

Genuine Agreement

Jake and his friend, Eddie, have just finished pushing Jake's "new" car six blocks to the Novak's apartment building after the transmission gave out.

Juleanne: Look at this, Jenny. Our brother, the tycoon, seems to be having some trouble.

Jake: (With obvious exasperation.) I'm not having any trouble, thank you.

Jennifer: He's not having trouble, Julie. He's having a great time pushing that sporty Mustang around town. I'll bet he's impressed quite a few girls with the speed of that beauty.

Jake: Stow it, will you please? I wouldn't be having this problem if Mr. Johnson hadn't put sawdust in the transmission to trick me. If only I'd asked him about the transmission. If he had lied outright, I'd get him for fraud. As it is, I'm stuck. Right, Eddie?

Eddie: Don't ask me. You're lucky I'm even speaking to you after conning me into buying your CD player.

Jake: Now, you can't hold that against me. I had no idea it was defective.

Juleanne: Sounds like misrepresentation to me.

Eddie: That's exactly what it was! Say, can I sue him for that?

Juleanne: Sure, but it won't do you any good. He hasn't got any money.

Eddie: He's got the money I paid him. He can have his worthless CD player back.

Juleanne: I forgot about that. You could make him rescind the contract.

Jake: I'd like to rescind my relationship with you.

Juleanne: I'm just trying to help.

Eddie: Are you going to give me my money back?

Jake: I would if I could.

Eddie: You could borrow the money from your father.

Jennifer: No, he can't. Dad's in real hot water too.

Eddie: I thought he got that metal type back.

Jennifer: He did. Then the Elrod Paper Company doubled its price on the special parchment paper for that Literary League job.

Eddie: So why didn't he go to another paper company?

Jennifer: He tried, but no one else carried that kind of paper. The Literary League was pushing him on the deadline so he had to give in.

Eddie: That doesn't seem very fair.

Jake: No fairer than what Mr. Johnson did to me.

Juleanne: Maybe Mr. Johnson just made a mistake.

Jake: Right. He thought he was putting transmission fluid in the car and reached for the sawdust by mistake.

Juleanne: It's possible.

Jake: It's about as possible as what happened when you called that 900 number and Dad had to pay \$74 in phone charges.

Juleanne: That was different. Nobody told me to read the fine print.

Jake: The fine print was in bright red!

Eddie: (He has been looking at the written contract between Jake and Mr. Johnson for the sale of the Mustang.) Well, you're about to see some red of your own.

Jake: What are you talking about?

Eddie: This 1964 Mustang you just bought.

Jake: What about it?

Eddie: It's a '65.

Jake: What? Let me see that. (He takes the contract from Eddie.) That does it! I'm going to court!

New Terms

unilateral	concealment, p. 109
mistake, p. 106	misrepresentation, p. 111
bilateral	duress, p. 111
mistake, p. 107	economic
fraud, p. 108	duress, p. 111
rescind, p. 108	undue influence, p. 112
material fact, p. 108	



Learning Objectives

- 1.** Distinguish between unilateral and bilateral mistake.
- 2.** Determine what types of mistakes have occurred in a given situation and decide whether or not the contract can be voided.
- 3.** Explain fraud and differentiate fraud from concealment.
- 4.** Contrast misrepresentation and fraud.
- 5.** Distinguish between duress and undue influence.



The Spirit of the Law

If a valid offer has been made by the offeror, and a valid acceptance has been exercised by the offeree, a genuine agreement has been reached. The courts describe this genuine agreement by saying that there has been a “meeting of the minds” between the offeror and the offeree. Assuming the other three elements, consideration, capacity, and legality, are also present, then a valid contract exists between the parties. Sometimes, however, something goes wrong, and what seems like a valid contract on the surface turns out to be nothing of the kind. We then say that the contract or the agreement is defective. There are several circumstances that might create a defective agreement. These include mistake, fraud, misrepresentation, duress, economic duress, and undue influence.

Legal Issues:

1. Does the failure to read a written contract void that contract?
2. How can a deceptive action constitute fraud?
3. Is rescinding a contract a proper remedy for misrepresentation?
4. Are punitive damages a proper remedy for misrepresentation?
5. Can one party legally force another party to go along with sudden changes in a contract?

Mistake

The purpose of contract law is to fulfill the reasonable expectations of the parties to a contract. People sometimes enter into contracts in the belief that certain facts exist when they really do not. Or they believe that certain facts do not exist that really do. When the parties discover the truth, one or both of them may wish to avoid the contract. Avoiding the contract may or may not be possible.

Unilateral Mistake

A **unilateral mistake** is an error on the part of one of the parties to the contract. A person usually cannot get out of a contract because of a unilateral mistake. The mistaken party, through words or actions, has created reasonable expectations on the part of the other party to the contract. Those expectations should not be blocked because one of the parties has made an error.

Example 1. Sharonville received four bids for construction of a new city hall. Because their bid was the lowest, Angelini Construction got the contract. A few days after the contract was awarded, Angelini’s general manager discovered the bid should have been \$2 million, not \$1.5 million. Angelini Construction is bound by the contract to build the city hall for \$1.5 million.

Mistake as to the Nature of the Agreement

A mistake as to the nature of the agreement is one type of unilateral mistake. It cannot be an excuse to avoid a contract. Thus, people are bound

by a written agreement that they sign even if they have not read it or are mistaken as to what the writing says. By signing, they agree that the writing sets forth the terms of the agreement.

Example 2. In the opening vignette, Jake failed to read the contract between himself and Mr. Johnson for the sale of the Mustang. If he had read the contract closely, he would have known that the car was a 1965 model rather than a 1964. After Eddie points out the discrepancy to him, Jake wants to cancel the contract. In answer to Legal Issue 1, Jake's plea of ignorance and mistake would do no good because he had failed to read the document.

This same rule applies to people who cannot read English. The burden is on them to have the agreement read and explained to them by someone whom they can trust. If they sign without doing this, they will still be bound by the terms of the writing they sign.

Mistake as to the Identity of a Party

Another type of unilateral mistake is a mistake as to the identity of a party to a contract. Unlike the previous examples, this mistake may be cause to void a contract.

Example 3. Suppose you make an offer by letter to your friend Jill Gomez, who lives in a nearby town. The letter carrier delivers the letter to another Jill Gomez, who happens to live in the same town. The wrong Jill Gomez likes your offer and accepts it. The contract would be voidable because she is not the person you had in mind.

If, however, you are dealing face-to-face with a person you think is Jill Gomez, but who really is not, your mistake as to her identity will not prevent a binding contract. You are making an offer to the person facing you. She is the person who can accept it. Mistaken identity of this kind will not be grounds for voiding the contract.

Bilateral Mistake

Sometimes both parties to a contract are mistaken about some important fact. This is called a **bilateral mistake**. It is also known as a *mutual mistake*. If such an event takes place, the contract may be avoided by either party.

Mistake as to the Possibility of Performance

A bilateral mistake can be a mistake as to the possibility of performance. Suppose both parties entering into a contract believe that it can be performed when in fact it cannot. In this instance, either party may get out of the contract because of the bilateral mistake.

Example 4. Robert Houlihan agreed to sell his car to Cynthia Stamatopoulos for \$1,000. Unknown to both of them was the fact that the car had been totaled the night before and could not be repaired. Either one of them may avoid the contract on the ground of bilateral mistake as to the possibility of performance.

Mistake as to the Subject Matter

Both parties can be mistaken as to the identity of the subject matter when they enter the contract. In this type of bilateral mistake, the contract may be avoided by either one of them.

Reducing Legal Risks

If you are an offeree: Check and recheck all material facts. Ask for clarification of doubtful points. If the contract is important, get legal advice. Never rush into an agreement.

Example 5. Josephine Kyle agreed to sell and Marilyn Kavanaugh agreed to buy four lots of land on Prospect Avenue in Culver City. Kavanaugh refused to go through with the agreement when she discovered that the land she thought she was buying was on another street, Prospect Road, also in Culver City. Kyle sued Kavanaugh for breach of contract. Because there was a bilateral mistake as to the identity of the subject matter of the contract, Kyle lost the case against Kavanaugh.

Fraud

Another circumstance that may create a defective contract is fraud. In answer to Legal Issue 2, **fraud** is a deliberate deception to secure an unfair or unlawful gain. Persons who are induced to enter into contracts by fraud have a choice. They can **rescind**, or cancel, the contract or sue for money damages. In fact, because of the deliberate deception involved in fraud, the defrauded party may also try to collect *punitive damages*. These are damages designed to punish the wrongdoer for his or her conduct. Thus, punitive damages go beyond the amount of money needed to pay back the victim.

Example 6. Suppose that during their negotiations, Jake had directly asked Mr. Johnson, “Is this a 1964 Mustang?” and Johnson, knowing it to be a 1965, said, “Yes. It’s a 1964.” If Jake relied on Mr. Johnson’s statement and bought the Mustang, he could either get out of the contract or sue Johnson for damages. He might also consider asking the court for punitive damages.

To succeed in a lawsuit for fraud, the party bringing suit must prove five elements: (1) there must be a false representation of fact; (2) the party making the representation must know it is false; (3) the false representation must be made with the intent that it be relied upon; (4) the innocent party must reasonably rely upon the false representation; and (5) the innocent party must actually suffer some monetary loss.

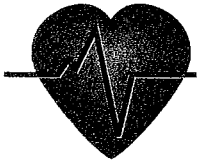
False Representation of Fact

First, in proving fraud there must be a false representation of a material, existing fact. A **material fact** is one that is important; it matters to one of the parties. It cannot be a promise of something to happen in the future. Nor can it be someone’s opinion.

Example 7. Suppose that instead of saying that the car is a 1964 Mustang, Mr. Johnson said, “This is a really flashy car. You’ll get plenty of dates with it.” Jake would not have a cause of action against Johnson for fraud for those statements alone if they turned out to be false.

The law allows a certain amount of “sales talk” (sometimes called “sales puffing” or “sales puffery”) without considering it to be fraudulent. The statement, “This is a really flashy car,” is an example of such talk. The statement, “You’ll get plenty of dates with it,” is not only the seller’s opinion, but it is also a promise of something to happen in the future.

Law and Health



Listening Well

Listening well is an important skill. Learn to listen well in every situation, whether the speaker is a family member, friend, co-worker, advisor, or someone you don't know. Listening well will help you avoid the mistakes and misunderstandings that can lead to conflict and legal proceedings. It will also help you be sure you achieve the results you have in mind. Here are some suggestions that will help you listen well.

Focus Your Attention—Suppose you make a verbal contract with a portrait photographer. The photographer, Paul, offers a choice of backgrounds for your portrait and explains the effect of each. Will you hear Paul if you are thinking about the movie you saw last night?

Look at the Speaker—Facial expressions or gestures add emphasis. Paul knows his job, and his face lights up when he talks about a

certain background for the portrait. If you are daydreaming, you may not notice.

Be Sure You Understand—If you do not understand, ask! You may think if you ask Paul to repeat the explanation, it will be obvious you were not listening. Asking for clarification, however, is better than deciding without all of the information you need.

Consider the Speaker's Point of View—Paul took time to help you make an informed decision. Have you been fair to Paul by not listening? Listen to others as you would expect them to listen to you.

Suppose you make a decision without all of the information Paul offered. You get the portrait and do not like it. You may no longer want to pay Paul, but do you have a choice? Has Paul failed to meet the terms of your contract? The portrait might have been better if your decision about the background had been an informed decision.

1. What are the four parts of listening well?
2. How will listening well help you?

Material false representations need not be confined to oral or written statements. Actions intended to deceive, such as painting over the rust spots on a car or turning back the mileage on a car's odometer, are considered to be false representations.

Example 8. In the opening vignette, we are told Mr. Johnson put sawdust in the transmission of the Mustang so the car would run smoothly. He intended to fool Jake into thinking that the car was in top condition. As indicated earlier, this action constitutes fraud.

Under some circumstances, individuals can make a false representation by not saying something that they should say. This is called **concealment** or *nondisclosure*. Concealment may be just as fraudulent as actively deceiving an innocent party. In most situations the parties to a contract are not required to reveal all things about the contract that they are entering. However, certain situations give rise to a duty to reveal. For example, if one party knows about some hidden problem that cannot be easily discovered by the other party, that knowledge would create a duty to reveal that hidden problem. Let's say that one of the parties has special knowledge about the subject matter and the other party relies on the expertise of that knowledgeable party. This situation would obligate the knowledgeable party to reveal any material fact that the other party is relying on him or her to provide.

Representation Known to be False

A second proof of fraud is that the party making the representation must know that it is false. This element may be satisfied by proving actual knowledge. Or it may be proved by showing that the statement was made recklessly, without regard for its truth or falsity.

False Representation Intended to be Relied Upon

Third, to prove fraud, the false representation must be made with the intent that it be relied upon. That is, the person making the misrepresentation must intend that the other party rely upon it as part of the contract negotiations.

