1. WHAT IS PROPERTY?

property: 5 questions
1. how created?
2. how transferred/lost?
3. what bundle of rights?
4. what can govt do?
5. pragmatic consequences?

intellectual property:
what we can learn
1. sources of law
2. constitutions, statutes, decisions, administrative, documents
3. court systems/process
4. the 5 questions
5. how to read statutes
6. how to read court opinions
7. how to analyze documents
8. solving client problems
   (see problems 2A, 2B, 2C)
9. how pragmatic issues enter
10. intellectual property principles themselves

2. INTELLECTUAL PROPERTY

Constitution: how read it?
1. To promote the Progress
2. of Science & useful Arts
3. for limited Times
4. to Authors & Inventors
5. the exclusive Right
6. to Writings & Discoveries

Notes
1. idea without an invention
   a. idea
   b. trivially simple invention
   c. the mustachioed happy face

2. statute versus Constitution

Sources:
" Private Documents/Agreements
" Constitutions
" Statutes
" Rules of Court
" Common Law
" Administrative Rules or Judgments
" Etc.

copyright statute: how read it?
1. original works
2. of authorship
3. fixed in tangible medium
4. communicable
5. list of 8 types
6. not an idea, process, . . . or discovery

Notes
1. originality: happy face
2. originality: hand-drawn
3. copyright is automatic
4. tangible medium: idea for happy face

OddzOn v. Oman
1. Background: Koosh; Copyright Register; this suit
2. Holding: refusal upheld
3. The originality issue
   a. familiar shape?
   b. originality?
How to Brief a Case

1. copyrights
   expression, fixed medium, original [registration]
2. trademarks
   distinctiveness, priority, use, nonconfusion [registration]
3. patents
   novelty, utility, nonobviousness
4. trade secrets
   substantially secret, bus use, ec value
   " [other types]

Trademarks & Unfair Competition:
Lanham Act
[There are other sections that create a broad protection against unfair competition. ]
§ 1127: registrable unless (1)
   resembles registered mark so (2)
   likelihood of confusion
[registration is not required]
§ 1114: infringement & remedies
§ 1127: trademark--any (1) device
   (2) used [by or intended] (3) in commerce (4) to ID, distinguish, &
   indicate source of goods/services.

Notes:
1. a. name on your law firm
   b. green-handled hammer
   c. red fire equipment
   d. General Motors on tools
2. registration: not required;
   advantages

How to Brief a Statute

1. Background: Qualitex s green-gold pads; registered; Jacobson
used similar colors; Qualitex suit under § 1114--registered mark; likelihood of confusion [potential damages & injunction]. Also, unfair competition.


3. Reasoning: a. color is a device. b. admittedly, it isn’t alone enough, like (1) fanciful, (2) arbitrary, or (3) suggestive symbols. c. but: can indicate source (red bolt head & pink insulation examples) if d. secondary meaning. e. not functional (light bulb shape; red fire equip examples). f. court rejects arguments about uncertainty, limited supply, old statute, no need.

Notes
1. when color alone? (device, ID source, secondary meaning, not functional.)
2. functionality: why excluded? (red fire-fighting equipment)
3. likelihood of confusion: what meaning? (a) side-by-side, ability to distinguish or (b) easy distinguishability alone? (Jacobson adopts close-but-different color OR Jacobson adopts orange paisley) 14

Two Pesos v. Taco Cabana
1. background: Pesos brazenly copied Taco’s overall design.
2. held: actionable as inherently distinctive trade dress, without secondary meaning

3. reasoning/principles
   a. mark not required; registration not required; unfair competition--passing off, etc.
   b. trade dress: overall feel; total image.
   c. types of marks: (1) generic (Beer); (2) descriptive (Lite); (3) suggestive (Pearl); (4) arbitrary (Rolling Rock); (5) fanciful (Blatz)
   d. secondary meaning = public identification
   e. not required for trade dress if inherently distinctive. Why not? 15

Notes
1. Secondary meaning; why not required here?
2. hierarchy of mark strength: Apple Computers; Coppertone, Nice N Soft, Bathroom Tissue
3. Wal-Mart v. Samara Brothers: Wal-Mart imitated designer clothes. The designs were unique but didn’t have secondary meaning (what does that mean?) Held, where trade dress is part of product design, as opposed to packaging, infringement is not actionable without secondary meaning. Why? How distinguish from Two Pesos case? 16

Anderson’s Black-Rock
1. background: patent issued for combined heater, spreader, shaper;
spreader-shaper combination
well known, heater well known
2. held: patent invalid
3. reasoning: statutes--novelty, utility,
nonobviousness. Combination must
produce synergy over prior art.
Commercial success not enough.
Nonobviousness std is constitutional.
Notes:
1. 3 requirements; what s missing?
2. expense, delay, risk of patent application
3. judging obviousness: hindsight 17
United States v. Adams
1. background: patent issued for
magnesium, CuCl, & water battery.
Each element known, but
combination filled need. Useful,
unexpected.
2. held: patent valid.
3. reasoning: prior art must be examined. Differences from prior art are important. So are unexpected results, etc. Novelty, utility, nonobviousness are present
Notes
1. Was Adams battery really nonobvious? (Novel or different, yes, but nonobvious?)
2. Combination patent: ALL patents!
3. Distinguishing Adams from Anderson s Black-Rock: 3 well known ingredients in each,
commercial success, etc.
4. Expert doubts, results, need, comm l success: do these count?
5. What is nonobviousness ? Is it arbitrary?
6. The claims in a patent
a. claims are the heart of the patent
b. exact words used to determine infringement
c. note focus on claims in Adams
d. strategy: (1) multiple claims;
   (2) broadest claims possible--but not so broad as to threaten
   novelty, utility,
   nonobviousness 18
UTSA : Uniform Trade Secrets Act
BP Chemicals v. Jiangsu Sopo
1. background: real issue is personal jurisdiction, which requires connection between elements of claim & act in U.S. For that, must explore claim. Sopo, a foreign sovereign entity, worked with SPECO to obtain BP secret methods from BP licensees & then disseminated them to American contractors.
2. Held: claim elements exist in U.S.; therefore, jurisdiction exists.
3. Reasoning: a foreign sovereign is subject to suit in the U.S. for a claim based on commercial activity in the U.S. A trade secret, under UTSA, is (1) information, w/ (2) economic value, (3) not generally known, and (4) with secrecy reasonably maintained. Misappropriation, under UTSA, is defined & includes dissemination.
Notes
1. Secrets v. patents: why didn't BP patent all secrets?
2. Subjects: customer lists, prospects, customer specs?

