## Introduction to the Study of Contract Law

A. **Contract Defined:**

1. Lawyers use “contract” to refer to an agreement that has **legal effect** – it creates obligations for which some sort of legal enforcement will be available if performance is not forthcoming
2. Three elements in a transaction, each of which can be called a contract:
3. **Agreement-in-fact** between the parties
4. **Agreement-as-written** (which may or may not correspond accurately to agreement-in-fact)
5. **Set of rights and duties** created by a and b.

B. Jurisdiction

1. Subject matter jurisdiction
2. Limits cases courts can hear.
3. Contract case most likely to be heard in state courts, usually in courts of general jurisdiction.
4. Federal courts are courts of limited jurisdiction. They have jurisdiction in two types of matters: federal question and diversity of citizenship
5. Federal question
6. 28 USC §1331: “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”
7. Federal courts have exclusive jurisdiction over certain federal question cases
8. Diversity jurisdiction
9. Federal court gets subject matter jurisdiction based on diversity if:
10. Both parties are citizens of different states and
11. Amount in question exceeds $75,000
12. Corporations: For purposes of “citizenship,” corporation is deemed to be a citizen both of the state of its incorporation and its principal state of business.
13. While diversity jurisdiction was originally designed to prevent a state from discriminating against non-residents, it is now a means for D to choose the forum.
14. Arbitration: Arbitration panel’s jurisdiction arises from arbitration clause.
15. Parties can make private choice to exempt their transactions from the legal system that generally resolves disputes.
16. Separability doctrine: Court can only hear claims that *arbitration clause* was entered into fraudulently. If P argues only that it is necessarily fraudulent because contract as a whole was entered into fraudulently, then fraudulence of contract as a whole will be determ ined in arbitration. (Prima Paint, also see Rollins). Policy reasons:
17. Reduces case-load of the courts
18. Policy underlying the FAA favors arbitration

C. **Professional Responsibility**

1. Some states have adopted the **Model Rules of Professional Responsibility,** others have adopted the **Federal Code.**
2. **Model Rule 1.2:** A lawyer shall not assist a client in anything lawyer knows to be criminal or fraudulent. A lawyer may not continue to represent client in something lawyer originally thought was ethical but later discovered to be fraudulent.
3. **Question your client:** Must satisfy yourself, as a professional, that you know enough to go forward. You are obligated to question your client enough to make conclusions. If your integrity is compromised before a tribunal, your value as a lawyer is severely diminished.

D. **Fraud in signing of contract**

1. **Fraud in the factum:** Misrepresenting character of document (i.e. A and B agree to a contract and it is read by B. Afterward A substitutes a writing containing essential terms different from those agreed upon and induces B to sign it, believing it is the one he has read)
2. **Fraud in the inducement:** Misrepresenting what the contract says (i.e. A tells B contract is for four months but it is really for three years; B does not read contract but chooses to rely on A’s explanation)
3. Only **fraud in the factum** invalidates a contract – fraud in the inducement makes it *voidable*, but not void (Rollins).

E. **Standard form contracts**

1. **Disputes** over standard form contracts **take two forms**:
2. People claim to have entered an oral agreement that differs from standard form contract
3. Term in standard form contract was never addressed by either party. Standard form contracts contain a lot of “boiler plate language” dealing with ancillary matters.

F. How should court deal with the claim that either there was **a separate oral agreement,** or something in the document was **never discussed?**

1. Enforce the writing
2. Enforce oral agreement, disregard the writing
3. Reach some compromise between the two
4. **Enforce the writing**
5. Advantages:

* **Avoids disputes** about who said what
* **Excellent evidence** for the court
* **Creates incentives to write things down** and thus be more careful about what you say and how you say it.

1. Disadvantages:

* **“Deceptive clauses”**:One party did not understand and was not aware of them.
* **One party didn’t think about explaining everything in the contract:** Not likely to result in fraud, but likely to cause imbalance between parties
* **Eliminates consumer choice**

1. **Enforce oral agreement**
2. Advantages:

* May **better reflect what parties agreed to** than the writing does.
* Allows **individualized contracts,** thus increasing consumer choice.
* **Simplicity of contract:** Can explain it to anybody, so that both parties understand it.

1. Disadvantages:

* **Difficult to determine** what oral agreement was – parties can a) lie about it because it wasn’t in writing, or b) have different interpretations of agreement
* **Uncertainty:** Hurts party that based its decisions on the written agreement – i.e. business that assumes disputes would be arbitrated rather than go to court

## II. Classical System of Contract Law: Mutual Assent and Bargained-for

## Exchange

1. **Mutual assent**: Agreements should be kept
2. **Meeting of the minds** refers only to the moment the contract is signed and the fact that the two parties assented to the agreement. It does not refer to expectations, intentions, etc. That is too subjective.
3. **“Honest mistake”** **not a reason to nullify mutual assent** (Ray v. Eurice). To invalidate contract, must show there is fraud, duress, or mutual mistake. **Policy reasons**:
4. **Claimed intent too hard to prove.** It is a subjective, not objective standard. Instead, courts rely on what a reasonable person would think the contract meant.
5. **Why do we allow mutual mistake** to void the contract, but not unilateral mistake?
6. In **unilateral mistake** case, one party relies on meaning of contract as written and we want to protect that legitimate expectation. In **mutual mistake,** neither party has a reasonable expectation based on contract as written.
7. **Duty to read doctrine** (Ray v. Eurice, see also Skrbina). Once parties enter into agreement, it is all or nothing.
8. Park 100 Investors, Inc. v. Kartes (defendants, on their way to a wedding rehearsal, had signed a personal guaranty of lease). Can be **distinguished** from Eurice:
9. **Fraud:** Defendants thought they were signing a different agreement than they ended up signing. *Fraud will void what can be thought of as assent.*
10. Fraud hinges on the **wedding rehearsal** in this case. It was an unusual time and place to sign a contract (5:00 as defendants were leaving work), and person asking them to sign agreement knew that they were in a hurry. His explanations were not sufficient.
11. This case turns on what is **justifiable reliance.** Court found material misrepresentation, without which there is no claim for fraud. Misrepresentation occurred in calling it a lease agreement. Under the circumstances/added pressure, the Karteses were diligent and acted with due care.
12. **Defenses to contractual obligation:**
13. **Fraud** (in the factum and in the inducement)
14. **Failure to disclose** (when there is a duty to inform)
15. **Unconscionability** – four factors from Rollins:
16. Whether there is an absence of meaningful choice on one party’s part
17. Whether the contractual terms are unreasonably favorable to one party
18. Whether there was unequal bargaining power among the parties
19. Whether there were oppressive, one-sided, or patently unfair terms in the contract
20. **Duress and undue influence**
21. **Mistake,** both **unilateral** and **mutual**
22. Offer may be accepted in **any manner reasonable under the circumstances**.
23. **Silence as acceptance** – Restatement (Second) §69. Ordinarily silence does not constitute acceptance. There are certain exceptions, however:
24. Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
25. 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.
26. Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intent to accept.

##### Offer and Acceptance: Bilateral Contracts

1. **Offer defined** (Restatement (Second) §24): “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”
2. Lonergan v. Scolnick
3. D owns real estate and P wants to buy it. **P claims that D breached contract by selling land** to third party. P had placed ad in newspaper advertising the land. Then D sends form letter to P saying the rock bottom price is $2500. (No legal significance – it *could* be an offer if the part saying it was a form letter was removed. **Convention:** **If it says it is a form letter, it is not an offer**.) P sends letter to D with a number of questions about the exact location of the land.
4. On April 8, D tells P he will have to decide fast. Appellate court reverses lower court, decides it’s a legal nothing.
5. On April 15, P writes back, says yes and says he will deposit $2500 – incurs costs due to reliance on the offer. What is the document?
6. **Lower court** says it was an attempt to accept the offer but it wasn’t returned fast enough – ineffective acceptance.
7. **Appeals court**says D hadn’t made an offer so it couldn’t be an acceptance. At most, it is an offer.
8. Appellate court overruled trial court because trial court doesn’t give a lot of guidance in saying “Not fast enough.” Appellate court tells lower courts not to be quick to judge that letters are offers at this point in the process – **if there is ambiguity, err on the side of *not* finding a contract**.
9. **Mailbox rule**: **Acceptance** will in some circumstances be treated as **effective as soon as dispatched** into a stream of communication that is reasonable under the circumstances. On the other hand, **offer and revocation of offer** are **effective only upon receipt**.
10. **Modern permutations are complex**. What are reasonable means of conducting transactions these days? Two examples: 1. X sends an email to Y, but Y does not check email every day. 2. X leaves voice mail with Y, but there’s a flood and all the voicemail in the county gets erased.
11. **Risk allocation rule**: Risk of the acceptance being lost will be on the offeror and not on the offeree. Offeror is the master of the offer and can confine risks in how offer is made – i.e. “If I do not hear from you by x time, call me and tell me…” Law protects interests of offeree because offeror is in a better position to protect herself.
12. Normile v. Miller.
13. P sent a signed offer to purchase to D. It contains “time is of essence” clause – the offer will terminate if P does not hear from D by 5 p.m., Aug 5. D signed it under seal, made several changes in the terms, and returned it to P. Changes constituted a counteroffer.
14. **Court rejects P’s view** that he had an option and could take his time to think about whether he wanted to accept. **Courts have high bar to find options**. They look for express, unmistakably clear language, and consideration because an option is a valuable right. It gives option holder time to decide what he wants to do. Courts assume that people don’t give up something for nothing, and thus look for value exchange.
15. **“Mirror image” rule** – when you accept an offer, you must accept it on its terms. If you don’t agree to the terms of the offer, you reject the offer and are making a counter offer. Counter offer is legally a rejection and termination of previous offer – Restatement (Second) §39.
16. **Principles from Normile**
17. **Options** make offers irrevocable during option period, but courts are very slow to find irrevocable offers unless they find express language and consideration for option
18. **What constitutes acceptance is determined by offeror** – offeror controls terms of the offer
19. Where offer **does not specify a method**, **any reasonable conventional method of acceptance may be used** (mail is no longer deemed acceptable)
20. What is **reasonable** depends on industry and customs of the industry – in some industries deals are concluded by a handshake, and in those industries handshakes are sufficient to create the contract