Example 9. Suppose that Jake, while visiting Mr. Johnson several months ago, asked, "Is this a 1964 Mustang?" and Johnson, with no intention of selling the car but with knowledge that it was a 1965 model said, "It's a 1964." If Jake then went out and bought a similar Mustang somewhere else, thinking that it was a 1964, he could not win a lawsuit against Johnson for fraud. Johnson did not make the statement with the intent that Jake rely upon it.

False Representation Actually Relied Upon

A fourth proof of fraud is that the innocent party must reasonably rely upon the false representation. Sometimes persons will make misrepresentations to others who pay no attention to them. If one pays no attention to a false representation, one cannot bring suit for fraud. The false representation must be reasonably relied upon by the other party at the time that it is made.

Example 10. Suppose that when Johnson tells Jake that the car is a 1964 Mustang, Jake is accompanied by George Timmer, an antique car expert. He takes Jake aside and tells him that the Mustang is actually a 1965 and worth much less than the amount Johnson is asking. If Jake goes ahead and buys the car at Johnson's price, he could not succeed in a lawsuit for fraud because he did not actually rely on Johnson's false statement.

Resulting Loss

Finally, in proving fraud, the innocent party must actually suffer some monetary loss. Someone may make a false statement to you. Relying on it you enter into a contract. Unless you suffer loss as a result, you cannot win a lawsuit for fraud.

Example 11. Suppose that Johnson's Mustang is a 1964 model. Suppose further that Johnson is unaware of the value of the Mustang and believes that a 1965 is more valuable. In trying to deceive Jake he tells him that the car is a 1965 Mustang. Jake relies on this falsehood and buys the car. He later learns that it is a 1964 model, worth considerably more than he paid. He would have no grounds for a lawsuit for fraud because he has suffered no loss. Moreover, Johnson has no grounds for a suit despite his loss. Only the innocent party can ask to cancel the contract because of fraud.

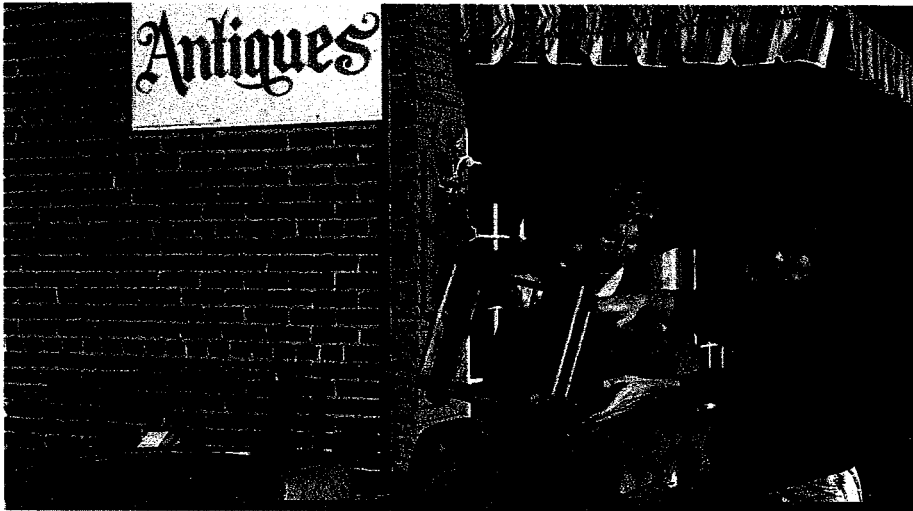
YOU And The LAW

Are there limits in your state on the amount of damages that can be paid when a lawsuit involves fraud?

Innocent Misrepresentation

Sometimes a person will make an innocent statement of supposed fact that turns out to be false. The person honestly believes it to be true, but it really is not. Others may expect a person to have certain knowledge. If that person's statement of that knowledge turns out to be false, there has been a **misrepresentation**, or untrue statement of facts.

The law gives an injured party the right to rescind a contract because of an innocent misrepresentation. However, the injured party has no right to damages if the false representation is innocently made. In the opening vignette, Eddie was misled by Jake's misrepresentations about the condition of the CD player. In answer to Legal Issue 3, Eddie could legally force Jake to give him back his money, as long as Eddie gives back the CD player. However, in answer to Legal Issue 4, Eddie would be unable to collect damages.



FYI

All contracts contain agreements, but not all agreements are contracts. An agreement may or may not be legally enforceable. To be enforceable, an agreement must conform to the law of contracts.

◀ Sometimes unique handmade objects, such as rugs and furniture, are sold by their owner in the mistaken belief that they are antique. Can someone who buys such an object then prosecute the seller for fraud?

Duress

Parties to an agreement must enter into it voluntarily, not under duress. Otherwise, it cannot be enforced. **Duress** is overcoming a person's will by use of force or by threat of force or bodily harm. Agreements made under duress are either void or voidable. When actual physical force is used to cause another to enter a contract, the contract is void. When a threat of physical force is used to cause another to enter a contract, the contract is voidable. Such a threat may be made against the party to a contract or a member of his or her immediate family. The innocent party may avoid the contract if he or she chooses to do so.

Another type of duress is **economic duress**. It consists of threats to a person's business or income to cause him or her to enter a contract without real consent. In answer to Legal Issue 5, such a contract would be voidable.

Example 12. In the opening vignette, the Elrod Paper Company had a contract to deliver some special parchment paper to Mr. Novak by a certain date. Mr. Novak could not buy similar parchment paper elsewhere. Elrod threatened to not deliver the parchment paper by the agreed date

Reducing Legal Risks

If you are an offeror: Never participate in a fraud by misrepresenting material facts with the intent of deceiving someone. Avoid actions or words that might be considered duress or undue influence.

unless he agreed to an upcharge. Eventually, Mr. Novak signed a contract to buy the parchment at double the original price. He would be able to avoid the contract with Elrod on grounds of economic duress.

Note, however, that a threat to exercise one's legal rights is not duress. For example, a party with grounds to sue may threaten to do so or demand satisfaction.

Undue Influence

Another factor that can cause a contract to be voidable is undue influence. **Undue influence** is unfair and improper persuasive pressure exercised by one person in a relationship of trust with another person. Undue influence usually is exerted by a stronger person upon one who is weaker. Circumstances such as ill health, old age, or mental immaturity may put a person in a weaker position. The stronger person substitutes his or her will for the will of the weaker person.

Example 13. Paulding, an elderly woman, lived with her son, who was Paulding's only child and sole support. The son persuaded Paulding to sell him some land worth \$150,000 for \$50,000. Shortly before the transfer of title, Paulding discovered that her son was going to resell the property to Visconti for \$175,000 for construction of an apartment complex. The mother refused to go through with the sale. In the breach of contract suit that followed, the court found that the son had taken advantage of his mother's trust in him to persuade her to sell the land. Paulding could avoid the contract.

Chapter

8 Review



Summary

Carefully read the summary below before completing the chapter review.

1. If a valid offer has been made and a valid acceptance has been exercised, then a genuine agreement has been reached. Assuming that consideration, capacity, and legality are also present, a valid contract exists.
2. The circumstances that might create a defective contract agreement are mistake, fraud, misrepresentation, duress, economic duress, and undue influence.
3. A unilateral mistake is an error on the part of one of the parties to the contract. It may be a mistake as to the nature of the agreement or a mistake as to the identity of a party. A unilateral mistake usually does not allow a contract to be avoided.
4. When both parties to a contract are mistaken about some important fact, a bilateral mistake has been made. It may be a mistake as to the possibility of performance or a mistake as to the subject matter. The contract may be avoided by either party.
5. Fraud is a deliberate deception to secure an unfair or unlawful gain. To succeed in a lawsuit for fraud, the party bringing suit must prove five elements: (a) false

Chapter 8 Review

- representation of fact, (b) representation known to be false, (c) false representation intended to be relied upon, (d) false representation reasonably relied upon, and (e) resulting loss.
6. An innocent statement of supposed fact that turns out to be false is a misrepresentation. The law gives an injured party the right to rescind a contract because of an innocent misrepresentation.
 7. Duress is overcoming a person's will by use of force or by threat of force or bodily harm. Economic duress is threatening a person's business or income to cause him or her to enter a contract without real consent.
 8. Undue influence is unfair and improper persuasive pressure exercised by one person in a relationship of trust with another person.



Language of the Law

Choose the term from the list that best completes each sentence below. Then write the complete sentence on a separate sheet of paper.

undue influence	economic duress	fraud	misrepresentation
material fact	rescind	bilateral mistake	unilateral mistake
duress	concealment		

1. A(n) _____ is an innocent statement of untrue facts.
2. Securing an unfair or unlawful gain through deliberate deception is _____.
3. A(n) _____ is an error on the part of one of the parties to a contract.
4. Overcoming a person's will by use of force or by threat of force is _____.
5. Making a false representation by not saying something that should be said is _____.
6. Unfair and improper persuasive pressure is _____.
7. Threatening a person's business or income to cause that person to enter a contract without real consent is _____.
8. A(n) _____ has been made if both parties to a contract are mistaken about some important fact.
9. Persons who are induced to enter into contracts by fraud can _____ the contract.
10. A(n) _____ is something that is important; it matters to one of the parties.



Questions for Review

Answer the following questions. Refer to the chapter for additional reinforcement.

1. What is the difference between a unilateral mistake and a bilateral mistake?
2. What are two kinds of bilateral mistakes? Who may avoid a contract that contains a bilateral mistake?

Chapter 8 Review

3. What is fraud?
4. How does fraud differ from concealment?
5. How does fraud differ from misrepresentation?
6. What is the essential difference between duress and undue influence?



Applying Critical Thinking Skills

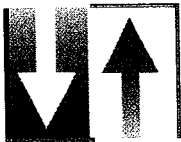
Apply your understanding of the chapter concepts by answering the questions below.

1. The purpose of contract law is to fulfill the reasonable expectations of the parties to a contract. What do you think this statement means?
2. Find a news article about a contract case in which punitive damages were awarded. Review the facts of the case from both the plaintiff's and the defendant's viewpoints. Then decide whether or not you would have awarded similar damages and explain why.
3. What are some relationships of trust in which one party might exert undue influence?
4. Give two examples of situations where a prospective buyer might be hurt by the use of "sales puffery."
5. Explain the effect that duress may have on a contract agreement.



Applying Decision-Making Skills

While you are at Eric's house, Serina calls to ask Eric about some stereo equipment he is selling. Eric tells Serina the stereo equipment is all top quality and hasn't been used much. You know for a fact that Eric is not being completely honest with Serina. What will you do?



Cases in Point

For each of the following cases, give your decision and state a legal principle that applies:

1. Norris Petroleum and Cambridge Oil, Inc. negotiated a deal. Cambridge was to sell certain oil wells, located in Kuwait, to Norris. The contract was finalized on the afternoon of August 2. Unknown to either party, the oil wells were destroyed that morning during the Iraqi invasion of Kuwait. Must Norris honor the contract? Explain.
2. Akeo Shimazu signed a form without reading it. He assumed the form was a request for a sample copy of an expensive book. When his order arrived, he found that he had actually signed an order form for the book itself. Shimazu refused the book, claiming he was not bound by the agreement because of his mistake. Is Shimazu legally bound by the agreement? Explain.
3. The basement of Rodney Wiseman's house flooded every time it rained. Nevertheless, when Phelps, a potential buyer, asked about water in the basement, Wiseman said that the basement was dry. Phelps had an expert check the basement for dryness. Can Phelps recover damages from Wiseman for fraud? Explain.

4. Estelle Petkins put her summer cottage up for sale. Edith Ong, who was interested in buying it, asked if it had termites. Petkins was not aware of a termite problem—her answer was no. Ong bought the cottage and later found termites. Does Ong have any recourse against Petkins for fraud? Explain.
5. Helena Crump was hired to take care of Lorna Boff, an elderly lady who was in poor health. Crump was a strong, persuasive person, and Boff was weak and ill. After caring for Boff for three weeks, Crump talked Boff into signing a contract agreeing to transfer all property to Crump. On what legal grounds may this contract be attacked? Explain.



Cases to Judge

*In each case that follows,
you be the judge.*

1. Yost purchased two horses from Millhouse: a two-year-old named Pand y and a yearling named Andy. Millhouse gave Yost the registration papers for Pand y and told Yost the papers for Andy would arrive later. Millhouse assumed that Andy was also registered. Yost later learned that Andy was not registered. Yost would not have bought the horse if this had been known. Yost eventually sold Andy at a loss. Can Yost win a lawsuit against Millhouse? Explain. *Yost v. Millhouse*, 375 N.W.2d 826 (Minnesota)
2. Benton signed some documents when she opened a cash management account with a brokerage firm. Benton did not read the documents because she could not read English. The broker did not know that Benton could not read English, and Benton did not ask the broker to read the documents to her. Is Benton bound by the agreement? Explain. *Merrill Lynch, Pierce, Fenner and Smith v. Benton*, 467 So.2d 311 (Florida)