

I. Contract Formation

A. Mutual Assent

i. Meeting of the Minds

- a. **Objective Theory** -- There must be an objective meeting of the minds for contract formation.
 - 1) Objective Standard -- The court must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.
 - 2) Jokes -- Only dispositive when the joker manifests the joke so that the other party can reasonably interpret it as such.
- ii. **Provisions that Prevent Contractual Liability**
 - a. **Corbin on Contracts (§34 at 138)** -- When the subject matter of an agreement is of a kind that is customarily dealt with in enforceable contracts, and the parties have in fact acted under the agreement, a court is likely to look with some distaste at provisions that seem to exclude all sanctions and remedy.

B. Offer

i. General

- a. **Definition** -- An offer is a manifestation of willingness to enter into a bargain made to give another person an understanding that her assent to that bargain is invited, and will conclude it. An offer is clear, definite, explicit, and leaves nothing open for negotiation.
 - 1) Manifested -- Offer must be communicated to the person to whom its addressed.
 - 2) Express Intent -- Offer must indicate a desire to enter into a contract.
 - 3) Person or Group -- An offer must be directed at some person or group.
 - 4) Invite Acceptance -- An offer must invite acceptance (the power of acceptance). If the offeror reserves the final say for himself, there is no offer.
- b. **General Terms** -- Delivery date, price, terms of payment, description of subject matter, the party that the offer is directed to.
 - 1) UCC 2-204(3), Terms Left Open -- Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy
 - 2) UCC 2-311(1), Particulars of Performance -- A contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any specification must be made in good faith and within the limits of commercial reasonableness.
- c. **Advertisements** -- If goods are advertised for sale at a certain price, it is not an offer and no contract is formed; such an invitation is merely an invitation to bargain.
 - 1) Exception -- An advertisement to the general public may be an offer if the facts show that some performance was promised in positive terms in return for something requested.
- d. **Quotes**
 - 1) General Rule -- Generally, a quotation of prices is not an offer to sell.
 - i) *Quote v. Offer* -- To distinguish a quotation from an offer the correspondence must be read in the whole. The closer the correspondence is to stating all the necessary terms of an offer, the closer it is to an offer and not quotation.
 - ii) *Quote Combined with Context* -- Although a price quotation, standing alone, is not an offer, there may be circumstances under which a price quotation, when considered together with facts and circumstances, may constitute an offer which, if accepted, will result in a binding contract.

ii. Duration of Offer

- ★ a. **Actions that Terminate the Power of Acceptance (RST §36)**
 - 1) Rejection or counter-offer by the offeree;
 - 2) Lapse of time;
 - 3) Revocation by the offeror;
 - 4) Death or incapacity of the offeror or offeree; **OR**
 - 5) The non-occurrence of any condition of acceptance under the terms of the offer.
- b. **Lapse of Time** -- If the offer does not specify a time limit, the offer remains open for a period that is reasonable under the circumstances. (eg., An offer made during a conversation ends when the conversation ends unless the parties indicate otherwise)
- c. **Rejection by Acts** -- Rejection of the offer can occur when the acts of the offeree indicate that he is not accepting.
- d. **Revocation by the Offeror** -- Generally, the offeror may revoke his offer at any time, even if the offer specifies that it is to be left open for a certain period (assuming no option contract) and that period has not yet expired.
 - 1) Duration of Revocation -- For a revocation to be effective, a manifestation of revocation must be received by the offeree from the offeror or a reasonable 3rd party.

- e. **Duration of Offers Via Post** -- When the offeror uses the post to make an offer, the offer is not made when it is posted, but when it is received by the offeree. Ambiguity as to its duration should be read against the party that creates it.
- f. **Option Contract**
 - 1) Common Law -- At common law, an option contract must be supported by consideration. Any money consideration, however small, is adequate value to make a binding option contract.
 - 2) RST §87(1) -- An offer is binding as an option contract if it is 1) in writing and 2) signed by the offeror, 3) recites a purported consideration for the making of the offer and 4) proposes an exchange on fair terms 5) within a reasonable time
 - 3) UCC §2-205 (Firm Offers) -- 1) An offer 2) by a merchant 3) to buy or sell goods 4) in a signed writing which 5) by its terms gives assurance (no consideration necessary) that it will be held open.
 - i) *No Time Stated* -- A reasonable time is substituted.
 - ii) *Maximum Period of Irrevocability* -- May not exceed 3 months (90 days)
 - iii) *Form Supplied by Offeree* -- Must be signed by offeror
- g. **RST §87(2), Holding Open a Bid for Service** -- Basically a bid creates an option K.
 - ◆ An Offer which the offeror should
 - ◇ Reasonably expect to induce action or forbearance of a substantial character
 - ◇ On the part of the offeree
 - ◇ Before acceptance
 - ◇ Which does induce such action or forbearance
 - ◇ Is binding as an option contract to the extent necessary to avoid injustice.

iii. Unilateral Contracts

- a. **Unilateral v. Bilateral**
 - 1) Unilateral Contract -- In a unilateral contract only one party to the contract makes a promise (eg., reward).
 - 2) Bilateral Contract -- In a bilateral contract there are mutual promises between two parties to the contract; each party is both promisor and promisee.
 - 3) Unclear Mode -- Where the mode of contracting is unclear the contract is presumed to be bilateral.
- b. **Part Performance or Tender (RST §45)** -- Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance (unilateral contract), an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
- c. **Notice of Acceptance** -- Generally, not required. A contract is formed by performance.
 - 1) UCC §2-206(2) -- Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified (actual or constructive) of acceptance within a reasonable time may treat the offer as having lapsed before acceptance. (eg., office remodel case)
- d. **Revocation of a Unilateral Contract** -- Any offer to enter into a unilateral contract may be withdrawn before the act requested to be done as has been performed.

C. Acceptance

i. General

- a. **Definition** -- Acceptance is a manifestation of assent to enter into a bargain. An offer must be accepted by whoever received the power of acceptance, with knowledge of the offer, in the manner specified.
- b. **Mirror Image Rule** -- The offeror is the master of his offer. Thus, any qualification of, or departure from, the terms of the offer, invalidates the offer.
 - 1) UCC §2-206(1)(a) -- An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances, unless otherwise unambiguously indicated by the language or circumstances.
- c. **General Variables of Acceptance**
 - 1) There are three possible variables that can influence acceptance:
 - i) Mode of Acceptance
 - ii) Place of Acceptance eg., return wagon case
 - iii) Time of Acceptance

Note: Unless offeror specifies otherwise the time of acceptance is the only thing that really matters to a court today.

ii. Acceptance by Performance

- a. **RST §32, Invitation of Promise or Performance** --In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests **or** by rendering the performance, as the offeree chooses.
- b. **Offeree Elects to Accept by Performance** -- When the offeree accepts by performance he must do so in a way that communicates to the offeror so that he knows or should know of the acceptance.

iii. Communication

- a. **Generally** -- To be effective an acceptance must be definite and unequivocal.
- b. **Conditional Language** -- An acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition.

- c. **Acceptance by Silence (RST §69)** -- General rule: Silence or inaction do not constitute acceptance. Silence or inaction by the offeree constitutes acceptance only when:
- 1) Where the offeree 1) takes the benefit of offered services with 2) reasonable opportunity to reject them and 3) reason to know that they were offered with the expectation of compensation.
 - 2) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
 - 3) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept
 - 4) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable.

iv. Rejections and Counter-Offers

- a. **Rejections** -- Rejection by the offeree terminates the power of acceptance even if the offer specifies a later expiration. The rationale is that the offeror may rely on the rejection.
- b. **Counter-Offers** -- If offeree's communication is interpreted as a counter-offer, it should be treated as a rejection of the offer. Implicit in a counter offer is the offeree's rejection of some material term in the offer.
 - 1) RST §39(2) -- An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

v. The Mailbox Rule

- a. **In General** -- Acceptance is effective when it is deposited in the mail and thus out of the control of the offeree. If offeree can still retrieve the acceptance he is not bound (eg., mailroom).
 - 1) Delay -- Offeror takes the risk of delay or lost acceptance because he had the power to specify in the offer how acceptance was to be received.
 - 2) Option Contracts -- In a majority of jurisdictions the mailbox rule doesn't apply. Other courts apply the mailbox rule.
- b. **Rationale**
 - 1) Agency -- The offeror nominates the post office as implied agent and thus receipt of the acceptance by the post office is regarded as that of the offeree. The offeror also has the power to require actual receipt as a condition of the offer.
 - 2) Dependable Basis for Acceptance -- Offeree needs a dependable basis for his decision whether to accept. The uncertainty is thus imposed on the offeror.

D. Agreements to Agree

i. Written Memorials

- a. **General Rule** -- For an enforceable contract to be created, both parties must have a 1) clear understanding of the terms of an agreement and 2) an intention to be bound by its terms. If their expressions convince the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document will be nothing more than a memorial of that contract.

ii. Restatement §27

- a. **Existence of Contract Where Written Memorial is Contemplated** -- Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

iii. Agreements "Subject to" Future Events

- a. **Traditional Rule** -- A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.
 - 1) Exception -- If the term left open is uncertain because it requires a course of dealing between the two parties (eg., a contract with a yearly sales quota to be mutually agreed upon).
- b. **Modern Trend** -- An agreement to agree, in which a material term is left for future negotiations, is enforceable. Courts will generally find one of two possible agreements:
 - 1) Reasonable Term -- The parties agreed to contract on reasonable terms (usually some market value)
 - 2) Negotiate in Good Faith -- The parties agreed to negotiate in good faith.

E. Form Contracts Under the UCC

i. UCC §2-207

a. General Observations

- 1) In most cases, allowing a response to operate as an acceptance even where the mirror image rule is not satisfied. The contract is formed on the offeror's terms (often a buyer's purchase order).
- 2) The terms not satisfying the mirror image rule are merely proposals to the contract. But, between merchants, additional terms often become part of the contract. See UCC § 2-207 comment 3.
- 3) In cases where the parties' writings do not form a contract, a contract can still be formed based on the conduct of the parties. In these cases, the contract is governed by the terms on which the parties agree, plus certain gap-fillers that Article 2 provides.

- b. **UCC §2-207(1), Acceptance** -- A definite and reasonable expression of acceptance, operates as an acceptance even though it states terms additional to or different from those offered:
 - 1) Exception -- If acceptance is expressly made conditional on assent to the different terms
 - 2) Definite -- Generally: If the acceptance departs from the four golden (price, quality, quantity, delivery date) or is not a bargained term, the acceptance will not be considered definite.
 - 3) Seasonable -- An acceptance is seasonable if it has been sent prior to the offer lapsing
- c. **UCC §2-207(2), Terms W/ Acceptance** -- Additional terms are construed as proposals for addition to the contract.
 - 1) Between Merchants -- Such terms become a part of the contract unless:
 - i) The offer expressly limits acceptance to the terms of the offer;
 - ii) They materially alter it; **or**
 - (a) Materiality -- Context dependent, a significant element of the exchange bargained for by a party. Anything that would result in a surprise or hardship if changed would likely be material.
 - iii) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
 - 2) Consumers -- Consumers are not merchants. Under §2-207(2), when both parties are not merchants additional terms are treated as proposals to be added to the contract.
- Note:** §2-207(2) only applies to acceptances, NOT counteroffers!!
- d. **UCC §2-207(3), Terms W/O Acceptance** -- Conduct (eg., performance) by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale, although the writings of the parties do not otherwise establish a contract. In such a case, the terms of the particular contract consist of those terms on which the writings of the parties agree together with any supplementary terms incorporated under any other provisions of this act.
- e. **The Omission of "Different" from §2-207(2)** -- It is not clear if the omission of "different" was done with intent or was merely an oversight. Further, the distinction between "additional" and "different" is not always clear. Courts have taken 3 approaches:
 - 1) Inadvertent Omission -- Just pretend it says "additional to or different from"
 - 2) Literal Meaning -- Since different terms are not covered, §2-207(2) is not applicable and the different terms are disregarded.
 - 3) Knockout Rule -- The different terms cancel each other out and are replaced with UCC gap fillers. This rule seems more consistent with the spirit of §2-207 but is not supported textually.
- f. **Rational of §2-207**
 - 1) Boilerplate Language -- §2-207 places less emphasis on boilerplate language

II. Warranties

A. Express Warranties (UCC §2-313)

i. Creation of Express Warranty

a. What Constitutes an Express Warranty?

- 1) *Express Term or Promise* -- Any express affirmation of fact or promise that becomes a basis of the bargain is an express warranty.
- 2) *Description of Goods* -- Any description of the goods which is made a part of the basis of the bargain. Description can be implied.
- 3) *Sample or Model* -- Any sample or model which is made a part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

b. What Language Creates an Express Warranty?

- 1) *Formal Words* -- Formal words such as "warrant" or "guarantee" are not necessary.
- 2) *Intention* -- No specific intention to create a warranty is necessary.
- 3) *Opinions (Puffing)* -- Communications that amount to statements of opinion are insufficient to create a warranty.

ii. Disclaimer of Express Warranty

- a. **UCC §2-316** -- Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other... Negation or limitation is inoperative to the extent that such construction is unreasonable (eg., express warranties that are in the contract and negated are deemed made).

B. Implied Warranties

i. Warranty of Title

- a. **Creation** -- Unless excluded, in a sale of goods, the seller warrants 1) that the title to the goods conveyed is good and that transfer to the buyer is valid, and 2) that the goods are free from any security interest or lien or encumbrance of which the buyer has no knowledge.

ii. Warranty of Merchantability

- a. **Creation** -- For a warranty of merchantability to be implied seller must be a merchant with respect to the goods subject to warranty.

- b. **Merchantable Goods:**
 - 1) Community Standard -- Pass without objection in the trade under the K description; and
 - 2) Description -- (fungible goods) --> are of fair average quality within the description; and
 - ★3) Ordinary Purposes -- are fit for the ordinary purpose for which such goods are used; and
 - 4) Within Variations Permitted -- run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - 5) Packaging -- are adequately contained, packaged, and labeled as the agreement may require; and
 - 6) Labels -- Conform to the promises or affirmations of fact made on the container label if any.
- iii. **Disclaimer of Implied Warranty of Merchantability**
 - 1) **Hard Way (§2-316(2))** -- To exclude or modify the implied warranty of merchantability the language must mention merchantability (literally in most courts) and in the case of a writing must be conspicuous.
 - 2) **Easy Way (§2-316(3))**
 - 1) Language -- Using expressions which in common understanding calls buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty (eg., "as is," or "with all faults").
 - 2) Examination -- If there is a defect which examination would have revealed and buyer either examined or refused to examine, then there is no implied warranty with regard to that defect.
 - 3) Community -- Implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
- iv. **Warranty of Fitness for a Particular Purpose**
 - a. **Creation** -- Unless excluded (disclaimed), if seller has 1) a reason to know any particular purpose for which the goods are required and 2) that buyer is relying on seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose.
- v. **Disclaimer of Warranty of Fitness for a Particular Purpose**
 - a. **Hard Way (§2-316(2))** -- Must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof."
 - b. **Easy Way (§2-316(3))**
 - 1) Language -- Using expressions which in common understanding calls buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty (eg., "as is," or "with all faults").
 - 2) Examination -- If there is a defect which examination would have revealed and buyer either examined or refused to examine, then there is no implied warranty with regard to that defect.
 - 3) Community -- Implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

III. Policing Doctrines

A. General Principles

i. Freedom of Contract

Freedom of contract is presumed in most cases. Modern courts have put less emphasis on freedom of contract but it remains a powerful limitation on the policing doctrines.

ii. Relationship Between Assent and Content

a. Two Categories of Policing Doctrine

- 1) Assent Based -- Those addressed to the quality and existence of assent which show lack of valid agreement or promise (eg., duress, misrepresentation, non-disclosure, etc.)
- 2) Content Based -- Those focused on the substantive content of the agreement or promise -- aimed at inequality of exchange, public policy, mutuality of obligation and substantive Unconscionability.

iii. Duty to Read

A party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents.

iv. Nature of Transaction

Courts treat different transactions differently (eg., contacts between a merchant and consumer should be treated differently than contracts between two businesses). The policing doctrines should reflect this principle.

B. Existence and Quality of Assent

i. Duress

- a. **Hard Bargain/Market Conditions** -- Duress is not shown because one party to the contract has driven a hard bargain or that market or other conditions now make the contract more difficult to perform by one of the parties of that financial circumstance may have caused one party to make concessions.
- b. **Modern Doctrine** -- Duress is established when 1) one of the parties makes a threat, 2) the threat is improper, and 3) it must induce the apparent assent, in that it 4) leaves the victim with no reasonable alternative but to agree.
- c. **Constraints to do What one Would not Have (Coat Case)**
 - 1) General Rule -- Has the person complaining been constrained to do what he otherwise would not have done?
 - i) *Old Limitation (Rejected Today)* -- A person cannot claim to have made a payment under duress if, before he made the payment, there was an immediate and adequate remedy in the courts available to him to resist it.

d. **Restatement Approach (§§ 175, 176)**

1) When Duress by Threat Makes a Contract Voidable (§175)

- i) *Threats by Parties to the Agreement* -- The contract is voidable by the victim if: 1) a party's manifestation of assent is induced by an 2) improper threat by the other party that 3) leaves the victim with no reasonable alternative.
- ii) *Threats by Third Parties* -- The contract is voidable by the victim if: 1) a party's manifestation of assent is induced by 2) one who is not a party to the transaction.
 - (a) Exception -- The contract is not voidable if the other party acted in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

Note: The contract is only voidable by the victim -- Thus, the person making the threat cannot use the threat to void the contract in court.

2) When a Threat is Improper (§176)

- i) A threat is improper if:
 - (a) What is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property.
 - (b) What is threatened is a criminal prosecution (note absence of civil action),
 - (c) What is threatened is the use of civil process and the threat is made in bad faith (eg., legitimate settlements are okay), **OR**
 - ★(d) The threat is a breach of the duty of good faith and fair dealings under a contract with recipient.
- ii) A threat is improper if the resulting exchange is not on fair terms, and
 - (a) The threatened act would harm the recipient and would not significantly benefit the party making the threat,
 - (b) The effectiveness of the treat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, **OR**
 - (c) What is threatened is otherwise a use of power for illegitimate ends (power refers to something like a big company).

ii. **Unconscionability**

- a. **Definition** -- A contract is unconscionable when it is so unfair that it shocks the conscious. The doctrine of unconscionability is applied very rarely but frequently argued.
 - 1) Presumption of Freedom of Contract -- Freedom of contract is presumed. It takes a very strong argument to overcome this presumption.
- b. **Alternative: No Consideration** -- Often courts will find no consideration when there is unconscionability. This was especially true before the doctrine was well accepted. The UCC made courts more willing to apply the doctrine of unconscionability.
- c. **Two Types**
 - 1) Substantive -- An awful bargain. Can find unconscionability with only substantive.
 - 2) Procedural -- The conditions under which the contract was made were very unfair. Often procedural unconscionability must be accompanied with substantive unconscionability.
- d. **Typical Case** -- The typical case will be between a sophisticated merchant and an unsophisticated consumer. Though, mere difference in sophistication between parties is usually not enough.
 - 1) Cases Between Merchants -- There are a few rare cases of unconscionability between merchants (eg., *Ashland Oil v. Donahue* -- Ashland contracted with service station; contract for petrol was for 10 years while lease for service station was terminable at will; Donahue raised a brilliant argument where both contracts could be combined so that UCC §2-302 would apply).

iii. **Misrepresentation, Concealment, and the Duty to Disclose**

a. **Fraudulent Misrepresentation: Elements**

- 1) Statement of Fact -- Only a misrepresentation of fact constitutes fraud. An opinion or prediction cannot be used to establish fraud. May need to argue opinion v. fact.
- 2) Types of Misrepresentation
 - i) *Affirmative Statements* -- An affirmative false statement of fact is the most direct and easily identifiable type of fraudulent misrepresentation.

Note: An affirmative statement could also lead to an express warranty!
 - ii) *Concealment* -- Deliberate conduct to hide a fact.
 - ★iii) *Nondisclosure* -- Only fraudulent if the circumstances impose a duty on the party to disclose information. Duty usually arises through circumstances where honesty and fair dealing require disclosure. Simply possessing superior information is typically not enough to create a duty to disclose.
 - (a) Example -- Home purchase: A buyer cannot generally be held to be able to judge the contents of a parcel of land by the eye, even though a buyer examines the land before purchasing he may normally rely upon the representations of the seller as to measurement. Generally depends on if the buyer intended to purchase the land by looks or a certain amount of land
- 3) Knowledge of Falsity and Intent to Induce -- The party committing fraud must have had two state of mind components: 1) knowledge of the falsity and 2) the intent to mislead.
- 4) Materiality -- The misrepresentation must have affected the basis of the bargain in a significant way.

- 5) **Justifiable Inducement** -- The fraud must have motivated the victim to enter the contract.
- b. **Negligent Misrepresentation** -- When deliberate intent is lacking could be negligent misrepresentation or innocent misrepresentation. A misrepresentation is negligent if the person making it failed to act with reasonable care in ascertaining and communicating the truth.
- c. **Innocent Misrepresentation** -- A person may rescind a contract for innocent misrepresentation if: 1) he has been induced to become a party 2) in reliance upon false though innocent misrepresentations 3) respecting a cognizable material fact 4) made as of his own knowledge by the other party to the contract.
 - 1) **Damages** -- Damages recoverable are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction.
- d. **"As is" Clause** -- Disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain. "As is" does not prevent fraudulent representation relied on by the buyer from constituting fraud.

C. Content of Agreement or Promise

i. Public Policy

a. General

- 1) **Balancing Test** -- In resolving issues involving public policy courts balance the policy concerns and equities between the parties. Generally this involves a tension between the policy of freedom to contract and some other public policy.
- 2) **Sources of Policy**
 - i) **Easy Source** -- Common law or statute ---> sometimes to allow a contract will be clearly in conflict with the common law or statute.
 - ii) **Judicial Policymaking** -- Courts generally look to other government pronouncements of policy and will sometimes look to policy arguments advanced by the parties.

b. Disclaimers of Liability

- 1) **Typical Policy Tension** -- Freedom of contract v. holding a tortfeasor accountable for injury caused by his actions and deterring wrongful conduct.
- 2) **Adhesion** -- Factual circumstances that create situations of adhesion can lead a court to strike a disclaimer because there was not true freedom of contract.

c. Covenants not to Compete

- 1) **Countervailing Policy** -- Policy against agreements that stifle competition or restrict a person's freedom to earn a livelihood by full participation in the market.

Covenant not to compete -- upheld if:

1. Necessary for the protection of the legitimate interest of an employer
2. Reasonably limited in its operation with respect to time and place
3. Not unduly harsh and oppressive in curtailing the legitimate efforts of an employee to earn a livelihood
4. Reasonable from the standpoint of sound public policy
5. Supported by consideration

IV. Determining Contract Terms

A. Contract Modification

i. The Pre-Existing Duty Rule

- 1) **Traditional Courts** -- Traditional courts strictly applied the pre-existing duty rule to contract modifications, requiring any modification to be supported with consideration. The traditional courts used consideration to police contract modifications because it was all they had.
 - 1) **Rationale** -- to prevent a party from taking undue advantage of the circumstances.
- 2) **Modern Courts (RST §89(a))** -- Modifying a duty under a contract not fully performed on either side is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.
- 3) **Rationale** -- To deny enforcement of modifications whereby one party takes undue advantage of the other (e.g., Alaska Packers Case).

ii. Modification, Rescission and Waiver (§2-209)

- 1) **Agreements Modifying a Contract** -- An agreement modifying a contract within this Article needs no consideration to be binding. The agreement must be made in good faith.
 - ★ a) **The Role of the Statute of Frauds** -- The requirements of the statute of frauds must be satisfied if the contract as modified is within its provisions.

B. Parol Evidence Rule

i. Integrated Writing?

- 1) **Integrated Writing, Generally** -- A writing is taken to be an integrated agreement where: the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement.
- 2) **Fully Integrated Writing** -- A fully integrated writing is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.
 - a) **The Test:** At the time of contracting both parties must have intended that the writing accurately stated everything that they agreed to on the transaction covered by the contract and that there was nothing they agreed to on the transaction that was not contained in the writing.
- 3) **Partially Integrated Writing** -- A partially integrated writing is an integrated writing that is not a complete statement of the terms of the agreement.

ii. Is the Evidence Parol Evidence?

- 1) **Definition** -- Parol evidence is any prior agreement (written or oral) or any contemporaneous (oral only) agreement.

iii. Impact on the Integrated Writing?

- 1) **Fully Integrated Writing** -- A fully integrated writing cannot be contradicted or added to by evidence of any prior agreements or contemporaneous oral agreements.
 - a) Corollary Rule -- The court will not admit parol evidence tending to show that the parties did in fact agree on terms contradicting or adding to the written terms.
- 2) **Partially Integrated Writing** -- A partially integrated writing cannot be contradicted by evidence of any prior agreements or of contemporaneous orally agreed upon terms.
 - a) Corollary Rule -- Either party will not be permitted to introduce parol evidence that tends to contradict terms in the partially integrated writing.

iv. Exceptions

- 1) **Proof of Fraud** -- Parol evidence is always admissible to provide evidence of fraud.
- 2) **Collateral Agreement** -- A creative argument. Parties actually entered two agreements, only one of which was reduced to writing.
- 3) **Other Uses of Parol Evidence** -- Even if evidence may not be admitted for contradicting terms or adding terms to the agreement there are still some other possible uses:
 - ◆ Whether the writing is an integrated agreement;
 - ◇ Whether the writing is completely or partially integrated;
 - ◆ The meaning of the writing (e.g., interpreting)
 - ◆ Illegality, fraud, duress, mistake, lack of consideration, condition precedent or other invalidating cause;
 - ◆ Ground for granting or denying rescission, reformation, specific performance or other remedy.

C. General Principles of Interpretation

i. Whose Meaning Prevails (RST §201)

- 1) **Parties Attach the Same Meaning** -- Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
- 2) **Parties Attach Different Meaning** -- Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made:
 - ◆ That party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; **OR**
 - ◆ That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
- 3) **Other Situations** -- Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

ii. Mistake

- 1) **Mutual Mistake of Fact** -- When there is a mutual mistake of fact as to some material term of an agreement there is no mutual assent and thus no agreement.
 - a) Unilateral Mistake -- A mistake by only one of the parties is not grounds for relief unless the non-mistaken party knew or should have known of the mistake.
- 2) **RST §20 -- Effect of Misunderstanding**
 - a) There is not manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
 - i) Neither party knows or has reason to know the meaning attached by the other; or
 - ii) Each party knows or has reason to know the meaning attached by the other
 - b) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if:
 - i) That party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; **OR**
 - ii) That party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party

Note: Evidence of mistake is not barred by parol evidence rule

iii. Interpretation of Integrated Agreements

- 1) **Jury Issue** -- The interpretation of an integrated agreement is to be determined by the trier of fact if it:
 - ◆ Depends on the credibility of extrinsic evidence **OR**
 - ◆ A choice among reasonable inferences to be drawn from extrinsic evidence.
- 2) **Judge Issue** -- Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

iv. Ambiguity

- 1) **General Rule** -- Language in a contract is interpreted according to its ordinary meaning. Where the meaning of the language of the contract is plain and unambiguous, the terms of the contract and intent of the parties will be interpreted as being consistent with that language.
 - a) *Objective Standard* -- Courts look to what the parties said and did not to their unexpressed subjective intent. One party's un-communicated understanding concerning the specialized meaning of contract language is not binding on the other party.
 - b) *Commercial Reasonableness* -- Commercial reasonableness can be a useful guide for interpretation (eg., a large difference between price and value could be a clue that something isn't right).
- 2) **Two Types of Ambiguity**
 - a) *Patent Ambiguity* -- Ambiguity that is apparent upon the face of the instrument. Traditionally, courts would not use extrinsic evidence to interpret. Modern courts use extrinsic evidence for both.
 - b) *Latent Ambiguity* -- Language is clear but some extrinsic fact creates a necessity for interpretation among two or more possible meanings.

v. Course of Performance or Practical Construction (UCC §2-208)

Watch out for conditions in course of performance fact patterns

- Any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement where:
 - ◆ The contract involves repeated occasions for performance by either party with:
 - ◇ knowledge of the nature of the performance **and**
 - ◇ opportunity for objection to it by the other.
- The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other when:
 - ◆ such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

vi. Functions of Course of Performance

- Provides evidence to clarify an ambiguity in a term of the contract
- Provides evidence to find an implied modification to the contract

vii. Course of Dealing and Usage of Trade (UCC §1-205)

- 1) **Definition: Course of Dealing** -- A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- 2) **Definition: Usage of Trade** -- A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.
- 3) **The Impact of Course of Dealing/Usage of Trade**
 - a) Supplementation or Qualification of Terms -- A course of dealing and any usage of trade of which the parties should be aware give particular meaning to and supplement or qualify terms of an agreement.
 - b) Express Terms v. CD/UT -- The express terms of an agreement and applicable course of dealing or usage of trade shall be construed whenever reasonable as consistent with each other
 - i) *Unreasonable Construction* -- When such construction is unreasonable, there is a hierarchy of what controls:
 - ▶ Express Terms
 - ▶ Course of Dealings and Usage of Trade
 - Course of Dealings
 - Usage of Trade
 - c) Part Performance -- Applicable usage of trade should be used in interpreting any part performance.
- 4) **Course of Dealing/Usage of Trade and Parol Evidence** -- Writings are to be read on the assumption that the course of prior dealings between the parties and the usages of the trade were taken for granted when the document was phrased.

viii. How Terms Come into a Contract

- 1) **The Hierarchy** -- **This is not a rigid hierarchy --> chronology may be a factor in what trumps what**
 - ◆ Expressly agreed upon terms
 - ◆ Implied by express terms and conduct
 - ◆ UCC §2-207
 - ◆ Terms implied by law (e.g., employment contract: at will employment)
 - ◆ Course of performance, course of dealing, usage of trade,
 - ◆ Modification -- Separate K adding or taking away from original K (requires consideration)
 - ◆ Waiver
 - ◆ Parol evidence

ix. Waiver

- 1) **Waiver Distinguished from Contract Modification** -- an attempt to modify contract terms (actual or implied) can, if not objected to, operate as a waiver, even though it may not satisfy the writing requirements of the contract. Other party must detrimentally rely on the modification.

D. Gap Fillers

i. Gap Filling by Interpretation

- 1) **Generally** -- A court may fill an apparent gap by interpreting written contract language in light of extrinsic (outside) evidence and surrounding circumstances. The court may then conclude that the parties intended a particular approach to the apparent gap so that there really is no gap at all.
 - a) Indefinite Terms -- A contract is rightly deemed unenforceable for indefiniteness when it leaves out a 1) crucial term that 2) a court cannot reasonably be asked to supply in the name of interpretation.

ii. Gap Filling by Parties Intentions

- 1) **Generally** -- A court may attempt to ascertain the intentions of the parties (by surrounding circumstances) even though the parties clearly had no intentions concerning the matter (e.g., parties "intended" performance in a reasonable time when no time of performance was specified in the contract).
- 2) **Duration of Contract** -- Where the parties have not clearly expressed the duration of a contract, the courts will imply that they intended performance to continue for a reasonable time (e.g., NYC sewer case).
 - a) Exception -- Employment, exclusive agency, or distributorship contracts are excluded (all are treated like employment contracts). When the duration of an employment contract is indefinite, the contract can be terminated at will by either party.
 - i) Non-Indefinite -- If a period of duration can be fairly implied from the nature of the contract, its subject matter and relationship of the parties, the contract is not terminable at the pleasure of either party and the court will give effect to the manifest intent of the parties (e.g., pig herd revitalization case).

iii. Gap Filling Under the UCC

- 1) **Section 2-204(3)** -- Even though one or more terms are left open a contract does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

E. Good Faith

i. RST §205: Duty of Good Faith and Fair Dealing

- 1) **General Rule** -- Every contract imposes upon each party the duty of good faith and fair dealing in its performance and enforcement.
- 2) **Meaning of "Good Faith"** -- Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Conduct that violates community standards of decency, fairness or reasonableness is not consistent with good faith.
- 3) **Good Faith Performance** -- Deceptions and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. Bad faith may be overt or may consist of inaction. Fair dealing may require more than honest.

ii. § 2-306. Output, Requirements and Exclusive Dealings

- 1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

V. Conditions

A. Conditions in General

i. Terminology

- 1) **Condition Precedent** -- A condition precedent is an act or event, other than a lapse of time, which must exist or occur before a duty to perform a promise arises. If the condition does not occur and is not excused, the promised performance need not be rendered.

Note: Look out for condition precedents in an offer and acceptance fact pattern, particularly where there is the possibility of a unilateral contract. It is difficult to distinguish a condition precedent to the formation of a contract from a condition precedent to the performance of a contract. This is because the distinction is highly artificial.

- 2) **Pure Condition** -- A condition that is not accompanied with a duty (express or implied).
- 3) **Promissory Condition** -- A condition that also includes a duty or obligation.

B. Express Conditions

i. General

- 1) **Express Conditions v. Promises** -- Failure to perform a promise, unless excused, is a breach. On the other hand, failure to comply with a condition is not a breach. Thus, the distinguishing between the two is critical.
- 2) **Conditions v. Time References** -- Situation: General contractor agrees to pay subcontractor "as money is received from the owner." ---> Question: Does this function as a express condition or as setting the time of payment. The majority says that it sets the time of payment ---> The general is in a better position to take on the risk.
- 3) **Satisfaction Clauses** -- Enforceable if the actors satisfaction is reasonable (objective) or in good faith (subjective).
- 4) **Requirements Contracts** -- A contract in which one party promises to fulfill all of his needs for a particular product from one source and one source only.
 - a) Consideration -- Consideration is found by the fact that the promisor is giving up the right to buy the goods in question from any other source. There is also an obligation of good faith incumbent upon both parties.

- 5) **Substantial Performance** -- When a contractor's performance is in some way deficient, through no willful act by the contractor, yet is so nearly equivalent that it would be unreasonable for the owner to deny the agreed upon payment. If a contractor successfully demonstrates substantial performance, the owner remains obligated to fulfill payment, less any damages suffered as a result of the deficiencies in workmanship by the contractor.
- a) Forfeiture -- There is a general legal policy opposed to forfeitures.

ii. Interpretation to Find an Express Condition

- 1) **Restatement §227(1)** -- In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.
- 2) **Ambiguity** -- The provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction.

iii. Excuse and Avoidance of Express Condition

- 1) **Excuse** -- If a party fails to perform an express condition, it should be considered whether the party's obligation had been excused.
- 2) **Conditions that Create Excuse** -- There are X situations which give rise to excusable non-performance:
- a) Impossibility -- The obligation required is impossible. No person on earth can carry out performance.
- i) Exception -- If a party to the agreement makes performance impossible, there is no excuse.
- b) Waiver -- The voluntary relinquishment of a known condition. Must be solely for the party waiving.
- i) Non-Waiver Agreements -- Are valid but can be voided if a party acts outside of the scope of the agreement (e.g., Firebird Motel case).
- 3) **Overriding an Express Condition to Prevent Forfeiture**
- a) General Equitable Principle -- The gravity of the fault must be compared with the gravity of the hardship.
- b) Leaseholds -- An equitable interest is recognized and protected against forfeiture in some cases where the tenant has in good faith made improvements of a substantial character, intending to renew the lease, if the landlord is not harmed by the delay in the giving of the notice and the lessee would sustain substantial loss in case the lease were not renewed.