

Course Outline

Overview

Contracts and Common Law – Common law deals and has always dealt with contract breach, not by forced compliance but by compensating the injured party for his loss through an award of money damages. Contract(s) is the law of voluntary exchange. Contracts are primarily the exchange of risk. Most contracts are business relationships dealt with at arms length

Rule: the injured party may recover from the party in breach a dollar sum sufficient to put him in as good a position as he would have occupied had the contract been paid in full (there are no, or there rarely are punitive damages)

Two Basic Theories of Contracts

- 1) Objective Theory: -- If A acts as if he's making a contract with B, even without subjective intent A should be held liable.
 - a) Promisor creates a reasonable impression on the promisee that a promise has been made.
 - b) Objectivity Test – whether reasonable person as offeree would have understood the offeror to be proposing a bargain
 - c) Promisee must be reasonable in dealing with the conduct and words of the promisor
 - i) Conduct
 - ii) Word(s)
 - iii) Intent (and Consent)
- 2) Subjective Theory: -- about consensus, without consensus there is no contract
 - a) Became somewhat of a dead-end in the 19th century

Four Primary Questions of Contract

- 1) Was the contract formed?
 - a) Did the parties agree to be bound
 - b) You must first determine whether a contract ever existed, which the law recognizes and will enforce and whether acts or omissions complained of on P's part constitute a breach by D
- 2) What are its terms?
 - a) What did the parties agree to
 - b) No contract, no matter how detailed, can be wholly comprehensive, therefore legal rules (**UCC**, Statute of Frauds, Restatement) on which the parties can rely in absence of a fully articulated agreement are deemed to be adopted by the court when there is nothing in the agreement to the contrary

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- i) Parties can go forward without the need to reach express agreement on every question that might bear on the transaction
- 3) Is there a breach?
 - a) Did someone break the terms of the contract
- 4) What is the appropriate remedy for the breach?
 - a) Damages (two types) -- That procedure which will enable the party harmed by the breach to be made whole. What is the proper remedy for breach, performance or monetary damages
 - i) Performance – court orders the breaching party to perform (usually used in instances of reliance or restitution)
 - ii) Monetary damages – monetary compensation to make one whole in the face of the injury suffered
 - b) In the use of legal rules by the courts, the court will assign a task or term missing under the contract to the party in the better position to deal with the risk or responsibility in the cheapest and most efficient manner
 - i) Risk Analysis – If A has greater knowledge or resources than B then A is usually the party who can better mitigate the risks. Claim for monetary damages is a factual matter, which has to be proven.
 - ii) Differential Knowledge – A is very sophisticated and B is very naïve – may play a role in the determination of contract formation or whether or not it might be necessary for the court to nullify one or more of the terms
 - iii) Course of Dealings – term of art, means there is a history, a track record between the two parties, courts will take this into consideration when looking at the contract

Types of Contracts

- 1) Express – a contract formed by writing or oral language, legally enforceable agreement
- 2) Implied – a contract manifest by the actions of the parties even though it is not explicitly written or stated
 - a) Implied-in-fact – the promises of the parties are inferred by their acts or conduct or from words that are not explicit words of agreement (real contracts formed by the parties)
 - i) Considered a bargain contract and does imply assent
 - ii) You may sue for expectation interests
 - (a) Test: see if damages/recovery includes profits. If yes, the contract is implied in fact
 - iii) Must rest upon the intent of the parties
 - iv) It is circumstantially proved

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Exam Tip: if the fact pattern goes to intent, usually implied in fact

- b) Implied-in-law – a contract is implied in law where one party is required to compensate another for a benefit conferred in order to avoid unjust enrichment (not real contracts, imposed by the courts to stop unjust enrichment – there is no assent)
 - i) Not a bargain contract
 - ii) Only carry out the parties intent
 - iii) Fictions of the law adopted to enforce legal duties by actions of contract where no proper contract exists
 - iv) Seek measured damages – not the amount the impoverished party has been impoverished, rather the amount the enriched party has been enriched (seeks restitution – does not imply lost profit, it implies lost cost)
 - v) Example – A, a doctor, sees B lying on the side of the road unconscious and renders medical services. When B recovers, A bills B. B is liable for the reasonable value of A's services. **Note:** As a matter of policy, the law will fictionally imply a request of B for A's services.

Exam Tip: if the fact pattern talks about justice or injustice, usually implied in law (unjust enrichment)

- 3) Quasi-Contract – a court-created obligation which is created in the absence of a real contract for “reasons of justice” (no negotiations), an equitable remedy, not governed by contract law, rather governed by maxims
- 4) Gift – not a contract, two things needed to make a gift enforceable as a contract
 - a) Intent to make the gift
 - b) Delivery of the gift (either in part or in whole)
- 5) Equity – morally right thing to do – there used to be an equity chancery in the US – when there is no remedy in law, the standard is equity

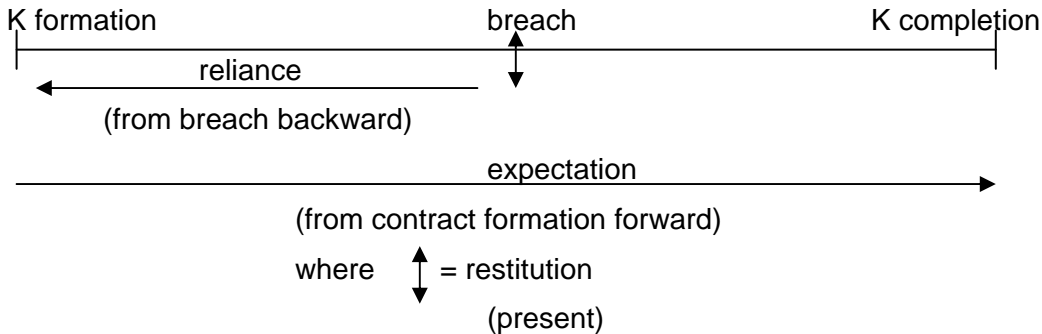
Application of Law

- 1) Two bodies of law govern contracts:
 - a) Common Law – the decisions of the courts – **Mirror Image Rule**
 - b) Article II of the Uniform Commercial Code (UCC) – usually similar to common law, has been adopted as statute in most states – **Sale of Goods to Promote Commerce**
- 2) When to use common law or UCC
 - a) Common law used in most instances except the sale of goods
 - b) Selling of goods to anyone, use UCC Article II (does not apply to the sale of real estate) – **Goods are Moveables**

