ILLEGAL BARGAINS

What Makes a Bargain Illegal?

- Restatement 2d § 178. When a Term is Unenforceable on Grounds of Public Policy

- (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

Restatement 2d § 178. When a Term is Unenforceable on Grounds of Public Policy

- (2) In weighing the interest in the enforcement of a term, account is taken of
- (a) the parties' justified expectations,
- (b) any forfeiture that would result if enforcement were denied, and
- (c) any special public interest in the enforcement of the particular term.

Restatement 2d § 178. When a Term is Unenforceable on Grounds of Public Policy

- (3) In weighing a public policy against enforcement of a term, account is taken of
- (a) the strength of that policy as manifested by legislation or judicial decisions
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.

Public Policy Reasons Include:

- Immorality
- Unconscionability
- Economic policy
- Unprofessional conduct
- Obstruction of justice
- Paternalism
- Ultra vires

Recovery on an Illegal Executory Bilateral Contract

- Ignorance of Facts and Law
  - Where one party knew of facts regarding illegality and one reasonably did not, the innocent party may still recover by showing they were ready willing and able to recover but for the illegality. Issue is ignorance of facts, not of law.

- Bargain Illegal by Virtue of Wrongful Purpose
  - One party's knowledge of the other's illegal intent does not prevent recovery, unless the first party actively aids in the illegal venture.

Where the Parties are not in Pari Delicto

- *In pari delicto* (in pah-ree dee-lick-toe), adv. Latin for "in equal fault," which means that two (or more) people are all at fault. In contract law, if the fault is more or less equal then neither party can claim breach of the contract by the other.

- Where law is designed to protect one of the two parties to the agreement, the protected party may still be able to enforce rights under the agreement, even though the agreement violates the law.

Severance

- If the illegal provision is not central to the agreement and does not involve moral turpitude, the court may disregard the illegal provision and enforce the rest.
- Purposeful Interpretation and Reformation
- Rule of interpretation that says when a clause or agreement is susceptible to two readings, one making it legal, one making it illegal, the legal one will prevail.
- Reformation is also possible, but rarely used.

Effect of Licensing Statutes

- Traditional distinction made between statutes that are designed to produce revenue and those intended for consumer protection.
- If designed for consumer protection (and even if not, as the current trend goes), no recovery is allowed.
- Exceptions have been made in the interests of justice.

Remoteness of the Illegality

- Recovery may be denied if a contract for a legal purpose is carried out in an extra legal manner, if illegality is significant.
- Depositaries and Agents
- Illegally begat funds, deposited in a bank, cannot be withheld by the bank. The illegality is too remote.
- Divisibility of Illegal Bargains
- Parts of agreement with a legal purpose may be divided out and recovery allowed.

Restitutionary Recovery – Not *in Pari Delicto*

- Party who has performed under an illegal agreement and who is not guilty of moral turpitude and who, although blameworthy, is not as equally guilty as the other party, is entitled to restitution.

Restitution - *Locus Poenitentiae*

- *Locus poenitentiae* is a Latin phrase associated with contract law that means the opportunity to withdraw from a contract or obligation before it is completed or to decide not to commit an intended crime. This signifies repentance in the context of criminal law and provides an opportunity to withdraw from a projected contract before the parties are finally bound, or of abandoning the intention to commit a crime.

- A party who disaffirms the illegal agreement prior to illegality occurring may claim restitution.

- The party's actual motivation for disaffirmance is irrelevant to the court.

Change of Law or Facts After the Bargain is Made

- Subsequent illegality = impossibility

- Subsequent legality does not validate the contract, though it may be ratified.