DETOUR: PREFACE, APPENDIX A
Preface: Characteristics of This Course
1. different ways to teach it
   a. jurisprudential
   b. historical
   c. litigation context
   d. modern transactions
   e. combination
2. modern cases
3. lawyering strategies
   a. problem-solving
   b. counseling clients
   c. negotiation
   d. document preparation
   e. document analysis
   f. litigation presentation
4. property is PRIVATE LAW
   a. agreements
   b. documents
   c. they make the law
   d. customary transactions
   e. transactions & documents as well as cases
5. the Shaq example
6. the goal
7. IP as starting point
   a. nature of property
   b. UH curriculum committee
8. the book [publication pending]

I. OVERVIEW
   A. PRE-SUIT STAGE
   B. WHERE AND HOW TO FILE

SUIT
1. Subject-Matter Jurisdiction
   a. State-Federal
   b. Type of Court--Probate, Etc.
2. In Personam Jurisdiction; also, Service of Process
3. Venue
4. Parties
C. THE PLEADINGS
   (Complaint, Answer, Etc.)
D. PRELIMINARY DISPUTES
   (Jurisdiction, Etc.; Motions to Dismiss)
E. DISCOVERY AND PRETRIAL
F. DISPOSITION WITHOUT TRIAL (Summary J., Default, Settlement, Dismissal, Etc.)
G. TRIAL--SCHEDULING AND TRYING
   1. Judge and Jury
   2. Selecting the Jury
   3. The Trial: Evidence, Arguments
   4. Court's Charge and Verdict; Judgment
   5. Taking Case from the Jury: Directed V.; J. Notwith. V.; New Trial
H. ENFORCEMENT; Remedies
I. APPEAL
J. ALTERNATE DISPUTE RESOLUTION

2. INTELLECTUAL PROPERTY, CONTINUED
property transfer agreements
the six elements approach (a method
of analysis devised by this professor)
I. Parties
II. Preconditions
III. Obligations: Other Party
IV. Obligations: Client
V. Breach & Remedies
VI. Termination
[Other considerations]
What do these mean?

Why study?
Property Law is PRIVATE LAW.
Most of lawyer’s efforts concern
AGREEMENTS and other
DOCUMENTS.
(This course is different!) 22

I. Parties
   Can they perform? Do we have all
   we need? Are they financially
   responsible?

II. Preconditions
   What has to happen before the
   other party is obligated? On the
   other side, is the client protected
   from obligations that shouldn’t
   exist?

III. Obligations: Other Party
   What does the agreement say, and
   how specifically, about what the
   other party must do? Do these
   obligations fit the client’s
   expectations, as written?

IV. Obligations: Client’s
   What does the client have to do? Is
   it specifically limited, or can it be
   read to require more than the client
   expects to do?

V. Breach and Remedies
   If the other party performs in a
   way we don’t like, can we clearly
   prove breach? And what relief
   can we get? On the other side,
   can the other party possibly
   claim breach after sound
   performance by our client, or
   obtain ruinous remedies?

V. Termination
   Can we tell when and why the
   other party’s and the client’s
   obligations end? What happens
   then?

WHY THIS SYSTEM IS NEEDED:
It’s what’s NOT expressed that really
matters, and you won’t notice what’s
not there if you don’t look at it
systematically. 23

1. Property law is PRIVATE LAW.
2. Property law is DOCUMENTS.
3. AGREEMENTS form much of the
   law.
4. If you WRITE it, a court (almost
   always) will ENFORCE IT.
5. It becomes the LAW.
6. CUSTOMARY language and
   structure are important.
   a. understood among
      DIVERGENT PARTIES. A
      suspicious buyer or seller on
      the other side more likely can
      trust it.
   b. the EXPERIENCE factor: a
      document that has been through
      thousands of transactions (or
for that matter, even a few) is more likely to reflect experience about risks than one you scribble on a legal pad or type out on a laptop with no experience. 24

Objectives of Problems
1. Six elements application
   a. Recognizing when form wrong
   b. How to fix it
      (1) formation & conditions
      (2) obligations/opponent
      (3) obligations/client
      (4) breach/remedies
      (5) termination
      (6) parties
2. Loose ends
   a. can you resolve? or not?
   b. what if you can't?
   c. merger clause/execute all docs
3. Terminology
4. Client relations
   a. correcting client
   b. effort projection
   c. personality traits
   d. need it yesterday
   e. overreaching
   f. adversariness injection 25
5. Estimating effort
   a. up front
   b. what if you can't
   c. analyze steps: absorb prob,
      gather into, find form(s),
      cannibalize/change/combine/
      draft, produce, analyze internal
      logic, analyze six elements,
      convey/advise client, revise,
      confer client, revise; repeat!
   d. fee estimate
   e. billing & collection
6. Errors/ambiguities
7. Ease/preparation
   a. setup of forms
   b. declarations page?
   c. office systems; variations
   d. the systems approach
8. Style
   a. detail/generality
   b. formal/informal 26
9. Document logic v. people's behavior
   a. contingencies
   b. multiple docs? (all?)
   c. self-interest
10. Warranties
    a. yours
    b. other party's
    c. for unintended cons q?
    d. enforceable?
11. Negotiations
    a. methods/tactics
    b. ethics
    c. zero-sum v. cooprtv
    d. multiple issues
    e. timing
    f. paperwork 27

Intellectual Property: Four Issues
1. creation?
2. protected?
3. prevented?
4. pitfalls?

[compare to the Five Questions ] 28
" Syllogism (Deductive)
   First Premise
      All emeralds are green.
Second Premise
This object is an emerald.

Conclusion
This object is green.

" Analogy (Inductive)
" Generalization (Inductive)

Here's the key! Law school analysis is heavily deductive (syllogistic).
1. PRINCIPLES (all) (First Premise)
2. FACTS (all) (Second Premise)
3. CONCLUSION (this comes last!) 29

1. Valcom: my computer prog; base inputs lead to mkt valuations; used known algorithms/commands combined by me; sold printout to investor customers; how protect?
2. Wrestler, The Hammer --steel-like plastic helmet & gloves, distinctive gait & speech; how stop imitation/neg publicity, get paid when pictured 30

3. REAL PROPERTY OWNERSHIP

property interest creation
1. gift: a. donative intent, b. delivery, c. acceptance
Panhandle Baptist v. Clodfelter
d. notes
(1) formal requirements: why?
(2) burden (heavy) on donee: why? Presumptions: why?
2. devise or descent
3. purchase: equitable title
Problem 3A: Pravelka-Damani
4. adverse possession: a. actual & visible, b. appropriation,
c. continuous (tacking), d. hostile claim of right
Trevino case: visible, continuous
Commander v. Winkler: hostile
e. notes
(1) long historic effect
(2) adverse can clear up title
(3) what is adverse possession?
(4) must be hostile
(5) statutes of limitation (multiple)

5. discovery and occupation
6. patent (grant) from sovereign
[7. other means: a. accretion v. avulsion, b. capture v. correlative rights] 31

Decotiis & Steele, Skills of the Lawyering Process
1. capabilities: which?
2. reading, writing, case analysis, research? NO(!?)
3. skilled generalists, here; contrast other practitioners
4. strategies that matter: client relations, negotiation, document preparation, learning, courthouse activities [also: management, not included]
5. teaching documt prep: start w/legal pad?
6. relevance of law schl? 32

possessory estates:
1. fee simple absolute
   O to A & heirs
2. life estate
   O to A for life
[3. others: later]

future interests:
4. remainder
   [O to A for life] and then to B & heirs

problems:
1. to Grantee & heirs
2. to Grantee & heirs; heirs claim a remainder
3. to Grantee in FSA
4. to Grantee for life, then to Grantee’s son & his heirs
5. to Grantee for life; no further gift

Chinn v. Chinn
Notes
1. rights and duties: agreeing cotenants had right; other’s objection not relevant: why?
2. accounting: must employ good faith to make it profitable and account. Objecting cotenant had reasonable argument! why?
3. useful, but messy. why?
   a. many cotenants
   b. don’t know/trust well
4. a family disaster
5. partition suit: division, sale

Estate of Mitchell
1. took title: as joint tenants.
   (meaning? presumption?)
2. dissolution suit, TRO
3. Robert’s severance declaration
4. what is a joint tenancy?
5. how to sever?
   presumption of community, b.
   death before severance/divorce, c.
   after divorce: cotenancy, unless awarded,
   d. effect on passage at death
7. effect of TRO: a. absolute right to sever? NO, b. avoids violating TRO? YES, because not transfer: Robert successful

Notes
1. parties’ strategies
2. severance: what effect
3. Robert’s severance: dirty trick, or what law expected?
4. what if K not to sever?

Problem 3C: Pravelka-Damani Deed
1. The assignment; the previous problem
2. Tenancy in common: what language?
3. The deed form
   a. elements (look at form)
   b. how to complete it
4. detailed instructions
a. conforming gender, singular/plural
b. consideration: why?
c. property description, careful: why?
d. habendum & warranty: to H & W heirs; defend against all; why?
e. all exceptions to title
f. taxes
g. acknowledgement; why?

5. EVERY remaining encumbrance
a. MUST be an express exception! Why?
b. But not those that will be removed at closing. Why?

6. What if joint tenancy desired?
7. Function of the title report

"tenancy by entirety (TE)
like j tenancy, but only H & W, not severable usually except by divorce; abolished in most States

Goldman v. Gelman: security interest in one tenant's tenancy-by-entirety; severed by divorce; both resulting tenancies in common awarded to other cotenant

notes
1. mortgage on one TE (or JT) interest usually unwise. why?
2. mortgage on TC less risky. why?

"security interests
notes
1. different names and types
2. Goldman case: what if Gelman hadn't obtained security interest?

1. Historic common law: unity; dower/courtesy
2. Married Women's Acts
3. Uniform Dissolutn of Marriage Act
4. Equitable Dist.
5. UMPA
6. Meanwhile: community prop continental system

community property
Estate of Mitchell shows:
1. divisible on divorce
2. characterization important
3. passage on death too
4. community presumption
5. protections of community

additional points:
1. which States (southwestern rim)
2. separate: gift, devise, descent; inception/title; partition
3. differences among States
4. what's community
5. the presumption; commingling
6. homestead

notes
1. mixed-up bank acct: W premarital acct check
   earnings acct; check
   100 shares. 5 yr, 10 x value; who gets it? H: commingling. W:
   inception/title, tracing. What if commun funds used on part/debt?
   (reimbursement).
2. H prefers characterizing as community, not reimbursement. Why?
3. med degree as prop? career as prop? Graham;
   The dumpor-dumpee scenario
4. the professional-as-wage-slave scenario
5. valuation (very important to property lawyers)
   a. capitalizatn/earnings
   b. multiple/earnings
   c. market value
   d. hist. cost (book val)
   e. replacement cost
6. should difficulty of valuation mean it's not prop? (Graham case) 42

Is earning capacity property?
1. Graham = most states (Tx.)
2. NJ: reimbursement alimony, based on contributions
3. how value spousal contributions?
4. business goodwill is divisible. Should pers goodwill be?
5. refusal to characterize human labor as propty?
6. N.Y. approach, based on its D.R. statute: prof degree is prop; so is career 43

common law States; difference
UMPA
1. marital, individual, mixed
2. mixed equals marital unless traced
3. broad power/agreements
4. managemt: titling, etc.
5. creditors: presumption marital
6. survivorship
   EXCEPT DETAILS, this is commun prop system!
7. add: reimbursement 44

trusts
1. what is a trust?
   a. legal-equitable
   b. settlor, trustee, beneficiary
2. creation: a. parties, b. res,
   c. formalities, . intent (language)
3. fiduciary duties
   a. loyalty, b. non-self-dealing,
   c. prudence, d. preservation,
   e. noncommingling (segregate),
   f. account
4. surcharge; example, market-value self-dealing
5. other fiduciaries: executors; bus. officers, attorneys
6. trust uses: a. children, b. flexibility (spray, etc.), c. tax effects (bypass), d. business
7. do you want to serve as tee? 45

in re Rothko
notes
1. not honesty alone . . . .
2. prudence, advice/counsel not enough
3. difference between fiduciary duty & ordinary K with Rothko
4. which duti(es) violated? loyalty, self-dealing, prudence, account, preservation?
5. surcharge amount: appreciation damages
6. do you want to serve? (yes and no) 46

Problem 3C: Davis Operating Trust
1. the divorce
2. the accommodation: home for her, access to (and provision for) son, for him
3. tenancy in common; purchase price responsibility; limited homestead right by agreement; trust
4. lawyering tasks:
   a. for H: adapt form of Operating
4. TRANSACTIONS: THE PURCHASE AGREEMENT

road map for real estate transaction

1. Brokerage

2. Negotiations

3. Earnest Money Contract
   or
   Agreement of Purchase and Sale

4. Fulfilling Financing Preconditions

5. Fulfillment of Inspection Preconditions

6. Fulfillment of Title Preconditions

7. Preparation of the Core Documents: Note, Deed, and Mortgage
   [or Deed of Trust]

8. Preparation of Ancillary Documents

9. Closing: Execution of the Documents

10. Title Insurance, Funding, Recording, Delivery, Possession

getting in the mood--why be careful about agreements?

1. Asimov, Foundation
   a. meaningless rhetoric
   b. promises don't mean what you want them to
   c. what isn't said matters
   d. how to analyze

2. McElroy, Ross and Me
   a. enthusiasm seems to promise results & prompts victim's investment; then, pull the rug out
   b. changing the deal
   c. refusing to make reasonable agreements
   d. killing the deal arbitrarily
   e. accusations & hardball
   f. exploitation of vague or half-way deals
      [g. nonperformance]
      [h. false accusations of nonperformance]
      [i. aggressive interpretation of the deal]

3. People do these things: a. because they are sloppy, b. because of wishful thinking, c. because of strategy

brokerage

1. roles of brokers
2. the brokerage agreement
   a. exclusive v. nonexclusive
   b. ready, willing & able
   c. liability concerns
3. terms: duration, post-term sales, Statute of Frauds
4. terminology
Frady v. May: the transaction; the financing condition; the two contracts; 1st failed the parties' strategy; Statute/Frauds prevents recovery except under written K
Court salvages recovery: how?
notes
(1) requirement of a writing
(2) closed under 1st or 2nd K?
(3) passage of equitable title--meaning?
(4) what if buyer defaults--seller still owe?

extra-contractual liability tension: prospective defendant wants to limit liability to K. fairness, predictability, risk. prospective plf wants open non-contractual liability. fairness, expectation, risk.
Hoffman v. Connall
2. Broker adopts seller's representations that reasonably seem true. (Broker must.)
3. Three approaches: (a) warranty (strict) liability, (b) negligence liability, (c) no duty to buyer.
4. Court adopts (b). why? not negligent here; why?

notes
1. broker lost by winning
2. broker's liability reduct n

brokerage agreement
1. price & terms--what, why?
Negotiating techniques
" firm, fair offer
" THE negot method:
- unreas 1st
- conceal point
- pretend reas
" other techniques
- merits
- blame client
- reverse psych
- agenda
- drafter
- barg chip
- time
- collateral cons
- whipsaw
- focal points
- clubbiness
- physicalities
- mediator
- feigned emotion
- test/strength

Notes
1. ethics? (what about, agree, repudiate, & raise?)
2. importance of negotiation?
3. importance of the merits?