Exam Tip: Determine the subject matter of the question (1) sale of goods, use UCC, (2) no sale of goods, use common law

Interest Analysis

Remedy Analysis Chart



Types of Interest

- 1) Expectation Interest – bargain contract (A expected something from B as a result of a contract they had in place)
 - a) Expectation damage rule: injured parties expectations are compensated. It operates to deprive the party who breaches of any benefit of indulging in non-cooperative conduct and reciprocally gives the party that didn't breach compensation. Expectation interest recovery – there is a benefit in the bargain and the non-breaching party gains the benefit
 - i) The seller is required to mitigate damages if the buyer breaches, by accepting the best price then available in the market
 - (1) Law requires P to take reasonable measures to mitigate the damages
 - (2) The difference between the price received and price bargained for is the actual damages received by the seller
 - ii) Two types of expectation damages:
 - (1) Direct – damages caused by the actual breach
 - (2) Consequential – damages which flowed out of the breach
 - b) Efficient Breach – the concept of efficient breach deals with economic efficiency, saying that A should be able to breach if he can compensate B for injury or damages suffered from the breach. Efficient breach may be thought of as wealth maximization, allocating resources to their best and most efficient usage (planning function). A property right – there is property in the promise.
 - i) Two views:
 - (1) Cowboy Market – each person is a self-interested actor and has to watch their own back

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- (2) Boy Scout Vision – promotes good faith agreements to stabilize markets
 - ii) Sometimes a breach by the seller is good because the seller enriches himself/herself without actual harm to anyone else
 - iii) Counter argument is that the market price rule (expectation damage rule) encourages stability in the market place.
- c) Common Law Calculation of Damages -- Loss in value of the expected performance (expectation damages): Difference in value between what the injured party contract for and what it received,
 - i) PLUS – Other losses: **incidental**: costs incurred in an effort to avoid loss or injury and **consequential**: other injury suffered because of damage resulting from the breach (only awarded when they are reasonably foreseeable),
 - ii) MINUS – **Cost avoided**: savings to the injured party from not having to perform
 - iii) AND – **Loss avoided**: value of a substitute
 - iv) ALL OF THIS LEADS TO NET EXPECTATION
- 2) Reliance Interest – Reliance on the other party to one's detriment – Allowing the injured party to recover expenses incurred due to his reliance on the promise of another. Money expended and opportunities forgone – the relying party usually does nothing that directly benefits the promisor
 - a) The basic goal of reliance damages is to put the parties where they would have been if the contract or action on P's part had never been performed
 - i) A performs on the reliance of something B said or on B's action
 - ii) The difference between reliance damages and expectation is that expectation damages would put the parties where they would be if the contract had been performed
 - iii) Reliance damages are used when there was no bargain and expectation damages cannot be figured with any certainty
 - iv) Reliance usually comes into play on contracts for performance (also commonly known as **promissory estoppel**)
- 3) Restitution Interest – unjust enrichment, B being enriched at A's expense [to restore the damaged party to whole, to stop unjust enrichment]. **Note** – restitution can be claimed by the party in breach, e.g., A is in an employment contract with B for one year to be paid \$10 a month, at the end of the year period. After 9 ½ months, A stops working, breaches, A can still sue under restitution for the 9 ½ months work since B got a benefit out of A's labor and to let A go uncompensated would be unjust enrichment.
 - a) Various names:
 - i) Quasi-contract
 - ii) Constructive contract – the word constructive is used as a legal device to achieve a certain result

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(1) Prof. Baker notes that when you see the word **constructive** it usually implies that there is not a contract in place, rather a court constructed device

iii) Quantum meruit – work done in expectation (labor can't be returned) of payment

b) Damages:

- i) Compensation for injuries suffered
- ii) Value of unjust enrichment

Cases

Agreement not a K

1) Balfour v. Balfour [Mr. Balfour (D), who worked in Ceylon, agreed to pay wife (P) a specified monthly sum while she was in England recovering from illness]

a) Rule of Law: an agreement is not a valid contract unless the parties intend that it can be sued upon [intend that it be attended by legal consequences]

Indefiniteness does not make a K

2) Davis v. General Foods [p. 121, D agrees to examine P's new recipe, with any compensation for its use solely within D's discretion]

a) Rule of Law: a promise is too indefinite to create a valid contractual obligation where the promisor retains an unlimited right to decide later the nature or extent of his performance

Cannot withdraw K after performance

3) The Mabley & Carew Co. v. Borden [D withdrew promised death benefit from P's estate]

a) Rule of Law: even if he retains the right to withdraw it, an employer's promise to provide death benefits to his employee's designated beneficiary is supported by consideration so long as the employee continues to work for such employer until his death and so long as the promise is not withdrawn prior to the employee's death.

Joke not a K

4) Armstrong v. M'Ghee [P alleges that he sold his horse to D in jest]

a) Rule of Law: if both parties realize that a contract is a mere jest, no contract is formed and any property which is exchanged is held in trust pending return

5) Anderson v. Backlund [P sued D claiming that D said there would be enough water if P bought excess cattle]

Terms must be certain

a) Rule of Law: contracts must be certain in terms and not so illusory as to make it impossible to say what is promised

b) General rule: an offer must be so definite as to its material terms that "the promise and performances to be rendered by each party are reasonably certain."

Liable for breach of K

6) Sullivan v. O'Connor [plastic surgery nose for the entertainer case]

a) Rule of Law: where the proof is clear, a patient can maintain an action for breach of a doctor's agreement or promise to cure or bring about a given result

b) Such medical contract cases require clear proof

Formation of Contract (Offer and Acceptance)

Offer and Acceptance are the critical process elements of contract formation. An enforceable obligation attaches only if there has been offer and acceptance. This is a two step process:

- 1) Find an agreement

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- 2) Determine if the agreement is legally enforceable

Analysis of Contract Formation

Offer → Acceptance → Consideration = Enforceable Agreement

Exam Tip: Compare facts on a timeline

Offer – a promise by the offeror to do or pay something in exchange for something else (an offer is a manifestation of a willingness to enter into a commitment)

- 1) General Common Law Rule: an offeror may revoke his offer at any time prior to its acceptance by the offeree
 - a) **Offeror as King of the deal.**
- 2) Two elements:
 - a) Manifestation (Intent) – intent to make a bargain, via words and actions (what people said or wrote – don't look at subjective intentions)
 - i) Intent Determinative – even if an important term is omitted, a statement can still be construed as an offer if the omission does not indicate a lack of intent to conclude a bargain and if the court can fill in the missing term by implication
 - b) Commitment (Certainty) – definiteness of terms, from manifestation the parties show a willingness to be bound and held to those words or actions
- 3) To form a contract you need the manifestation of mutual assent (consensual nature of contracts):
 - a) Could be manifest by a writing
 - b) Could be manifest by an oral expression of agreement
 - c) Could be manifest by the commencement of a performance that the offer calls for



- 4) Revocation – the offeror is free to revoke the offer anytime prior to acceptance
- 5) Tests:
 - a) When is a communication to be regarded as an offer and when is it to be taken merely as an invitation to engage in bargaining and negotiation
 - b) Can you say, “I accept”
- 6) Time Period – an offer that does not specify time limit stays open for a reasonable period unless revoked

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Problem Areas

- 1) Advertisements – **Rule:** ads are not considered an offer, only an invitation to a party to make an offer
- 2) Missing Terms – can communication manifest commitment without price? Depends on the law
 - a) Common Law – no, requires all material terms to be present
 - i) Major Terms
 - (1) Date
 - (2) Subject matter
 - (3) Quantity
 - (4) Price
 - (5) Time and place of delivery or performance
 - (6) Duration
 - (7) Signature of parties (to be bound)
 - b) UCC, Sale of Goods – yes, can constitute an offer without a price term (would be supplied by the court under UCC) **filled in under UCC default terms**
- 3) Requirements and Output Contracts – exclusive dealing arrangements
 - a) Element of Indeterminacy –
 - i) How much requirement/buyer will demand
 - (1) Each order becomes the acceptance of the offer (where the acceptance is the order)
 - (2) Continuous offer – long term contractual relationship(s), the significance is in the length of the relationship
 - (3) Standing offer – an offer which isn't revoked
 - ii) How much output/seller will tender
 - b) Okay to be vague about quantity term, these types of contracts usually provide for a maximum and minimum level on quantity
 - i) Two main questions:
 - (1) Indefiniteness
 - (2) Lack of mutuality – is one party bound and the other is not – the very notion of mutuality is that each party can sue the other if there is a breach
 - ii) Contract obligations are deemed satisfied if the quantity tendered or demanded falls within an acceptable range
 - c) If increased requirements or output, use reasonable test based on prior requirements/demands

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- d) Must deal in **good faith**
 - i) Requirements/buyer or output/seller may reduce or discontinue its participation as a participation as a part of a general withdrawal from the business itself, however, it cannot escape the contract by diverting the same materials or facilities to a more profitable use – courts look at prior output and stated estimates to determine good faith
 - ii) Four means of cancellation
 - (1) Forfeiture – court then doesn't want to enforce K
 - (2) Economic waste
 - (3) Mitigation
 - (4) Bad faith

Termination of Offer

- 1) Four Ways to Terminate and Offer:
 - a) Time expires
 - b) Death of either party
 - c) Revocation of offer – offeror changes mind. **Issues to watch for:**
 - i) How does the revocation happen?
 - (1) Later statement (words) – “No, I do not want to sell.”
 - (2) Later conduct (action) – Sold to another personBoth require offeree to be aware. There is no revocation without the awareness of the offeree.
 - ii) When does the revocation happen? – Question of timing (exams).
 - (1) Before acceptance – complete revocation
 - (2) Via mail – only effective at receipt of revocation by offeree
 - iii) When does the revocation not happen? – Some offers cannot be revoked
 - (1) Four situations where offers cannot be revoked
 - (a) Option – promise to keep an offer open in exchange for consideration (an offer is usually considered revocable unless a fee or premium is paid by offeree to offeror to keep the offer open (Option))
 - (i) Nominal Consideration – i.e., in exchange for “one dollar in hand paid, receipt whereof is hereby acknowledged” – X makes a promise to Y for nominal consideration for the option to complete an act in the future
 - (b) Reliance – reasonable and foreseeable, e.g. – contractors reliance on a subcontractors bid package

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- (c) Partial Performance (Exam Favorite) – partial performance of offer to enter into unilateral contract cannot be revoked, e.g. painted half the house, then cannot say, I revoke. (**Baker's Key Bridge scenario**)
 - (i) Note: preparation to perform *can* be revoked. If it is a question of fairness, turn to an equity remedy (quasi-contract), however, there is no remedy under contract law.
 - (d) UCC Sale of Goods, Article II "Firm Offer Rule" – Merchant signed writing – promises to keep offer open and cannot revoke. Only with the sale of goods between merchants is no consideration needed; rationale is that business people know what they're doing.
- d) Rejection of Offer – offeree turns down offer.
 - i) Direct rejection – "I reject your offer." (not likely to be on exam, too easy)
 - ii) Indirect rejection – Three Types (usually on exams)
 - (1) Counter Offer – Once a counter offer is made, the original offer is no good.
 - (a) Be aware that the factual line between counter offer and bargaining may at times be thin, e.g. "Will you take \$200.00?" is bargaining, not rejection of the offer. It is hard, at times, to determine the legal difference counter offer and bargaining.
 - (b) Common law treats a counter offer as an outright rejection of the offer
 - (2) Conditional Acceptance – "I accept if..." An offeree may not purport to accept an offer and in doing so add various conditions and qualifications of his own
 - (a) Common Wording:
 - (i) Subject to...
 - (ii) On condition that...
 - (iii) If...then...
 - (b) Note: Mirror Image Rule – the offer accepted must be the offer given. A statement of acceptance is only effective if it is the mirror image of the offer and expresses unconditional assent to all of the terms and conditions imposed by the offeror – the mirror image rule applies to service contract formation.
 - (3) Additional Terms – "I accept and..." – treat exactly the same as conditional acceptance except "Battle of the Forms"
 - (a) Common Law – here the mirror image rule applies
 - (b) UCC – not always a rejection (battle of the forms)

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Battle of the Forms (UCC § 2-207)

- 1) Under routine merchandise transactions the mirror image rule has been supplanted by § 2-207, e.g. the purchaser orders a quantity of goods from a supplier at a stated price for delivery at or by a certain date (using purchase order/order acceptance)
 - a) Forms will have certain same transaction language, yet have different “boiler plate” fine print – UCC § 2-207 will supercede mirror image rule and allow for a contract, the return form or “Order Acceptance” will be viewed by the courts as an acceptance rather than a counter offer
- 2) Depends on the facts if additional terms are accepted:
 - a) Adding – generally okay to contract formation
 - b) Insisting on new term – generally not okay to contract formation
- 3) Contract of Adhesion – form contract, much like a lease (very few if any of the terms are bargained for – price term may be negotiated e.g., car purchases) Note – courts will find consideration in contracts of adhesion in those term(s) that would have been bargained for
 - a) Standardization allows one to get things done more efficiently
 - b) Tend to be contracts of monopoly or oligopoly
 - c) A take it or leave it contract
- 4) “Seasonable Expressed Acceptance” UCC § 2-207 – expression of acceptance or written confirmation which must be sent in a reasonable time acts as an acceptance even though it states terms additional to or different from those offered or agreed upon. Additional terms to be construed as proposals when it is a transaction between merchants. **Note: Baker said 2-207 is a path for analyzing contract formation.**
- 5) Problem – what and where is the deal?
 - a) Deal depends on:
 - i) If the parties are merchants
 - ii) If the new term alters the deal
 - iii) If the offeror accepts the new term(s) – If not, then there is acceptance only for the original offer
 - b) Offeror is always the controller of the deal

Once the offer is established and still fresh, one moves on to acceptance.