##### Unilateral contracts: Exchange of a promise for actual performance only

1. Classic unilateral contract – $75 reward for return of my dog. You will only give the money for performance – promise of performance does you absolutely no good.
2. There is a **preference by courts for finding bilateral contracts over unilateral contracts**.
3. Petterson v. Pattberg – **classical law approach**
4. Bank promises discount if P pays early. P shows up at D’s house with money and D refuses to open the door. D says he has already sold the mortgage, with the principal intact, to somebody else. D refuses to open the door and allow P to perform (via payment) yet **court finds for D because offer was revoked before P could complete performance**.
5. **Judge Lehman’s dissent**. The only reason performance was not rendered was because D refused to accept, preventing P from fully performing. Lehman seems to say on the one hand that P performed and on the other hand that D prevented performance.
6. This case wouldn’t necessarily have turned out differently after the restatements – hinges upon whether court believed partial performance had occurred, as per §45. However, it is likely that P would not have paid off principal early were it not for D’s inducement – thus probably partial performance had occurred.
7. **Modified rule – Restatement (Second) §45**: “(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. (2) The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.”
8. Duldulao v. Saint Mary of Nazareth Hospital Center.
9. Summary judgment motion – no issue of fact to try. **P’s argument** was that **handbook constituted an implied contract**, creating rights for her and obligations upon the employer that were breached by employer’s failure to follow rights set out in the handbook (that employer may not terminate employee without first providing notice). Court finds elements for offer, acceptance and consideration in the text of the handbook. Court finds that the handbook created rights.
10. Unless the **other party acts in response**, there is no meeting of the minds. In this case, **performance is P continuing to work** – constitutes performance of unilateral contract.

##### Consideration

1. Doctrine of consideration reflects underlying view in classical law that we should not enforce mere promises.
2. Hamer v. Sidway.
3. Uncle William Story, in front of lots of people, stood up and promised the nephew $5,000 when he reaches 21 if he refrains from drinking, using tobacco, swearing and playing cards or billiards for money until he becomes 21. **It was an offer** under Restatement (Second) §24. It is a **unilateral contract** – offeror is not requesting a promise – he is requesting performance. Nephew was 15 at the time of offer. He used tobacco and occasionally drank liquor at the time and had a legal right to do so.
4. **D’s legal argument** was that nephew’s performance benefited the nephew and did not benefit the uncle – therefore no legal obligation. Court said there must be giving up of legal right, which is harm to promisee. Court accepts D’s test, but states that a **detriment is abandonment of any legal right**. D’s test is disjunctive – *either* harm to the promisee *or* benefit to the promissor. The fact that it might have been good overall for the P is irrelevant – he only needs to have constrained his behavior beyond what law required.
5. **Hypo: Uncle tells nephew he will pay $5,000 if nephew refrains from cocaine for six years**. Court **cannot enforce this promise**:
6. **Incentives run counter to public policy**: Encourages people to break the law and then auction off following the law to the highest bidder.
7. **We demand compliance with law as public duty**.
8. This case sets out the **benefit/detriment test** – places a value upon your right to exercise all the legal rights you have. When you forebear from exercising all your legal rights, you incur some cost.
9. **Hypo**: Uncle promises nephew $5,000 if he **continues to be a good boy**. **Void for indefiniteness** – “good boy” is a vague term that the two parties cannot know.
10. Gratuitous (gift) promise is not enforceable
11. Lucy v. Zehmer: D’s defense is that he **thought P was joking** when asking him to sign contract. Court determines that past dealings between parties can make it reasonable for buyer to believe seller was serious.
12. Baehr v. Penn-O-Tex Oil Corp.
13. Cause of the conflict was Kemp. P leased property to Kemp in exchange for gas stations. D sold assets to Kemp for money. Kemp got into debt, and D took over his assets. The **issue is whether, by taking over Kemp, D now has the obligation to pay the lease to P**. Penn-O-Tex took over the business because it was their best shot at getting paid off. D is hoping it will get paid off and leave the shell for all other creditors to fight over. Penn-O-Tex told its agents to say they were helping Kemp but in no way taking possession, in order to avoid taking over the lease.
14. **Is there an offer**? D said they would see that P got his checks – a promise was made, but isn’t binding because there was no consideration. P says that consideration was that he didn’t sue D (Hamer v. Sidway – he foregoes a legal right).
15. **Court says there was no contract**. They say the only reason P didn’t sue was because he was in Florida and it would have been inconvenient to sue. No negotiation resulted in forbearance of one party. Consideration must be regarded by parties as such, and there was no intentional exchange here. However, by making the promise, D was able to buy more time and get more money from the operation – helped D and hurt P.
16. **Hypo**: P consults his lawyer, P’s lawyer calls D and the same conversation ensues. In this case, we have no idea of whether P did forbear – much less clear.
17. **Bargain theory of exchange**: Must be conscious of exchange occurring. Court construes the evidence against awareness of an exchange. **Decision is implausible** because there is **no other good explanation** for what happened on D’s part.
18. Enforcement system biased against promises made in family or otherwise outside of the marketplace. Hamer would start out with several strikes against it under this theory. It was a family event where people make unsupported claims and give wild assurances. It was intrafamily, largely donative, where people try to outdo each other in generosity.
19. Dougherty v. Salt. Aunt’s promise to a nephew. Court rules that this is a mere **donative promise**, and **donative promises are not enforceable** as contracts.
20. Courts look for **actual consideration**.
21. Plowman v. Indian Refining Co.
22. 18 people laid off by D company. Each had conversation with plant manager and received letter confirming conversation along with payments from the company. Plaintiffs claimed breach of enforceable contract – terms were that they would stay on payroll, come to plant twice a month to pick up checks for half of normal salary.
23. Court holds that “in absence of a valid agreement to make payment for the rest of their natural lives, clearly the agreement was one revocable at the pleasure of the defendant… We merely have a gratuitous arrangement without consideration.”
24. **Past service or already-executed consideration cannot serve as consideration** – salaries already captured this and compensated for it.
25. **Moral duty is not legal consideration** unless complimented by a separate legal duty.
26. **Autonomy concerns** – my morals and yours may not be the same.
27. In the case of **mixed motive** (benevolent intent and other reasons), the fact that the promisor may have had some other motive for making the promise will not by itself defeat the agreement – Restatement (Second) §81, and Comment *b.*
28. **Some performance in order to receive the benefit is only consideration if it amounts to “a price of the promise.”** Thus, coming to the office to pick up checks is not consideration – it was a condition to a gratuitous pension rather than consideration for a contractual exchange. How do you tell the difference between the two?
29. Nobody has done a satisfactory job. **Williston** comes the closest – whether a **reasonable person** would recognize it as a price and an exchange.
30. **Hypothetical**: If employer makes them sign a release, it indicates that employer felt it received something of value. Classical contract law says once there is a contract, we will not inquire into relative value of the items exchanged. If the release is of value to the employer, it might be enough.
31. **Hypothetical**: What if each promisee was required to sign an agreement that he would on request assist in training new employees?
32. Looks like a classical **bilateral exchange**
33. If they are never called, it probably wouldn’t matter. You might call this a **consulting agreement**, which are entered into all the time.
34. It’s possible that it was a sham and both parties knew it was a sham at the time. But that will be extremely hard to prove.

##### Agency.

1. Agent has **actual authority** to speak for principal.
2. Actual authority comes from the **eyes of the agent** – if agent reasonably believes that principal is giving him authority, then he has actual authority.
3. Actual authority can be **implied or express**.
4. **Apparent authority**: Viewed through **eyes of** **reasonable third party** – if agents words would have caused a reasonable person in third party’s position to believe that the agent had authority, then third party has a claim.
5. **Hypo**: **You call a company, someone answers**. It is reasonable for third party to believe that this agent has apparent authority. Agent tells customer to wire the money to a certain account – it is his account and he is never seen again. In this case, **corporation can be sued because the agent had apparent authority**.

There is a spectrum from only representing yourself to obligations being imposed on a greater level. **Arm’s length contract** – nobody is expected to look out for anybody else’s interests, and everybody is assumed to be an autonomous individual capable of looking out for his own interests. On the other side of the spectrum, we have the trustee who is required to look out exclusively for beneficiary’s interests (self-denial).

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Arm’s length | Agent | Director of corp. | Lawyer | Trustee |
|  | Principal | Shareholders | Clients | Beneficiary |

An **agent**, by mutual assent, acts on behalf of another. That person, the **principal**, has control.

**Directors** act on behalf of **shareholders**.

**Lawyers** act on behalf of **clients**.

Early on it was thought that these relationships should be governed by contracts. Later they looked to **fiduciary principles** as effective ways to reduce the costs that inhere in these relationships. It reduces monitoring costs – if I stray, I am subject to liability.

**Hypo**: Your friend agrees to buy you a sandwich for $5 but it costs $6. Can she just spend more? No – the **agent can only take actions that it was instructed to** within the scope of its agency. Once the agency relationship is established, third party can go after either agent or principal. If your friend grabs sandwich and leaves without paying, the deli can go after your friend or can go after you.

## III. Obligation in the Absence of Exchange: Promissory Estoppel and

## Restitution

1. **Promissory estoppel**.
2. Promissory estoppel **defined** – Restatement (Second) §90: “(1) A promise which the promisor should **reasonably expect to induce action or forbearance** on the part of the promisee or a third person and which **does induce such action or forbearance** is **binding if injustice can be avoided only be enforcement of the promise**. The **remedy** granted for breach **may be limited as justice requires**. (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.”
3. **Limiting the remedy as justice requires** allows reimbursement of harm that was suffered. If there is no full-blown contract, full blown contract damages don’t follow. The injustice that this section seeks to remedy is uncompensated detrimental reliance.
4. **Example**: You get $1000 if you spend $1000 in anticipation of D performing. You won’t get the $5000 that you would get if D fully performed the promise. However, court could allocate more if they want.
5. Kirksey v. Kirksey. **Common law pre-promissory estoppel**.P was wife of D’s brother. After P’s husband died, D offered her a place to live. Later he asked her to leave.
6. Court **ruled for D because there was no bargained-for exchange**. Even under traditional doctrine, this case could have come out differently. Court below found for P on benefit/detriment analysis.
7. **Extra-legal factors contributed to decision**:
8. **Gender-based discrimination**. She would have gotten property had she won, and there was a social bias against this.
9. **Law averse to dealing with intra-family relationships**, and the aversion is stronger the further back in history you go.
10. **Injustice of holding** is pretty clear.
11. Allegheny College v. National Chautauqua County Bank – **charitable subscriptions**.
12. Mary Yates Johnson promises to donate $5,000 to Allegheny College in exchange for scholarship being established in her name. She donates $1,000 but later repudiates the promise.
13. **Cardozo’s decision is for Allegheny College**. He **combines promissory estoppel and consideration**, suggesting that the reliance amounts to consideration, in that the consideration is qualified by promissory estoppel.
14. **He brings reliance in future back in time to count as consideration now**: “The moment that the college accepted $1000 as a payment on account, there was an assumption of duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation.”
15. Cardozo finds that **a bilateral contract has been made**:
16. College implies a promise to establish scholarship in return for promise to give money, so it’s consideration
17. However, the implied promise comes from the fact that they relied on the money.
18. **“Future detrimental reliance”** – this is what the college would have to have done if they had gotten the money. Possible future detrimental reliance (which does not bind the college today) creates sufficient consideration for a contract when they want to enforce it against her.
19. Acceptance of money created duty to engage in future reliance and thus there was consideration.
20. If no money was given, no contract would have been formed.
21. Katz v. Danny Dare, Inc. Katz sues for pension payments after they are cut off from him.
22. P uses **promissory estoppel** for his claim.
23. **Is there a contract claim** here? There is bargained-for exchange **–** they spent 13 months coming up with conditions under which Katz would retire. The pension is clearly the price that Katz negotiated in exchange for retirement. However, there is **no legal consideration** – the bargaining was not consideration because Katz didn’t have the right to give up the job, as he could have been fired at any time. The fact that parties may have been mistaken about legal consequences of their actions is not determinative – Normile v. Miller.
24. Court **finds for P on promissory estoppel**. While Katz did not have a right to stay hired, he was not obliged to retire. He could have waited until company chose to fire him.
25. Courts **reasonably tough on what constitutes reliance** – it must be serious and measurable. The **weak link here is detrimental reliance**, since Katz retired in the face of inability to remain employed, then turned around and got other employment.
26. **Different than Plowman**: In Plowman, employees were fired before the promise, so promise was mere gratuity. In Katz, 13 month of negotiation meant that D expected P to rely on pension. He reasonably did, to his detriment.
27. Vastoler. **Change of position that might be viewed as financially beneficial can still support promissory estoppel**. P accepted promotion in part because employer promised certain pension benefits. Employer subsequently denied making promise, and Vastoler brought suit on promissory estoppel grounds. Trial court granted summary judgment for D because Vastoler did not suffer financial loss – was better off economically because of new position. **Court of Appeals reversed** – **all jobs are not the same, some have higher levels of stress and anxiety**. That is why not everybody accepts promotions.
28. Promissory estoppel **troubling in business setting**:
29. People **aren’t prone to emotionalism in business transactions**. Emotional impulses are difficult for courts to deal with because they might seem inappropriate for judicial resolution. Causes courts to look at hard-nosed actions.
30. Parties’ **reasonable interactions involve hard bargaining**. People’s expectations are that they will negotiate. What they care about is not leaving any money on the table.
31. In a business setting**, you take risks and incur costs, and you don’t always get compensated for the risks you take**. One of the things businesses do is price the risks they take – charge for services based in part on the risks. Promissory estoppel, which says it’s unjust for you not to be compensated for those costs, is unsettling in an environment where we expect people to take risks and handle their losses. This is why courts today are likely to demand something definite.
32. Universal Computer – the kind of case that **would go forward today under promissory estoppel**.
33. P called company taking bids and asked, if they sent bid by air carrier, could the company have it picked up at the airport. D agreed and it turned out they were not allowed to pick it up. By that time it was too late for P to get the bid in any other way – it was reasonable for them to rely on the promise, and thus **promissory estoppel**.
34. **Restitution**.
35. Restitution cases **rest on notions of injustice**, but the injustice arises not from costs incurred by the promisee, but **from the benefits received by the promisor**. It would be unjust for promisor to maintain full value of those benefits without compensating the other party.
36. Three theories of relief:
37. **Enforceable contract**. Action is **breach of contract** and the remedy is either damages or performance of contract. Puts P in the position it would have been if there had been full performance.
38. **Promissory estoppel**. **Costs of the detrimental reliance** that it incurred – the amount it suffered in believing the promise would be fulfilled. Usually occurs **where offer and acceptance are present but consideration is not**.
39. **Restitutionary claims**. The measure by which **you conferred value on the promisor**. Unjust enrichment theory – injustice arises from how the promisor got enriched, not how much it cost you. Grounded in equity, sometimes called quasi contract. Usually occurs **where consideration is present but offer and acceptance are not**.
40. **Restitution in the Absence of a Promise**.
41. Glenn v. Savage – **classical contract theory**.
42. P went into the river, rescued D’s building equipment, and returned it. Court ruled that this was a **voluntary act of courtesy**, and **Savage had no obligation to pay for the services** rendered which benefited him.
43. Court says **there must be voluntariness (to pay) before we enforce an obligation.** It would do violence “to some of the kindest and best effusions of the heart” to let them “be perverted by sordid avarice.”
44. Court’s considerations in Glenn:
45. **Prevent officiousness** – wants to avoid one individual doing something of service for another and then demanding payment. Parties should not have obligations imposed on them which they do not voluntarily assume.
46. **Not everything should be commercialized.** Voluntary acts of kindness are not commercial in nature – in many classes of situations, law is a dysfunctional and negative mechanism because the processes of law are adversarial in nature. Some areas of law are not appropriate for commercialization.
47. **For services rendered to the individual**: Restatement of Restitution, **§116**: “A person who has supplied things or services to another, although acting without the other’s knowledge or consent, **is entitled to restitution** therefor from the other **if**
48. he **acted unofficiously and with intent to charge** therefor, and
49. the things or services were **necessary to prevent the other from suffering serious bodily harm or pain**, and
50. the person supplying them had **no reason to know that the other would not consent in receiving them**, if mentally competent; and
51. it was **impossible for other to give consent or**, because of extreme youth or mental impairment, the **other’s consent would have been immaterial**.”
52. In re Estate of Crisan: Hospital allowed to recover in restitution for value of serviced performed to patient who collapsed, was unconscious when brought to the hospital, and who died without regaining consciousness. Court relied on **Restatement §116**.
53. **For services rendered to individual’s possessions**: Restatement of Restitution, **§117**: “A person who, although acting without the other’s knowledge or consent, has preserved things belonging to another from damage or destruction, is **entitled to restitution for services rendered or expenditures incurred** therein, **if**
54. he was **in lawful possession or custody of the things or if he lawfully took possession thereof**, and the services or expenses were **not made necessary by his breach of duty** to the other, and
55. it was **reasonably necessary that the services should be rendered** or the expenditures incurred **before it was possible to communicate with the owner** by reasonable means, and
56. he had **no reason to believe that the owner did not desire him so to act**, and
57. he **intended to charge for such services or to retain the things as his own** if the identity of the owner were not discovered or if the owner should disclaim, and
58. the **things have been accepted by the owner**.”
59. Would court have reached different conclusion in Glenn v. Savage if it applied §117? The question is whether Glenn intended to charge. Courts end up trying to figure out whether the person rendering the services is a professional in providing the services or not. Generally, experts are compensated while ordinary citizens are not:
60. Experts **confer greater benefit**, and therefore are more deserving of compensation in a restitutionary claim than anybody else.
61. Professionals are **rarely motivated by altruism** – thus we can assume that they want to be compensated.
62. **Economic theory of restitutionary cases** – what is the bargain that would have been made? Only people who intend to charge for services have a compensable claim for restitution.
63. **Posner on restitution**: The law will only impose these obligations where parties would reach a bargain if they had the capacity and the time. In Crisan, woman probably would have sought treatment from doctor or a hospital – we are finding the bargain that we believe the parties would have made had they been able to, and the circumstances that prevented the bargain from being made were extreme. We look for cases where we are pretty sure parties would have reached a bargain.
64. Watts v. Watts.
65. Live-in couple “divorces” and wife sues for restitution. There was essentially a contract in which the consideration was her services to him and the family.
66. This is a good case of **pleading in the alternative,** because some of P’s theories are contradictory.
67. P argues that she has a right to **equitable division** of property (where court makes allocation of property based on equitable notions of fairness, taking into account a variety of factors) in a divorce. Court decides that **she has no claim** after looking to legislative intent – marriage was intended to apply to formal marriage schemes provided by the state.
68. P argues that **D should be estopped from denying lack of formal marriage** because D’s own actions estop him from equitably denying the existence of a formal marriage. Court says **P cannot extend scope of rights under a statute when legislature has drawn the line**.
69. P claims that D breached contract and court **finds for P on this claim, rejecting D’s arguments**:
70. D argues that claim is grounded on **illegal sexual activity as consideration**. Court says that doesn’t apply – consideration was not just sexual relationship but also services she rendered to D and family. It **only contravenes public policy if sexual relations were key to the contract**.
71. D argues that claim **contravenes Wisconsin family code**, referring to Hewitt case in Illinois. **Court distinguishes the codes** – Wisconsin had abolished criminal sanctions for cohabitation, while Illinois had not.
72. D argues that **this is a job for the legislature, not for the court**. Court says **this is common law development of contract on a case by case basis –** we are applying a new set of facts to the doctrine.
73. P argues **unjust enrichment** (restitutionary claim). Court says that refusing to entertain the claim only punishes one party to the relationship. Both parties were just as involved, and the law should not as an equitable matter develop a rule that favors one party over the other on that basis. P says she was part of the accumulation of property – it was a partnership or a joint venture. D characterizes the relationship as employer/employee. Court concludes that **facts alleged are sufficient for P to state a claim for recovery**.
74. **Restitutionary claims for family member who cares for aged parent**. Allowing such claims would allow family member asserting the claim to obtain a larger share of the estate than would otherwise be received under either deceased’s will or state’s intestacy law. General rule is that **services rendered by family members to each other are presumed to be gratuitous**, while services rendered between individuals who are not members of the same family are presumed to be for compensation.
75. Whether parties are part of the same family depends on facts and circumstances, not just on kinship. Adams v. Underwood – where adult or emancipated child moves back into parent’s house to care for parent over long period of time, presumption of gratuity need not apply.
76. **Policy exists because**: 1) Court’s hesitance to get involved in family matters. 2) Court may have found after hearing many cases that, more often than not, services were gratuitous.
77. **Same-sex couples in contract law**.
78. **Professor Testy** says the feminist critique of contract law has been overbroad, and that contract law includes a commitment to “fairness and connectivity” which can be harnessed to benefit women in general and lesbians in particular.
79. Contract law is increasingly used by same sex couples. However, pricing a relationship (or even pieces of a relationship) can exclude large elements of value. Services overall are genderized – women’s work is undervalued, whether performed by women or men.
80. **Promissory restitution**.
81. Restatement (Second) of Contracts, **§86**:
82. **A promise** made **in recognition of a benefit previously received** by the promisor from the promisee is **binding to the extent necessary to prevent injustice**.
83. A promise is **not binding** under Subsection (1)
84. **if the promisee conferred the benefit as a gift** **or** for other reasons **the promisor has not been unjustly enriched**; or
85. to the extent that its **value is disproportionate to the benefit**.
86. Mills v. Wyman. P says he took care of D’s son, who suddenly took sick and died. D writes back, promising to pay P for expenses. P sues to have court enforce the promise. **Court finds for D**, because **moral obligations are left to “the tribunal of conscience.”**
87. **No consideration** for father’s promise for adult son. There is a moral duty, but courts don’t enforce that. They don’t define public policy in a manner contrary to personal autonomy.
88. Would not have mattered if the son was 16 instead of 25 from contracts perspective – he would have been responsible for paying necessary services rendered. But this is not grounded in contract law – it’s grounded in family law principles.
89. Webb v. McGowin. P falls out of mill holding block to prevent decedent from being hit. P is injured and cannot work any longer. McGowin agreed to care for and maintain Webb for the rest of Webb’s life. Payments made for years, but are discontinued after McGowin’s death, and suit is brought against the executor. Court **holds for P on the ground that decedent received material benefits to justify his agreement to pay**.
90. **Ratification theory**: Benefit conferred was of such magnitude that the subsequent promise was equivalent to the request being made prior to the action.
91. **Different than Mills**:
92. In Webb, **benefit was given to a promisor**, not to a third party.
93. In Webb, **payments were made for years**. If it’s a contract and donor dies, it’s still executed.
94. **Timeframe in making promise**: In Mills, father immediately made promise. In Webb, there was a month between injury and McGowin’s promise.
95. Promise is a way we can say with certainty that this is what the promisor would have asked for. In non-promisory restitution cases, questions revolve around whether D would have wanted services performed. Here we have the promise to fulfill those functions even though it is made after the fact.
96. **Payment of promise distinguishes this case**: In Glenn v. Savage the benefited party refused to pay from the beginning. In Mills, promise was disavowed before any payment was made. This raises the question of how the case would have come out if the payments hadn’t been made, or if payments had stopped while McGowin was still alive. Court does not satisfactorily answer this. Shows problem with court’s approach of treating the problem like it had occurred before the fall.
97. **What if Mrs. McGowin had made the contract**? Depends on whether she received a material benefit. If she made promise before services were rendered, we wouldn’t care who benefited. Restatement (Second) **§71(4)**: “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.”
98. Harrington v. Taylor. Wife was about to stop husband with an ax. P intervened and was struck by ax. Husband subsequently orally promised to pay P for her damages. Later the husband refused to honor the promise, and P brought suit. NC Supreme Court **found for D because humanitarian act does not allow P to recover**.

## IV. Obligation in the Absence of Complete Agreement

1. **Limiting the Offeror’s Power to Revoke: The Effect of Pre-Acceptance Reliance**
2. James Baird Co. v. Gimbel Bros., Inc. – **classical contract doctrine**
3. Subcontractor made bid to general contractor, then revoked. General contractor had made its bid before receiving revocation. Since general contractor had not yet officially accepted subcontractor’s offer, subcontractor could still revoke
4. **Court finds for D** **subcontractor**. There is no bilateral contract, and no promissory estoppel – this is in the commercial context, and estoppel claims fit on margins of market.
5. This case speaks to the **difference between contracts and promissory estoppel**.Finding promissory estoppel would bind subcontractor while general contractor would not be bound. Judge Hand’s view is that it isn’t fair to subcontractor in this setting – we either have mutual obligations or we have none.
6. Court does not take account of the inducement that the subcontractor was engaged in. Its incentive is to make the lowest bid to get the contract. In Baird, the subcontractor guaranteed its prices in an effort to make its bid even more attractive.
7. Drennan v. Star Paving Co.
8. Judge Traynor says in bidding cases there’s no contract or option contract, but that the bid constitutes a promise – if you use our bid, we’ll keep the bid open. Thus, **court finds for P on promissory estoppel**.
9. Judge Traynor finds **two promises embedded in the bid**:
10. Promise **to perform**, subject to the condition that the contract is awarded.
11. Promise based on **§45 of the Restatement**, that there is a subsidiary promise to hold the option open once performance has commenced.
12. Use of the bid constitutes **detrimental reliance** by the general contractor – thus, justice requires that the subcontractor hold the bid open. Deviation from the bid causes general contractor to suffer a penalty – he cannot substitute subcontractors without great risk.
13. **Restatement §87(2)**: “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 **and which does induce such action** or forbearance **is binding as an option contract to the extent necessary to avoid injustice**.”
14. **Limits to promissory estoppel** in the context of **general contractors and subcontractors**:
15. If the bid **expressly states or implies that it is revocable**, promissory estoppel does not apply – Drennan. (It puts the other party on notice that they are taking a risk, and if the offer says it is revocable at any time then it is not reasonable to rely on it.)
16. **General contractor** **cannot reopen bargaining** with subcontractor and still hold the original bid. You cannot use promissory estoppel as a club: “You’re bound and I’m not – you have to cut your price by ten percent, but if you don’t, you’re still bound.”
17. If bidder makes **bona fide mistake** and general contract knows or should have known this bid is mistaken, subcontractor isn’t bound because general contractor can’t reasonably rely on it.
18. **Choosing Drennan over Baird is really a policy choice**.
19. General contractor is benefited (and was also in the better bargaining position vis-à-vis subcontractor to begin with).
20. Benefits the client, because more likely than not the subcontractor would raise rather than lower bids after they’re awarded.
21. Client may be hurt, however, because **subcontractors may charge more as insurance** of profit – bids will ultimately be higher.
22. Drennan rule imposes **serious opportunity costs on the sub** because the sub cannot bid on other conflicting jobs unless the sub can staff other conflicting jobs at the same time. This raises risk to the subcontractors – they have to bid on fewer jobs, be more particular in the jobs they do bid on.
23. **Irrevocability by Statute: The “Firm Offer”**
24. **Background on firm offers**.
25. When a merchant wants to reliably assure the other party that it will not revoke its offer, it may make a **firm offer**. Under the common law, some consideration must be exchanged for a firm offer – there is almost no way to create firm offer under common law.
26. **Reasons** a party would want to make irrevocable offer:
27. To **reduce uncertainty to other party** by giving them an offer which they can have time to think about, without going through the costs of turning it into an option.
28. **Induce other party** to take actions and incur expenses because they know that at the end of the day the offer will be there.
29. **UCC §2-205**: “**An offer by a merchant** to buy or sell goods in a signed writing **which by its terms gives assurance that it will be held open is not revocable**, for lack of consideration, **during the time stated or if no time is stated for a reasonable time**, but **in no event may such period of irrevocability exceed three months**; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.”
30. **Components** of a firm offer:
31. An offer
32. By a merchant
33. Of goods
34. An assurance that it will be held open
35. Within a reasonable period (not to exceed three months)
36. **Goods** – UCC §2-105: “(1) ‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107). (2) **Goods must be both existing and identified** before any interest in them can pass. **Goods which are not both existing and identified are ‘future’ goods**. A purported present sale of future goods or of any interest therein operates as a contract to sell.”

a. **UCC article 2 covers goods** – UCC 2-102: “This article applies to transactions in goods.”

1. **Merchants** – UCC §2-104: “(1) ‘Merchant’ means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”
2. **Requirements and Outputs Contracts** – UCC §2-306:
3. 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.
4. **A lawful agreement** by either the seller or the buyer **for exclusive dealing** in the kind of goods concerned **imposes** unless otherwise agreed an **obligation by the seller to use best efforts to supply the goods** and **by the buyer to use best efforts to promote their sale**.
5. **Reasons to enter** a requirements contract:
6. **Buyer** may need to **know how much the product will cost in advance** – i.e. Campbell’s Soup Co. may need to secure tomatoes in advance.
7. **Seller** has a **guaranteed customer**. He incurs a lot of expenses in producing what he does. It is enormously valuable to have a guaranteed customer – if he produces more than his customer needs, he can sell it elsewhere.
8. Parties agree to **limit their risks –** buyer’s risk that price will go through roof or there will be a shortfall in the market, and seller’s risk that the market will fall.
9. Mid-South Packers v. Shoney’s.
10. Shoney’s said they had a **requirements contract** with Mid-South, and said Mid-South would give notice of every price increase. They accepted that proposal by making orders, and that created a binding and enforceable requirements contract.
11. **No requirements contract if buyer does not promise to bind himself exclusively to supplier**. Court foundno requirements contract because Shoney’s testified that they had the right at all times to purchase from other suppliers.
12. Promissory estoppel. Hard for Shoney’s to show detrimental reliance in competitive commodities market – **no estoppel**.
13. Mid-South says that at most it was a **firm offer**. **Great strategy** behind that – the court figured that Mid-South was being noble by admitting it was a firm offer, but in the end Mid-South lost nothing. If it was a firm offer, the question is how long it will be open. There is no durational term in the contract – thus, according to §2-205, the period of irrevocability may not exceed 3 months. After that, Mid-South is free to revoke or change it. Court believes that the 45-day notice period disappeared.
14. Court says Shoney’s could send purchase order with reservation on the price, or find an acceptable price. Court was clearly mad at Shoney’s tricking Mid-South into thinking they’ll pay.
15. Opinion shows that on the same set of facts, the **court can characterize a relationship in a variety of ways**. Court read §2-205 to say it all comes to an end on day 90. If at day 60 Mid-South says it will raise prices, price protection only lasts until day 90 – it does not last for 45 days.
16. **Breach of requirements contract**: The remedy for breach is benefit of the bargain damages, which could be specific performance of the contract or monetary damages in the equivalent amount.
17. **Qualified Acceptance: The “Battle of Forms”**
18. **Reasons that businesses develop forms**:
19. Saves **time**, allows entities to deal with massive amounts of transactions that normally couldn’t (i.e. large businesses today)
20. **Consistency for customers** – gives customers consistency across deals
21. **Consistency among members of sales force** – incentive of a sales force is to make sales, and they would normally waive terms that customer doesn’t like in order to make a sale. But the form’s conditions cannot be waived by salespeople – otherwise the staff may vary them for any particular deal.
22. Poel v. Brunswick – **common law approach**
23. D could simply have accepted P’s proposal by initialing it, but instead sent his own form which **did not mirror the offer**. Court **found for D. Since the acceptance added new terms, it was not an acceptance but a counteroffer** and thus required further assent. No further assent was given, thus no contract formed.
24. This is an example of the **last shot rule**: Since each form is slightly different, each amounts to a counteroffer. If parties perform the contract, they give effect to the last form sent, usually an advantage to the seller.
25. This case also embodies the **mirror image rule**: Unless acceptance is mirror image of offer under common law, it is a counteroffer.
26. **UCC §2-207**: A response to the common law last shot rule.
27. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time **operates as an acceptance even though it states terms additional to or different from those offered or agreed upon**, **unless acceptance is expressly made conditional on assent** to the additional or different terms.
28. **The additional terms are** to be construed as **proposals for addition** to the contract. Between merchants **such terms become part of the contract unless**:
29. **the offer expressly limits acceptance** to the terms of the offer;
30. they **materially alter** it; or
31. **notification of objection to them has already been given or is given within a reasonable time** after notice of them is received.
32. **Conduct by both parties** which 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 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**.
33. Brown Machine v. Hercules.
34. Employee of Hercules was injured by a machine designed for the manufacture of Cool Whip bowls, and brought a tort claim against Brown for injuries sustained. Brown demanded that Hercules defend the suit, and Hercules refused. **Brown instituted this action** against Hercules **for indemnification**, based on their indemnification clause. One of the questions in this case is whether what was really going on was that the court did not like this clause.
35. An acknowledgement form that does not mirror the offer serves as acceptance of that offer if it does not contain an express condition that its own conditions must be assented to by the original offeror. If it does contain such a provision, it is a counteroffer – UCC §2-207(1).
36. Conditional nature must be clearly expressed in writing, not just in boilerplate, and to such degree that it is clear that the party would not be willing to proceed otherwise.
37. Here, acknowledgement form was an acceptance that proposes additional or different terms that automatically become part of the contract unless someone objects or they are immaterial – **UCC §2-207(2)**
38. Here original purchase order **expressly limited offeree’s acceptance** to the terms of the original contract, so new terms fail to become a part – **§2-207(2)(c).** The language tracks 2-207 and it is put in a blue box, both of which the court looks on approvingly.
39. **Problem created by §2-207:** What happens when everybody starts using blue boxes and the court starts throwing them out? Then you can require initialing. After the first court holding that approves of an initialing, everyone will use them. Escalates level of proof required.
40. Even if Hercules’ express limitation had not been effective, the **indemnification clause fails anyway because it’s a material alteration**. It shifts the *entire risk* to the other party.
41. If a provision is deemed to be a material alteration, **silence does not constitute acceptance**.
42. If there’s **only a counter-offer and parties perform**, it’s not acceptance of that term. In that case, **§2-207(3)** **determines what the terms should be** by knocking out those that conflict.
43. Applying 2-207 – See **§2-207 Checklist**
44. **First shot rule** now in effect? Whoever gets their form recognized as original offer gets to set terms (with new or different ones knocked out).
45. If terms are customary in the trade, court is inclined to put them in the contract even if the parties disagree on them – **UCC §2-208(2)**.
46. Dale Horning Co. v. Falconer Glass.
47. P was a subcontractor on construction project responsible for installing glass. Falconer supplied the glass. Original order was made by phone and **both parties sent forms confirming the transaction**. Glass was defective. P incurred **consequential damages –** extra time on the job, materials, overtime pay. The **issue is whether Falconer should pay for these damages**.
48. Contract is already formed, but confirmation notices contained new terms.
49. Court addresses materiality under 2-207(2)(b): an **additional term materially alters a contract if** its incorporation would **result in surprise or hardship**. Surprise and hardship are **distinct tests**:
50. No surprise because this type of indemnity provision is common in glass industry
51. **There is hardship** because consequential damages are normally allowable under §2-715 – altering the liability would be a substantial economic hardship.
52. Such a term would normally be **actively negotiated** by the parties, so it can’t be thrown into boilerplate and expected to be enforced.
53. Court lectures about trying to abuse or circumvent 2-207:
54. Boilerplate language not always acceptable
55. People should actually negotiate important terms
56. 2-207 does not always condone battle of the forms
57. **Postponed Bargaining: The “Agreement to Agree”**
58. Why put renewal terms (agreement to agree) in contract?
59. **Reduce transaction costs**: You incur a lot of costs in negotiating this out to a conclusion. You want to save some costs up front by deferring the negotiations.
60. **High level of uncertainty**: May not know what the market will be at the point that you set the rent. Both parties may want to wait until they have a better set of facts.
61. **Inducement** to the other party, that the basic structure of the relationship will stay the same even if there is a change in a few items down the road. Gives assurance to both parties that the structure and terms will stay in force.
62. **Reduces transaction costs down the road** – induces both parties to stay in relationship when new term kicks in. Costs of negotiation may be high. It may be cheaper for landlord to negotiate rental term with same tenant than to go out, find a new tenant, and negotiate the entirety of a new agreement.
63. **Element of stability** – you may get a break because of costs of replacing you with another party on the other side, even if the market moves against you. You can capture some piece of the costs that the other party would have to spend to get another party instead of you.
64. Walker v. Keith – **common law approach**.
65. Parties’ lease contract included a renewal term, and did not specify price or a mechanism by which price would be agreed upon in the future.
66. Court holds contract **void for vagueness** – court is reluctant to fix terms that parties failed to agree upon, but in doing so the court is reading the “price to be determined later” clause out of the contract.
67. Court assumes that if parties really wanted to reach agreement, they would have, and that bargaining power of the parties is equal.
68. Court would **have enforced renewal term if** parties had included a **definite objective standard** by which to compute future lease price.
69. **Restatement (Second) §33** – **Certainty**
70. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
71. The **terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach** and for giving an appropriate remedy.
72. The fact that **one or more terms of a proposed bargain are left open** or uncertain may show that a **manifestation of intention is not intended to be understood as an offer or as an acceptance**.
73. Courts usually reject this approach because:
74. **Disparity of bargaining power** – enforcing renewal terms reduces the imbalance the lessee faces in respect to landlord’s bargaining power (especially if lessee is a business and has built up good will in community)
75. **Parties did intend something** – courts presume that parties don’t enter into non-contracts
76. **Lessee should not be deprived of the right to enforce its contract** – renewal term was initially negotiated for, and has value in the contract
77. **UCC §2-305: Open Price Term**
78. The parties if they so intend **can conclude a contract for sale even though the price is not settled**. In such a case the **price is a reasonable price at the time for delivery** if
79. nothing is said as to price; or
80. the price is left to be agreed by the parties and they fail to agree; or
81. the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded
82. A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
83. When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
84. **Where**, however, **the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract**. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.
85. Quake Construction v. American Airlines. American Airlines gives Quake Construction a contract for expansion of its facilities in the O’Hare Airport. At a press conference they announce that Quake will undertake the project, and later that day tell them that they are off the job.
86. Actual holding of the case is that the letter of intent in controversy is ambiguous, and therefore it is remanded for trial.
87. Court considers a variety of factors in determining whether the letter is binding (based on Restatement §27):
88. Was this the sort of contract that is usually put in writing?
89. Does it have a lot or few details?
90. Is amount large or small?
91. Does it require formal writing for full expression?
92. Where in negotiation process was process abandoned?
93. Other party’s reliance on anticipated transaction?
94. **UCC §2-204: Formation in General**
95. A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
96. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
97. 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.
98. **Letters of intent**
99. Letter of intent is an agreement to negotiate out terms not yet agreed upon, after basic terms are decided. Costs less than going into full agreement – can investigate them under this setting, rather than investing in full contract and then discovering dirty laundry.
100. Risks of letters of intent:
101. The principal legal risk is that **your client will be bound when it doesn’t want to be bound** to a transaction.
102. The other risk, although not usually as substantial, is that **the other party won’t be bound when your client wants them to be bound**.
103. **Factors** that come into play when trying to determine whether to draft letter of intent:
104. **Cost of full agreement is very high** – uses up a lot of company resources
105. A market penalty is assessed when a transaction that is disclosed is not completed. You have to be sure that you reach enough agreement that you’re pretty sure it’s not going to die. The market will assess a penalty in the stock price for non-completion of disclosed deals.
106. Parties still use letters of intent when they have to. They are too useful to abandon. Letters of intent have become very long, complex documents, including a ton of disclaimers about the letter not being binding. They are so long because of the risk of being bound to a deal where you have not uncovered the bulk of the issues.