Problems
1. out-of-pocket medical only
2. give me your best shot
3. client is unreasonable
4. tell me what s fair
5. doesn t want to cash out

the (infamous) Farah case: posturing about intent is tortious: fraud, duress, etc.

Notes
1. is negotiating a tort?

2. are some misrepresentations ok in negotiation?
3. does Farah require firm, fair offer?
4. will Farah produce a don t negotiate mentality?
5. distinguishing/justifying Farah?

requisites of the property transfer agreement:
Statute of Frauds
Kmiec v. Reagan--
no legal (surveyable) description
held: some description sufficient if owner owns only 1 tract that fits.
Here, one tract, sufficient; other, not.

Notes
1. loose v. strict cases
2. other terms--price?
3. kinds of documents covered

Problem 4A: Wilson v. Prairie
1. the set of pleadings
   a. petition (like complaint)
      exhibit A (the agreement)
   b. answer (and counterclaim)
   c. special exceptions (like motion to dismiss)
   d. setting of hearing
2. Statute of Frauds
3. roles assigned
4. types of arguments (based on Kmiec)
5. standard: assume all in petition true; if under law no way plaintiff can win, dismissal
6. how to argue motion
   a. introduce
   b. legal standard
c. GET TO POINT--
   no learned counsel etc.
d. explain why, as to intelligent lawyer 58

conditions precedent/preconditions
1. inspection conditions
   Allen v. Cedar Real Estate
   a. K: subject to purchaser s approval of environmental;
      satisfaction std.
   b. condition not met, but purch claims K enforceable
   c. condition precedent
   d. seller s responsibility, under law;
      BUT--no K!
2. financing conditions
   Frady v. May
   a. most land is financed
   b. what if condition omitted?
   c. usually more detailed
   d. why a condition instead of pre-financing?
3. title conditions
   a. why agree, if title unsure?
   b. methods: satisfactory v. usual v. permitted encumbrances
   c. the free look concern & how it arises
   d. Texas custom: good title, plus insurance 59

Preferred Properties v. Indian River:
claim of oral/implied extension
notes
1. strategies re: (a) term,
   (b) extension, (c) exercise
2. full agreement included 60

escrow
1. three-way, with stakeholder
2. attys, title co s, etc.
3. seller escrows; buyer escrows (earnest $)

Matter of Akivis--escrow to secure seller s removal, held by atty; no standards in escrow K; held, escrowee has duty of reasonable inquiry, liable for breach
notes
1. caught in the middle (as trustee!)
2. escrowee prefers agreement allowing action on party s certification
3. earnest $ as escrow 61

real estate sales agreement
1. Can you give me big picture?
2. yes and no
3. six elements
4. competing objectives: a. obtain expected benefits, b. reduce/shift risk, c. reduce ambiguous obligations, d. clarify obligations received
5. mutual objective: agreement
6. purchaser s view
7. seller s view
8. purchaser s 3-time protection:
   a. time of agreement, b. period of pendency, c. closing
9. traditional, customary solutions
10. universality 62
sample agreement
1. parties
2. property
3. price
4. financing
5. earnest $
6. title policy/ survey
7. condition, inspection
8. broker fees
9. closing
10. possession
11. special provisions
12. settlement expenses
13. prorations
14. casualty loss
15. default/remedies
16. mediation
17. attorney s fees
18. escrow
19. representations (warranties)
20. [tax]
21. notices
22. merger, etc.
23. option
24. consult attorney 63

merger clauses and extra-K liability
1. the parol evidence rule
2. the policy basis for the rule
3. extent of the rule: inconsistency
4. merger clause: entire agreement
5. fraud: the dilemma
6. compromise solution case
Woodlands Land v. Jenkins
1. merger clause, but boilerplate, not sophisticated, not dispute resolution
2. statutory fraud (§ 27.01(a))--a. false rep, b. real estate, c. purpose of
inducing, d. reliance
3. § 27.01(d)--non-disclosure, actual awareness (not here)
4. exemplary damages (yes, but not here)
5. mental anguish (yes, but not here)
6. cost of repairs (damage amount) 64

Problem 4B: Damani-Pravelka
Renegotiation
1. the problem: inadequate agreement
2. how: use document analysis (6 elements), plus this chapter
3. status letter: format, terms
4. renegotiation
a. use all possible techniques
b. explain them
c. give all offers/counteroffers
d. ethical issues
e. must reach agreement (but tell why you wouldn’t have if so) 65

5. TRANSACTIONS:
FINANCING AND
CONVEYANCING
DOCUMENTS
1. Real Estate Lenders
FNMA; secondary market
S&L crisis of the 1980's
private law, FNMA-driven
2. Loan Documentation
retail & secondary
result: negotiation, but common elements
public law: e.g., required disclosures
flat-rate & adjustable
the credit quartet: rate, term, amortization, amount
core documents: note, deed, mortgage, deed of trust
other documents at closing
recording

Figure 1
Real Estate Finance:
A Simplified Diagram

Seller
funds
deed

Lender note and Buyer-
mortgage/deed of trust Borrower

real estate promissory notes
1. promise (contract) to pay
2. acceleration
3. relation to mortgage
4. deficiency judgments
5. legal limits on deficiency j s
6. resale: assumption (liability on note); subject to debt (no liability)

Moore v. Bank Midwest
1. lenders: Gibraltar, which sold note to Midwest
2. original buyer-borrowers: Moores. Then:
   a. assumption sale to HSA
   b. HSA s subject-to sale to MGM
3. MGM abandoned. But: who s liable?
4. the deficiency statute in this state: limited by FMV, found by jury; prevents windfall
5. negotiated provisions & customary;

here, 20% of outstanding principal balance
6. costs, etc. recoverable
7. unambiguity desirable

Notes:
1. assumption v. subject-to
2. battle of the appraisers
3. what should deficiency statute say if bidding is vigorous?

sample promissory note
1. negotiable instrument (¶s 1-3)
2. adjustable rate (¶ 4)
3. caps (¶ 4(D))
4. right to prepay (¶ 5) v. penalty
5. usury/illegality savings clause (¶ 6)
6. default & remedies (¶ 7): late fee, acceleration, recovery, costs
7. other provisions (¶ 8-10)
8. uniform secured note (¶ 11):

Deed Components
deed descriptions
1. plats v. metes-and-bounds
2. reference to other landmarks; reservations
3. rules of construction: ambiguities; conflicts

Ferriter v. Bartmess
1. ambiguous reservation
2. conflict: it says SW corner, but locates also by road intersection that is not at SW corner.
3. the dance hall reserved (what fun!)
4. rules/construction: a. liberal construction to effect intent; b. interpret grant favorably to
grantee, reservation to grantor; c. rights to center of road; d. avoid extrinsic evidence if unambiguous; e. if conflict, prefer definite & ascertained

5. here, SW corner prevails--why?  

notes

1. Theriault v. Murray: monuments (vegetation) gone. Controlled by . . . monuments, courses, distance, quantity in that order. Figure where monuments were(!)

2. The Shady Oaks ambiguous description (why is it ambiguous?)

3. What the attorney advised doing: nothing(!)

Problem 5A: sketch plat

1. the assignment
2. tendency to neglect the property description: junior-est lawyer, etc.
3. purpose: how see ambiguities? how resolve? should we neglect? 

deeds and warranties

1. Ohio: a. general warranty, b. limited warranty (also, special warranty)--only defects created by grantor, c. quitclaim

2. language: Ohio, Texas

notes

1. grantor by SWD who never had title: no recovery on warranty
2. when use SWD?
3. what difference if grant by GWD?
4. suit under warranty not preferred method!
5. quitclaim to the moon?

6. when use quitclaim?
7. conveyance w/out warranty
8. variance from prescribed or customary language? (wisdom?)

Brown v. Lober

1. general warranty contains covenants
   a. of seisin, b. against encumbrances, 
   c. of quiet enjoyment

2. problem: seller sold without excepting 2/3 of minerals, now owned.

3. suit on warranty fails, though. Why?
   a. covenant of seisin is breached at conveyance; limitations has run.
   b. covenant of quiet enjoyment requires ouster; none, here.

notes

1. how should deed have been written? (exception!)
2. what if suit on covenant vs. encumbrances? (probably violated at time of conveyance)

St. Paul Title Co. v. Owens: up-chain warrantors are liable too--but, limits!

sample deed of trust: big picture

1. reading documents; how?
2. fine print matters
3. is there a big picture?
4. the other golden rule
5. lender's interest in valid security
6. lender's interest in payment
7. lender's interest in protecting
8. lender's interest in
foreclosure/remedies
9. lender's interest in short duration:
due-on-sale clause
10. rights provided borrower

sample deed of trust: notes
1. is conveyance to trustee a conveyance? what's the power of sale?
2. default: what remedies, with what requirements?
3. default other than nonpayment: what if borrower removes walls?
4. hazard insurance: why? what if borrower doesn't obtain? what if destruction, fire?
5. other default: what if maintenance assessment unpaid, association records lien?
6. foreclosure method? process?
7. substitute trustee: why?
8. other remedies by law (deficiency)
due-on-sale: notes
1. meaning of ¶ 17
2. federal legislation about due-on-sale: in public interest?

" deed as a financing doc: title to mortgage depends on deed; lender usually drafts/approves deed
" the straight mortgage
1. explicit conveyance to lender; east of Mississippi
2. judicial foreclosure
3. New York approach: protect debtor to time of sale, much less after
Bank of New York v. Sheik:
very limited set-aside

Figure 3

The Deed of Trust Mortgage

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<td>Lender note</td>
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<td>Deed of Trust Trustee</td>
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deed of trust mortgage
1. historical origin: used straw trustee to expedite
2. equity: still a mortgage
3. use today; trustee isn't a trustee
4. regulation by law
5. trustee's duties: notice, process, reasonable auctioneer
6. wrongful foreclosure, injunction, set-aside

Allied Capital Corp. v. Cravens:
complaint is, lender over-advertised, interfered w/debtor's own sale(!)

notes
1. power of private sale v. suit to enjoin
2. odd claim, here; rejected, but--it partly worked (bought time)
3. deed in lien of foreclosure

the foreclosure process

notes
1. how exacting must compliance be?
2. other irregularities: inadequate price?
3. other processes: reasonable auctioneer

Problem 5B: Damani-Pravelka
Foreclosure
[1. notice of default; notice of acceleration]
2. appointment of substitute tee
3. request to act
[4. notice of sale]
5. affidavit of notice/posting
6. conduct of the sale--various substeps
7. substitute trustee's deed

lien, title, redemption
1. comm l: mtg conveys seisin; absolute deed; repay, law day, = defeasance
2. common l vs. equity: competition; no adequate remedy/law
3. equity of redempn: petition to set aside deed, reconvey if pd, even not in conformity/mortg
4. uncertainty clouded lender's title
5. equity responded: foreclosure (=foreclosure of equity/redemp)
6. lender's effort to prevent equity of redemp; e.g., initial waiver
7. equity responded: clogging equity/redemp prohibited
8. today: foreclosure process set by law; instrument can't avoid, if a mortg

Bank v. Chunkapura
1. trustee isn't one (hired gun); lender, only bidder. (today, vultures ?); less than value (mkt)
2. Mont, lending crisis; no power/sale; passed Sm Tract Financing Act
   a. judicial: equity redemp 1 yr
   b. legis compromise: pvt sale mortg; no equity/redemp, no deficiency action
   c. judicial not amended
3. lender elects judicial, here (Why?)
   a. other states allow defic
   b. slower, but get defic
4. holding: apply limits of Act to judicial too
   a. legis compromise
   b. possible overreaching
   c. judicial, 1 yr equity redemp not valuable enough to borrower
5. dissent (critique): judicial already balances equities; holdg exacerbates lending problem; mkt will create bids if widespread overreach; statutory constr; legis can solve if problem

the vendor's lien
1. automatic, operation of law, pay purchase price
2. advantages/disadvantages
3. should be express (in deed, so recordable)

Chrissikos v. Chrissikos--
Andy paid for home; unsecured note; homestead; vendor's lien (also,
notes

1. what creates vendor's lien? (what if Andy had loaned $ to Theo & Sophia? No lien!)
2. what effect if no lien, since it's homestead?
3. the resulting trust: why, here?
4. modern usage: put expressly in the deed
5. what if not express in deed? Not recorded; malpractice suits

Problem 5C: Pravelka-Damani
Assumption Sale
1. complete the assumption deed (how differ from non-assumption)
2. not the subject-to deed (why not?)
3. deed of trust to secure assumption: assuming-purchasers grant security interest to sellers. Why?
4. preparing the DTSA
5. due diligence w/lender:
   a. balance; b. nondefault;
c. due on sale; d. estoppel letter

6. TRANSACTIONS: TITLE ASSURANCE
customary contract requirements
record title
   good title
   or, good & indefeasible
marketable title
   insurable title
   permitted encumbrances (listed)
Texas custom: good & indefeasible,
   plus insurance (sometimes, marketable)

Conklin v. Davi

K: marketable & insurable, only permitted encumbrances; title based on adverse, but testimony by insurer, willing.

notes

1. record, good, marketable, insurable--which here?
2. adverse is both sword and shield
3. permitted encumbrances approach here

Title recording acts

1. pure race: a. of 2 BFP's, first to record gets title. b. policy: clarity.
2. pure notice: a. BFP w/out notice gets title. b. policy: tempers clarity w/avoidance of sharp practices.
c. disadvantage: notice is messy fact, muddies record. d. Texas statute.
3. race-notice: a. 2nd BFP wins only if 1st to record. b. policy: fairness, but encourage recording.
c. disadvantage: messy facts. d. New York statute

Sanchez v. Telles
1. Texas: pure notice
   then, O [Montoya] defective deed,
   no exception B [Sanchez], recorded.
Telles records; Sanchez then obtains correction deed.

3. Held: for Telles. Sanchez’s unacknowledged deed was nullity, though recorded.

notes
1. what if Sanchez’s deed valid & acknowledged? (Sanchez wins, even if not recorded. why?)
2. what if Telles had validly recorded, immediately?
3. non-acknowledgment: should it destroy notice?

race-notice
1. the New York statute
   a. 2nd purchaser wins only if 1st to record
   b. contrast pure race
2. Vitale v. Pinto
   O option to A [Vitale], unrecorded
   O mortgage to B [Lloyd], recorded.
3. what if Lloyd had no notice?
4. but, held: Lloyd had inquiry notice.

notes
1. effect of race-notice: Lloyd wins only if no notice AND recorded first. why?
2. inquiry notice: how extensive a search?
3. what creates?
4. what interests are recordable? lease, option, etc.

unrecordable interests: adverse possession, etc.

What result, under race, notice, race-notice?

Figure 1
Second Purchaser Records First
O transfer recording A $
O transfer recording B $

Figure 2
First Purchaser Records First, but after Second Sale
O transfer recording A $
O transfer recording B $

Figure 3
Transfer by Unrecorded Interest Holder to Remote Grantee (C)
O transfer recording A
O transfer recording B
A transfer recording C

interpreting recording acts: reasonable search concerns; chain of title

Ellingsen v. Franklin County:
road easement filed in engineer’s office. Held, not constr notice; otherwise, title search
impossible. [dissent: statute says, file there.]

notes
1. concept of chain of title
2. concept of reasonable search
3. still, though, multiple records
   public recording--document is filed; then:
   1. grantor-grantee index; grantee-grantor (reverse) index
   2. title search, based on index
   3. what if not indexed right?
      Howard v. Brunson: no constr. notice

title examination
1. follows chain as indexed
2. reas search, only after grantor received title, until grantee received.
   Misses grants before & after. See Fig. 4.
3. effect on interpretation
4. what you won’t find: improperly indexed, wild deed, before-after
   In re Dlott (citing Morse v. Curtis)
   1. A (mortgage) B; B (deed) C, w/notice; C records;
      B records;
      C (deed) D, BFP.
   2. D won’t find mortg by reasonable search! Why? It was conveyed before D’s grantor, C, obtained C’s interest.
   3. Held, for D; no constr. notice.
   5. Questioning this rule(?)

Witter v. Taggart
Lawrance

Tract A
Tract B
[plus scenic] [burdened
easement] by easement,
burdening but doesn’t
Tract B] say so]

Witter
Taggart
held: no notice to Taggart, actual, constr, or inquiry.

notes
1. what if easement recorded in Taggart’s chain?
2. Bishop v. Reuff: opposite result!
   Why? (What policy?)

Marketable title acts
1. English [& Eastern U.S.]
2. Model Act: 40 yr.
3. problems: a. interests left open by
documents are not cut off.
   b. overfiling.
4. other states: adverse p

Abstracts, Plants, Torrens
1. abstracts of title
2. title plants: by tract
3. Torrens: why not keep public
   records by tract?
4. Certificate system
5. Problems: a. disuse; b. interpre-
tation to avoid unfairness

title examination
1. abstract: correctness?
2. adverse p: examiner makes half-
circle (e.g., Burton conveyance) for defect/encumbrance; crosses out when cured--or, ignores, if adverse p. certain.

3. non-sale transfers: probate, plat. Check for proper docs.

4. the title opinion: caution. Limit promises! Avoid strict liability (warranty where no control!)

Title insurance: K liability
Manley v. Cost Control: insurer & abstractor knew or should have of wetlands; didn't warn; law[s] . . . regulating occupancy, use and wetlands designation excepted. Held, no liab under K, or outside K.

1. wetlands: disastrous for buyer.
2. why even insure?
3. extra-contractual: why?
4. title commitment/binder
5. different result: L. Smirlock case. Buyer knew, but insurer liable anyway--didn't expressly except!

6. reliance on title report--?

Title insurance: extra-K liab
1. reconsider Manley
2. recovery from seller, broker, etc.--possible; limited; solvency
3. policy limits: if buyer improves (or appreciation), won't cover

Somerset Savings v. Chicago Title: K, negligence, negligent misrep. claims; integration (merger) clause; exclusions (any law . . . , etc.); no consent to bldg permit by transportation agency. Held: no K liability, but liable as abstractor/volunteer for negl or negl misrep.; merger clause against pub policy.

Notes
1. purchaser's motivation to seek extra-K?
2. effect on insurers and future insureds?

The insurance policy
1. structure--5 parts:
   a. coverage definition
   b. exclusions from coverage (printed)
   c. conditions & stipulations
   d. declarations page (the particulars)
   e. exceptions (like exclusions, but negotiable, depending on propy)

2. exceptions/exclusions: bigger than coverage

3. your auto insurance, similar structure. casualty, liability, etc. This info is general, useful.

4. importance of insurance policy and law!

The ALTA (American Land Title Ass n) policy
1. structure: covered risks, exclusions, conditions, declarations (Sched. A), exclusions (Sched. B).

2. covered risks? (a) forged deed, no title;
   (b) recorded mortg; (c) land unsaleable;
   (d) landlocked; (e) $10,000 to defend title.

3. not covered (exclusions)?: (a)
zoning law or wetlands; (b) pending unrecorded condemnation; (c) easement known about by insured, didn't tell; (d) potential claim yet unasserted vs. propty.

4. conditions/stipulations? (a) judgment; didn't notify insurer. (b) insured refuses deposition. (c) insured wants to prevent settlement. (d) purchase $50,000, now worth $250,000 (merger clause).

5. exceptions? (a) adverse possessor; (b) boundary doesn't close; (c) prescriptive easement; (d) recorded utility easement but not excepted.

6. extra-premium deletions

7. what's actually insured? third party liability

Page v. Frazier: agreement says atty solely to protect interests of lender; lender's practice was, employ atty to certify clear title; Page relied; but, no title. held, not actionable.

notes
1. purchaser looks for liability
2. attorneys: relationship; duty; negligence. Disclaimer customary.
3. abstractors: negligence/negligent misrep
4. surveyors: Craig case: seller hired; buyer recovered because entitled to rely.
5. lender liability: many kinds of claims.

Problem 6A: Pravelka-Damani
1. the problem: state of the title
2. the title report: 6 kinds of exceptions
3. items that will remain encumbrances or easily be cured (all but mineral reservation)
4. assignment: assignment: assignment: counsel assignment: counsel assignment: counsel the Damanis

Problem 6B: Pravelka-Damani
1. continuing the problem
2. economically wise to cure?
3. steps--examine: (a) the mineral deed, (b) deed restrictions on grantee, (c) nonconveyance before restrictions, (d) grantee's interest released
4. cost? how to bill the client?
5. assignment: letter to title co. requesting deletion; evaluate economics.
6. non-assignments; prepare invoice; locate documents.

Morgan, Client & Public Relations
1. why effort projectn?
2. defining problem
3. niceness
4. how project effort?
   a. attention (phone)
   b. do something now
   c. treat as important
   d. suit: uniform
   e. sell 'em paper
      1. every paper
      2. Dear Mr. Jones
   f. bill projects effort
5. accept addl responsbl
6. community

7. TRANSACTIONS: CLOSING, TERMINATION, REMEDIES

closing
1. anticlimax
2. documents executed
3. before & after closing
4. lawyer s function
termination
1. under an option
2. failure of condition
3. disagreement/ambiguity
problem: Pravelka-Damani
1. late-discovered easement
2.-3. different positions
4. agreement: usual, common exceptions
5. counseling Damanis: choices

Dover Pool & Racquet v. Brooking
1. agreement requires good, record, & marketable title
2. except existing . . . laws
3. notice of new zoning law
4. buyer refused to close (chancy!)
5. title is good, record & marketable
6. but buyer guessed right: recission based on mutual mistake of fact

notes
1. unpredictability
2. what if a good deal?
3. this case, K relatively clear!

Hillard v. Franklin:
home destroyed during K period; seller kept $35,000 insurance; buyer seeks specific performance.

1. general rule
2. nature of equitable remedies

notes
1. Skelly v. Ashmore--5 different rules when no insurance(!) Most common: risk on purchaser
2. agreement should cover both loss and insurance (see sample EMK, above, placing risk on seller).
3. should the risk be on the purchaser (or seller?)
4. equitable conversion: does it justify placing risk on buyer?

contract for deed
1. what is it? why use?
2. seller s concern: will court treat as mortgage?

Turbiville v. Hansen
1. contract for deed, escrow, agreement to preserve liquor license, buyer resells to ineligible person, escrow is on demand
2. escrowee delivered deed to seller on demand; buyer s loss; on demand; buyer s loss; on demand; buyer s loss

remedies

damages: basic remedy at law
Brett v. Wall: seller s damages
1. not limited to deposits as liquidated dmgs because no deposits (is this correct?)
2. difference, K price, mkt price on date of breach (loss of bargain dmgs)
3. plf sellers proved price on date of trial

notes
1. proof can be difficult (here, court too strict?)
2. battle of the appraisers?
3. specific performance as a seller's remedy—consider later

Beard v. SE Venture: buyer's damages
1. bankruptcy: rejection
2. K: seller's discretion to terminate (but good faith requirement implied)
3. the Fleureau rule: no loss-of-bargain damages for good-faith title defect
   Not applicable because--
   a. rule came from time in England when title records lacking
   b. this wasn't a title defect (failure to complete construction)
   c. no good faith (not defined by malice)

notes
1. damages are tricky: estimate mkt value, at proper time
2. Fleureau rule: sensible?
3. out-of-pocket damages (sale & contract costs), benefit of bargain, consequential damages (rental of substitute)

liquidated damages & earnest $  
Kelly v. Marx
1. K says deposits are liquidated damages
2. lower court used 2nd look: review amount at contract and later, after loss. Here, buyers defaulted, but seller sold at higher price.
3. this court: one look only, at time of K. Function of liquidateds, to avoid proof problems. 5% ($17K-plus) reasonable here.

notes
1. usefulness of liquidateds
2. functions of earnest $  

3. reasonable estimate, not penalty; one-third too much, 5% reasonable.
4. conditions, measure, exclusivity: according to agreement.

lis pendens
1. what it is
2. what it does
3. equitable remedies
   specific performance
   Hillard v. Franklin
   court ordered specific performance, with insurance abatement
   1. what is specific p?
   2. a flexible remedy: nature of equity
   3. inadequate remedy at law requirement
   4. land usually meets requirement: unique
   5. Centex v. Boag: specific p. denied to seller because money not unique
   6. Brett v. Wall (previous §) allowed specific p or damages (alternative) to seller. Theoretically, wrong; why?

recission/reformation
Doover Pool & Racquet v. Brookings: pending zoning law, unknown
1. was Dover case a mutual mistake of fact?
2. the poltergeist reputation case, Stambovsky v. Ackley: fraud or actionable nondisclosure supports recission

equitable remedies generally
1. history of equity
2. restitution (unjust enrichment)
3. compared to compensatory damages
4.-5. constructive trust
6. resulting trust
7. others: equitable lien, accounting, backpay, subrogation
8. continuing evolution: the palimony example
9.-10. institutional reform decrees declaratory relief

Ejectmt: D
ousted my tenant
1. common l pleadgs
2. forms of action
3. growth: history, not logic
4. fictions
Trespass/Try Title
1. petition contents descrip, interest, possn, ouster
2. possessor is D
3. defense: not guilty
4. abstract/title
5. surveyor, etc.

**PAPERBACK BOOK: THE ANATOMY OF A REAL PROPERTY TRANSACTION**

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**Seller**

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<td>Buyer</td>
<td>1. uniform covenants</td>
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<tr>
<td>Lender</td>
<td>1. function of closing</td>
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<td>A deed/trust is literally a conveyance</td>
<td>2. escrow usage</td>
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<td>in trust, but not really; it's really a</td>
<td>3. escrow disadvantages</td>
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<td>privately foreclosable mortgage, and the</td>
<td>4. borrower's undertakings</td>
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<td>trustee isn't one.</td>
<td>5. voluntary disclosures</td>
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<td>1. deficiency?</td>
<td>6. required disclosures</td>
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<td>1. due-on-sale</td>
<td>7. Reg Z statement</td>
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<tr>
<td>2. borrower credit?</td>
<td>8. disclosure cost/benefit</td>
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<td>3. other concern?</td>
<td>9. closing instructions</td>
</tr>
<tr>
<td>4. due/sale controversy</td>
<td>1. deed restrictions</td>
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<td>5. golden rule</td>
<td>2. force of restrictions</td>
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<td>1. PUD rider</td>
<td>3. lapse</td>
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<td>2. adjust/rate rider</td>
<td>4. zoning compared</td>
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<td>3. self-destruct rider</td>
<td>5. homeowners assn</td>
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<td>4. forms &amp; riders</td>
<td>6. powers/duties</td>
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<td>1. trace to sovereign?</td>
<td>7. maintenance fee</td>
</tr>
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<td>2. adverse possession</td>
<td>8. officers/directors</td>
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<td>3. driveway easement</td>
<td>1. assumption instrumts</td>
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<tr>
<td>4. examiner's method</td>
<td>2. assumption v. subject-to</td>
</tr>
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<td>5. marketable legislatn</td>
<td>3. lender's consent</td>
</tr>
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<td>6. marketable, record, good</td>
<td>4. terms for consent</td>
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<td>7. recording system</td>
<td>5. alternative: new note</td>
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<td>8. taxes, judgments</td>
<td>6. estoppel letter</td>
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<td>9. variations; attys</td>
<td>7. other docs</td>
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<td>1. deductibility</td>
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<td>2. recognition</td>
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<td>3. capital gain</td>
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<td>4. ord, nec bus exp</td>
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8. **LIMITS ON REGULATION OF PROPERTY**
constitutional and statutory limits
1. empowering provisions, fed/state
2. limiting provisions, fed/state
lesser protection for economic rights?
1.-2. Friedman’s view: economic rights needed for political
3. argument against
Fifth and Fourteenth Amendments
history: 13th Amendment, CRA of 1866,
14th Amendment, Slaughter House cases
notes
1. regulation decreasing worth:
   deprivation?
2. if so, nothing’s constitutional!
3. liberty of contract: anti-regulatory
   reasoning

Fifth and Fourteenth Amendments:
Text—let’s read them.
3 distinct clauses:
1. Due Process Clause:
   no person [shall] be deprived of
   life, liberty, or property without due
   process of law
2. Equal Protection Clause: nor deny .
   . . the equal protection of the laws
3. Takings Clause
   nor shall private property be taken
   for public use, without just
   compensation

Lochner v. N.Y.
N.Y. statute limited baker’s hours.
Held,
We do not believe in the soundness of
the views which uphold this law. Not
a direct & substantial health & safety
law; liberty of contract.
Holmes: the rational and fair
legislator
Harlan: baker’s work can be seen as unhealthy
notes
1. contrasting modern rational basis
to Lochner
2. criticisms of Lochner—judge’s
   idiosyncratic preferences; anti-
   democratic
3. defending Lochner
Nebbia v. New York
1. rational basis test (court uses both
types of rhetoric but adopts
   Holmes)
2. burying freedom of contract
3. rational speculation?

Williamson v. Lee Optical:
ophthalmologist or optometrist, not
optician. May be needless, wasteful
. . . but upheld.
Duke Power Co. case
notes
1. hypothetical, speculative, etc.
2. are mere economic interests
   really separable from political
   interests?
3. retroactive tax legislation: OK
Village of Belle Terre v. Boraas:
Zoning
1. economic impact
2. most limits are legislative/
   administrative
3. but: family living arrangements?
   equal protection?

What’s a Taking?
(How determine?)
" existing doctrine (precedent)?
" words and context?
" historical intent?
what makes sense (policy)?  what judges think is ethical?

Court s holding:
" no general rule;  ad hoc, factual inquiry ; BUT
" perm physical occupation is a taking. (Virtually per se.)

Why?  

Taking Clause: WHY?
A. Fairness?
   1. Avoids sacrifice of individual to common good.
B. Economics?
   2. Limiting thoughtless govt intervention.
   3. Harmonizing competing uses.
   4. Encouraging investmt

Loretto v. Teleprompter
I. Facts: New York law provides that a landowner must permit a cable television company to install its facilities on his property. TelePrompter installed thin cables across the roof and side of Loretto s building, together with metal boxes, affixed with nails or screws.

II. Held: A taking.

III. Principles: A permanent physical occupation is a taking regardless of public interests served. It chops through the entire bundle of rights that makes up property, denies the owner the right to exclude, and presents few problems of proof. Regulations requiring safety or tenant facilities are different, because they do not involve occupation by another party. (The dissent argues that this per se rule is unjustified and that a multifactor balancing test is historically required.)

What is PROPERTY ?
What does it MEAN to say you OWN something?
(an idea, a car, a wetlands, a home, a trademark, a bank account . . .)

Bundle of Rights

Nollan
" Perm phys occup?
" Does ambiguity defeat purpose of per se rule?
" How tell whether perm phys occup (in close case)? [rt to exclude]
" Hypoth: street dedication req d of subdiv developer.
" Close fit requirement

A city usually regulates new subdivision development
" Requires plat approval.
" Conditions that on dedication of streets, etc.

Nollan continued:
Even if p phys occ, State can salvage if . . . what?

Close fit; nexus
1. Present here?
   Scalia: No. Lateral easement can t solve access to beach or view block.

Brennan: Yes.

2. Why require close fit? (Prevent state s pretextual sacrifice of chosen indiv?)

   Brennan: No.  

Lateral easemt
doesn t solve?
" psych barrier/access;
" view
Step 1: City wants a chunk of Jim s land for a park (but doesn t want to pay for it).
Step 2: City realizes, can t just TAKE IT.
Step 3: City identifies a unique (but unrelated) feature of Jim s land to REGULATE.
Step 4: The regulation is, Jim must deed the City the chunk of land for a park.

_Dolan:_ rough proportionality between regulatory need & amount taken.
(Why? Prevents taking a mile when an inch would do.)
_Lucas:_ destruction of all econ benefit also a virtual per se taking.
_Consider:_ 1. Indian lands case. 2. Swamp land used for mud racing. 3. Andrus v. Allard (no sale bald eagle parts).

_Penn Central v. N.Y._
1. What N.Y. did
2. Zoning s OK. How historical preserv differ?
3. Regulation v. taking if goes too far
4. How tell if goes too far (too far as to what)?
5. Multi-factor balancing approach
6. How Rehnquist differ from Brennan?
   a. Multifactor?
   b. Treatment of factors?
   c. Who s right?

The Factors (as I see them):
1. Econ impact on investment-backed expectations?
2. Phys invasion?
3. Broad pub purpose?
4. Comprehensiveness? (Reciprocity?)
5. Noxious uses?
6. Acq for govt. use?

A good test?
What problems w/multifactor test?
Why so mushy?
Two approaches:
1. Formalism: apply rule rigorously to facts; define rule clearly.
2. Instrumentalism: determine policy factors; apply to accomplish purpose.
3. Advantages? Disadv?
4. Which is Nollan? Which Penn Central?

_Remedy; compensation ( inverse condemnation )_

_First English Evangelical_
1. Remedy obvious? (in Constitution!) No, govts argued; remedy is repeal.
2. Argument against: deterrence of some proper regulation
3. Argument favoring
   a. Text of Constitution
   b. What most likely deterred?
      (most dubious, most damg)
   c. What if comp not req d?

_price regulation: a taking?_ (pub utilities, rent control)
1. no other use; firm can t quit business; regulated, so inevitable loss?
2. the Hope test: cost plus competitive return
   a. why include return?
   b. what return?
3. the new regulation
   a. used & useful
   b. must allow higher return? Edsel-Mustang analogy

Ball Devel. Co. v. Va. City
1. Different?: (a) real (b) open-ended (c) harder (d) can't just say, I'm liberal/conservative
2. Factual background
   a. 2 versions?
   b. How developed?
3. Documents
4. Notes
   a. Apply due p; taking?
   b. taxation?
   c. escrow: why?
   d. real case ??

1. Complaint
   Does it state/claim? What is function? How many claims?
2. Answer: state, fed rules
3. Fact development
   a. discovery
   b. affidavits
4. Motions/summ j
   a. no genuine issue of material fact
   b. procedure
   c. 2 versions?

state-law restrictions
1. constitutions: Texas s taking or destruction
2. state authorizing laws; prohibitory laws

Tex. Gov t Code ch. 2007

notes
1. extends beyond constitutional takings: 25% reduction trigger
2. toothless? (no damages, only recission order)
3. toothless? (exceptions, e.g. municipalities)

APPENDIX: THE LIFE OF A LAWYER
1. What % dissat?

Where I want you to be: satisfied!
2. Why these stats?
3. Compare physcns

4. What makes diff? (Do we know?)
5. Why this coverage? Mushy content, uncertain answers, depressing?
6. If trying to avoid pitfalls, what will be nature of what you study?
   (a) pleasant things
   (b) unpleasant ones
   the goal (remember!)

7. time usage (managemt)
   (1) billable rec ds
   (2) administrative
   (3) personal life
   (4) short tm deadlns
   (5) long tm deadlns
   (6) wipeouts (flex)
   (most imp variable?)

8. adversary sys
   " oppos attys
   " oppos parties
   " judges
" rules
cost
unpredict
unintended

9. people/ your side
" clients
morals
intellect
popular knowl
attitude/you
" co-counsel
" employees
saying NO 157

10. business mgmt
" business plan?
" financing? [KONTEST]
" personnel?
" equip/inventory?
" style?
" accounting?
" systems?
" govt/employer?
" change/technology? 158

11. stress
" what it is
" what produces
" what it does
" managing

12. relationships

13. dealing w/failure
" law school
" practice
" Lombardi

14. anger

15. health

16. subst abuse 159