Acceptance – an acceptance is a reflection of an offer. Once an offer is established, the next step in contract formation is the acceptance by the offeree, once there is acceptance, both parties are bound. A promise constituting acceptance would normally be stated in appropriate language, whether written or oral (acceptance can also come through performance).

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1) Two Elements

- a) Who accepted – person accepting must be the person to whom the offer was made

Exam Tip: Reward/Contest/Prize Fact Pattern – must know of the offer at the time of acceptance; you cannot collect the \$500.00 reward for the lost dog if you didn't know about the reward at the commencement of performance, i.e., found the dog then heard about the reward – Under unilateral contract you must know of offer to accept it

- b) How acceptance happened – Three ways (fact patterns)

- i) Return Promise – e.g. “I will buy.” **General Rule:** Most offers are accepted with a promise.

- ii) Start of Performance – e.g. start to paint the house. Must look to the nature of the offer (reliance interest/unilateral contract)

(1) If the offer says acceptance by performance, then anything other than performance cannot be acceptance

(2) Silence to method of acceptance/ Bilateral – starting to perform is acceptance – creates the contract – must commence performance within a reasonable time – course of dealings and trade custom or practice may also allow for silence as acceptance (outside of these exceptions it not usually allowed).

- iii) Mailbox Rule – (only works for acceptance) Where a reasonable response would be via mail – acceptance dates from the time sent not the time received.

(1) **Exam Fact Pattern:** Send offer to sell car for \$400.00. Two days later, on Tuesday, send another letter revoking offer (Remember that revocation is only good via mail upon receipt). However, other party mailed *acceptance* on Wednesday. **Mailbox Rule:** Legal acceptance before awareness/knowledge of revocation of offer: Agreement exists.

Note: Proper acceptance does not always make a contract. An agreement may exist which may not be legally enforceable.

Consideration (Bargained for Exchange)

- 1) **Consideration** – denotes receipt by the promisor of “something of value” from the promisee

- a) Once there is consideration there is a contract and both parties are bound to perform accordingly

- b) The evaluation for whether a contract is legally enforceable: *Consideration* or *Reliance Interest (reliance to one's detriment)*

- i) Consideration – bargained for legal value (receipt from promisor of “something of value” from the promisee)

- ii) Reliance Interest

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- c) Holmes – a promise is enforceable because someone buys a promise with a promise.
 - d) Consideration for a promise may consist solely of a performance by the promisee
 - i) Example(s):
 - (1) C promises to pay D \$10 if D mows C's lawn
 - (a) In this instance, D is not asked for a promise, rather D is asked for a performance
 - (b) C's promise to pay becomes binding when the service is rendered by D
 - e) The aim of consideration is to tie legal enforcement to the common act of trading one thing for another
 - i) Look at the offeror – what is this person asking for? (Usually will find consideration)
 - f) Legal Value – consideration is often considered a bargained for legal value (the receipt by the promisor of “something of value” from the promisee)
 - i) Doing something you're not currently obligated to do
 - ii) Promising
 - iii) Forbearance
 - iv) Promising to forbear
- 2) Exam Context – Three Problems
- a) Past Consideration – **there is no such thing**, e.g., Promise given after saving a person's life. There is no bargain for something already done.
 - b) Partial Payment of Debt – e.g., X pays \$600.00 on a \$1000.00 debt to Y. Even if Y will accept partial payment in full satisfaction or discharge of the debt, there is no consideration. X is still obligated to pay the money in full, and Y can sue for the remaining \$400.00. The debtor's payment of the lesser sum is not consideration because the debtor is only doing what he has a preexisting legal duty to do.
 - c) Pre-existing Legal Duty – **Rule**: Something one is already legally obligated to do is not consideration. E.g., Willy Nelson signs a contract to play a show for \$20,000, then he decides not to. Concert promoter, in a bind, says, “Will you play for \$30,000?” Concert promoter only owes Willy \$20,000. Concert promoter is *not* under a legally enforceable agreement since there is no consideration. Nelson is obligated to play under the signed \$20,000 contract.
 - d) UCC, no pre-existing rule – **Good Faith Test** (a merchant must be honest in fact and commercially reasonable)
 - i) § 1-203 “Obligation of **Good Faith**” – every contract or duty within this act imposes an obligation of good faith in its performance or enforcement
 - ii) § 1-201(19) **Good Faith** Definition – means honesty in fact in the transaction concerned

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- iii) Breach of good faith – aggrieved can recover cost of bid preparation
- iv) Evidence of bargaining in bad faith:
 - (1) Get and take a better offer
 - (2) Break off negotiations due to market price fluctuations
 - (3) Proposing extravagant or unexpected term or demand
 - (4) Rejecting routine provisions (standard boilerplate)
 - (5) Shifting bargaining positions when agreement is near
 - (6) Dilatory tactics (putting people off)
 - (7) Withholding agreement on trivial matters
 - (8) Ultra-hard bargaining/Coming to a stalemate
 - (9) Reneging on an agreed upon term
- 3) Illusory Consideration – where one party is bound and the other is not – at times it will deal with a situation where one party has a termination option – goes to mutuality (the very notion of mutuality is that each party can sue the other if there is a breach)
- 4) Peppercorn Consideration (Nominal Consideration) – the basic idea behind peppercorn consideration is that A will give B something very small for something larger in return (often times courts don't want to evaluate the worth of the consideration, they just want to see that it's there)
 - a) Courts will look at the comparative value of peppercorn consideration when peppercorn is exchanged for highly valued X and the disparity in value is not readily explainable (**usually only when they suspect abuse**)
 - i) Often times you will find peppercorn consideration in option contracts or investments that have a big pay out, yet relatively little chance of success (speculation)
 - ii) A dollar in hand...
- 5) Restatement (Second) Contracts § 17
 - a) Requirement of a Bargain
 - i) Except where special rules apply, the formation of a contract requires a “bargain” to which the contracting parties give assent, and a “consideration” which can take the form of either a return promise or actual performance
 - (1) Exchange of promises to do something in the future
- 6) Restatement (Second) Contracts § 71
 - a) Requirement for Exchange; Types of Exchange
 - i) To constitute consideration, a performance or a return promise **must be bargained for**.
 - ii) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

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- iii) The performance may consist of:
 - (1) An act other than a promise, or
 - (2) A forbearance, or
 - (3) The creation, modification, or destruction of a legal relation.
 - iv) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.
- 7) Consideration Tests:
- a) Whether it is a gift or a contract
 - b) **Is there a bargained for exchange** (needs to be there for the contract to be enforceable)
 - c) Is there reliance – enforceable in the absence of consideration
- 8) Two Types of bargain Contracts: (consideration may be found in either)
- a) Bilateral – a contract involving an exchange of promises
 - b) Unilateral – contracts involving an exchange of a promise for a performance, the offer requires performance to accept

Exam Tip: Question will often turn on whether the K is unilateral or bilateral. In order to determine this, look to the nature of the offer...“Did the offer require performance, or was the offer open and the performance only consequent?” Unilateral fact pattern – Reward or contest, i.e. “\$500.00 reward for finding my dog.” Here the only way to form K is through performance, find the dog. Possible performance, expressly required.

Reliance Interest

Remember to always look for consideration first. Your analysis will always come down to the doctrine, which is least weak.

Promises to Make a Gift

- 1) Donative Promise(s) – general rule is that a promise to make a gift in the future is not enforceable
 - a) The mere promise to make a gift in the future is not enforceable
 - b) Where the donee, relying in good faith, on the donor’s promise, is led thereby to spend money, incur debts or take some other costly and irreversible step, the donor must be “estopped” on the grounds of equity and fairness from asserting “want of consideration”
- 2) Gift – Two Elements
 - a) Intent – I intend to give
 - b) Delivery – I gave at least in part
- 3) Cases:

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Waive legal
right as
consideration

a) Hammer v. Sidway (uncle promises nephew X amount if the nephew gives up his bad and evil ways)

i) **Rule of Law – In general, the waiver of any legal right, at the request of another party is a sufficient consideration for a promise**

(1) **The waiver of P's legal right limits P's freedom to act**

(2) **The inducement to forbear can suffice as consideration for a promise**

(a) **Performance as forbearance**

(b) **Courts usually do not inquire into the adequacy of consideration**

Promise
induces
action or
forbearance
RELIANCE

b) Ricketts v. Scothorn (I'll give you money if you don't work says grandfather to granddaughter, then he dies and the estate refuses to pay) this case has the element of foreseeable reliance

i) **Rule of Law** – a promise may be legally binding without consideration if it reasonably induced action or forbearance and if injustice will be avoided by its enforcement

Promise not
to rescind K
as
consideration

c) DeCicco v. Schweizer (father promises to pay daughter \$2,500 per annum upon her marriage to the Italian Count)

i) **Rule of Law** – a promise by a third person to two parties jointly to induce them not to rescind or modify a contract which they are free to abandon is supported by consideration

d) Devecmon v. Shaw – (nephew goes to Europe on the promise of reimbursement from uncle, uncle dies and nephew sues uncle's estate to recover funds expended)

Reliance as
consideration
substitute

i) **Rule of Law** – sufficient consideration is present where the performing party, in the reliance of the other party's promise of repayment, has done something in a manner which he otherwise would not have been compelled to do

Charitable
subscription

e) Allegheny College v. National Chautauqua County Bank of Jamestown (widow makes charitable subscription to college, pays a portion then later rescinds, upon her death the college sues the estate to recover the rest)

i) **Rule of Law** – the acceptance of a charitable subscription by the trustees of the charity implies a promise on their part to execute the work contemplated and to carry out the purposes for which the subscription was made

Concept of "Estoppel" (Reliance)

1) Promissory Estoppel – a promise which is expected by the promisor to induce the promisee to take some action, and which does induce such action, is binding and enforceable if necessary to avoid injustice. The concept of reliance based enforcement (represents the principle exception to the standard requirement of consideration). You rely, to your detriment, on the promise of another.

a) Three Elements:

i) Promise

ii) Promise relied upon (reasonable and foreseeable test) Anderson v. Backlund (not reasonable reliance, only God can make it rain)

iii) Enforcement necessary to avoid injustice

b) Reliance by the promisee may be sufficient to create an enforcement right against the promisor, even though the transaction does not involve a bargain between the parties, and even though the promisor receives no consideration

Course Outline

- c) It is a mixed set on “interactive dealing” that stands midway between conventional swap transactions (where consideration is present by definition) and wholly non-reciprocal gift promises (where consideration is not ever present).
 - d) Promise on one side and a cost – but neither a “return promise” nor a “performance” – on the other side
 - i) Promise and cost are causally related, where there is at least an inference of reciprocity
 - (1) Simple fairness suggests that the law would be deficient in reflecting reasonable expectations unless a remedy of some sort were available to the promisee
- 2) Equitable Estoppel – reliance on a representation of material fact
- 3) Restatement (Second) § 90:
- a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a 3rd party and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise
 - (1) The remedy granted for the breach may be limited as justice requires
- 4) Difference from Consideration – consideration always about something bargained for
- a) Example: You say you will not foreclose on my house. In return I say I will paint my house. You foreclose. Which approach, promissory estoppel or consideration. *Answer:* Promissory estoppel – the promisor did not receive any thing of value from the promisee.
- 5) Instances Where Promissory Estoppel Applied:
- a) Charitable subscriptions
 - b) Gratuitous bailments in which the bailee undertakes to preserve or insure the property delivered to their care
 - c) Oral promises to convey land on which the promisee then enters and makes improvements
 - d) Occasional family gifts

Statute of Frauds

(Exam Favorite)

The Statute of Frauds is simply **the proof of the existence of an agreement**. The Statute of Frauds requires **that those contracts that come under its jurisdiction be in writing**. *The primary purpose of the Statute of Frauds is to prevent fraud and perjury on the court by persons who might falsely claim that a contract was made, when it was not.* The statute requires that certain kinds of contracts be in a writing signed by the party to be charged (by the party against whom the enforcement of the contract is sought). There are three basic questions that must be asked to determine such existence:

- 1) Does the contract fall within the Statute of Frauds?

Course Outline

- 2) Does it satisfy the Statute of Frauds? —————> Enforceable
3) What happens if it does not satisfy the Statute of Frauds? —————> Unenforceable

Note: Within the Statute of Frauds —————> Governed by the Statute of Frauds

- 1) What falls within the Statute of Frauds?
- a) Contract for the sale of land or the sale of interest in land
- i) Under the SOF contracts for the sale of land, or interest in land must be in writing, e.g. lease on land for its use.
 - ii) Oral transfer of "Blackacre" from A to B. You need two of the following three things in place.
 - (1) Possession
 - (2) Improvement
 - (3) Partial Payment
- b) Sale of goods for \$500.00 or more – falls within the statute of frauds
- i) E.g., sell shirt for \$10.00. Under Article II of the UCC but not under the Statute of Frauds.
 - ii) The sale of goods of \$500.00 or more must be in writing
 - iii) Goods are defined as all tangible moveable property, it does not include intangible securities or services
 - iv) Note: an oral contract for the sale of goods priced over \$500 is enforced when:
 - (1) The buyer receives and accepts all or part of the goods, e.g., part performance satisfies Statute of Frauds, *but* only to the extent of the partial performance, e.g., 1000 widgets at \$1 each. Only 400 delivered – only enforceable for 400 delivered.
 - (2) The buyer makes part payment for the goods
 - (3) Special manufacture – e.g., I manufacture 500 gold velvet Elvis suits for the greater Vermont Elvis Impersonators Club -- at start of performance by the seller (production) satisfies Statute of Frauds – legally enforceable
 - (4) Contract between merchants
 - (5) Admission – the contract's existence is admitted to by the party against whom enforcement is sought
- c) Contracts in consideration of marriage, e.g., Mother orally promises X \$10,000 to marry her daughter. X marries daughter. Promise is not enforceable under SOF cause it was not in writing.
- d) Service not capable of being performed within one year.
- i) E.g. – Hired for the rest of your life. Life-time deal – does not fall within the Statute of Frauds since you could die tomorrow.

Course Outline

- ii) E.g. – Hired for two years – definite term longer than year. Specified time period – does fall within the Statute of Frauds.
- iii) E.g. – “John Denver Rule” – contracted for a performance a year-and-a-half away – need Statute of Frauds
- e) Suretyship contracts – promises made to the creditor of another party (the debtor) to answer for the obligations of the debtor must be in writing
 - i) Usually a favorite of the law – courts want to discourage collusion between the debtor and the creditor
- 2) Formalities:
 - a) The seal has been replaced by the signature
 - b) Requirements of writing in the SOF – conveys the general idea that reliable evidence is needed to show that the transaction took place

Satisfaction of the Statute of Frauds – allows enforcement

- 1) Writing/Written Instrument(s) – Two Issues:
 - a) What does the writing say?
 - b) Who signed the writing? – Obviously it must be signed by the person P is trying to enforce the contract against D
 - c) Normally the SOF can be satisfied by any sort of writing signed by the party against who P seeks enforcement
 - i) Does not need to be a contract – can be a letter
 - ii) Must contain all the essential terms of the agreement
 - iii) Essential terms:
 - (1) The identity of the contracting parties
 - (2) A description of the subject matter of the contract
 - (3) The terms and conditions of the agreement
 - d) Can be signed by agent under original SOF
 - i) Equal Dignity Statutes – in some states it is required that the agent’s authority to sign for the contracting party also be in writing
 - e) Document Integration – the writing may be composed of several documents – if this is the case each document must refer to or incorporate the others or the documents must be otherwise integrated (e.g., stapled to the signed document satisfies integration (court may seek to integrate the documents)
- 2) SOF as Affirmative Defense
 - a) Must be raised by D at the beginning of the court proceeding
 - b) When raised as an affirmative defense, P must produce one of the following:

Course Outline

- i) The signed writing, representation that the contract had been reduced to writing
- ii) Show that the contract comes under a UCC exception to SOF, a representation that no writing was required
- iii) Show that the contract comes under case law exception to SOF, or D says won't raise SOF if contract breached

3) SOF Cases:

Writing for sale of land

a) Hughes v. Payne – sale of property under SOF, D agreed to sell land to P and then would not consummate sale. D said written agreement wasn't enforceable under SOF

i) Rule of Law – a writing complies with the SOF if it states the identities of the contracting parties and a description of the land sold. In this case parole evidence was necessary to reform the contract to reflect the actual agreement. *The parole evidence rule does not apply where reformation is sought.* (Reformation – equitable action)

Part performance sale of land

b) Baldrige v. Centgraf – P orally agreed to sell land to D. D gave down payment to 3rd party until P transferred deed. P granted D right to occupy land prior to transfer. P then tries to evict D. D sought to show part payment as part performance.

i) Rule of Law – possession of real property is not sufficient part performance to take an oral contract for land out of the SOF. **Note:** some courts will hold that possession plus valuable improvements is sufficient to show part performance.

Sale of goods over \$500

c) Harry Rubin & Sons, Inc. v. Consolidated Pipe Co. of America, Inc. – memorandum sent in confirmation of oral agreement

i) Rule of Law – by statute, under UCC § 2-201(2) it is not necessary that there be a memorandum signed by the party charged to maintain or defend an action on a contract for the sale of goods for \$500 or more. All that is needed is a memorandum.

(1) Under UCC, Writing must have:

(a) **Quantity term** – quantity term needed because without it there could be no remedy and there is no way under the UCC to have a default quantity term

(b) **Name of parties**

(c) **Signed**

Waiver case

d) Imperator Realty Co., Inc. v. Tull – P claimed that D orally agreed not to enforce a covenant that all state and municipal violations had to be corrected prior to transfer.

i) Rule of Law – an oral waiver of a condition to a written contract, which has been relied on, estops the promisor from pleading the SOF.

ii) Waivers (Insurance Contracts)

(1) Election waiver – must be notified w/in 30 days for claim, unless insurance company elects to waive 30 day period to make claims

(2) Estoppel waiver – company says don't worry about 30 day period, you rely on company's utterance

(3) P has substantially performed contract and D say he won't insist on non-material condition, then insists on condition they've given up (condition waived, non-enforceable)

Real estate in writing

e) Boone v. Coe – P was promised land and was unable to show a writing

i) Rule of Law – damages cannot be recovered for the breach of an oral contract that is within the SOF. *P was impaled on the SOF.*

ii) Where there is no writing then search for remedy through equity. Try quasi-contract and unjust enrichment. No writing – no enforcement of the contract

Course Outline

Defenses (Against Contract Formation)

1) Unconscionability (UCC 2-302) – if a court, as a matter of law, finds a contract or any clause of the contract to have been unconscionable when made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause. *Determination is a matter of law for the courts to decide.*

a) Salient factors of unconscionability:

- i) An absence of meaningful choice on the buyers part
- ii) The presence of contract terms “unreasonably favorable” to the seller – Unfair surprise – hidden contract term
- iii) Distribution of risk in unexpected or unusual ways

Exam Tip: identify the obnoxious clause. Courts are more likely to remove it than void the whole contract.

2) Duress – promises extorted by violence or threat of violence are unenforceable

a) Elements:

- i) Threat – there must be a threat, **no threat – do duress**
- ii) Threat must be wrongful
- iii) No reasonable alternative
- iv) Acquiescence to threat

b) Involves action under threat – originally only defense now a valid claim

3) Incapacity – makes contract with individual unable to enter into contract **Capacity Issues** – both parties must have the capacity to enter into contract

a) Under 18 years of age is infant – only issue of fact

b) Mentally incompetent – cannot understand – only issue of fact

c) Intoxicated (different) – two fact test:

- i) Drunk?
- ii) Other parties reason to know drunk? If yes then there is a capacity issue.

d) Special Rules: Rule of Necessarily: Even persons lacking capacity are legally obligated to pay for necessities, e.g., Kid out of the house, buys motorcycle, he is still obligated to pay for it.

4) Undue Influence – self dealing, e.g., one of the parties influences the other to benefit themselves at the other party's expense. There is no undue influence if the other party isn't profiting.

a) Elements:

- i) Susceptibility – the affected party must be weakened
- ii) Disposition – one party has reason to manipulate another

Course Outline

- iii) Opportunity – the rise of undue influence may arise out of a confidential (or special) relationship between the parties (atty/client, parent/child, brother/sister)
 - iv) Inadequate Consideration – the transaction makes no sense, commercial or otherwise
 - b) No threat necessary
 - c) Often times deals with will and estates
 - d) **Undue influence voids a contract because consent is lacking**, contract was entered into because of manipulation – if there is bargaining the courts may be less apt to suspect undue influence
 - e) also may take place in a confidential or fiduciary relationship (the power to take advantage of another)
 - i) There is usually a disparity in:
 - (1) Age
 - (2) Education
 - (3) Business experience
 - f) Case:
 - i) Jenkins Towel v. Fidelity Philadelphia (bank wanted to give Esso station right to buy when Jenkins had highest solid bid, Jenkins sued for specific performance, thought to be self-dealing on the part of Fidelity)
 - (1) Rule of Law – a writing which contains ambiguity susceptible to more than one interpretation must be resolved against the party which scripted the writing.
- 5) Misrepresentation (Fraud) – requirement of assent implies in a general way that both parties to an exchange shall have a reasonably clear conception of what they are getting and what they are giving up (non-disclosure or concealment amounts to a failure to act in good faith)
- a) Elements of Fraud:
 - i) Intent -- Knowing or intentional (to deceive)
 - ii) Misrepresentation -- of a material fact (primary element of fraud)
 - iii) Reliance – which misrepresentation is relied upon
 - iv) Injury – reliance causes
 - b) Fraud trumps contracts – there is a societal interest in not allowing fraud – public policy (an allegation of fraud can be made if the elements are there for a cause of action).
 - c) Warranty Doctrine – a good when sold has a basic warranty that it will do what it's intended to do (born out of fraud)
 - i) Warranty of Merchantability – goods are fit for their intended use (can disclaim out of warranty in certain instances)
 - (1) Material change in contract, if you have no warranty rights you have no basis for liability when the goods are defective

Undue
Influence
case.

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- ii) Warranty of eligibility – individual is eligible for the warranty and becomes a judgement creditor (given a satisfaction warranty – buyer gets to judge whether or not satisfied).
- 6) Illegal – if a contract is legal at the time of the offer yet illegal before acceptance, the intervening illegality terminates the contract. If a contract becomes illegal after it is made then it is discharged.
 - a) A contract is illegal if either the consideration or the object of the contract is illegal. Some contracts are illegal because they are expressly prohibited by statute.
 - b) An illegal contract is void and the general rule is that *if a contract is illegal the courts will not enforce it.*
- 7) Indefiniteness/Ambiguity – the term(s) of the contract is too ambiguous to enforce, for a bargain to be enforceable, its terms must be sufficiently definite to evidence that the parties have concluded a deal and to enable the court to supply a remedy for breach – default terms “boiler plate” will be supplied by the UCC (when sale of goods)
 - a) Three necessary facts:
 - i) Term(s) must be ambiguous
 - ii) Each party different meaning in mind
 - iii) Neither party knows or has reason to know of meaning attached to other party
 - (1) If one party knows of the ambiguity and the other’s meaning – agreement is legally enforceable under terms of the other party

Exam Tip: if a question involves a bargain, which the parties have failed to specify price, quantity, or payment terms, should consider indefiniteness. Know that it is usually the nature of the court to fill in the gaps (if for the sale of goods, will fall under the UCC which has a number of gap fillers, neutral terms)

- 8) Mistaken facts
 - a) Mutual mistake to material facts – a shared mistake made by both parties to the contract, (usually a shared assumption of both parties as to the conditions in the outside world) test for material fact.
 - i) What is being sold – material fact
 - ii) Value of what is being sold – not a material fact
 - iii) Modern Rule: where parties enter into a contract under a mutual mistake concerning a basic assumption of fact on which the contract was made, the contract is voidable by the adversely affected party if the mistake has a material effect on the agreed exchange and the adversely affected party did not bear the risk that the assumption was mistaken. The party that bears the risk of the mistake bears the liability.
 - (1) E.g., A leases Blackacre to B for one day for the purpose of a concert. Unbeknownst to either party, a municipal ordinance is passed banning

Course Outline

such concerts. The contract is voidable by B because neither party knew of the new ordinance

- b) Unilateral Mistakes – one party makes mistake or term(s), usually refers to a mechanical error, and error in computation, or perception
- i) E.g., Normal bid for the plumbing work for a construction contract at around \$30,000, one party's bid package comes in at \$30,000. The other party cannot take advantage of such a mistake
 - ii) Non-mistaken party aware of the error – if the non-mistaken party is aware of the error then the contract is voidable (actual knowledge not necessary, reason to know sufficient)
 - iii) General Rule – not a basis for a defense, yet cannot take advantage of obvious mistake
- c) Impossibility – I cannot perform X because it is impossible to obtain Y – often used when natural resources are in short supply or not available, a critical event has rendered performance physically impossible or the critical event has reduced the market value of the performance, or increased its cost, in a way that no one seemed to anticipate (intellectual cousin of mistake)
- i) Three Elements:
 - (1) An unexpected occurrence
 - (2) A failure to have allocated the risk of occurrence by agreement or by custom
 - (3) "Commercial Impracticability" with respect to P's obligation(s)

Other party can't take advantage of party mistake.

Exam Tip: No contract obligation → go to quasi-contract (recover value of performance to persons).

Parol Evidence Rule

- 1) The Rule – where an agreement has been reduced to a writing intended as the parties' final and complete expression of their agreement (an integrated document), evidence of prior oral or written expressions or of any contemporaneous oral expressions (parol evidence) is not admissible to add, vary, or contradict the writing. *Parol Evidence is only used after the contract is formed and it goes to the term(s) and the writing.* **Prof. Baker notes that the parol evidence rule is not a rule of evidence, rather a rule of substantive contract law about what terms should be a part of the contract.** It is a jury control device (the judge must decide whether the jury will see such evidence not contained in the writing).
- 2) Integrated document – a document, or group of documents with the proper references to the signed writing, that the parties intended to be the final, complete expression of their agreement
 - a) Merger or Integration Clause – no other agreement beyond the face of this writing, all other documents have been merged or referenced and this is the final version
 - b) Four tests:

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- i) Face of the instrument (four corners) – parties intent must be determined from the “face of the document” itself
 - ii) Corbin test – Any relevant evidence – most courts today will consider any relevant evidence that will show the parties’ intent to be bound – should be admitted as a matter for the jury to decide
 - iii) Willistonian Restatement Test
 - iv) UCC § 2-202 (course of dealings and usage of trade)
- c) What constitutes Parol Evidence
- Both of these examples constitute parol evidence
- i) Where there is an integrated document, evidence of a prior oral or written agreement that is within the scope of the writing
 - ii) Where there is an integrated document, evidence of a contemporaneous oral agreement
- 3) Extrinsic Evidence – evidence that is external to the writing (**Prof. Baker says to use this term instead of parol evidence**)
- a) Instances of extrinsic evidence:
 - i) Ambiguity of language – words have multiple meanings
 - ii) Parol Evidence Rule cannot be used to exclude the evidence of fraud (cannot insulate from tort liability on the basis of contracts
 - (1) Allowable when it goes to contract formation (anything that goes to contract formation is admissible)
- 4) Exceptions to the Rule:
- a) Separate Consideration – if the parol evidence and the agreement are each supported by separate consideration, courts will recognize the evidence as a separate agreement even if it relates to the agreement at hand
 - b) Naturally Omitted Terms – a term that would be naturally omitted from the writing is admissible as parol evidence. The writing is incomplete on its face due to the omission of a material fact. Here the parol evidence is admissible due to the fact that the necessary term would make the contract complete. Even if there is a merger or integration clause, if term X is missing parol evidence will be allowed to introduce that term.
 - i) Restatement Test (Willistonian):
 - (1) The omitted term does not conflict with the writing
 - (2) The omitted term(s) might naturally be made a separate agreement and omitted from the writing
 - ii) UCC Test (§ 2-202) – for the contract for the sale of goods, parol evidence is admissible unless the omitted term(s) “would certainly have been included” in the agreement
 - c) Partial Integration – where the integrated writing is not complete, it still covers those subjects enumerated therein, those subjects not so enumerated may be admissible as parol evidence.

Course Outline

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- d) Lack of Consideration – parol evidence is admissible to show a lack of consideration
 - e) Fraud, Duress, Undue Influence, or Mistake – Parol evidence is admissible to show any of these situations
 - i) Note – a person who makes a promise he has no intention of performing is said to commit "promissory fraud" – courts will usually allow parol evidence to show such fraud
 - f) Condition Precedent – fact, act or event, which must exist or occur before a duty of immediate performance of a promise arises [parol evidence is admissible to show that there was condition precedent (oral or written) to the legal effectiveness of the written agreement]
 - i) You may have situations under contract where rights will not be assigned unless certain conditions are met.
 - ii) Condition Defined – facts or events that must happen before liability arises (conditions usually divest liability)
 - iii) Promise v. Condition:
 - (1) Promise:
 - (a) Made between the parties to the contract
 - (b) Creates a duty in the promisor
 - (c) Promise is performed then the duty is discharged
 - (d) When a promise is not performed that is a breach of contract giving rise to e remedial right
 - (2) Condition:
 - (a) Parties must agree to the condition
 - (b) Condition postpones or relieves a duty
 - (c) If condition precedent occurs then quiescent duty arises
 - (d) Failure of meeting condition means duty remains dormant
 - (e) If party X is responsible for bringing about a condition then a promissory consideration arises
 - g) Modifications – a modification to a written agreement does not fall under the parol evidence rule since it was subsequent to contract formation. Mods must comply with the SOF. An agreement subsequent to the writing should stand or fall on its face (parol evidence can't exclude it)
 - i) Modification need not be in writing but needs consideration (unless for the sale of goods, UCC requires a writing when it was required in the original contract, but not consideration)
 - ii) Modification may act as a waiver in certain situations

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- iii) Agreements to agree – while not usually recognized in contracts, they may be recognized when a contract is in place and the parties agree to agree on a term in the future
 - h) Strike Clause/Force Majeure – hedging bets, protection against things beyond one's control – general labor strike, acts of God or acts of governments
- 5) Case:

Parol
Evidence
case.

- a) Zell v. American Seating – D contended that the parol evidence rule precluded the introduction of any evidence concerning a bonus payment to P which was not in their written agreement
 - i) Rule of Law – where the parties agree that a written agreement does not reflect the true agreement, parol evidence is admissible to establish the true agreement.

Exam Tip – the proponent of the evidence (the party which seeks to introduce the evidence) is seeking to show that the contractual obligations of the parties is greater than the writing. The opponent will seek to show that the contract is contained wholly within the writing. And, the court is tasked with trying to decide which utterances comprise the contract. Cannot exclude evidence going to contract formation. If trade standards are operative they are admissible to explain the contract. You can also look to the course of dealings or performance to see how the parties dealt with each other in the past and during contract performance.