**Business Law Study Review Chapters 4-6**

**Have a general understanding of the history of the Constitution including dates and main drafters; how did the creation of the Declaration of Independence differ from the creation of the Constitution (generally)**

1774-Continental Congress

1776-Declaration of Independence

1778-Articles of Confederation

1787/1788-Constitution

Declaration of Independence: 1776 declared our independence from England

Constitution: the fundamental law of the United States of America

**What is the Bill of Rights; when was it enacted; why weren’t these protections included in the original constitution (generally)?**

-The first 10 amendments to the Constitution

-Added in 1791

-The Bill of Rights guarantees certain fundamental rights to natural persons and protects those rights from intrusive government action

-Originally did not think it was necessary but added it to guarantee these freedoms

**What are the two major functions of the Constitution?**

-Creates the three branches of government

-Protects individual rights by limiting the government’s ability to restrict those rights

**What is federalism; what are enumerated powers and reserved powers; why does the constitution specifically reserve powers to the states (generally)**

**-**Our country’s form of government, the federal government and all 50 states share powers

-enumerated powers: certain powers delegated to the federal government by the states

-reserved powers: any powers that are not specifically delegated to the federal government by the Constitution are reserved for state governments

-to empower states to deal with local affairs

**What is the doctrine of separation of powers?**

Each branch of federal government has different powers:

1. Legislative branch: power to make law
2. Executive branch: power to enforce law
3. Judicial branch: power to interpret law

**What is the doctrine of checks and balances; examples of each?**

Placed into the constitution so no one branch becomes too powerful

-Judicial branch has authority to examine the acts of the other branches to make sure they are constitutional

-Executive branch can only enter into treaties with approval of the senate

-Legislative branch can create federal courts and enact statues to change judicially made law

-The president can veto a bill passed by congress 2/3 of the senate and the house needed to override it

-The House has the power to impeach the president

**What is the supremacy clause/preemption doctrine?**

-Establishes that the U.S. constitution and federal treaties, laws, and regulations are the supreme law of the land

-Federal law taking precedence over state and local law

**What is the commerce clause?**

Grants congress the power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes” has a greater impact on business than any other provision in the constitution

**What is interstate and intrastate commerce?**

-Interstate: Commerce that moves between states or affects commerce between states

-intrastate: Local commerce that does not move between states (state police power), the federal government may regulate intrastate commerce if it *affects* interstate commerce.

**What does the federal government control?**

Foreign commerce authority to regulate.

**What does the state government control?**

Intrastate commerce that occurs within the State’s borders.

**What is the restriction on state/locals laws and interstate commerce?**

Any local interstate activity that has an effect on interstate commerce is subject to federal regulation.

**What is state police power?**

-Power that permits states and local governments to enact laws to protect or promote the public health, safety, morals, and general welfare.

-retention of power to regulate intrastate commerce and much interstate commerce that occurs within their borders

**How many amendments are there; how is the Constitution amended**

-27 amendments to the constitution currently

- 2/3 majority vote by the House and Senate

**What is the incorporation doctrine?**

Most of the fundamental guarantees contained in the Bill of Rights are applicable to state and local government action

**What are the 3 types of speech under the 1st Amendment, examples of each, and what are the restrictions on each type; what is considered speech?**

Speech is oral written or symbolic speech

1. Fully protected speech: government cannot prohibit or regulate, includes political speech
2. Limited protected speech: can be subject to time, place, and manor. This includes offensive speech and commercial speech
3. Unprotected speech: not protected by the first amendment this includes:

-Dangerous speech: yelling fire in a crowded room

-Fighting words: likely to provoke a hostile violent response

-Speech that incites overthrow of the government

-Defamatory language: untrue statement about someone else

-Child pornography

-obscene speech: movies, videos, music

**What are the two clauses related to freedom of religion; what is provided by each?**

-Establishment clause: Prohibits government from establishing a government-sponsored religion or promoting particular religions

-Free exercise clause: Prohibits government from prohibiting or inhibiting people from participating in or practicing their chosen religion

**What is the equal protection clause; what are the three tests and the requirements of each and the classes it pertains to?**

-The government cannot deny to any person within its jurisdiction the equal protection of the laws.

-If a law treats similarly situated persons differently, a court may review its constitutionality, using one of three tests.

a. Strict scrutiny test: Applied by courts to classifications based on suspect classes (e.g. race, national origin, citizenship) or fundamental rights (e.g. voting)

b. Intermediate scrutiny test: Applied to by courts to classifications based on protected classes (e.g., gender)

c. Rational bias test: Applied to by courts to classifications not involving a suspect or protected class

**What are the two types of due process; what does each require?**

This Clause provide that no person shall be deprived of life, liberty, or property

-Substantive due process: Requires laws to be clear and not overly broad reasonable person standard

-Procedural due process: Requires proper notice and hearing before depriving them of life, liberty, or property

**What does the privileges and immunities clause provide; what is the level of discrimination allowed?**

-Prohibits states from enacting laws that unduly discriminate in favor of their residents

-Only applies to citizens, not corporations

-Cannot prevent residence of other states from owning property or business in state

**What is a tort?**

A wrong

**What are the two types of monetary damages for torts; what is the burden of proof?**

-Compensatory: money

-Punitive: punishment of the defendant

The prosecution (plaintiff) has the burden of proof

**What are the 3 major types of torts and their characteristics?**

1. Intentional tort: conscious desire to cause harm or knowledge harm was substantially certain to result
2. Unintentional tort (negligence): ignores intent elements
3. Strict liability: only concerned with the act

**What is the reasonable person standard?**

Hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability

**What are the elements of assault; what is the standard?**

-Threat of immediate harm or offensive contact, action that creates reasonable apprehension of imminent harm

-Actual physical contact is unnecessary

-Threats of future harm do not count

**What are the elements of battery; what is the standard; what is the transferred intent doctrine; what is the role of consent?**

-Unauthorized and harmful or offensive physical contact that causes injury

-Need not be direct contact (throwing something)

-Need not be aware of contact (sleeping)

**What are the elements of false imprisonment; what are merchant protection statutes and their elements?**

-Intentional confinement or restraint of another without their permission, without authority or justification

Merchant protection statutes:

-Reasonable grounds for suspicion

-detained for reasonable period of time

-investigations conducted in reasonable manner

**What are the elements of misappropriation of right to publicity?**

Appropriation of a living person’s name or identity for commercial purposes

**What are the elements of the right to privacy; what is false light?**

-Unwarranted or undesired publicity of a private fact about a person, the fact does not need to be untrue

-False light: The privacy laws in the United States include a non-public person's right to protection from publicity which puts the person in a false light to the public.

**What are the elements of defamation?**

-Untrue statement of fact

-Published (heard or saw) to a third party

**What are slander and libel; what is the rule for public figures?**

-Slander-spoken

-Libel-written

-Public figures cannot recover for defamation unless they can prove that the defendant acted with actual malice. This means that the defendant made the false statement knowingly or with reckless disregard of its falsity.

**What are the elements of fraud?**

1. The wrongdoer made a false representation of material fact

2. The wrongdoer had knowledge of falseness and intent to deceive

3. The innocent party justifiable reliance on representation

4. The innocent party was injured

**What are the elements of intentional infliction of emotional distress; what is the required level of mental distress?**

-Extreme or outrageous conduct

-Intentionally or recklessly causes severe emotional distress

- “so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society”

**What are the elements of negligence; what are the characteristics of each?**

Defendant owed a duty of care to the plaintiff: Not to cause any unreasonable harm or risk of harm standards applied, reasonable person standard, reasonable professional standard

Defendant breached this duty of care: Failure to exercise care is a breach of duty, expose to a foreseeable, unreasonable risk of harm, act or failure to act

Plaintiff suffered injury: Defendant’s negligent act caused plaintiff’s injury:

**What are the characteristics of the special negligence doctrines?**

**Negligent infliction of emotional distress**: a person who is not physically injured, but suffers emotional distress, because of the defendant’s actions can recover damages from the defendant for emotional distress

**Professional malpractice**: professional who breaches this duty of care is liable for the injury for their negligence

**Negligence per se**: The violation of a statue already in place to protect people that is breached and causes injury

**Res ipsa loquitur**: The thing speaks for itself

-the defendant had exclusive control of the situation that caused the plaintiff’s injury

-the injury would not have occurred but for someone’s negligence

**Good Samaritan laws**: relieves medical professionals from liability for ordinary negligence when they stop and render aid to victims in emergency situations

**Assumption of the risk**: Plaintiff who (1) had knowledge of the risk (2) voluntarily assumed that risk

**Contributory Negligence**: holds that a plaintiff who is partially at fault for his own injury cannot recover against the negligent defendant

**Comparative Negligence**: damages are apportioned according to fault

**Be able to identify specific torts from factual patterns. What is strict liability/product liability; how does it primarily differ from negligence; what are the types and examples of each?**

-Liability without fault.

-Care taken is irrelevant.

-Applies to merchants

-Chain of distribution liability

a. Defect in manufacture: occurs when the manufacture fails to properly assemble a product

b. Defect in design: when a product is designed incorrectly

c. Failure to warn: occurs when a manufacture does not place a warning on the packaging of products that could cause injury is the danger unknown

d. Defect in packaging: when a product has been placed in packaging that is insufficiently tamperproof

**What are the defenses to product liability?**

1. Generally known danger: some products are inherently dangerous
2. Government contractor: when places manufacture things for the government
3. Abnormal misuse of a product: plaintiff abnormally uses product
4. Supervening event: materially altered or modified
5. Assumption of the risk: plaintiff knew the risk
6. Statute of repose: limit a manufacturer’s and seller’s liability to a certain number of years form the date when the product was first sold

**What is the definition of crime?**

-An act

-Done in violation of those duties owed to society and

-For which breach the law provides that the wrongdoer shall make amends to society

**What is the presumption of innocence?**

-A person in the United States is considered innocent until proven guilty

**What is the burden of proof in a criminal trial; how are the parties to a criminal action different from a civil action?**

-The prosecution has the burden of proof

-For criminal cases the accused must be found guilty beyond a reasonable doubt (compared to preponderance of the evidence for civil)

-Conviction must me a unanimous jury vote

**What is a crime; what are the different classes?**

Felony: The most serious crime. Mala in se (inherently evil) and are usually punishable by imprisonment

Misdemeanor: Less serious than a felony, they are mala prohibita (prohibited by society) and are usually punishable by a fine and/or a imprisonment less than a year

Violation: Least serious, generally punishable by a fine

**What are the penalties for crimes?**

-Fines

-Imprisonment or probation/community service

-Capital punishment

**What are the purposes of punishment?**

Incapacitation

Rehabilitation

Deterrence

Protect from retribution

**What are the 2 general elements of a crime; what is actus reus and mens rea; what is a non-intent crime?**

1. Criminal act (actus reus): the defendant must have performed the criminal act actus reus means guilty act
2. Criminal intent (mens rea): the defendant must be found to have the requisite state of mind when the act was preformed, mens rea means evil intent
3. Non-intent crime: reckless negligence that causes injury to another person

**What is probable cause?**

The substantial likelihood that a person either committed or is about to commit a crime

**When is an arrest warrant required/not required?**

-it is not requited if the police arrive during the commission of a crime or a person is fleeing from the scene of a crime

-it is required when the judge is needed to find probable cause to make the arrest

**What is booking?**

After arrest the person is taken to the police station, administrative procedure for recording an arrest, fingerprinting, taking a photo and so on

**What is an indictment or information; when is each required?**

-Information: the charge of having committed a crime based on the judgment of a judge (usually a misdemeanor)

-Indictment: the charge of having committed a crime based on the judgment of a grand jury (usually a felony)

-required when a person needs to be formally charged with a crime

**What is a grand jury and its purpose?**

-Evidence of serious crimes are presented, 6-24 citizens who must evaluate the evidence

-Determine if there is a sufficient amount of evidence to hold the accused for trial

**What is an arraignment; what are the 3 pleas and the meaning of each?**

**-**Arraignment is after an indictment or information is issued

-a hearing during which the accused is brought before a court and is

1. Informed of the charges against them

2. Asked to enter a plea

a. Guilty: they did it

b. Not guilty: does not admit guilt

c. Nolo contendere: agrees to the punishment but does not admit fault

**What is plea bargaining?**

Negotiation prior to trial with the intent to avoid trial

**What are the steps from arrest through plea bargaining?**

1. Arrest: arrest warrant, warrantless arrest
2. Booking
3. Indictment or information: Grand jury indictment or information
4. Arraignment: Defendant is informed of charges, plea is entered, guilty, not guilty, nolo contendere
5. Plea bargaining

**What are the steps of a criminal trial?**

1. Jury selection
2. Opening statements
3. Plaintiffs case
4. Defendant’s case
5. Rebuttal and rejoinder
6. Closing argument
7. Jury instructions, deliberation, verdict
8. Entry of judgment

**What are the possible results of a trial; who can appeal?**

-if found guilty the defendant can appeal

-government cannot appeal if defendant is not found guilty

-if jury cannot come to unanimous decision it is considered a hung jury, may retry case before new judge and jury

**What are the elements of: robbery, burglary, larceny, theft, receiving stolen property; arson, extortion, forgery, embezzlement, bribery, money laundering and criminal fraud?**

**Murder**: Unlawful killing of a human being with malice aforethought, Felony murder rule

**Robbery:** Taking of personal property from another by use of fear or force

**Burglary:** Unauthorized entry with intent to commit a felony

**Larceny**: Wrongful and fraudulent taking of personal property

**Theft:** All three combined

**Receiving stolen property**: Knowingly receive, intend to deprive

**Arson**: Malicious or willful burning of a dwelling of another

**Forgery**: Written document, fraudulently made or altered, that affects legal liability of another

**Embezzlement**: Fraudulent conversion of property by one to whom it was entrusted

**Bribery:** Transfer of value for a favor

**Extortion**: Obtaining another’s property with consent by wrongful use of actual or threatened force, violence or fear.

**Money Laundering:** Knowingly engage in monetary transaction involving property from an unlawful activity worth >$10,000**,** Knowingly engage in a financial transaction involving the proceeds of an unlawful activity

**Criminal fraud**: Obtaining title to property through deception or trickery

**What acts are covered by the ITAD Act and the IIP Act?**

Identity Theft and Assumption Deterrence Act

-Knowingly transfer or use

-Without authority

-Identity of another

-With intent to commit an unlawful activity

Information Infrastructure Protection Act

-Intentionally access and acquire information

-From any internet attached computer

-Without authorization

**What is RICO and its purpose?**

-acquire/maintain an interest in, use income from, conduct or participate in

-affairs of an enterprise

-through a pattern of racketeering activities

**What is a criminal conspiracy?**

2 or more persons enter into an agreement to commit a crime, overt act

**What is corporate criminal liability?**

-Corporations are criminally liable for the acts of their managers, agents, and employees.

-Sanctions may include fines, loss of license or loss of franchise.

**What protections does the 4th amendment provide; when is a search warrant required/not required; what is required to obtain a search warrant; what is unreasonable search and seizure; what are the exclusionary rule and its exception?**

-Prohibits unreasonable search and seizure, a search warrant is usually necessary, Persons, houses, papers, and effects

Warrantless searches:

-Incident to arrest

-Plain view

-Destruction of evidence is likely

-Certain industries

-Exclusionary rule: Evidence acquired through an unreasonable search may not be introduced at trial, Good faith exception may allow evidence to be used.

**What are the protections against self-incrimination?**

Fifth Amendment provision that a person may not be required to be a witness against himself or herself in a criminal case

**What are the Miranda rights?**

-A criminal suspect must be informed of their rights before interrogation

1. Remain silent
2. Anything said can and will be used
3. Right to consult a lawyer and have one present during questioning
4. Appoint a lawyer if can’t afford

-Statements given before Miranda rights are given may be excluded from evidence.

**What are the protections of attorney client privilege; what other relationships are/are not covered?**

The Fifth Amendment protects communications between attorney and client.

Other privileges have been recognized:

-Psychiatrist-patient

-Clergy-penitent

-Spouse-spouse

-Parent-child

Some states recognize accountant-client privilege

**What is immunity from prosecution?**

The government’s agreement not to use against a person granted immunity any evidence given by that person

**What is the double jeopardy protection?**

Fifth Amendment protects persons from being tried twice for the same crime.

**What are the Sixth Amendment guarantees?**

-Right to a public jury trial in a criminal case

-Right to confront witnesses against the accused

-Right to an attorney

-Right to a speedy trial

**What are the Eighth Amendment provisions on cruel and unusual punishment?**

Prohibits cruel and unusual punishment