## V. The Statute of Frauds

1. **In General**
2. Purpose: Designed to prevent fraud by ensuring that claims have support, and prevent fabrication of oral testimony to enforce fraudulent claims.
3. **Disadvantages**: Statute **prevents some legitimate claims** from enforcement; **prejudices unsophisticated parties** who do not know of or do not have bargaining power to force a signed writing.
4. **Advantages**: Evidentiary and cautionary functions
5. Statute of Frauds – Restatement (Second) §110:
6. The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception:
7. contract of an executor or administrator to answer for a duty of his decedent
8. contract to answer for the duty of another
9. contract made upon consideration of marriage
10. contract for sale of an interest in land
11. contract that is not to be performed within one year
12. The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by the Statute of Frauds provisions of the UCC:
13. a contract for the sale of goods for the price of $500 or more (§2-201)
14. a contract for the sale of securities (§8-319)
15. a contract for the sale of personal property not otherwise covered, to the extent of enforcement beyond $5,000 (§1-206)
16. Requires a **signed writing**:
17. **Signed**: Any form of authentication
18. **Writing**:
19. Several writings can be combined as long as one is signed and the others clearly relate to the same transaction – Restatement (Second) §132. Writing need only be signed by party against whom contract is enforced.
20. writings can be for any purpose (not just for creation of contract) – Restatement (Second) §133
21. Signature merely needs to be made with intention to “authenticate the writing” – Restatement (Second) §134. Anything that is used to authenticate the documents, including letterhead, can be used for this purpose if it is shown that letterhead is only used for official transactions
22. Memo may be made “at any time before or after” contract formed – Restatement (Second) §136
23. **Application of Common Law Statute of Frauds**
24. **Checklist**
25. Is this contract within the Statute of Frauds? If yes,
26. Is the statute satisfied?
27. Signed writing by party against whom enforcement is sought, and
28. Writings contain material terms of agreement
29. If not, is there an **exception** which gets us out of the statute of frauds?
30. **Partial performance** – Witnernitz
31. Crabtree v. Elizabeth Arden Sales Corp. – Crabtree requests three year contract at $25,000 a year, and Arden gives him two year contract instead, with progressive pay raises after six months and one year. Does not give him the second pay raise. Court **finds for P**.
32. Statute applies because contract can’t be performed within a year.
33. Problem for court was to put together a series of writings (some signed, some not) into a single contract. Court says you can read them together, provided that they refer to the same subject matter (Restatement §132).
34. Where a material term in a contract is not in the writing signed by D, D must have acquiesced to its contents. In Crabtree, this was not a problem. It could have been a problem if Crabtree had prepared the memo with the terms in it.
35. If Crabtree had breached the contract, he might have successfully asserted statute of frauds as a defense. Only the party against whom enforcement is sought must have signed.
36. Freedman: P alleged that D orally promised to pay him a commission for procuring a contract for the construction of a **chemical plant in Saudi Arabia**. Court found one-year clause did not apply because **construction could have taken place within a year**, even if “unlikely or improbable.”
37. Winternitz v. Summit Hills – court uses **alternate claim** to compensate P
38. P’s phamacy’s lease in D’s mall expires after 2 years if P fails to make necessary improvements – if he makes them, he gets option for another 8 years. P fails to make improvements, and decides to sell business for $70,000 – terms include lease renewal. D fails to sign lease. P’s deal with purchasers drops to $15,000 and P sues. There is no signed writing saying that D will renew lease.
39. **Statute of Frauds applies** because state’s statute of frauds covers leases (leases are not “sale of land”).
40. P **attempts to show partial performance (§129**: “A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific performance.” P claims detrimental reliance because he paid one month of rent at the higher price. **Part performance is not applicable here – it is only available for equitable relief purposes** (i.e. if P wants to stay as a tenant), **not for monetary damages.**
41. **Reasons** partial performance is **limited to** cases of **equitable relief**:
42. Judicial exceptions to legislative statutes applied sparingly
43. Where party wants to stay as a tenant and has partially performed, his claim is less likely to be spurious
44. **Partial performance exception only applies to land-based sales**.
45. **Partial performance does not remove contract from “one-year provision”** of Statute of Frauds. Contract not enforceable just because one party has partially performed. However, in some cases this part performance may work to estop one or both parties from claiming that the Statute of Frauds renders the contract unenforceable.
46. Court finds **alternative remedy in tort**, because court doesn’t like D’s motive.
47. **Restatement (Second) Torts §767:** Malicious conduct. “In determining whether an actor’s conduct in intentionally interfering with a contract is improper or not, consider:
48. the nature of the actor’s conduct,
49. the actor’s motive,
50. the interests of the other with which the actor’s conduct interferes,
51. the interests sought to be advanced by the actor,
52. the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
53. the proximity or remoteness of actor’s conduct to the interference, and
54. the relations between the parties.”
55. Court finds that D’s malicious motive (based on hostile comments) outweighs D’s legitimate business interest, and gives P relief even though the renewal of the lease was not an asset to which the P had an interests in the first place. Short of D’s testimony about personal animus, no tort.
56. Court avoids using promissory estoppel theory because the reliance is weak, and promissory estoppel shouldn’t apply to real estate.
57. Alaska Democratic Party v. Rice – **court invokes promissory estoppel exception to the Statute of Frauds**.
58. Rice promised a job in Alaska by Democratic Party. Discharged after moving there, and files suit for wrongful discharge. Appellate court affirms award of damages.
59. **Restatement (Second) §139**: Enforcement by Virtue of Action in Reliance
60. **A promise which the promisor should reasonably expect to induce action or forbearance** on the part of the promisee **and** **which does induce the action or forbearance is enforceable notwithstanding the statute of frauds if injustice can be avoided only by enforcement** of the promise. The remedy granted is to be limited as justice requires.
61. In determining whether injustice can only be avoided by enforcement, consider:
62. availability and adequacy of other remedies;
63. the definite and substantial character of action or forbearance;
64. the extent to which the reliance corroborates evidence of the making and terms of the promise;
65. the reasonableness of the reliance;
66. the extent to which reliance was foreseeable by promisor.
67. Court examines **reasonableness of her reliance**, finds both implied and apparent authority on the part of Wakefield, who offered her the position.
68. Custom can be brought into statute of frauds questions. The elements of promissory estoppel can be illuminated by evidence of custom. Here, both apparent authority and reasonableness of reliance are based on the fact that this is normally what occurs.
69. In this case, there was a move from the lower 48 states to Alaska – detrimental reliance.
70. Munoz: P moved from Texas to California and lost his house in California. Court found no estoppel exception because there was insufficient detrimental reliance. California was his childhood home, he wanted to move back there, and was unemployed when he took the job – insufficient detrimental reliance to make this enforceable as a matter of justice.
71. **The Sale of Goods Statute of Frauds: UCC §2-201**
72. UCC §2-201: Statute of Frauds
73. Except as otherwise provided, a **contract for the sale of goods for the price of $500 or more is not enforceable** by way of action or defense **unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought** or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
74. Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.
75. A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects **is** **enforceable**
76. **if the goods are to be specially manufactured for the buyer and are not suitable for sale to others** in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

* LTV Aerospace Corp.: Agreement for sale of 8000 shipping containers for all-terrain vehicles manufactured by P for export to SE Asia enforceable under exception since containers were made pursuant to D’s specifications and were not suitable for sale to others
* Colorado Carpet Installation, Inc.: Contract for sale of carpeting not subject to exception because carpeting was standard item, not specially cut; nothing in character of carpet requires basic changes to make it marketable to other purchasers.

1. **if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made**, but the contract is not enforceable under this provision beyond the quantity of goods admitted; **or**

* Lewis v. Hughes: D admitted agreement but believed that failure to agree on payment in cash left terms to be negotiated, preventing formation of contract; effect of testimony was to admit existence of contract
* Nebraska Builders Prodocts Co.: D sufficiently admitted facts to justify application of admissions exception; question is not witness’s possibly inadvertent use of legal terminology, but the nature of facts admitted

1. **with respect to goods for which payment has been made and accepted or which have been received and accepted** (Sec. 2-606).

* This is the UCC’s **partial performance exception**.

1. Buffaloe v. Hart.
2. **Facts**: Alleged oral agreement by D to sell P tobacco barns. Buffaloe claimed the Harts had agreed to $4000 per barn. He had already agreed to resell them for $8000 each. **Court upholds jury verdict for P**.
3. Court defines the **barns as goods** – identifiable and moveable. Under §2-201, they would have met the statute of frauds with a check signed by him. Under the UCC, the deposit on the total purchase price satisfies the part payment for purchase of the goods.
4. Court upholds jury verdict because there was sufficient evidence to find that there was an agreement that had been partially performed – once the money has been accepted, that’s enough.

## VI. The Meaning of the Agreement: Principles of Interpretation

1. **Principles of Interpretation**.
2. Three theories of interpretation:
3. **Subjective** – exemplified by Raffles case, where both parties used the name Peerless to describe different boats. Court found no breach of contract because there was no contract – no meeting of the minds. Today we would be skeptical of the claim – we would want to see if market had moved in favor of the buyer.
4. **Too hard to enforce a contract** under subjectivist theory
5. **Objective** – has nothing to do with what the parties are thinking about. It deals with what a person outside the transaction would think is a reasonable interpretation of the words.
6. Problematic because it can create an interpretation that neither party intends – one party thinks they are dealing with English patents, the other party thinks they are agreeing to get English, French and American patents. Under objectivist theory, party may get English and French patents – an agreement that neither of the parties had in mind.
7. **Modified objective**
8. **Shift from subjectivist to objectivist** can be explained by a number of things. Courts may no longer assume that people are telling the truth in court. Even if we don’t think parties are actively lying, parties’ memories fade or they emphasize different things.
9. Courts like to come up with agreements that parties might have thought they are entering into – **Restatement (Second) §§201-204**.
10. **Generally**, the **reasonable meaning** of parties’ words **governs**. **However, evidence of parties’ intentions can overcome reasonable meaning** – if 2 parties agree on unreasonable meaning of words, their meaning will govern. Where they disagree on meaning, the Restatement provides some guidance. If both parties disagree and neither party knew or had reason to know of the other party’s meaning, there still may be no contract, but the evidence will focus on whether either party knew or should have known.
11. **Restatement §201 –** main set of interpretive guides.
12. 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.
13. 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:
14. 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**
15. 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**.
16. 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.
17. Joyner v. Adams.
18. P is landlord and D is the lessee of undeveloped land in NC. Agreement stipulates that D must develop the land by a certain date or else face penalties. Dispute is over what constitutes development.
19. Court of Appeals **reverses and remands in part**. Trial court had said that ambiguity should be resolved against P, because they drafted the language – where it’s ambiguous, they will use ambiguity against the drafter. Court of Appeals says that we should not apply a mechanical rule of finding which party drafted it and ruling against them. Instead we’ll use the §201 rule – whether the party knew of any different meaning attached by the other.
20. On the final remand, trial court finds that D neither knew nor had reason to know of P’s meaning, and therefore holds for D.
21. **Various maxims** utilized by courts:
22. **Noscitur a sociis**. “Words of a feather.” The meaning of a word in a series is affected by others in the same series; or, a word may be affected by its immediate context.
23. **Ejusdem generis**. A general term joined with a specific one will be deemed to include only things that are like the specific one. Example: S contracts to sell B his farm together with “cattle, hogs and other animals.” This probably does not include S’s favorite house-dog, but might include a few sheep that S was raising for the market.
24. **Expressio unius**. If one or more specific items are listed, without any more general or inclusive terms, other items although similar in kind are excluded. Example: If S contract to sell B his farm together with “the cattle and hogs on the farm,” other animals such as sheep and dogs are excluded.
25. **Courts look for validity as opposed to invalidity**. If you have two interpretations, court will prefer the interpretation that makes the contract valid.
26. **Ambiguity construed against the drafter**. This maxim favors the party with less bargaining power.
27. **Interpret the contract as a whole**. Writings that form party of the same transaction should be interpreted together as a whole – every term should be interpreted as a part of the whole and not as if isolated from it.
28. **“Purpose of the parties.”** If you can ascertain it, it will be used very heavily. In many cases, the problem is that the parties agree insofar as they can articulate a purpose. In Joyner, even the purpose of the clause was the same to both parties. Where courts can ascertain it, it will help immensely.
29. **Specific provision is an exception to a general one**. If two provisions are inconsistent and one is “general” enough to include the specific situation to which the other is confined, the specific provision will be deemed to qualify the more general one.
30. **Handwritten or typed provisions control printed provisions**.
31. **Public interest preferred**. If a public interest is affected by a contract, that interpretation is preferred which favors the public interest.
32. Frigaliment Importing Co.
33. Judge Friendly turns his interpretive powers on the question of what is a chicken. Court rules in favor of D because there are two possible interpretations of chicken – P has not met its burden of proof that its meaning should control.
34. Case is included because of the discussion of the various types of evidence courts can use to determine the meaning of a disputed term. Court uses six interpretive devices.
35. **Language of contract**: P argued that chicken was supposed to be young chicken, only good for broiling. They said that the smaller birds could only have been broilers, thus the larger birds must also have been broilers – “**words of a feather**.” Court rejects this argument as a non-sequitur.
36. **Preliminary negotiations** among the parties. Parties used the word **chicken** instead of the German words, understanding that the English word was more limited. There is testimony though, that when D asked P what kind of chicken he wanted, he said any chicken. Thus, first 2 sources of evidence (language of contract and preliminary negotiations) are mixed at best.
37. **Trade usage** – evidence is mixed. P’s witnesses put forward broad definition of chicken.

* **UCC §1-205(2) defines trade usage**: “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 any expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.”
* **UCC §1-205(3)** subjects parties to usages of trade of which they are or should be aware. The code thus places the onus on new entrants to become familiar with such usage, while the common law made the other party show that new entrants either knew or else should have known about the trade usage.
* This provision of the code **helps efficiency** of transactions. It also **helps new entrants** – the incentive the old rule creates is counter to the interests of new entrants, because it discourages people from entering into contracts with them. The UCC rule will persuade merchants that it is less risky to do business with new entrants because they can avoid the legal risk of having to prove that the new entrants knew all the trade usage of the industry.

1. **Regulatory materials** incorporated by reference into the contract. The court incorporates the relevant Department of Agriculture standards. Incorporation by reference makes whatever you incorporate as if you repeated it verbatim in the document. If you’re not willing to incorporate everything from document you’re incorporating, you shouldn’t use this technique. D contends that P adopted all of the definitions in those regulations, and court seems to like D’s argument – if you use the Department of Agriculture’s definitions, perhaps you should use all of them.

* **Modern view** is that definitions of terms contained in statutes or administrative regulations are not determinative of meanings of such terms in contracts – **R2d §201, comment c**.
* **Modern view is superior** because incorporation by reference doesn’t necessarily have anything to do with the parties’ intent. Comes from an increasing focus on the private nature of contracts, which are seen as matters of private choice. This view is starting to ebb, however.
* If it were a **consumer contract**, this material would not be brought in – unfair to bind consumer by it.

1. **Maxim of interpretation that courts choose reasonable interpretation if they have a choice between a reasonable and unreasonable one**. They think D’s view is the only reasonable interpretation because price was too low for large birds to mean broilers – they would have to sell at a loss. However, **P’s view might be reasonable** – selling at a low price was a **loss-leader** to start cornering European markets.
2. **Course of performance evidence**. D argues that P accepted birds and therefore accepted D’s meaning of the word chicken. This argument is weak, however, because performance only counts where it is without objection. Here, P consistently objected.
3. **UCC’s position**: Most relevant aids (trade practice, course of dealing and course of performance) can trump the language of the contract.
4. **Prof Zamir** says that trade practice, course of dealing, etc. should trump language of contract:
5. **Conforms better to the intention of the parties** than a literalistic enforcement of the words of any document the parties may have executed.
6. Contract law **should properly be viewed as public rather than private law** because it involves the use of the power of the state to coerce a party into performance of an agreement that the party no longer wishes to honor. Social principles, such as good faith and fair dealing, should be primary factors in resolving contractual disputes.
7. A proper application of the principles of economic analysis supports a reversal of the traditional approach to contract interpretation. From an economic perspective, the **law should attempt to maximize social utility, not necessarily promote individual preferences**.
8. **Prof Bernstein** disagrees. She says there is an overall relationship in commercial dealings in which the law only plays one part. Contracts start the conversation. After that, the documents are put aside and parties behave as if in ongoing relationship. Contract doesn’t come into play again unless and until relationship has broken down completely.
9. Parties don’t want contract interpreted using the various tools of interpretation. They want to go back to language of contract, because it is an endgame product. Course of performance is illusory – not really how people behave.
10. Some courts require **evidence of ambiguity** first. Common law rule is that without finding ambiguity in contract’s wording, you can’t go further than contract. More modern courts have more flexible view of what they will look at to determine that something is ambiguous.
11. **Plain meaning** is very much held in disrepute with all courts except for the Supreme Court. Other than that, most courts find the plain meaning rule not to advance analysis of a document very far – depending on the population, there can be a variety of meanings.
12. **Adhesion contracts**. When we call something an adhesion contract, the effect of that characterization carries with it certain statuses that have a higher level or changed set of obligations. Relevant factors:
13. **printed form, many terms**
14. **drafted by one party** to the transaction
15. **drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine**.
16. The form is **presented to the adhering party with the representation that**, except perhaps for a few identified items, **the drafting party will enter into the transaction only on the terms contained in the document**. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent.
17. **Document signed by adherent**.
18. **Adhering party enters into few transactions of the type represented by the form**, at least in comparison with the drafting party. (Suggests informational asymmetries.)
19. **Principle obligation of adhering party is the payment of money**.
20. C&J Fertilizer v. Allied Mutual Insurance Co. **– Doctrine of Reasonable Expectations**
21. Is this an **adhesion contract**? Contract meets the criteria described above.
22. **Facts**: P suffered burglary loss and tried to recover. Insurance company denied coverage – burglary is only when there was physical damage to the exterior of the premises. Thief got in without leaving visible marks. **Trial court found for the insurance company** – unambiguous exclusion. P appeals.
23. **Appeals court reverses** on the face of what it is happy to say is not ambiguous language. Appeals court thought the insurance company took P’s money and did not give P what it thought it was getting.
24. Majority adopts **doctrine of reasonable expectations**. Doctrine of reasonable expectations lets the court throw out a part of the contract. Wherever we can find ambiguity, we can make the insurance company suffer due to the ambiguity.
25. **Ability to substitute** influences court’s decision to apply doctrine of reasonable expectations. If good/service can easily be substituted (i.e. parking garage), court will be less inclined to apply the doctrine.
26. **Problem**: May place a premium on failure to read. If you don’t find the package you’re looking for, incentive exists not to read the policies and rely on “reasonable expectations.”
27. **Alternative way to reach same result**: If majority had excluded coverage for inside jobs, they still could have found for P. If they read “exterior to the premises” to cover any premises that were locked (whether inside or outside the building), the majority could still have found for P and there probably would not have been a dissent.
28. **Court throws out regulatory scheme**: Although contract was subject to review by state department of insurance, court rejects that claim because insurance regulation is weak – it cites a law review article to support that proposition. The validity of the system of regulation was not at issue before the court. Part of the scope of this case comes from the fact that it just tosses out regulatory schemes in a snap.
29. Court adopts test in **§237 of Restatement, comment f**: “Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction.”
30. Here the terms wasn’t bizarre or oppressive, but the purpose of the policy is frustrated because it eliminates a group of outside burglaries.
31. How could company prevent the exclusion from being thrown out?
32. **Go over each policy with each policy holder** – extremely expensive, will raise costs of entering insurance policies
33. **Raise premiums across the board** for those situations where they will have to cover the claim despite the language of the contract
34. Case was **rightly decided**, with the wrong reasoning.
35. Most likely, insurance company will not change its policies after this decision is handed down. Most of the time, the clause will still work – the number of people who pursue claims to litigation will be tiny.
36. Bad for courts to throw out entire clauses of contracts and obliterate the duty to read – particularly in a case like this where the traditional legal tools are available to find for P.
37. **Parol evidence rule**.
38. Parol evidence rule is a rule of exclusion, like statute of frauds. It is never a reason to include evidence, only to exclude it.
39. Prof. McCormick, an evidence scholar, says that the parol evidence rule emerged for two reasons:
40. When there is a written agreement against oral testimony, usually the more powerful party has the written agreement. Juries systematically favor the less powerful parties.
41. Written agreement usually more reliable.
42. Thompson v. Libby – **classical view on parol evidence**
43. D says warranty is breached, so he doesn’t have to pay. Warranty not contained in writing. Under classical contract law, **court determines that the entire agreement between the parties was in writing**.
44. **Four corners test**. The test is the document itself – “four corners” of the document constitute an entire legal obligation. If it is complete, the parol evidence rule bars evidence that contradicts or varies its terms. Warranty is not inconsistent, but under common law parol evidence rule, you cannot vary the terms of the written agreement.
45. **Merger clause.** Clause that says the contract constitutes the entire agreement between the parties – every reasonably complex contract will have a clause like this:
46. Alerts parties that if the want something in contract, it will have to be in document.
47. Tries to capture benefits of parol evidence rule by saying, “This is the whole agreement.” Under classical view, clause like this is conclusive evidence that document is the entire agreement.
48. **Exceptions** to parol evidence rule under common law:
49. **Fraud** – can’t use parol evidence rule as shield for fraud.
50. **Writing is not complete on its face**. Court can find that the writing is not complete on its face, in which case it can take evidence to determine what parties intended to be in there
51. **Parol evidence to explain the contract** – common law courts would have to make a finding that there is something unclear in document. Modern take different view – if a party claims that something is included in contract, courts will take evidence to prove that contention.
52. **Agreements collateral to the subject matter**. A whole different subject to which the writing relates. Here a warranty is part of the purchase and sale transaction.
53. Taylor v. State Farm Mutual - **modern application of parol evidence rule**.
54. Taylor claims that State Farm’s refusal to settle personal injury litigation against him arising from an auto accident was in bad faith. State Farm claims that Taylor relinquished bad faith claim when he signed a release in exchange for State Farm paying $15,000 in uninsured motorist benefits.
55. External evidence shows that Taylor’s claim was for $2.1 million, so one can assume he did not wish to relinquish it in exchange for $15,000.
56. Court finds for P (Taylor). Can look at extrinsic evidence in determining the effect of general releases. They must be carefully drafted – the terms of the release can be quite extensive and have unintentional effects that can be limited by insertion of a few words.
57. Hershon. Case where common law (classical) evidence rule was applied with a harsh result. It was a universal release, which released the mortgage loan made by D to plaintiffs. Court excluded extrinsic evidence offered to show that parties who signed general release did not intend it to apply to mortgage loan. It is difficult to overcome a general release because the language is very strong.
58. **UCC §2-202** Final Written Expression: Parol or Extrinsic Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein **may not be contradicted by evidence of any prior agreement** or of a contemporaneous oral agreement **but may be explained or supplemented**

1. by **course of dealing or usage of trade** (Section 1-205) **or by course of performance** (Section 2-208); and
2. **by evidence of consistent additional terms** unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
3. Nanakuli Paving & Rock – **UCC version of parol evidence rule**.
4. Nanakuli and Shell were in a long-term requirements contract. Nanakuli sued Shell because Shell failed to price-protect. Jury found for P below, but trial judge entered j.n.o.v.
5. **Appeals court finds for P** in the face of the explicit language of the contract by use of evidence about trade usage in course of performance. To find for P, court has to find a way to determine that the evidence does not contradict the explicit language of the contract.
6. UCC recognizes that the set of practices and vocabulary of the trade is the web of meaning that informs the whole contract. That is a remarkable recognition that the world is not law-driven and that legal rules should bend because underlying realities aren’t likely to.
7. First, **must define the trade and the area** (product market, geographic market). Shell wanted a narrow definition. If defined more broadly, you are bound by the broader set of usages and practices. One of the practices in the broader definition was price protection:
8. Parties are bound by proven usages of trade even if they don’t know about them – if you choose to become a member of the trade, you should learn the rules of the game.
9. You are bound by usages if you know or should know about them. Shell is bound by usages in Oahu if they are so regular that Shell should have been aware of them.
10. In this case, Shell had extensive prior dealings with members of the trade and had price protected twice itself. Appeals court says Shell will be bound as someone who knew or should have known about usages of the trade.
11. Once you determine scope of trade usage, must show that usage exists. **UCC §1-205(2)** discusses legitimate and enforceable expectations of parties: “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. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.”
12. P did it here with expert testimony and documentary evidence from other members of the trade. P had all the evidence – Shell did not point in rebuttal to one instance of failure to price protect before its own refusal.
13. Even if there were no evidence on regularity of the usage, we also have course of performance evidence. Twice in the past, Shell had price protected Nanakula. **UCC §2-208**: course of performance is the best evidence, over course of dealing and usage of trade. However, it says that the best evidence is the language of the contract.
14. Hierarchy of evidentiary aids: 1) Course of performance, 2) Course of dealing, 3) Usage of trade.
15. Even under the UCC, parol evidence cannot contradict the terms of the agreement. Here, court says that we try to determine if there is any way to reconcile parol evidence with express language of the contract. Court found that trade usage provided an **unstated exception** in times of price increases. Court reconciles course of performance with express terms of the contract by making it discuss **when** the price rise takes effect **rather than whether** the price rise takes effect.
16. Even if Shell had prevailed on the trade usage claim, court would have still held for P because attempt to raise prices violated Shell’s **duty of good faith**. Code requires observance of reasonable commercial standards of fair dealing. Court felt that Shell was breaching some sort of obligation of commercially fair dealing between the parties. Doing something that is permissible under the contract but undermines the purpose of the contract violates the duty of good faith.