
AudioOutlines
LISTEN
AND
LEARN
Contract
LAW

AudioOutlines

Table of Contents

CHAPTER 1. WHAT IS A CONTRACT?

Under the law, a **contract** is a promise or an exchange of promises that courts will enforce. A *promise* will be legally binding when it is exchanged for adequate consideration. And when a contractual promise is breached, the law provides a remedy.

A. A **contract** is a legally enforceable agreement.

B. Most often, a contract is formed when 2 parties come together and **expressly** make promises to each other.

1. Contracts can be *written down* or can be *oral*.

Example — Liz calls Adam, a painter, and says she would like her front door painted. Adam offers to paint her front door for $200, and Liz agrees.

→ A contract has now been formed since each party has expressly made promises to each other, which are supported by adequate consideration. Liz and Adam are contractually bound to perform their promises, and if either fails to perform, they may seek remedies in court.

C. **Implied** contracts are created, not by words, but by the conduct of the parties.

Example — Danny hails a taxi in New York City. He gets in the cab and says "5th and Broadway," and the cab driver begins to drive him there.

→ In this case, an implied contract has been formed based on the conduct of the parties in which the cab driver promises to drive Danny to his destination, and Danny promises to pay the cab fare.

D. **Quasi-contracts** are constructed by courts to avoid *unjust enrichment* in certain cases when one party is unjustly enriched at the expense of another.

Example — Alison contracts with Mr. Handyman to build a deck for her house. They agree that Alison will pay $4000 to Mr. Handyman for the deck once it has been completed. Mr. Handyman begins working on the deck. Halfway through construction, Mr. Handyman becomes paralyzed in a car accident, and is unable to complete the deck. Alison refuses to pay Mr. Handyman for the partially built deck and Mr. Handyman sues.

→ In this case, since the contract states that payment shall be made when the deck has been completed, Alison is not contractually obligated to pay anything to Mr. Handyman for the unfinished deck. Under these circumstances, Alison would gain a partially built deck for free, and Mr. Handyman would be deprived of any compensation for his work. In order to avoid such injustice, the court will find that a quasi-contract exists and will allow Mr. Handyman to recover from Alison.

► In this chapter, we learned that a **contract** is a legally enforceable agreement. We learned that contracts are generally formed when parties, either orally or in a writing, expressly make promises to each other. We learned that implied contracts can be formed by the conduct of parties. And lastly we discussed the quasi-contract theory and how it may be utilized by courts to prevent unjust enrichment.

CHAPTER 2. WHAT LAW APPLIES — COMMON LAW OR THE UCC

A. Contract law is governed by two sets of law:

(i) The common law, and
(ii) Uniform Commercial Code.

B. The **COMMON LAW** governs a wide range of contracts, including **service** contracts as well as real estate contracts.

1. The term "common law" refers to the body of rules that have been developed through the courts over time. In other words, common law is judge-made law.

2. Note that most of the principles of the common law of contracts have been outlined in the 2nd series of the Restatement of the Law of Contracts, which is a legal treatise that was developed to inform judges and lawyers about the general principles of contract common law.

C. The **UNIFORM COMMERCIAL CODE** (particularly **Article II** of the code) governs contracts that are for the **sale or lease of goods**.

a. **Goods** — Concrete, tangible items that are movable, such as merchandise, food, and cars.

b. The **UCC** has been adopted in nearly every state.

D. When a contract is for **services** AND **goods**, the portion of the contract that dominates will determine whether the common law or the UCC applies.

Example — You pay a hair salon $50 for a haircut and a cheap plastic comb. You are unhappy with your haircut and you sue the hair salon.

→ In this case, since the haircut—the service part of the contract—dominates the contract, the court will apply the common law.

C. If a contract is structured in a way that **splits up payment between a service and a good**, the transaction will be treated as two separate contracts. The common law will apply to the service portion, and the UCC will apply to the sale of goods portion.

Example — Assume that the hair salon gave you a receipt that listed the haircut as $45 and the comb as $5.

→ If you sued the hair salon for messing up your hair, the court would apply the common law. If instead you sued the hair salon for selling you a defective comb, the court would apply the UCC.

► In this chapter, we discussed the 2 sets of law that govern contracts.

The **UCC** governs contracts for the sale or lease of goods.

The **common law** governs all other contracts.

CHAPTER 3. CONTRACT FORMATION — OFFER

A contract is a legally enforceable agreement. In order to form an agreement, there must be an exchange of promises between 2 or more parties. This most commonly occurs when there has been an *offer* and an *acceptance*, which is otherwise known as *mutual assent*. Once there has been an offer and an acceptance, an agreement has been formed.

A. **Offer** — A promise to enter into a contract.

1. The person who makes an offer is called the **offeror**. And the person to whom the offer is made is called the **offeree**.

2. Once the offeror makes an offer, and the offeree *accepts*, an agreement has been formed.

B. In order for an offer to be **valid** (meaning that it is capable of being accepted) the offeree must have a *reasonable expectation* that the offeror is willing to enter into the agreement.

1. In other words, if it seems that the offeror does not want to enter into an agreement, or the offeree does not know about the offer, then the offer is invalid, and cannot be accepted.

C. There are 3 categories of offers that are always **invalid**:

(i) Offers that do not have definite terms,
(ii) Offers that have not been communicated to the offeree, and
(iii) Offers that do not show an intent to be bound.

1. An offer will NOT be valid when the **terms in the offer are not definite**.

Example — If someone says, "I will sell you my motorcycle for a reasonable price," this is not a valid offer because the price term, "a reasonable price" is too vague.

2. An offer will NOT be valid when there is **no communication made to the offeree**.

Example — Let's say you find a lost dog and return it to its owner. Afterwards, you see a flyer offering a reward for finding that same dog. So you go back to the owner and demand the reward, but the owner refuses to pay.

→ In this case, since an offer can only be accepted by people who are aware of the offer, you are not entitled to the reward because you did not know about it when you returned the dog.

4. An offer will NOT be valid when the words used by the offeror **do not show that he intends to be bound to the offer**.

Example — Evil Knievel says "I am asking $1000 for my motorcycle." → This statement is not an offer that can be accepted because it does not show an intent to enter into a contract. Instead, Evil Knievel is initiating negotiations and his statement is considered an invitation to deal.

► In this chapter, we discussed **offers**. We learned that an offer is a promise to enter into a contract. We also learned that certain types of statements cannot be valid offers, such as invitations to deal. We commonly see invitations to deal in advertisements, which we will discuss in the next chapter.

CHAPTER 4. ADVERTISEMENTS

A. An advertisement is an example of an *invitation to deal*. Like invitations to deal, **advertisements** are generally NOT considered to be valid offers.

Example — Clothes-R-Us places an advertisement in the newspaper selling scarves for $10. You cannot go to the store and say "I accept" and have there be a contract. The reason for this is that advertisements are not offers, but invitations to deal.

B. However, note that there are 2 types of advertisements that may be considered a valid offer:

(i) Advertisements that offer a reward, and
(ii) Advertisements that state a quantity and who can accept.

1. An advertisement will be a valid offer when it's in the form of a **reward**.

Example — Let's say the Clothes-R-Us scarf advertisement promises a $5 reward to any purchaser who gets wind burn on their neck while wearing the scarf.

→ When you buy the scarf under these circumstances, you accept the offer which includes the reward. And if you end up getting wind burn on your neck while wearing the scarf, Clothes-R-Us would be obligated to pay you the $5 reward.

2. An advertisement will be a valid offer when it specifically **states a quantity** and **indicates who can accept**.

Example — A newspaper advertisement by Clothes R Us reads: "1 scarf $10 – first come, first served."

→ Because this advertisement specifies quantity, 1 scarf, and indicates who can accept, the first to come, this advertisement is a valid offer, and the first to come to the store can accept the offer of 1 scarf for $10.

► In this chapter, we discussed **advertisements**. We learned that, subject to two exceptions, advertisements are not offers but invitations to deal.

CHAPTER 5. OFFERS FOR THE SALE OF GOODS

So far, we have been discussing the common law rules dealing with offers. In this chapter, we will discuss the UCC rules that apply to **offers for the sale of goods**.

A. Under the UCC, an **offer will be valid** only if the quantity is an actual number or if the offer states that the quantity will be determined at a later time.

1. An offer to buy or sell goods must contain the quantity of the goods or state that the quantity will be determined later.

B. However, there are 2 types of contracts that can be formed from an offer that does not contain an actual number of goods:

1. **Output contract**

a. In an output contract, the *seller's entire output goes to the buyer*.

b. The seller agrees to sell all of a good it produces to the buyer, and the buyer agrees to purchase the seller's entire output.

Example — A farmer offers to sell all the grain he harvests to a bakery and the bakery agrees.

→ Even though the grain output in the offer is not an actual number, a valid output contract has been formed, since the entire output of the Farmer will be purchased by the bakery.

2. **Requirements contract**

a. In a requirements contract, the *buyer agrees to buy all of a particular good that it requires*, exclusively from one seller.

Example — Ford Motor Company offers to purchase all of its windshields from GlassX Company for the next 10 years and GlassX agrees.

→ Even though the number of windshields in the offer is not an actual number, a valid requirements contract has been formed, since Ford will purchase all the windshields it requires only from GlassX.

3. *** Note that when parties enter into output and requirements contracts, typically they have a good idea of each other's output or requirements — they intend that the quantity of goods will be reasonably proportionate to any estimated or previous numbers.

a. Regardless, sellers may produce a different number of goods each year, and buyers may require a different number of goods each year. This change will be permissible as long as it is *reasonable*.

Example — If Ford had purchased 10,000 windshields a year for the first 5 years of the contract, and demanded 20,000 the next year, this would be unreasonably disproportionate, and GlassX would not be obligated to supply 20,000 windshields.

C. Note that **price** (unlike quantity) does NOT have to be definite for an offer to buy or sell goods to be valid.

1. Under the UCC, a contract can be formed without agreeing on a price.

a. If the parties choose, they can have the price set at some market standard, or they can agree to come to a price at a later date.

► In this chapter, we discussed **offers for the sale of goods**. We learned that in order for such an offer to be valid under the UCC, it must contain a quantity of goods. However, the quantity term is not required in offers for output and requirements contracts.

CHAPTER 6. TERMINATION OF AN OFFER

Once an offer has been accepted, a contract has formed. However, BEFORE an offer is accepted, it may be terminated (and once an offer is terminated, it can no longer be accepted).

A. There are 5 common ways in which an offer can be terminated:

(i) The offeror **revokes** the offer,
(ii) The offeree **rejects** the offer,
(iii) The offeree makes a **counteroffer**,
(iv) There is a significant **lapse in time**, and
(v) The offer is terminated by **law**.

B. **Revocation**

1. For an offer to be revoked, the offeree must *become aware* that the offeror wants to revoke the offer.

a. The most obvious way to do this is by communicating directly to the offeree.

1) This can be done in many ways — in person, over the phone, in an email, by a letter.

b. However, an offer may also be terminated by revocation when there is indirect communication.

1) This can be done when a reliable 3rd party relays information to the offeree that the offer has been revoked.

2) It can also occur when the offeror acts in such a way that shows he has revoked the offer, and the offeree becomes aware of the revocation.

Example — Nancy offers to sell her dog to you for $100. Before acceptance, Nancy's offer can be revoked in several ways:

(i) If Nancy tells you she sold the dog to someone else (direct communication),
(ii) If Nancy's husband tells you the dog has been sold to someone else (reliable 3rd party communication),
(iii) If you see the dog with a new owner, and become aware that Nancy has sold the dog to someone else (offeror's actions and awareness).

C. **Rejecting the Offer**

1. If the offeree **rejects** the offer — simply by saying "I do not accept" — the offer becomes terminated.

D. **Counteroffer**

1. The offer will also be terminated if the offeree makes a counteroffer.

Example — Let's say Dan offers to sell his car to you for $5000. If you reply "I will give you $4000 for the car," that is a counteroffer. Once this counteroffer has been made, the original offer becomes terminated.

E. **Offer Remains Open for too Long**

1. If an offer does not state a period of time that it will remain open, the offer will terminate after a *reasonable time*. (In general, this will happen after a couple of months.)

F. **Terminated by Law**

1. The law terminates offers in 2 situations:

(i) When a party *dies* or *becomes legally insane*, and
(ii) When the subject of the offer is *destroyed* or *becomes illegal*.

2. An offer will be terminated by **death** or becoming **legally insane**.

a. *** Once a party dies or becomes legally insane, the offer terminates at *that exact moment*, even though the other party may not be aware of the death or insanity.

3. An offer will be terminated by law when the subject is **destroyed** or **becomes illegal.**

Example — There is an offer to sell patio furniture set. If the set is destroyed in a tornado, the offer would terminate because the set was destroyed before acceptance.

Example — If there is an offer to sell a strip club, and then a law is passed that bans strip clubs, the offer would terminate by law because strip clubs became illegal.

► In this chapter, we discussed how **offers may be terminated**. The five ways an offer may be terminated are by revocation, rejection, making a counteroffer, a lapse in time, and by law.

CHAPTER 7. IRREVOCABLE OFFERS

A. An offer CANNOT be revoked in 3 particular situations:

(i) When there is a firm offer for an **option contract**,
(ii) When the parties are **merchants**, and
(iii) When there has been **detrimental reliance**.

B. An offer cannot be revoked when there is an **OPTION CONTRACT**

1. An option contract forms when the offeree pays the offeror to leave the offer open. An offer that is to remain open for a certain period of time is known as a *firm offer*.

Example — Lance offers to sell you his bicycle for $100. You want to see the bicycle before you buy it, but cannot get to Lance's house to check it out until Saturday. In order to guarantee that Lance's offer will last until Saturday, you promise to pay Lance $10 now if he agrees to leave the offer open until Saturday.

→ If Lance agrees, you have created an option contract and Lance cannot revoke or terminate the offer until Saturday.

*** Note that if Lance agreed to keep the offer open just as a courtesy, and he was never paid anything to keep it open, Lance WOULD be able to revoke the offer at any time. The reason Lance may do so, is because he made a promise that was not supported by consideration. And a promise with no consideration is not binding.

C. **OFFERS BETWEEN MERCHANTS**

1. A **merchant** is a party who deals in certain goods.

a. Because merchants are in the business of dealing goods, they are held to a higher standard than individuals who are not engaged in the sale of such goods.

2. Under the UCC, if a merchant offers to buy or sell goods in a *signed writing*, the offer is **irrevocable** for either the time stated in the offer; or if no time is stated in the offer then for three months.

Example — Assume that Acme Bicycles offers to sell you a helmet for $20 in a signed writing, and promises to keep the offer open until Saturday.

→ In this case, since Acme Bicycles is a merchant, they cannot revoke the offer until Saturday. Note that if Acme Bicycles' offer did not state a time period, then they could not revoke the offer for 3 months.

D. **DETRIMENTAL RELIANCE** (also referred to as *promissory estoppel*)

1. Detrimental reliance occurs when the offeree **reasonably relies** on the offer and **begins performance**.

a. In order to prevent any injustice in these situations, the offer cannot be revoked.

Example — Sarah emails Mr. Painter and offers him $2,000 to paint her house. Without replying to the email, Mr. Painter buys paint and brushes, and begins painting Sarah's house the next morning. However, when Sarah comes home for lunch that day, she tells Mr. Painter that she found a better deal and wants to revoke her offer.

→ In this instance, because Mr. Painter *relied* on the offer and *began performance*, Sarah cannot revoke her offer.

*** Note that if Sarah had arrived at the house before Mr. Painter began to paint, Sarah could at this time revoke her offer to Mr. Painter because he *did not begin performance*.

2. **Preparing to perform** (like buying materials) does not constitute detrimental reliance, except in rare situations when there has been **substantial preparation**.

Example — Let's assume that Sarah had requested an expensive and unique type of paint imported from India that is not refundable. Once Mr. Painter buys this specialized paint for Sarah's house, Sarah could not revoke her offer because Mr. Painter detrimentally relied on the offer.

► In this chapter, we discussed types of offers that cannot be revoked, which include option contracts, signed written offers by merchants, and cases in which there has been detrimental reliance.

CHAPTER 8. ACCEPTANCE

A. **Acceptance** is the binding event that creates an agreement between 2 parties.

1. An **acceptance** is a promise or act by the offeree that indicates he wants to be bound by the terms of the offer.

2. Keep in mind that only a person to whom an offer is **made** and who is **aware** of the offer has the power of acceptance.

B. A valid **acceptance can be made in many different ways**.

1. Depending on the offer, an offeree may be able to accept the offer by stating that he agrees, by nodding his head in agreement, by signing a document, by beginning performance, and by completing performance.

2. Note that the UCC states that acceptance can be made in any reasonable manner; and in some cases, a seller may accept an offer to buy goods by merely shipping the goods to the buyer.

C. Oftentimes, an acceptance will **change or add to the terms of the offer**.

1. An acceptance that is different from the offer will affect *whether or not an agreement has been created*, and will affect the *terms* of the resulting agreement.

D. Under the **common law**, an *acceptance must mirror the terms of the offer* to be valid.

1. Under the common law, an acceptance must mirror the terms of the offer to form an agreement.

a. This means that any acceptance that changes the terms of the offer is a *rejection* and a *counteroffer*.

Example — your friend Billy offers to paint your wooden desk for $50. You reply, "I accept as long as you also build some drawers into the desk."

→ In this case, Billy's offer is for services, painting a desk, and therefore governed by common law. Under the common law, an acceptance must mirror the terms of the offer. Since your acceptance added the term about building drawers, the acceptance is not valid, and no agreement has been formed. Instead, your acceptance becomes a counteroffer, which Billy has the power to accept.

E. However, under the **UCC**, an *acceptance may change or add terms* to the offer and an agreement will still be created.

1. Under the **UCC**, an acceptance can change or add terms to the offer and may still form an agreement.

a. However, any acceptance that is *expressly made conditional* is a rejection and a counteroffer.

Example — Your friend offers to sell you her cell phone for $50 and you reply "I accept, but ONLY IF the phone comes with a charger."

→ In this case, cell phones are goods so the UCC applies. Therefore, since your acceptance is conditioned on the inclusion of a phone charger, it is not valid, and it operates as a counteroffer.

Example — However, let's assume that your friend offers to sell her cell phone for $50 and instead you say, "I accept. Include a phone charger."

→ In this case, even though your acceptance added a proposal to the offer, it is not made conditional, and therefore, an agreement has been formed.

F. Once an agreement has been created from an offer and acceptance that do not match, the next question to ask is, **what are the terms of the agreement?**

1. Under the **UCC**, the answer depends on whether the parties are **merchants**.

a. The rule is that if one or both of the parties are NOT a merchant, any additional terms in an acceptance do not become part of the agreement.

b. However, if both parties ARE merchants, additional terms may become part of the agreement.

Example — Your friend offers to sell her cell phone for $50 and you say, "I accept. Include a phone charger."

→ In this case, because the acceptance is not made conditional—but just adds a proposal—an agreement has been formed. However, under the UCC, the phone charger term does not become part of the agreement because you and your friend are not merchants. As a result, you and your friend are bound to an agreement whereby you are obligated to pay $50 to your friend in exchange for only her cell phone.

► In this chapter, we discussed **acceptance**, which is the binding event that creates an agreement.

(i) We learned that under the common law, an acceptance must mirror the terms of the offer.

(ii) However, under the UCC, an acceptance that changes or adds terms can operate to create an agreement, as long as it is not expressly made conditional.

The changed or additional terms in such an acceptance will NOT become part of the agreement when *one of the parties is not a merchant*; however, different terms in an acceptance MAY become part of the agreement when *both parties are merchants*.

CHAPTER 9. ACCEPTANCE BETWEEN MERCHANTS UNDER THE UCC

A. Under the **UCC**, when a merchant accepts an offer from another merchant, but the *acceptance changes or adds new terms*, the changed or added terms will generally become part of the agreement. However, there are 3 exceptions:

(i) If the new terms **materially alter** the contract,
(ii) If the original offer states that it **can only be accepted with its original terms**, or
(iii) If the offeror **rejects** the new terms **within a reasonable time**.

Example — An electronics store faxes an offer to sell 100 cell phones to another electronics store. The other store replies with a signed fax that states "I accept. Include a charger for each phone."

→ In this case, the UCC applies since the agreement concerns the sale of goods. Under the UCC, an acceptance with additional terms will create an agreement unless the acceptance is expressly made conditional. Since the acceptance in our example is not made conditional, but merely includes a proposal, an agreement has been formed.

Now that it has been determined that an agreement exists, the next step is to determine whether the additional terms in the acceptance are part of the agreement.

→ Under the UCC, if both parties are not merchants, any changed or additional terms in the acceptance do not become part of the agreement. However, if both parties are merchants, any additional terms in the acceptance do become part of the agreement unless one of the three UCC exceptions apply.

Since the electronics dealers are merchants, the additional term about the phone chargers will become part of an agreement unless 1 of the 3 exceptions applies. Since the addition of 100 phone chargers clearly *materially alters* the contract, those additional terms do not become part of the agreement.

Example — Let's assume that instead, the electronics dealer replied with a fax that stated "I accept. Deliver the phones within 3 weeks."

→ In this case, the additional term about delivering the phones within 3 weeks would become part of the agreement because delivery terms do not materially alter the contract.

However, if the seller rejects these delivery terms within a reasonable time, they will not become part of the agreement, and the seller will not be required to deliver the phones within 3 weeks.

► In this chapter, we discussed the **UCC rules on acceptance between merchants**. We learned that, when both parties are merchants, any additional terms in an acceptance will become part of the agreement unless the new terms *materially alter* the contract, unless the original offer has stated that it *can only be accepted with its original terms*, or unless the new terms are *rejected within a reasonable time*.

CHAPTER 10. MAILBOX RULE

An important legal concept regarding *acceptance* is called the **mailbox rule**. The mailbox rule comes into play when parties are not dealing with each other face to face, and there is a delay in communications — such as with sending letters through the mail, as well as with faxes, emails, and voicemails. When parties bargain in this manner, the mailbox rule determines whether certain communications, like offers and acceptances, are effective.

A. **Mailbox rule** — all communications are effective when received except an acceptance, which becomes effective when mailed.

1. This means that offers, counteroffers, revocations, and rejections become effective once they are received by the receiving party. However, *acceptances* are effective when mailed.

Example — Lewis mails Clark an offer to purchase 100 canoes.

→ This offer is effective once it is received by Clark. Therefore, Clark cannot accept the offer until he receives it in the mail. Once Clark receives the offer, he could call Lewis to accept the offer. He could also send an acceptance letter in the mail.

If Clark decides to accept through the mail, his acceptance becomes effective AT THE MOMENT he sends the acceptance letter. Therefore, if Clark does in fact send an acceptance letter, an agreement for the sale of 100 canoes has been formed, even though Lewis has not received the letter.

Example — Let's start over and assume that Lewis mails Clark a letter with an offer to purchase 100 beaver pelts. The next day Lewis changes his mind and sends Clark a letter revoking the offer. Clark receives the offer in the mail first, and immediately sends an acceptance letter. The next day, Clark receives the revocation letter.

→ In this case, an agreement has been formed between Lewis and Clark for 100 beaver pelts. Under the mailbox rule, all communications are effective when received, except an acceptance, which is effective when sent. When Clark received the offer, the offer became effective. Therefore, when Clark immediately sent his acceptance, the acceptance then became effective, and an agreement was formed.

*** Note that Lewis' revocation letter had no effect in our example because it was not received by Clark until after the agreement had already been formed. If Lewis really wanted to revoke his offer, he must have communicated it to Clark before he sent his acceptance letter.

B. **Exception** to the mailbox rule — when the offeree mails a rejection and then mails an acceptance.

1. When a rejection is sent BEFORE an acceptance, then the rule is that whichever is received first, becomes effective.

Example — Lewis mails Clark an offer to purchase 100 muskets. Clark receives the offer letter; he decides he does not want 100 muskets. and he sends a rejection letter. The next day, however, Clark changes his mind and sends an acceptance letter.

→ In this case, Clark's acceptance is not effective when mailed because he had already sent a rejection. Therefore, whichever letter Lewis receives first will become effective. So if Lewis receives the rejection letter first, that will become effective and there will be no agreement. However, if instead Lewis receives the acceptance letter first, then that will become effective and an agreement will be formed.

C. Note that the mailbox rule does not apply to **firm offers**.

1. Recall that a firm offer is an offer that is to remain open for a certain period of time. When an offer contains a deadline to accept, any acceptance will become effective when it is received, not when it is mailed.

Example — Lewis mails Clark an offer to purchase 100 maps. The offer states that Clark has until Wednesday to accept. Clark sends an acceptance on Tuesday, but Lewis does not receive the acceptance until Thursday.

→ In this case, there is no agreement. For firm offers, an acceptance does not become effective when mailed; rather, it becomes effective when received. Since Lewis did not receive Clark's acceptance until after the deadline to accept, there is no agreement.

► In this chapter, we discussed the **mailbox rule**.

We learned that under the mailbox rule, all communications are effective when received except an acceptance, which becomes effective when mailed.

However, when a *rejection is sent before an acceptance*, or when the offer is a *firm offer*, an acceptance instead becomes effective when received.

CHAPTER 11. CONSIDERATION

Remember that a **contract** is a *legally enforceable promise*. In order for any promise to be legally binding, it must be supported by adequate consideration.

A. **Consideration** (referred to as bargained-for exchange) — something of value that a party receives in exchange for their promise.

Example — Liz calls Adam, a painter, and says she would like her front door painted. Adam offers to paint her front door for $200, and Liz agrees.

→ In this case, a legally binding agreement has been formed. Not only did Liz and Adam make promises to each other, but there is adequate consideration because Liz bargained for Adam's painting services and Adam bargained for $200.

B. **Promises that lack consideration are unenforceable**

1. In other words, if a party makes a promise without bargaining for anything of value, that promise is not supported by adequate consideration and it will not be legally binding.

2. There are several categories of promises that are unenforceable due to lack of consideration:

(i) Promises to make a **gift**,
(ii) Promises that rely on **past consideration**, and
(iii) Promises that rely on a party's **pre-existing duty**.

3. A **gift** (includes a donation) is not adequate consideration.

a. Since a gift is made without an intention to receive anything in return, any promise to give a gift is not enforceable.

Example — Kelly is in a good mood and says to her friend Nathan, "I promise I will give you my gold watch."

→ In this case, Nathan will not be able to legally enforce Kelly's donative promise because it is not supported by consideration.

b. Note, however, that a gift promise may be enforceable when it contains some sort of a *condition*, but only if the condition is viewed as the value of the gift.

Example — Kelly says to Nathan, "I promise to give you my gold watch if you come over to my apartment to pick it up." Nathan rushes over to Kelly's apartment, but Kelly refuses to give him the watch. Nathan sues.

→ In this case, Kelly will not be legally obligated to give Nathan the watch, because coming over cannot reasonably be viewed as the price Nathan had to pay for the watch.

Example — However, let's instead assume that Kelly promises to give Nathan her gold watch if Nathan abstains from drinking alcohol for 10 years. Nathan agrees and does not drink for 10 years. At the end of the 10 years, Nathan demands the gold watch from Kelly, but Kelly refuses to give it to him. Nathan sues.

→ In this case, there is adequate consideration because the value of the gold watch was exchanged for the value of not drinking for 10 years. Therefore, Kelly's gift promise was supported by adequate consideration and Kelly must give Nathan the watch.

4. The second type of promise that lacks consideration is a **promise that relies on consideration from the past**.

Example — As a kind gesture, you mow your neighbor's lawn. Afterwards, your neighbor thanks you and promises that he will mow your lawn in return the following month. A month later, the neighbor changes his mind and refuses to mow your lawn.

→ In this case, your neighbor's promise is not binding because it was supported by past consideration.

5. The third type of promise that lacks consideration is a **promise to do something that the party is already legally obligated to do**.

a. In general, when a party promises to do something they are already legally obligated to do, the promise will not be legally enforceable. This is known as the *pre-existing duty rule*.

Example — Bobby tells his mother, "I promise to drive under the speed limit for a month if you give me $100." Mother agrees. After Bobby does not speed for a month, he demands the $100 from his mother. Mother refuses to pay and Bobby sues.

→ In this case, Mother will not be obligated to pay Bobby because their agreement is unenforceable for lack of consideration, since Bobby, as well as everyone else, is legally obligated to obey the law and not exceed the speed limit.

Example — Bruce has an agreement with Stacy to clean her gutters for a price of $50. After Bruce begins cleaning the gutters, he changes his mind and tells Stacy that he will not finish the job unless she pays him $100 instead. Stacy agrees. Once Bruce finishes the job, he demands $100, but Stacy pays him only the original $50 they agreed to. Bruce sues.

→ In this case, Stacy will not be legally obligated to pay Bruce $100 because their second agreement is not enforceable for lack of consideration, since Bruce was already under a pre-existing duty to clean the gutters for $50.

► In this chapter, we learned that in order for a promise to be enforceable, it must be supported by adequate **consideration**, which is a bargained-for legal detriment. In the next chapter, we will discuss consideration substitutes, which allow courts to enforce a promise that lacks consideration.

CHAPTER 12. CONSIDERATION SUBSTITUTES — DETRIMENTAL RELIANCE AND CONTRACT MODIFICATION

In certain situations, a promise without consideration WILL BE enforceable. Two substitutes for consideration include detrimental reliance and contract modification:

A. **DETRIMENTAL RELIANCE** (otherwise known as **promissory estoppel**)

1. Occurs when one party makes a promise and the other party relies on the promise and acts in a manner that is reasonably expected.

2. When there has been detrimental reliance on a promise that lacks consideration, the promise will still be legally enforceable.

Example — Sonny knows that Cher has been looking for a new car, and Sonny promises to give Cher $10,000 for a new car. Cher reasonably believes that Sonny will give him the money and relies on the promise and goes out and buys a car. Afterwards, Cher asks Sonny for the money that he promised her. Sonny refuses to give it to her and Cher sues.

→ In this case, even though Sonny's gift promise was not supported by consideration, Sonny's promise may be enforceable because it was relied on by Cher in a manner that Sonny should reasonably have expected.

Example — Acme Company sends you a letter promising you a job at the company, to begin on Monday. You quit your job, you show up to Acme on Monday morning, however they change their mind and refuse to hire you. You sue.

→ In this case, even though Acme's promise was not supported by adequate consideration, it will be enforceable based on detrimental reliance. Note that when enforcing this contract, the court will not order Acme to hire you, but will award appropriate money damages.

B. **CONTRACT MODIFICATION**

1. Modification of certain contracts may also be the basis for enforcing a promise that lacks consideration.

2. The requirements of contract modification differ between the common law and the UCC:

a. Under the **common law**, contract modification occurs when both parties to the contract modify their promises.

Example — Ren agrees to wash Stimpy's windows for a price of $50. After Ren begins performance, Stimpy says that he wants the windows clean within two hours. Ren replies that he will finish within 2 hours only if he receives $100 instead. Stimpy agrees.

→ In this case, the contract has been effectively modified because both parties have promised something new apart from their pre-existing duties. Ren agreed to finish the job sooner than originally promised, and Stimpy agreed to pay more. Because both parties changed their promises, there is valid consideration and the contract has been modified.

b. Under the **UCC**, modification of sale of goods contracts does not require consideration from both parties, however it must be done in good faith.

Example — Nike Shoe Company has a contract to sell shoes at a certain price and deliver them to Shoes-R-Us. Suddenly, rubber becomes scarce and expensive. As a result, Nike tells Shoes-R-Us that, due to the shortage of rubber, the shoes are going to cost twice as much. Although Shoes-R-Us doesn't have to agree to these new terms, it agrees to pay the higher price.

→ In this case, the contract has been successfully modified. First off, modification of sale of goods contracts does not require consideration; so it is irrelevant that Nike was already under a pre-existing duty from the

original contract, to sell shoes to Shoes-R-Us. Secondly, it is generally accepted that when a party raises prices due to a shortage of materials in the market, this does not amount to bad faith. Therefore, the contract between Nike and Shoes-R-Us has effectively been modified.

► In this chapter, we discussed **detrimental reliance** and **contract modification**.

(i) We learned that when a party has *detrimentally relied* on a promise not supported by consideration, the promise may be enforceable.

(ii) We also learned that under the common law, BOTH parties to a contract must modify their promises in order to make the modified contract enforceable. And we learned that, under the UCC, a contract for the sale of goods can be modified *without consideration* as long as it is done in *good faith*.

CHAPTER 13. STATUTE OF FRAUDS

The statute of frauds provides a safeguard to parties involved in contractual relations. Under the statute of frauds, certain agreements must be in writing, or else they will not be enforceable.

Since an agreement evidenced by a signed writing shows that the parties have seriously considered their promises and want to formally declare their intentions, the statute of frauds requires a party to produce a signed writing to prove the existence of important kinds of contracts.

A. Although state laws vary, most apply the **statute of frauds** to 6 types of contracts:

(i) Contracts for **Marriage**,
(ii) Contracts that are for a **Year** or longer,
(iii) Contracts that are for **Land**,
(iv) Contracts by **Executors**,
(v) Contracts for **Goods** of a certain value, and
(vi) Contracts by **Sureties**.

*** Remember contracts within the statute of frauds with the acronym MY LEGS. M for Marriage. Y for year. L for land. E for executor. G for goods. S for surety.

B. Contracts within the **statute of frauds**:

1. Contracts for **MARRIAGE**

a. Therefore, contracts for marriage MUST be in writing to be enforceable. (This includes pre-nuptial agreements.)

2. Contracts that take **A YEAR OR LONGER TO COMPLETE**

a. Therefore, contracts that take a year or longer to complete MUST be in writing to be enforceable.

b. Note that if there is any *theoretical possibility* that a contract could be completed within 1 year, no matter how remote the chance, it does not have to be in writing under the statute of frauds.

Example — Let's say you are a marathon runner and your friend is the owner of a company. You and your friend orally agree that for $3000 you will run your next 50 marathons wearing a shirt with your friend's company logo.

→ In this case, the oral agreement will be enforced without a writing. Even though it is highly unlikely that you will run 50 marathons within one year, it is theoretically possible that you will and, since it is theoretically possible for the contract to be performed within a year, the contract does not have to be in writing.

Example — Let's say instead that you and your friend orally agree that for $3000 you will run in the next 5 New York City Marathons displaying the company logo. There is only one New York City Marathon each year.

→ In this case, since it will take the next 5 years to perform, the oral agreement is not enforceable.

c. *** Note that there is an **exception** here.

1) If a party *fully performs* on an **oral** agreement that cannot be completed within 1 year, the agreement may be enforceable.

Example — You and your friend orally agree that for $3000 you will run in the next 5 New York Marathons wearing your friend's company logo. Over the next 5 years, you run in all 5 of the New York Marathons with the logo.

→ At this point, the oral agreement would be enforceable because you have fully performed your end of the bargain. Therefore, you could enforce the agreement without a writing, and your friend would be obligated to pay you.

3. Contracts for **LAND**

a. Therefore, contracts that deal with the transfer of an interest in real estate MUST be in writing to be enforceable.

1) Note, however, that real property leases for a year or less do not need to be in writing to be enforced.

4. Contracts made by the **EXECUTOR** of a will, or the administrator of an estate

a. Therefore, contracts in which an executor or administrator promises to be personally liable for the debt of an estate MUST be in writing to be enforceable.

Example — If Betty dies and John is the executor of her estate, any promise that John makes on behalf of the estate must be in writing to be enforced.

5. The fifth type of contracts that are within the statute of frauds are contracts for **GOODS VALUED AT $500 OR MORE**

a. Under the UCC, a contract to buy or sell goods for $500 or more MUST be in writing to be enforceable.

b. *** There are 2 **exceptions** to this rule: (Under each exception, an oral contract to buy or sell goods for $500 or more may be enforceable.)

1) If the *buyer receives and accepts all or some of the goods*, the agreement will become enforceable as to the goods that were delivered and accepted.

Example — Seller orally agrees to sell 10 boats to buyer for 1 million dollars each for a total of ten million. Seller delivers 8 boats, and after accepting the boats, the buyer tries to get out of the agreement, arguing that it was an oral contract for goods valued at over $500 and is therefore unenforceable.

→ In this case, even though there is no writing, the agreement will be enforced for the 8 million dollars' worth of boats that the buyer accepted. However, the buyer is under no obligation to accept and pay for the remaining 2 boats.

2) The second exception where an oral contract for goods for over $500 may be enforced arises when a seller manufactures *specialty goods* for the buyer, and the seller *substantially* begins making the goods.

Example — The seller orally agrees to sell 1 boat to the buyer for 5 million dollars. The boat is to be custom made of wood and will resemble Noah's ark. The seller designs the boat, orders material, and begins constructing the boat. The buyer then pulls out of the deal.

→ In this case, the oral agreement will be enforceable because it called for the manufacture of special goods which are not suitable to others and the seller made a substantial beginning in the manufacture of the boat.

6. Contracts made by a **SURETY**

a. A surety is a person who promises to pay the debt of another.

b. Under the statute of frauds, a contract where one promises to pay for the debt of another, otherwise known as a suretyship, must be in writing to be enforceable.

► In this chapter, we discussed the **statute of frauds**. We learned that, under the statute of frauds, six types of contracts must be in writing to be enforceable. They include contracts for *marriage*, contracts that cannot be performed within one *year*, contracts for *land*, contracts made by an *executor*, contracts for the sale of *goods* priced at $500 or more, and contracts made by a *surety*.

CHAPTER 14. DEFENSES — ILLEGALITY AND LACK OF CAPACITY

A. There are several **defenses** that will prevent a contract from being legally enforced. Aside from lack of consideration and the statute of frauds, the general defenses to contract formation include:

(i) Illegality,
(ii) Lack of capacity,
(iii) Duress,
(iv) Unconscionability,
(v) Misrepresentation, and
(vi) Mistake.

B. **Illegality** — Any illegal contract is unenforceable.

Example — Beatrice hires a hitman to kill her husband. In this case, the agreement is void and cannot be enforced.

C. **Lack of Capacity**

1. Under the law, people under 18 years of age and people with a mental illness or a mental defect, lack the capacity to enter into a contract.

2. When an agreement is entered into by a party who lacks capacity, the agreement is **voidable** by that party. Voidable means that the agreement cannot be enforced against the party who lacks capacity.

3. Note, however, that if the party *gains capacity in the future*, and continues to *retain the benefits* of the agreement, then the agreement becomes enforceable against all parties.

Example — A used car dealer sells a car to Ryan, a 16-year-old minor, who agrees to make monthly payments of $100 over 5 years. A year after purchasing the car, 17-year-old Ryan fails to make monthly payments for the car. The car dealer sues.

→ In this case, the car dealer will not be able to recover because Ryan can void the agreement for lack of capacity.

*** Note, however, that once a party gains capacity and continues to retain the benefits of the agreement, they can no longer void the agreement.

→ So if Ryan kept the car past his 18th birthday, and then defaulted on his payments, the car dealer could recover from Ryan, even though he lacked capacity when he originally entered into the agreement.

4. Note that when a party who lacks capacity enters into an agreement for **necessities**, this is an exception to the general rule and the agreement will be enforceable.

a. Necessities — things necessary for living (food, shelter, medical care, and clothing)

Example — If 16-year-old Ryan leased an apartment, he could not void the agreement for lack of capacity because it is for the necessity of shelter.

► In this chapter, we learned about the defenses of **illegality** and **lack of capacity**.

CHAPTER 15. DURESS AND UNCONSCIONABILITY

A. **Duress**

1. If a party is forced, by threats, to enter into an agreement—and the party has no reasonable alternative other than entering into the agreement—the agreement is voidable.

2. An example of duress would be the shotgun wedding. This is duress resulting from a *physical threat*, but there can also be **economic threats** that amount to duress:

Example — You own a flower store and have an agreement to buy 500 roses from a gardener, delivery to be made on Valentine's Day. Knowing that you need the roses for Valentine's Day, gardener calls you the day before and threatens to withhold the roses unless you pay more. You have no other source for roses and reluctantly agree.

→ In this case, since you had no reasonable alternative other than agreeing on the price increase, there is economic duress and you can void the agreement.

B. **Unconscionability**

1. An unconscionable contract is one that is so one-sided that it is *unfair*. These typically arise when an experienced business dealer requires an average consumer to sign a contract with confusing and technical language, and consumer has no ability to negotiate the terms.

Example — A lengthy loan agreement between a bank and an individual, which contains a provision buried deep in the writing that calls for severe penalties if borrower fails to make a payment. In this case, the borrower may be able to void the agreement for unconscionability.

► In this chapter, we discussed the defenses of **duress** and **unconscionability**.

CHAPTER 16. MISREPRESENTATION

A. **Misrepresentation**

1. A misrepresentation is essentially a **false statement**.

2. When a person makes a misrepresentation that he *knows* is not true, in order to get the other party to enter into an agreement, this is known as a **fraudulent misrepresentation**.

a. When a party *relies* on a fraudulent misrepresentation and *enters into an agreement based on the misrepresentation*, the agreement will be voidable by the innocent party.

Example — Axl, a representative of the Rock and Roll Hall of Fame, is looking for memorabilia to put in the Rock and Roll museum. While visiting an antique shop, he comes across a pair of sunglasses that the owner says were worn by musical legend Ray Charles. In fact, the owner knows that Ray Charles never wore them. Axl relies on the owner's statement and purchase the glasses. Later, Axl finds out Ray Charles never wore them and sues the antique store owner.

→ In this case, Axl will be able to void the agreement based on fraudulent misrepresentation and get his money back.

3. When a party relies on a misrepresentation that is **nonfraudulent**, the party may void the agreement, but only if the misrepresentation was *material*.

Example — Axl asks about sunglasses at an antique shop, and the owner says they belonged to Ray Charles. However, the owner truly believes that they belonged to Ray Charles. Axl relies on the owner's statement and purchase the glasses. Afterwards, Axl finds out that Ray Charles never wore the sunglasses and sues the antique store owner.

→ In this case, Axl may still void the agreement and get his money back. The antique store owner's misrepresentation was nonfraudulent because he did not know it was false. However, since Axl bought the sunglasses thinking they belonged to Ray Charles (and they actually didn't belong to Ray Charles), the nonfraudulent misrepresentation was material and Axl can void the agreement.

► In this chapter, we discussed the defense of **misrepresentation**.

CHAPTER 17. MISTAKE

A. **Mistake** — an incorrect assumption about a fact relating to an agreement.

1. Under contract law, if BOTH parties make a mutual mistake of fact when entering into an agreement, the agreement is voidable by the party that is harmed by the mistake.

2. However, if only ONE party is mistaken as to a material fact, the agreement is binding; unless the nonmistaken party had reason to know of the other party's mistake.

Example — Buyer agrees to purchase a cow from seller. Both buyer and seller believe the cow is barren (unable to reproduce) so they agree on a low price. Before the cow is delivered, seller learns that the cow is fertile and refuses to sell the cow. Buyer sues.

→ In this case, the seller may void the agreement and does not have to sell the cow to the buyer. Recall that if both parties make a mutual mistake of fact when entering into an agreement, the agreement is voidable by the party that is harmed by the mistake. Since both the buyer and seller made a mutual mistake of fact regarding the fertility of the cow, the agreement is voidable by Seller.

3. Remember that if only ONE party is mistaken as to a material fact, the agreement will be binding, unless the nonmistaken party had reason to know of the other party's mistake.

Example — Buyer and seller agree on the purchase of a pig. The seller knows the pig is barren, but the buyer is mistaken and believes that the pig is fertile. So the buyer agrees to pay a high price for the pig. After receiving the pig, the buyer finds out that it is barren, and sues the seller to get his money back.

→ In this case, the agreement will be binding and the buyer cannot recover his money. Since the seller did not know that the buyer was mistaken about the fertility of the pig, and since the seller did not act in bad faith, their agreement is enforceable, and the buyer will be stuck with the barren pig.

► In this chapter, we discussed the defense of **mistake**.

CHAPTER 18. TERMS OF A CONTRACT — DETERMINED BY PRIOR STATEMENTS

When a court is enforcing a contract, usually the court only needs to look at the contract itself to determine its terms. It is generally assumed that parties to a written contract have included all the terms in the contract and have left nothing out.

Accordingly, the law works to prevent courts from considering anything other than the contract itself when interpreting the contract. However, there are certain instances when the court may look at evidence outside the contract to determine its meaning.

A. One important rule of law that guides this process of interpreting contracts is the **PAROL EVIDENCE RULE**.

1. The parol evidence rule works to exclude certain **extrinsic evidence** from being admitted.

a. Extrinsic evidence — any evidence outside the four corners of the contract, which can include oral statements, other writings made by the parties, and conduct of the parties.

2. The parol evidence rule itself functions to exclude ONLY extrinsic evidence of oral or written statements of the parties made prior to and during the signing of the contract.

a. Therefore, the parol evidence rule CANNOT be used not used to keep out communications or agreements that take place AFTER the contract has been formed.

3. Note that the parol evidence rule applies to common law and UCC contracts.

4. In any case, the parol evidence rule only applies if the contract is in *writing* and was *intended by the parties to be final*.

a. A final written contract is known as an **integration**.

b. Note that contracts can be completely integrated, or partially integrated:

1) A **complete integration** is a written and final contract that contains all the terms of the agreement.

2) A **partial integration** does not include every single term of the agreement. If the written contract incorporates other outside documents, then it is a partial integration.

c. Note that some contracts include what is called a **merger clause**, otherwise known as an integration clause.

1) Merger clause — explicitly states that the contract is final and complete.

2) These clauses do not conclusively make the contract a complete integration, but they strengthen the presumption that the contract is completely integrated; and therefore in most cases, a contract that contains a merger clause will be considered a complete integration.

► In this chapter, we began our discussion on the **parol evidence rule** and we learned about **integrated contracts**.

CHAPTER 19. THE PAROL EVIDENCE RULE

Under the parol evidence rule, terms in a written and final contract MAY NOT be **contradicted** by extrinsic evidence of prior and contemporaneous oral or written statements. However, in certain situations, such evidence MAY be admitted to **add to** or **explain** the contract.

A. Three reasons why a party may want to admit parol evidence:

(i) To *contradict* the contract,
(ii) To *add* new terms to the contract, or
(iii) To *explain* the terms in the contract.

*** Depending on why a party wants to use parol evidence determines whether or not it can be admitted under the parol evidence rule.

B. Under the parol evidence rule, prior and contemporaneous oral or written statements CANNOT be admitted to **CONTRADICT** any integrated contract.

Example — You own an appliance store and you contract in a final writing to buy 15 ovens from a manufacturer. The manufacturer delivers 10 ovens and refuses to deliver more. You sue for breach of contract. In court, the manufacturer alleges the existence of a prior email stating that the agreement was in fact for 10 ovens, instead of 15 as stated in the contract.

→ In this case, the court cannot admit the email because it contradicts the contract. The email, which states the agreement is for 10 ovens, contradicts the contractual term of 15 ovens. Under the parol evidence rule, prior and contemporaneous oral or written statements cannot be admitted to contradict an integrated contract; therefore, the prior email is not admissible.

C. Under the parol evidence rule, prior and contemporaneous oral or written statements CANNOT be admitted to **ADD** to a *completely integrated contract*, but CAN be admitted to **ADD** to a *partial integration*.

Example — You and a manufacturer agree to the sale of 15 ovens in a written contract that contains a merger clause. The contract does not mention how the ovens are to be delivered. Prior to the contract, the manufacturer sends you a fax stating that he will deliver the ovens to your store. However, after the contract is signed, the manufacturer refuses to deliver the ovens and demands that you pick them up.

→ In this case, the court cannot admit the fax to add the delivery terms to the contract because the contract is a complete integration. Under the parol evidence rule, prior and contemporaneous oral or written statements cannot be admitted to add to a completely integrated contract. However, such evidence can be admitted to add to a partial integration. Therefore, if the contract did not contain a merger clause, and stated that it incorporated other outside documents, then the fax could be admitted.

D. Under the parol evidence rule, prior and contemporaneous oral or written statements MAY be admitted to **EXPLAIN** the terms of any *integrated contract*.

1. When contractual terms are plain, and the intent of the parties is clear, there is no need to explain the meaning of the terms. However, when there are ambiguous terms within a

contract that could have more than one possible meaning, the court can admit extrinsic evidence to clarify and explain the terms.

Example — You and manufacturer agree to the sale of 15 ovens in a written contract. The contract does not specify the type of ovens. After the contract is signed, a dispute arises because you claim the term "ovens" means electric ovens, and the manufacturer claims the term means gas ovens.

→ In this case, since the term "ovens" in the contract is an ambiguous term, the court may admit any prior and contemporaneous oral or written statements to show what type of oven was intended by the parties.

E. Note that extrinsic evidence will always be admissible to **attack the validity of a contract**.

1. This means that evidence of contract defenses (like misrepresentation, duress, mistake, and illegality) will always be admissible.

a. So even if such evidence contradicts the written contract, it will be admissible in order to determine whether the contract has a formation defect.

► In this chapter, we discussed the **parol evidence rule**.

(i) Under the rule, prior and contemporaneous oral or written statements cannot be admitted to **contradict** an integrated contract.

(ii) Prior and contemporaneous oral or written statements cannot be admitted to **add** to a *complete integration*, but can be admitted to **add** to a *partial integration*.

(iii) Extrinsic evidence is admissible to **explain** the meaning of ambiguous terms in a contract.

CHAPTER 20. TERMS OF A CONTRACT – DETERMINED BY CONDUCT

Aside from prior oral or written statements, certain **conduct** may be admitted as extrinsic evidence to add to or explain terms in a contract. Evidence of conduct may be admitted for common law contracts and UCC contracts.

A. When a contract is silent on a particular issue, or when there are ambiguous terms in the contract, courts may consider 3 types of **conduct** to supplement or explain the contract:

(i) Course of performance,
(ii) Course of dealing, and
(iii) Custom and usage.

B. Courts may look towards **COURSE OF PERFORMANCE** to determine the terms of a contract.

1. **Course of performance** — the conduct of the parties AFTER they enter into a contract.

2. Course of performance evidence may be admitted to *supplement* or *explain* a written contract.

Example — A bakery enters into a written contract to deliver bread to a deli for 5 years. The contract does not specify the type of bread to be delivered. For the first year of the contract, the bakery delivers only sourdough bread to the deli. In the second year of the contract, the deli demands that they deliver cornbread. The bakery refuses and the deli sues.

→ In this case, the court must determine what type of "bread" the parties intended under the contract. Since there is no parol evidence that can be considered, the court will look towards the parties' course of performance. For the first year of the contract, the bakery delivered sourdough bread to the deli. This course of performance evidence will be admissible to show that the parties intended the bread term in the contract to mean sourdough bread.

C. If course of performance does not help explain disputed terms of a contract, courts may then look to **COURSE OF DEALING**.

1. **Course of dealing** — the conduct of the same parties, but from a previous contract.

Example — The contract between the bakery and the deli expires. The two parties enter into a new written contract to deliver bread for another 5 years. Again, the contract does not specify the type of bread to be delivered. The bakery's first delivery to the deli is sourdough bread. The deli rejects the sourdough bread and demands croissants. The bakery refuses and the deli sues.

→ In this case, the court must determine what type of "bread" the parties intended under the new contract. Since there is no evidence of course of performance, the court will look towards course of dealing evidence. In the previous contract between the parties, the bakery delivered sourdough to the deli. This course of dealing evidence will be admissible to show that the parties intended the bread term in the contract to mean sourdough bread.

D. If course of performance and course of dealing do not help explain disputed terms of a contract, courts may then look to **CUSTOM AND USAGE**.

1. **Custom and usage** (also known as trade usage) — conduct of other parties involved in similar contracts. In other words, it is the customary practices of similar businesses.

Example — For the first time doing business together, a butcher and a restaurant enter into a written contract to deliver meat for 5 years. The contract does not specify the type of meat. For the first delivery, the butcher delivers beef. The restaurant rejects the delivery and demands chicken instead. The butcher refuses and the restaurant sues.

→ In this case, the court must determine what type of "meat" the parties intended under the contract. Since there is no evidence of course of performance or course of dealing, the court will look at custom and usage. Therefore, the court can admit evidence of the type of meat used in similar agreements between other butchers and restaurants.

► In this chapter, we discussed how **conduct** may be admitted as evidence to add to and to explain the terms of a written contract. We learned that courts may consider first the **course of performance**, then the **course of dealing**, and lastly **custom and usage**.

CHAPTER 21. THE UCC RISK OF LOSS RULES

A. **Risk of loss** refers to who is liable for goods that become lost, stolen, damaged, or destroyed, after a contract has been formed but before the buyer has received the goods.

B. The UCC sets out a 4-step process to determine who bears the risk of loss:

1. If the contract has a provision that covers risk of loss, then **the contract will apply**.

a. If the contract is silent on risk of loss, then we go to the second step.

2. The second step depends on whether a party has breached the contract. Under the UCC, if a party has breached the contract, then **the breaching party will bear the risk of loss**.

a. Note that even if the breach is unrelated to the damage of goods, the breaching party will still be liable. If neither party has breached, then we go to the third step.

3. The third step depends on whether a **common carrier** is used, and whether the contract is a **shipment contract** or a **destination contract**.

a. The rule under the UCC is this:

If delivery is made by a common carrier other than the seller, and the contract between the parties is a **shipment contract**, the risk of loss shifts from seller to buyer at the time the common carrier receives the goods.

However, when delivery is made by a common carrier, and the contract is a **destination contract**, risk of loss passes when the goods reach their destination.

b. A **shipment contract** is one that does not require the seller to deliver goods to a specific location.

c. A **destination contract** requires the seller to deliver goods to a specific location.

d. Note that if a contract contains a **free on board clause** with the seller's city, then the contract is a shipment contract; and therefore risk of loss passes when a common carrier receives the goods.

e. However, if the free on board clause states the buyer's city, or any city other than the seller's city, then the contract will be a destination contract; and therefore, when a common carrier is used, the risk of loss passes when the goods get to their destination.

4. If a contract is silent on risk of loss, if no party has breached, and if delivery is not made using a common carrier, then we go to the fourth and final step.

a. The fourth step depends on whether or not the seller is a **merchant**:

1) Under the UCC, if the **seller is a merchant**, then the *risk of loss passes when the buyer receives the goods*.

2) If the **seller is not a merchant**, then the *risk of loss passes when the goods are tendered*.

a) Goods are **tendered** — when they become available for the buyer to take possession.

Example — Toyota agrees in a written contract to sell 10 vehicles to a car dealership. The contract is silent on risk of loss and delivery. Toyota hires a common carrier to pick up the cars and deliver them to the dealership. Assume that the common carrier does not assume any liability. During the delivery, a tornado destroys all of the vehicles. In this case, who bears the risk of loss?

(i) Under step 1, if a contract covers risk of loss, then the contract applies. In our example, the contract was silent on risk of loss, therefore we move on to step two.

(ii) Under step 2, if a party has breached, the breaching party bears the risk of loss. In our example, neither party has breached, so we move on to step three.

(iii) Under step 3, if a common carrier is used, risk of loss depends on whether the contract is a shipment or a destination contract. For shipment contracts, the risk of loss passes when the common carrier receives the goods. However, for destination contracts, risk of loss passes when the goods reach the destination.

→ In our example, Toyota and the car dealership have a shipment contract because the contract was silent on terms of delivery and did not require the cars to be delivered to a specific location. Therefore, risk of loss passed from Toyota to the car dealership when the common carrier picked up the cars. And since the cars were destroyed after the common carrier received the goods, the car dealership bears the risk of loss, and will be responsible for the cost of the destroyed vehicles.

Example — Batman and Robin are talking on the phone, and Robin agrees to buy batman's mask for $100. Batman tell Robin that the mask is in the bat cave and to pick it up anytime. Before Robin can pick up the mask, Joker steals it and is never seen again. In this case, who bears the risk of loss?

→ In our example, since the contract was silent on risk of loss, since neither party has breached, and since a common carrier was not used, we look at the fourth UCC risk of loss rule.

(iv) Under step four, if the seller is a merchant, risk of loss passes when the buyer receives the goods; but if the seller is not a merchant, risk of loss passes when the goods are tendered.

→ In our example, Batman is not a merchant, therefore risk of loss passes to Robin once the mask has been tendered. Recall that goods are tendered when they become available for the buyer to take possession. Therefore, the mask was tendered once Batman told Robin that the mask could be picked up from the bat cave at any time. Since the mask was stolen after Batman tendered the mask, Robin bears the risk of loss, and Robin will be responsible for the cost of the stolen mask.

► In this chapter, we discussed the **UCC rules** for determining who bears the **risk of loss**.

CHAPTER 22. WARRANTIES

A contract for the sale of goods may include warranties. A **warranty** is an assurance by one party that a certain fact is true, and may be relied upon by the other party. Warranties may be oral or in writing.

A. There are 3 important types of warranties:

(i) Express warranties,
(ii) Implied warranties of merchantability, and
(iii) Implied warranties of fitness for a particular purpose.

B. EXPRESS WARRANTY

1. An **express warranty** is a specific promise made orally or in writing by the seller that affirms a fact or that describes goods or services.

Example — A shoes salesman says "these shoes have steel toes; they are top quality."

→ In this case, the statement that the shoes have steel toes is an express warranty, and therefore, the seller may be held liable if the shoes do not have steel toes.

*** Note that the statement that the shoes are "top quality" is not an express warranty, because it is merely *sales talk* or *puffery*.

C. IMPLIED WARRANTY OF MERCHANTABILITY

1. Under the UCC, this warranty is implied in every contract for the sale of goods when the seller is a merchant.

2. The **implied warranty of merchantability** warrants that goods are fit for their ordinary purposes.

Example — You buy new shoes from a shoe store. A week later, after wearing the shoes for walking around the city, the shoes come apart.

→ In this case, an implied warranty of merchantability exists because you purchased shoes from a merchant. The implied warranty of merchantability warrants that the shoes are fit for their ordinary purpose, which is to wear for walking and to last for a reasonable time. Since the shoes fell apart after only one week of walking, the shoes are not fit for their ordinary purpose and the seller has breached the implied warranty of merchantability.

D. IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

1. The **implied warranty of fitness for a particular purpose** is a promise that the goods are useful for a special function.

2. Under the UCC, this warranty is implied in contracts when the *seller has reason to know of a particular purpose for which the goods will be used*, AND the *buyer relies on the seller's skill or judgment* to select the goods.

3. Note that the implied warranty of fitness **applies to all sellers**, whether a merchant or non-merchant.

Example — You go to a clothing store and tell an employee that you are going on a hiking trip and need a jacket for cold and wet weather. The employee picks out a jacket for you and says it will be perfect. Once you're on your trip, you realize that the jacket is not waterproof, and you have a miserable time.

→ In this case, because the employee knew that you needed a jacket for wet weather, and you relied on the employee's judgment in selecting the jacket, there was an implied warranty of fitness for a particular purpose. Since the jacket was not waterproof, the warranty has been breached.

4. *** Note that, in certain cases, implied warranties may be **waived**.

a. If a seller issues a disclaimer that clearly eliminates implied warranties — for instance, states that the goods are sold "as is" — then the buyer agrees to accept goods in their present condition.

b. Note that a seller may disclaim the warranty of merchantability either *orally* or in *writing*; however, a seller can only disclaim a warranty of fitness for a particular purpose in *writing*.

► In this chapter, we discussed **warranties**. We learned about express warranties, implied warranties of merchantability, and the implied warranty of fitness for a particular purpose.

CHAPTER 23. CONDITIONAL PROMISES

A. Once a contract has been formed, each party is obligated to perform their mutually agreed upon *promises*. However, when a party makes a promise with an **express condition**, the party is not obligated to perform the promise UNLESS the particular condition has been met.

Example — David, a partner at a law firm, and Abby, enter into a contract under which David will hire Abby as a paralegal if his firm is successful in an upcoming criminal trial and their client is found not guilty.

→ This contract contains an express condition, whereby David does not have to hire Abby unless the firm wins the trial.

B. Note that an express condition may be **excused** — in which case, the promisor becomes obligated to perform the conditional promise.

1. An express condition will be **excused** in 2 situations:

1) The express condition has been **waived**.

Example — Assume that, after David and Abby entered into their contract, David tells Abby that he will hire Abby regardless of the outcome of the trial.

→ In this case, David has waived the express condition and he will be obligated to hire Abby.

2) The party who made the conditional promise **wrongly interferes** with the fulfillment of the condition.

Example — Let's assume that after David and Abby form the contract, David bribes a juror to find against his firm's client and the firm loses the trial.

→ In this case, because David has prevented his firm from winning the trial, the express condition has been excused and David will be obligated to hire Abby.

► In this chapter, we discussed **express conditions** in contracts. We learned that an **express condition** is a *promise in a contract that is required to be performed only if a certain condition is met*. We also learned that an express condition may be **excused** by *waiver* and by *wrongful interference*.

CHAPTER 24. EXCUSE FOR NONPERFORMANCE UNDER THE COMMON LAW MATERIAL BREACH RULE

Once a contract has been formed, both parties are legally bound to perform their promises under the contract. However, certain events may occur that excuse a party from performing.

A. A party may be **excused from performing** in several situations:

(i) When the other party **improperly performs**;
(ii) When there has been an **anticipatory repudiation** by the other party;
(iii) When it becomes **impossible** or **impractical** to perform; and
(iv) When the party has been **discharged**.

B. **Improper Performance**

1. The **common law** and the **UCC** have different rules for improper performance:

a. The common law follows the *material breach rule*.

b. The UCC follows the *perfect tender rule*.

*** In this chapter we will discuss the common law material breach rule, and in the next chapter we will discuss the UCC perfect tender rule.

C. **Material Breach Rule**

a. Under the common law, a party will be excused from performing when the other party **materially breaches** the contract.

1) A **material breach** occurs when a party has not *substantially performed* under the contract.

Example — A movie theater and a contractor enter into an agreement in which the contractor will build a parking lot with 100 spaces for $5,000, to be completed by the theater's grand opening. At the grand opening, the contractor has finished only 98 parking spaces. The theater refuses to pay the contractor, and the contractor sues to recover the money.

→ In this case, although the contractor has breached the contract, the theater will NOT be excused from paying because the breach was not material. By completing 98 of the 100 parking spaces, the contractor *substantially performed* on the contract.

*** Note that the movie theater may still recover money damages for the minor *breach of contract*.

Example — Let's assume instead that at the grand opening, the contractor had finished only 30 parking spaces. The movie theater refuses to pay the contractor, and the contractor sues.

→ In this case, the theater will be excused from paying because the contractor materially breached the contract. Clearly, completing only 30 out of 100 parking spaces is not substantial performance; and therefore, under the material breach rule, the movie theater will be excused from making payment.

*** Note that the contractor may still receive some compensation under a *quasi-contract theory*. Recall that courts can find that a quasi-contract exists in order to avoid unjust enrichment. Therefore, since the theater would gain 30 parking spaces at the expense of the contractor, the court may order the theater to compensate the contractor for the 30 parking spaces.

*** Note that this award to the contractor could be offset if the theater counterclaims and sues — for instance, for lost profits as a result of less parking available for customers.

D. **Severable contracts**

1. A **severable contract** — a contract that is made up of several separate contracts between the same parties, such as a series of payments, shipments, or performing services.

(i) *Severable service contracts* are known as a divisible contracts.
(ii) *Severable sale of goods contracts* are known as installment contracts.

2. Regardless, when one contract within a severable contract is **breached**, that is not a breach of the entire contract, and does not *excuse the other party from performing* the other separate contracts.

► In this chapter, we discussed the **material breach rule** under the common law. We learned that a party will be excused from performing under a common law contract when the other party fails to substantially perform, and thereby materially breaches the contract.

CHAPTER 25. EXCUSE FOR NONPERFORMANCE UNDER THE UCC PERFECT TENDER RULE

A. **Perfect Tender Rule**

1. Under the UCC, a buyer will be excused from performing when the seller does not **perfectly tender** the **goods**.

a. Goods are not perfectly tendered when the quality, quantity, or delivery of the goods do not *perfectly conform* to the contract.

B. When a **seller imperfectly tenders goods**, the buyer has 3 options:

(i) Reject all of the goods,
(ii) Reject any portion of the goods,
(iii) Accept all of the goods,
(iv) *** Sue the seller for any damages suffered as a result of the breach.

Example — Ben contracts to sell 100 cartons of vanilla ice cream to Jerry, with delivery to be made by August 1. On August 1, Ben delivers 99 cartons of vanilla ice cream and 1 carton of chocolate ice cream.

→ In this case, since Ben did not deliver exactly 100 cartons of vanilla ice cream, the goods were not perfectly tendered. As a result, Jerry has three options: (i) He may reject the whole delivery, (ii) he may accept any number of the ice cream cartons and reject the rest, or (iii) he may accept the whole delivery. (iv) In addition, Jerry may sue for any damages suffered as a result of the breach.

C. If a buyer wants to **reject** goods for not conforming to the contract, the buyer must *notify* the *seller* of his rejection *within a reasonable time* after their delivery or tender.

1. This means that once a reasonable amount of time has passed, the buyer can no longer reject the goods.

Example — Let's assume that Ben delivers the non-conforming order of ice cream to Jerry on August 1 and Jerry immediately notices the order does not conform to the contract. A few months later, Jerry finally gets around to calling Ben to reject the order.

→ In this case, since the court would most likely find that Jerry did not reject the order of ice cream within a reasonable time after delivery, Jerry can no longer reject the goods, and the goods have been accepted.

D. Under the UCC, the **acceptance** of goods can occur only after the buyer has had a *reasonable opportunity to inspect* the goods.

1. This means that paying for goods before inspecting the goods will not be an acceptance.

Example — Let's assume that Ben delivers the non-conforming order of ice cream to Jerry's warehouse on August 1. Jerry is out of town and will not be back to inspect the order until the next day. Regardless, Jerry calls Ben after the delivery has been made on August 1, thanks him for the ice cream, and pays him.

→ In this case, even though Jerry paid Ben for the ice cream, the order has not been accepted because Jerry did not have a reasonable opportunity to inspect the goods. Because there has not been acceptance, Jerry still has the option to reject any or all of the goods within a reasonable time.

E. Under the UCC, once an acceptance has been made — even of non-conforming goods — the buyer *can no longer reject the goods* and he will be obligated to pay the contract price for the goods. However, an **acceptance may be revoked**.

1. Revocation has the same effect as a rejection.

2. A buyer may revoke an acceptance of substantially non-conforming goods in 2 situations:

a. When the seller was expected to cure the imperfect tender and the seller has not done so.

b. When the buyer accepts the imperfect tender and is unaware of the nonconformity because it was difficult to discover.

Example — Ben contracts to sell 100 cartons of vanilla ice cream to Jerry, with delivery to be made by August 1. On August 1, Ben delivers 100 cartons that are labeled vanilla ice cream; however, each carton contains chocolate ice cream. Jerry inspect the goods, and without noticing the mix up, accepts the order. A few weeks later, after Jerry opens up a carton of ice cream, he discovers that the goods are substantially non-conforming. → At this point, Jerry has the right to revoke his acceptance.

► In this chapter, we discussed the **perfect tender rule** under the **UCC** — which states that a seller's tender of goods must be perfect, otherwise the buyer may be excused from performing on the contract.

CHAPTER 26. EXCEPTIONS TO THE UCC PERFECT TENDER RULE

In certain situations, a seller's imperfect tender will NOT excuse the buyer from performing.

A. **Exceptions to the UCC perfect tender rule**:

1. **Opportunity to cure**

a. When the seller presents an imperfect tender but has an **opportunity to cure**, the buyer cannot terminate the contract.

1) This situation commonly arises when the seller has delivered the goods before the due date.

Example — Ben contracts to send Jerry 100 cartons of vanilla ice cream by August 1. Ben delivers 80 vanilla cartons and 20 chocolate cartons on July 1.

→ In this case, there has been an imperfect tender, however the time for performance has not expired. Therefore, Ben has the right to cure the imperfect tender. And if Ben sends Jerry 100 cartons of vanilla ice cream by August 1, Jerry will be obligated to perform his end of the bargain.

2. **Installment Contracts**

a. An **installment contract** is a severable contract where goods are to be delivered in separate shipments (or installments).

b. Under the UCC, a buyer may reject an imperfect installment, but ONLY when the non-conformity substantially impairs the value of the installment, and the seller cannot cure.

Example — Ben contracts to send Jerry 100 cartons of vanilla ice cream per month for 1 year and Jerry will pay $10 per carton. In the first month, Ben delivers only 95 cartons of vanilla ice cream.

→ In this case, although there is an imperfect tender, Jerry cannot reject the installment because 95 out of 100 substantially conforms to the contract, and furthermore, Ben can send the missing 5 cartons of vanilla to cure the minor non-conformity.

► In this chapter, we discussed two **exceptions to the UCC perfect tender rule** — which arise when the seller has the *right to cure*, and when the contract is an *installment contract*.

CHAPTER 27. ANTICIPATORY REPUDIATION

A party may be excused from performing when the other party indicates they will not perform.

A. **Anticipatory repudiation** — one party makes a statement or acts in a manner that indicates that they will not perform under the contract.

B. Under the common law and under the UCC, when there is a repudiation prior to the time performance is due, this is considered an **anticipatory breach**, and the innocent party will be excused from performing and can sue for damages.

> *Example* — Mr. Poolman contracts with Molly to install a pool in her backyard by June 1, and Molly will pay Mr. Poolman on that same date. Before Mr. Poolman has finished installing the pool, Molly tells him that she is not going to pay him.
>
> → In this case, there has been an anticipatory repudiation by Molly, and therefore, Mr. Poolman is no longer required to work on installing the pool, and he can sue Molly for anticipatory breach.

C. Once there has been an anticipatory repudiation, the repudiating party may be allowed to **retract** the repudiation, but only if it is done before the performance is due, and only if the innocent party has not acted in reliance on the repudiation.

> *Example* — Mr. Poolman contracts with Molly to install a pool in her backyard by June 1. In April, before Mr. Poolman has finished installing the pool, Molly tells him that she is not going to pay. A few days later, before Mr. Poolman gets another pool installation job, and before he removes any equipment from Molly's yard, Molly changes her mind and tells Mr. Poolman she will pay him.
>
> → In this case, because Molly's initial repudiation was repudiated long before June 1, and because Mr. Poolman did not detrimentally rely on the repudiation, the repudiation has been successfully retracted and Mr. Poolman will be obligated to perform under the contract.

D. If one party **suspects the other party will be unable to perform—**even though there has not been a clear anticipatory repudiation**—**the innocent party may *suspend their performance* and *demand assurance* that the other party will perform.

> *Example* — Mr. Poolman contracts with Molly to install a pool in her backyard by June 1, and Molly will pay Mr. Poolman on that same day. In March, before Mr. Poolman has finished installing the pool, Molly calls him and tells him that she got fired from her job and doesn't know what she is going to do.
>
> → In this case, Molly's statement is not an anticipatory repudiation because she is not refusing to pay. Regardless, it gives Mr. Poolman reasonable grounds to believe that Molly may not be able to pay; and therefore, Mr. Poolman can suspend his performance and is not required to continue building the pool until he gets adequate assurance from Molly that she can pay for the pool.

► In this chapter, we discussed **anticipatory repudiation** as an excuse for nonperformance of a contract.

CHAPTER 28. IMPOSSIBILITY AND IMPRACTICABILITY

After a contract has been formed (but before performance is complete) unforeseen events may occur that make performance extremely difficult, if not impossible.

A. A party may be excused from performing when the contract becomes **impracticable** or **impossible** to perform.

B. **Impossibility** and **impracticability** can arise in several situations:

1. **Subject of contract is destroyed**

a. If the subject matter of a contract is **destroyed** after the contract has been formed, and the contract becomes impossible to perform, both parties will be excused from performing.

Example — A roofer agrees to install a new roof on a house but the house burns down before the roof is completed.

→ In this case, the roofer's duty to perform is excused because the subject matter of the contract, the house, has been destroyed and it would be impossible to install the roof.

Example — Assume that a construction company is hired to build a garage. The company begins construction, but due to a wild fire, the garage burns down before it is completed.

→ In this case, the construction company will not be excused from performing. It is still possible for the construction company to build the garage; it just has to start over.

2. **Subject of contract becomes illegal**

a. When a contract becomes **illegal** to perform due to a change in law, the parties will be excused from performing.

Example — A bar orders 10 kegs of beer from a liquor store. The parties agree that the beer will be delivered on August 10. On August 1, a law is passed that bans alcohol.

→ In this case, both parties are excused from performing because performance has become illegal.

3. **Unexpected shortage of materials**

a. Under these circumstances, a seller may be excused from providing the goods to the buyer.

Example — Farmer Joe enters into a contract with a restaurant to sell 100 ears of corn at the end of the season. Due to an unexpected flood, there is no corn to harvest.

→ In this case, Farmer Joe will be excused from selling corn to the restaurant.

4. **Death/incapacity of party**

a. If a contract specifically provides that performance shall be made by a particular person, that person's **death or incapacity** will discharge both parties.

1) Note, however, that if the contract requires a party to make *payments of money*, death of that party will not excuse the debt from being paid.

Example — A school hires a teacher to teach for the upcoming school year. Before the first day of school, the teacher dies.

→ In this case, because it would now be impossible for the teacher to perform, both parties are excused from the contract.

► In this chapter, we discussed certain unforeseen events that can occur after a contract has been formed that make performance **impracticable** or **impossible**. We learned that a party may be excused from performing when the subject of the contract is *destroyed*, when there is a *change in law*, when there is an *unexpected shortage of materials*, and when one of the parties *dies or becomes incapacitated*.

CHAPTER 29. DISCHARGE FROM A CONTRACT — RESCISSION, RELEASE, AND ACCORD AND SATISFACTION

A. When both parties to a contract mutually decide to end their contractual relationship, parties can **discharge** their contractual obligations in several ways:

(i) Rescission,
(ii) Release,
(iii) