Santa Monica, there is no specific requirement that a tenant need pay interest. However, failure to do so is a "factor" in the city denying a landlord's request for a rent increase or granting a tenant a rent decrease.

Tenant Eviction

Tenant Eviction can only be started by a written notice from the landlord. With a month-to-month agreement, 30 days notice is required and the landlord does not have to provide a reason for ending the tenancy. Where notice is given because of non payment of rent, only three days notice to vacate is necessary. If the tenant corrects the problem within the three days, the tenancy still exists. It is illegal for landlords to evict a tenant by force, lock the tenant out, change the locks, remove doors or windows, remove tenant's furniture or property or shut off any utilities or cause them to be shut off. The penalty for doing this is $100 per day.

Tenant Privacy

Tenant privacy is upheld under the law. A landlord, manager or employee may enter a tenant's unit only in case of emergency, to make necessary agreed-upon repairs, to show the property to prospective tenant's or purchasers or when the tenant gives permission. Except for emergency situations, tenants must receive 24-hour notice of intent to enter the suite.

MISC LAW

Emergency Issues

Things do not always go as planned. For example, even when a person has executed a valid health care power, the person authorized to make decision may not be around and no one may know the power exists.

That is why hospitals have the authority to provide emergency care, even if a person is unconscious and unable to consent to treatment. Certainly a hospital would prefer to have the consent of a family member or "fact attorney", but emergency care can be provided anyway. In fact, hospitals have a general duty, by law, to provide emergency care where a person is able to consent or has no insurance.

Organ and body donation is an important contribution to society. However, unless a dying person has clearly indicated intentions to allow transplant, hospitals will not proceed.

Good Samaritans

People who in good faith administer emergency aid are not liable for any act of error or omission.

Good Samaritans who, in good faith, offer to help someone and in the process is injured or killed is entitled to make a claim to the state to cover losses.

Parent Liability for Children

Ordinarily, parents are not liable for the negligent or clumsy acts of their children unless:

1. The act is willful -- A $10,000 limit exists for medical, dental or hospital expenses / $7,500 for school and teacher damages / $500 for stolen or damaged library books

2. A gun was used -- Up to $30,000 per person in a willful death claim, $60,000 maximum.

Deceptive Advertising

False or misleading statements can be punishable by up to $2,500 or six months in jail. Here are some guidelines:

- Packaged goods must list the packaged price. Large print showing the price of only one item is misleading.
- Rebate ads must not show the rebate price without indicating that the product must first be purchased.
- "Former Pricing" must fairly represent the former market price.
- An owner who runs an without a "limit" must allow the purchaser to buy as many as he/she wants.
- An owner must have "reasonable" supplies on hand before advertising "limited quantities".
- It is illegal to "bait and switch"
- Items advertised as "new" or "high quality" must indeed be so.
- Claims of "Made in USA" must be accurate.

Mandatory Insurance

In some states, every driver in must carry auto insurance with a minimum coverage, e.g.:

1. Bodily injury $15,000 per person / $30,000 per accident

2. Property damage -- $5,000 per accident

3. Liability coverage to insure against someone else operating the vehicle and damage a driver causes to property

Drivers may be required to show proof of insurance if involved in an accident or cited for a moving violation.

Co-Signors

Co-signors are liable for loans and other debts. However, the Federal Trade Commission now requires a

disclosure statement be given prior to signing to disclose the full extent of obligations and risks.

Bad Checks

Recipients of bad checks may collect up to three times the original amount by demanding full repayment of the bad check by certified mail within 30 days. If no payment follows, a suit for up to three times the original amount can be started.

Many people endorse the back of checks with the words "payment in full". However, the recipient of this check can merely strike out the words "full payment", cash the check and sue for the balance. To protect against this, a letter must first be sent and indicate that a "full payment" check will be mailed. After 15 days, but no longer than 90 days, a second letter (with the check attached) states "This check is mailed to you in accordance with my letter of ______ (date). If cashed, you agree that my debt is payment in full".

Tree Limbs & roots

The location of the trunk of a tree determines who owns it. However, adjacent property owners have the right to cut off branches and roots that stray onto their property. Damage beyond these rights may result in fines of three times the actual monetary loss.

Trees that are unsound and cause damage to surrounding owners can represent liability on the basis that the owner was negligent. The courts believe that owners must know or should have known that damage was likely.

Similarly, tree roots that spread to an adjacent neighbor and cause damage are considred a private nuisance creating liability for the owner of the tree.

Blighted property

Blighted property is property that has been allowed to fall into a state of disrepair. Certain city ordinances will require the maintenance of such properties when it creates a danger to people aroiund or is considered an eyesore that is reducing neighborhood property values.

Fences

Most municipalities place height restrictions on fences. These restrictions can also apply to "natural fences" such as rows of bushes or trees. Restrictions may also set forth setbacks that fences must maintain from sidewalks or streets. Fences may also be classified as a hazard to the general public where they interfere with someone else's use of their property or they diminish or block the view from a driveway or intersection.

Weeds & Rubbish

Unsightly weeds and rubbish may be classified as health problems because they encourage the breeding of insects and rodents or because they are fire hazards. Violations and fines to clean-up weeds and garbage may be enforced by fines added to the property tax bill.

Noise

Noise regulations are enforced by local police, landlords, associations and courts. Excessive, unnecessary and unreasonable noise are considred a public nuisance which can result in money damages. State laws also define excessive and deliberate noise violations as disturbing the peace or disorderly conduct . . . a crime punishable by fine or jail or both.

Attractive nuisance

An attractive nuisance is a potentially harmful property that is interesting enough to lure a child to investigate. Swimming pools or fountains are good examples as are ordinary objects like running autos, lawnmowers, open wells, etc. Natural conditions such as lakes or steep bank may not be considered attractive nuisances if they were not cretaed or maintained by an owner. Lawsuits surrounding attractive nuisances focus on whther the owner should have known that children were likely to come on the property and/or were there reasonable precautions the owner could have taken to prevent injury.

Obstruction of view

General common law holds that a property owner has no right to a view. Yet some cities have adopted view ordinances which may protect an owner obstruction of view -- usually from growing trees. Rarely do these ordinances restrict structures or buildings that limit an owner's view.

Boundary lines

Surveys are the only way to legally determine boundaries. However, when all parties agree, these boundaries can be changed by using a quitclaim deed. **NOTE: THE TRANSFER OF EVEN A SMALL SLIVER OF PROPERTY TO SOLVE A BOUNDARY LIEN DISPUTE CAN CAUSE A LENDER TO CALL HIS LOAN DUE. CHECK WITH THE LENDER BEFORE TRANSFERRING ANY PROPERTY.**

Dog Bites

Regardless of the condition of the pet or the situation causing a dog to bite someone, the owner is at least liable for the injury.

To sue for more, the injured party needs to prove that the owner knew the dog was vicious or had vicious tendencies and/or the owner was negligent, e.g., violating the leash law by allowing a dog to roam free. Owners may be excused from the higher liability if the injured person was found to provoke the animal.

An owner must pay damages caused by a dog harassing livestock. The livestock owner who finds a dog in the act of harassment may kill the dog without liability.

INSURANCE LAW

Risk

Insurance is the single most effective device for reducing or transferring risk. The sole purpose of insurance is to provide indemnity for a loss.

The basis of insurance risk is the **law of large numbers**. This assumes that NOT everyone in a group of insureds will have a loss all the time. Further, insurers predict their experience of loss based on actual losses that have recently occurred.

Liability

The purpose of insurance is to shift the risk of a financial liability loss from the insured to the insurance company. However, this does come without restrictions or policy limits.

Policy limits may be **expressed** per person (how much will be paid for injury to any one person for an occurrence), per occurrence (losses occurring at a specific time or place), per accident (losses for a specific time and place). There may also be **aggregate limits** which place a limit for all losses occurring during a policy period.

Insurance will also include **exclusions and conditions**. Typical exclusions may deny coverage in instances where the insured damaged his own property or where other coverage is already in existence. Conditions to coverage may include cancellation for non-payment, misrepresentation, fraud or the lack of duty to keep the premises safe after a loss.

Contracts

Contracts create the need for many types of insurance. Surety bonds, for example, guarantee that someone will faithfully perform what he or she agreed to do or pay as agreed. Business and professional liability coverage protects many parties for the unexpected losses that happen in the process of fulfilling contracts. Commercial property insurances pay for replacement or repair or premises or property to keep contracts legal. And life and credit life payouts help businesses and individuals complete contractual obligations.

The basic principles of contract law are applicable to insurance contracts. When someone buys an insurance contract, for example, a promise to pay the insurance company a specific amount of money or consideration within a specific period of time is exchanged for a promise to provide compensation from the insurance company upon the loss of a certain event.

Why is it important to know what constitutes an insurance policy? Because a contract defined to be insurance is subject to insurance regulation. Consider a nonrenewable service contract from an appliance manufacturer who agreed to maintain his product and replace parts for a specified period. This is NOT an insurance contract because it excludes loss by external causes (fire, theft, etc). On the other hand, a newspaper once offered to pay a sum of money to the heirs of anyone who was killed while holding a copy of the paper. Courts ruled this IS insurance. The newspaper withdrew the offer in lieu of securing its insurance charter.

Principles of Insurance Contracts

To be enforceable, an insurable interest must exist (John cannot take out insurance on Bill's car if he has no financial interest -- no **insurable interest**) and BOTH parties must extend absolute good faith. In addition, there must be an offer and acceptance, there must be competent parties, a legal purpose and consideration. Further, **insurance contracts are unilateral** (an act of payment is exchanged for a promise to pay) and conditional (the insured must meet certain conditions to collect).

Property, liability and health insurance policies are **contracts of indemnity** (compensating the insured for only the amount of the loss). Life policies, however, pay a specific amount and are NOT contracts of indemnity.

Life insurance is always in writing, but casualty is often verbally accepted over the phone. Eventually, a written

document is produced. An **agent wishing to review complete terms and conditions** prior to committing the client can request a **specimen policy** from the insuring company.

Because insurance companies do a large volume of business over wide areas, their policy contracts are standardized. This method of business operation usually means that the insured must accept a given policy or do without insurance. That is why insurance is a **contract of adhesion** meaning that terms of the contract have been written by one side. The remaining party is agreeing, knowing that the insurer as prepared all terms of the contract.

Insurance policies are also **executory contracts** which are obligations to be consummated some time in the future based on a certain act or occurrence. Further, they are **aleatory contracts** where equal value is NOT given by both parties. This is because the insured may stand to receive far more in benefits (proceeds of a policy) than he/she pays out in premiums.

Typical insurance contracts include sections devoted to declarations, conditions, exclusions and insuring agreements.

Briefly, declarations include the names, addresses and premium amounts. Conditions refer to the procedures to follow when an event occurs. Exclusions establish the acts that do not apply to the policy and insuring agreements outline the promises to pay upon certain events.

The Meaning of Insurance Contracts

Typically, words employed in contracts of insurance will be interpreted not by what the insurance company intended the words to mean, but what a **reasonable person** in the position of an insured would have understood them to mean.

As simple as this sounds it can get complicated, expecially when misunderstandings arise due to the "language barrier". In **Parsaie vs United Olympic Insurance** a client prevailed against an insurere because she understood little English and could not read the application. She relied on the advice of the agent but failed to disclose a preexisting condition. The courst determined that the insurance company could only deny coverage where an intent to deceive was found. In this case, no intent by the insured was found.

Commencement of Coverage

Exactly when an insurance policy takes effect can be a gray area of the law. Only a written binder can provide clear evidence of an understanding between the parties. However, when a prospect says "I want it" and an authorized agent says "you have it" a legal oral binder has been executed so long as the remaining conditions of consideration and legal purpose are met.

Property & casualty agents typically have the power to bind. Life and Health do not since they are considered to be soliciting agents and not contract writing agents. However, life agents can accept a premium payment and issue a conditional receipt which generally provides limited coverage when certain procedures have been followed (medical exams, blood tests, etc) Until that time insurance is NOT in effect.

Compared to binders, policy declarations are very precise as to when they take effect. A policy stating a start time of 12:01 A.M. on the date the policy commences and ending at 12:00 noon or 12:00 midnight the date it ends is specific. There is NO such thing as a grace period. Losses suffered outside of these times are simply not covered.

Policy Changes

After an insurance policy is issued, it can only be changed by rider, endorsement or amendment. Policyowners must be aware of and accept the changes as well as receive a copy of the contract change.

Further, most policies include a change clause which state "only the president, vice president or secretary of the company have the authority to alter the contract or waive any of its provisions.

Premium Rate Changes

Life insurance contracts usually offer new policy guarantees on how long rates will be fixed and another schedule showing the maximum annual premium. After that period, the insurer may charge any amount less than or equal to the maximum premium. Rate changes must be equally applied across classes of policyholders and are rarely adjusted more than once a year.

Casualty contracts may institute rate increases within 60 days of an insured event (loss by fire, an accident, etc). After that time the insurer may not change the premium during the policy period.

Breach of Insurance Contracts

Terms of an insurance contract may be breached allowing the insurance company to deny benefits under the following conditions:

Breach of warranty -- the insured did not do something he promised to do like keep his premises in safe condition.

Misrepresentation -- the insured lied about being a smoker

Concealment -- the insured committed bad faith by falsely claiming a fence was built around a pool when none existed.

In some instances, insuring companies grant insureds or limit themselves to stipulated period of time to uncover facts. An incontestable clause, for example, gives the insurer a period of time (about two years from issue) to find fraudulent facts in an insured's application. The suicide clause, invokes cancellation of the policy if the insured commits suicide within the first two years of the policy.

In casualty policies, the issues of misrepresentation and fraud are handled by warranties and waivers. A warranty is a condition of the policy that certain standards be adhered -- water pipes be drained each freeze. If a claim was filed and an inspection revealed this was not done, the insurer can void the policy contract. Waivers allow the insurer or his representative to knowingly overlook a condition that may have led to a cancellation or a denial of coverage from the outset.

Other parts of insurance policies set further conditions that must be met before payment or coverage of the contract can be released. A partial list might include surrendering the policy, a death certificate, timely notification of a claim, protecting the property, making the property available for inspection or meeting deductible and coinsurance payments.

Cancellation

Life, annuity and health insurance policies come with a 10-30 day examination period. During this "free-look" period, an unsatisfied policyowner may cancel the contract for a complete refund.

Additionally, most insurance contracts may be cancelled by the policyowner anytime before it expires. This is typically transacted by a letter from the owner answered by a request from the insurance company to surrender the policy. The insurance company will return to the policyowner any unearned premium (payments that have not been used up) and/or the cash value in the case of whole life type insurance and annuities.

Insurance companies do not have the same freedom to cancel out policyowners. Non payment of premiums,

concealment of false information or a major change in risk (a driver's license is revoked) are reasons for cancellation. However, a casualty insurer has the right to reject an application for coverage during the first 60 days after giving at least 10 days notice. Also, many disability and health insurers provide for cancellation rights for a specific class of policyholders (obviously to account for excess claims in one class over another).

Otherwise, and if the policy does not provide for guaranteed renewability, the insurance company must wait until the policy expires or renews to cancel.

Claims

Claim disputes in consumer law have many applications to insurance products and the agent. People buy insurance in anticipation of losses in hopes of avoiding claims and courts. And, the industry has responded with an almost limitless supply of coverages: from life, health and disability to property and casualty of all types and sizes.

Most often, it is the presence of an insurance carrier that settles a claim before it reaches major proportions. Thus, the insurance industry plays a very important "third party" role in everyday law.
Claims may also be "direct" between insurer and the insured. Generally, there are two types: Friendly claims and disputed claims

Friendly Claims. Those in compliance with the terms of the insurance contract -- such as submitting a claim for the payment of death benefits by submitting proof of death. The insurance company agrees to pay this claim within two months and all is settled.

Disputed Claims. One of the parties has disagreed with the payment or extent of coverage. In the case of the latter, the procedure is very different from consumer claims. The first hope in a situation where a dispute between an insured and an insurance carrier cannot be resolved is for settlement by internal remedies such as informal complaint from the insured to the insurance company (a letter to the company president or department supervisor) or binding or nonbinding arbitration (some policies stipulate this to be a means of settlement).

Most policies provide an additional "built-in" settlement device which can require the insured to assign all rights of recovery to the insurance company. This is called **subrogation**. It occurs when an insured has been damaged by another party who is clearly at fault but refuses to pay. The insurer may step in and pay his insured and then proceed against the party that did the damage by the right of subrogation -- transferring the right of recovery from the insured to the insurer.

Where a dispute cannot be settled by either of these means, legal claim by lawsuit may result. Again, there are typically two avenues:

Breach of contract -- a request to the court to compel the breaching party to comply under "specific performance".

Bad-faith litigation -- this is also called "suing in tort" and can result in damages far beyond breach of contract since a violation of the covenant of good faith and fair dealing has occurred. There are two types of bad-faith cases:

1) First-party cases -- where an insured and insurance company are dealing direct and one party has withheld benefits or compensation.

2) Third-party cases -- where an insurance company has settled a suit in a less than favorable way leaving the insured exposed for more damages.

Issues that arise in claims against an insurance company include the following:

Waivers allow the insurer or his representative to knowingly overlook a condition that may have led to a cancellation or a denial of coverage from the outset. Consider an insured who operates an informal carpool from time to time. The agent explains that the practice is permissible, or perhaps the agents says nothing, issues the policy and collects the premium. When a claim occurs, it is likely the insurance company may deny the liability based on the exclusion of using a personal auto for public conveyance. The principle of estoppel would prevent the insurer from withholding payment in that the agent's actions constituted a "waiver" of the exclusion.

Parol evidence refers to any evidence, whether oral or in writing, which is extrinsic to the written contract. Under this rule, insureds may introduce information that convinces the court that an agent or representative of the insurance company changed the written contract. Since the courts recognize that some agents have the authority to "bind" contracts, their actions may create new contracts beyond the scope of the written document.

Reformation of a contract allows the courts to modify a fully executed contract to reflect the parties intentions. Consider an insured who acquires a second house. The agent incorrectly wrote the new house but dropped the first. A fire leaves the first house exposed and the insurer unwilling to pay. The court "reformed" the contract to meet the original intentions of the parties.

Claim settlement disputes represent the most frequent complaints filed with the Department of Insurance. New regulations, implemented January 10, 1997, affect agents and insurers alike.

Debt & Insurance

The association of insurance and debt is a long one. Lenders offer credit life or credit disability plans which pay off or takeover payments when debtors die or become unable to make payments. Families have purchased life insurance in order to have the choice to pay off major debts in the event of the breadwinners demise. And business pays for surety bonds to be sure that debts between parties are paid faithfully.

Creditors

Creditors have no rights to takeover the benefits provided by disability and health insurance. Further, most cash value insurance and annuities should include a spendthrift clause which prevents creditor access to the principal and payments of these policies. A typical spendthrift clause might read as follows:

"To the extent permitted by law, no payments under this policy shall be subject to the debts, contracts or engagements of the Owner, Insured or of any Beneficiary of this policy. Payments may not be levied upon or attached for the payment thereof"

Policy Loans & Payment Plans

Loans from cash value insurance or an annuity establish another debt relationship. Most policy loans set up the policy as sole security for the loan by automatic loan collateral assignment. Loan payments and interest that are not paid by the due date are usually added to any existing loans. A loan balance exceeding cash value may result in the policy maturing. Loans not paid back at time of death are deducted from the death benefit.

Many property insurance policies contain a **salvage clause** which allows the insurer to take title to damaged property after payment of loss. This may help the insuring company reduce or "salvage" a portion of the claim costs.

Periodic premium payments are yet another way that debt works inside insurance. Typically, premium due

dates are "drop dead", final due dates which trigger cancellation if not paid. Life, health and disability policies, however, are unique in that a grace period of usually 31 days is permitted. Even though the due date has passed, the insurance remains in effect and the premium can still be paid. If death occurs during the grace period, the benefit will be paid minus the unpaid premium.

Family Law & Insurance

In the scheme of the family, insurance offers a monetary and moral role. Life insurance and pension annuities can cushion the financial loss of a breadwinner and provide the resources to help keep a family together.

Most insurance issues concerning family evolve around the proceeds and cash values of life insurance.

One issue is the determination of beneficiary at death. In most cases this is a simple matter of a beneficiary spouse surviving an insured spouse. However, on rare occasions where both the insured spouse and beneficiary are involved in the same accident this can be difficult. If the beneficiary did indeed live five minutes longer, the proceeds of life insurance would go to his/her separate estate instead of to the contingent beneficiary (usually the children). Legislation has been passed to prevent this.

The **Uniform Simultaneous Death Act** states that if no proof exists that the beneficiary outlived the insured, death benefits will be paid to the contingent beneficiary or the estate of the insured if none exist. Families can take this a step further by providing a common disaster provision in their policy which sets a specified period of time that the beneficiary must outlive the insured -- usually 10 to 30 days -- in order to receive death proceeds.

Community Property & Insurance

Community and separate property issues clearly affect insurance policies, particularly in the case of annuities and life insurance.

Concerning the death benefits of a life insurance policy. The **premium tracing doctrine** states that the death proceeds of life insurance are owned by the separate estates of the spouses and by the community property estate in the same proportions as the sources of the funds used for premium payments. So, if a wife paid one third of the premiums on her husbands life insurance, she would be entitled to one-third the death benefits, the remaining two thirds would be the property of the community, of which she is also one-half. Most often the payment of premiums does not represent much of a problem because most policies are purchased with funds from the community property bank account and the spouse is named as the primary beneficiary.

However, if a deceased insured leaves a surviving spouse but names a third party beneficiary (not the spouse), the third party is entitled to receive 1/2 of the death benefit even where 1/2 of all premiums paid came from community property accounts. The assumption is that the other half of premiums came from the deceased insured who wanted his death proceeds to go to a third party.

Where a divorced couple and cash value life insurance is concerned, similar principles apply. If it is agreed to "cash in" the policy, the cash proceeds will be distributed according to the principle tracing doctrine. A spouse who paid 70% of the premiums with his or her separate property funds would be entitled to 70% of the cash value. Where the entire source of premiums was the community property account, the couple would normally share.

Inheritance & Insurance

Life insurance and annuities are valuable estate planning tools. Determining the type and amount that is

appropriate is best left to courses on that subject. Deciding how a policy should be titled, however, draws on many legal factors.

Life insurance proceeds are received "income tax free" to a beneficiary, but are included in a decedent's gross taxable estate where he or she was the policyowner. Much effort is spent among estate planners attempting to eliminate potential estate taxes by varying title.

The crucial test of whether a person owns economic interests in a policy, and thus runs the risk of having the insurance proceeds subject to estate tax, is existence of so-called incidents of ownership. Typically, they take on one of the following forms:

- The right to borrow against the policy for the insured's own purpose.
- The right to obtain loans to pay premiums on the policy without the consent of the beneficiary.
- The right to change the name of the beneficiary is a clear incidence of ownership.
- The right to receive payments under the policy if the insured sustains certain defined disabilities.

Other situations where the incidence of ownership is present include corporate owned policies (portions of the policy not payable to the corporation are included in the decedent's estate), fiduciary arrangements (an individual who is trustee of a trust that owns a life insurance policy on his life), and reversionary interests (if the value of the reversionary interest exceeds 5 percent of the policy value).

Insured's may get rid of the incidence of ownership by transferring it irrevocably to the beneficiary or to somebody else. It is important to note, however, that transfers of life insurance within three years of death are still includible in the gross taxable estate.

Insurance trusts are another means to achieve effective estate planning. Typically, the person who is insured transfers policies on his life to trustees irrevocably. The trustees determine the beneficiaries from within a limited group of persons. An insurance trust also protects the proceeds from creditors of the insured and of beneficiaries because the policies belong to the trust.

Annuities

In years past, annuity contracts offered numerous titling options: owners, joint owners, tenants in common, joint annuitants, joint tenancy with right of survivorship, etc. Financial advisor's could effect a smooth "non-probate" transfer with minimal tax consequence should a death occur.

Today, IRS Section 72(s) limits the ability to continue annuity contracts, and continue to defer interest.

The typical annuity sale establishes the party buying the contract as the annuitant and owner, making the spouse the beneficiary. If the annuitant dies, the proceeds are paid to the spouse who can continue the contract, (without accelerating the taxes on the deferred income), take a lump sum or annuitize. In this classic example, probate should be avoided.

If the annuitant dies and the beneficiary is someone other than the spouse, they can take a lump sum or annuitize the contract. There is no chance to defer the contract and the annuity must be distributed over five years or annuitized. Again, probate should be minimal.

If an owner (not the annuitant) dies, the Internal Revenue Code requires the entire interest in the contract be distributed within five years of the death of the owner. From a probate standpoint, an owner (not annuitant) dying does NOT trigger a death benefit to a beneficiary. Rules of the will are followed which may involve probate. If there was a co-owner or contingent owner, however, probate could be avoided. But,

unless this co-owner was the spouse, the IRS will accelerate the contract.

Personal Injury & Insurance

Claims arising from bodily injury and property damage to others may result from the condition of the insured's premises or the personal activities of the insured. This exposure is typically covered under a general liability policy.

Personal injury liability coverage, however, protects against liability claims for other than physical harm and property damage allegations. It covers claims alleging such intentional torts as false arrest, detention, malicious prosecution, libel, slander, wrongful entry, eviction and invasion of privacy. This coverage is generally available as endorsement to general liability policies.

Agency & Insurance

Insurance Agency Concepts

The usual rules of agency law are applicable to insurance agents in their dealings with applicants and insureds. An agent binds his principal when he acts within the scope of his authority.

Agency in the insurance industry is granted to an agent by three authorities. **Express authority**, either orally or in writing, which permits agents to countersign, issue, deliver policies, bind or conditional bind. **Implied authority**, not formally communicated, which allows the agent to perform all of the normal duties necessary to sell and service insurance contracts. And, **ostensible authority**, also not written or orally expressed, which is authority that agents are perceived to have by any reasonable person. This includes what a consumer would believe about the agent's ability to bind the policy, either in full or conditionally.

An agent is not personally liable on a contract made in the name of the principal (insurer) where the agent had authority to make the contract; but if the agent had no authority and represented that he did, the agent is liable to the third parties who relied upon his representations.

When an agent and an applicant together work to defraud an insurance company, the agent has voided his duty to imply knowledge to the principal. This contract would not bind the company and open the agent to exposure.

Agency Structure

There are many different agency arrangements now practiced.

Some insurance companies choose to be their own agents. These are called no load or direct mail companies. Their business is solicited primarily through advertising or direct mail.

Next, there are "captive" or direct agent companies who hire agents to handle their product exclusively. Since these agents are employed they may be paid by salary or a combination of salary and commission.

An exclusive agency arrangement occurs when an insurance company contracts with various agencies to represent them exclusively in contrast to independent agency arrangements where independent contractor type agents or groups of agents contract with several different insurance companies to sell their policies.

Finally, there are independent agents consisting primarily of individual agents who may represent several insurers and sell as independent contractors.

Agents vs Brokers

Agents and brokers are both licensed to sell insurance, however, there is a very important legal difference. Agents represent companies versus brokers who represent clients.

The purpose of determining whether an insurance producer was acting as a broker or as the insurer's agent is to establish potential liabilty when something goes wrong. An attorney sueing an agent will generally proceed against him as a representative of the insurer **AND** as a broker or fiduciary of the client at the same time, thus seeking the deepest pockets available. An agent should be prepared to prove or disprove legal status at any given time.

Dual Agency

Wrongdoings outside the agency contract can subject the agent to additional exposure and liability under the banner of "dual agency". All agents assume some form of dual agency since they first represent the client as agent, then switch to an agent of the company when business is placed. Problems occur, however, when an agent assumes non-agency duties by professing to have special expertise, e.g., financial planner, an auto insurance specialist, a health care professional, etc. This is a more serious and potentially damaging form of dual agency that exceeds the scope of the agency contract and establishes the agent as a "professional" in the eyes of the law. Failure to perform as promised can result in conflicts and litigation.

Employment & Insurance

There are many insurance issues that are tied to employer laws. Some are mandatory coverages like workers compensation insurance or legal design requirements of pension plans. More are voluntary like health, disability and life insurance benefits designed to attract a higher quality employee. Even so, these coverages have many legal rules which employers must know. Finally, there are employee issues that require employers to seek out insurance

Worker's Compensation is a mandatory requirement of employers to insure against work-related injuries that arise in the course of employment. A proper policy (private or publicly purchased) will help protect BOTH employer and employee. This is an extremely specialized area of insurance, but suffice to say, policies must cover injuries connected with work, occupational illnesses (those that are the gradual result of work conditions -- stress, toxic exposure, etc). In addition to medical benefits, employees are entitled to wages while off work. This can amount to about 2/3 of gross weekly pay for temporary conditions and about $150 weekly for permanent disability.

Benefits Discrimination

There are many employee benefit programs that involve insurance products. The Equal Employment Opportunity Commission is the federal enforcement agency that reviews employee discrimination including benefit programs involving insurance products.

Most benefits legislation applies to companies with 20 or more employees. However, all employers should avoid discrimination practices such as unequal benefits by age -- the Older Workers Benefit Protection Act outlaws discrimination of employee benefits for anyone over age 40. The Equal Pay Act is federal legislation that requires employers to make equal pay for equal work, including fringe benefits like pension retirement plans which use insurance vehicles.

As of this writing, employers are not required to offer health insurance coverage to employees. However, health insurance provided for one employee MUST be available to all other employees in the same company. The most sweeping rules apply to employees that are terminated, their spouses and dependents under the

Health Insurance Portability and Accountability Act of 1996 (HIPPA).

HIPAA generally covers health care plans with at least two participants who are active employees of single-employers, multi-employers, and collectively bargained units. Generally, the statute allows individuals who leave their employers to keep health care coverage or obtain new coverage, regardless of any pre-existing medical conditions.

Under HIPAA, the maximum pre-existing condition exclusion period that any group health plan or insurer may require for new enrollees is 12 months from the enrollment date or exclusion. This period is increased to 18 months for late enrollees. Group health plans and their insurers must reduce this pre-existing condition limitation period by the individual's aggregate period of previous health insurance coverage. The pre-existing condition exclusion period is reduced by one day for each day of an individual's creditable coverage under a former health plan. As a result, neither group health plans nor their insurers will be able to deny coverage or apply pre-existing condition exclusions to individuals who had prior health coverage for at least 12 months. The credit for prior coverage is lost, however, if an individual went 63 or more days without coverage.

Each employer or health care issuer is responsible for providing to terminating employees, their spouses, and dependents certificates evidencing their period of health coverage under that employer's health plan. Certificates of creditable coverage will have to be provided automatically upon certain triggering events. These events include when an individual loses coverage under the employer's health plan, when an individual becomes covered under COBRA, and when an individual is no longer covered under COBRA. In addition, certificates will also have to be provided to any former participant upon request within 24 months after coverage ceases.

HIPAA also expanded rights under COBRA for certain individuals. Under the new law, the definition of a qualified beneficiary has been amended to include a child born or adopted during the COBRA continuation period. This law also requires that qualified beneficiaries be permitted to change coverage status from individual to family upon the birth or adoption of a child under the same terms as are applicable to active employees.

In addition, the new law expands the scope of the extension applicable to disabled employees and their dependents. Under the former law, an employee and his or her dependent could extend their COBRA coverage for an additional period of 11 months if they became disabled at the time of the qualifying event. The new law permits use of this extension for any employees and their dependents who become disabled during the first 60 days of the 18-month COBRA coverage period.

These changes have been effective since January 1, 1997 and notice of these changes was to have been given to all COBRA beneficiaries no later than November 1, 1996. Employers who have not taken steps to comply with these changes should take immediate steps to do so.

Group health plans and insurers that fail to meet the requirements of the new law may be assessed a penalty of $100 for each day for each individual affected by the failure. Moreover, there is a minimum penalty tax where the failure is discovered after a notice of examination. This tax is equal to the lesser of $2,500 or the amount that would be determined under the $100 per day rule. Significantly, the $2,500 is increased to $15,000 if the violations for any year are more than de minimis. Under any circumstances, the maximum penalty is $500,000. Because of the potential liability involved, plan sponsors should take appropriate measures to amend group health plan summary plan descriptions and to assure the proper establishment and implementation of procedures for tracking and certifying periods of creditable coverage.

Pension Plans

While there is no law that requires an employer to provide a pension plan there are specific benefit rules that apply once one is established. Since many insurance products have long been associated with pension planning, they also fall under specific benefit rules.

An employer may offer qualified and non-qualified pension plans to employees.

Qualified plans must meet specific IRS requirements to qualify for tax benefits. For example, if a company decides to offer a qualified pension plan to its employees, the Employment Retirement Income Security Act (ERISA) requires a plan document and an annual statement showing each employees pension benefits earned if requested by the employee. Plan documents must also spell out details of the plan and when an employee will be eligible for benefits as well as how to claim them.

Discrimination is probably the single most important factor when establishing qualified plans. Plans do not have to include all workers but must be laid out fairly to include a cross section of employees. Qualification to participate in plans may be set, including limitations on age and length of employment. Benefits that favor of officers and highly compensated managers are prohibited.

The hope of many companies is to use insurance to incorporate pension benefits and accomplish certain business agendas like the business buyout of a dead partner. Life insurance inside a qualified plan has been offered as a widespread solution. Unfortunately, IRS certain limits apply which limit the amount of life insurance purchase under the assumption that life insurance coverage should be "incidental" to other benefits provided by the plan. To accomplish this, the amount of death benefit is limited to 100 X the monthly pension benefit within defined benefit pensions. Defined contribution and universal life insurance have limits of 50% and 25%respectively.

Nonqualified pension plans do not possess as many tax benefits as qualified plans. Examples of nonqualified plans would be IRA's, annuities and deferred compensation plans. There are also fewer discriminatory rules.

In recent years, "personal pension plans" have become more prominent in business circles. *(Although these plans function identical to a pension plan,, agents should know that there have been signficiant consumer protection pressure and in some cases penalties for not disclosing that "insurance" is the basis of this concept.)* These plans utilize a universal life product that is funded by the employee monthly. There are NO discrimination rules and NO IRS filings so long as all employees have equal access to belong to the plan. Highly paid executives of corporations can use Section 162 bonus deductions to fund monthly investments of just about any size in contrast to line employees who may wish to make no contributions.

Personal pensions can be added to any existing plan and accumulate tax deferred to values beyond traditional retirement vehicles. Tax favored withdrawals at retirement and "automatic completion" of the plan if the employee dies early are two of its benefits. To maintain its life insurance status, the primary limitation is that the maximum excess premiums that can be deposited into the fund can be no more than 5 X the original monthly premium. However, 1035 tax free exchanges of existing cash values can be transferred into the fund at inception.

Ownership & Insurance

An almost endless variety of property can be insured from tangible, intangible, real and personal. Coverage can be specific, designating a particular item, or blanket. Blanket insurance may insure property at one location or ALL of the insured's property at multiple locations.

Property insurance contracts are also designed for fixed coverage at a specific property or floater coverage which moves to protect insureds at various locations.

Additional issues focus on scheduled coverage which set a limit of reimbursement for each piece of property versus unscheduled coverage where one limit applies to all property.

--END OF COURSE--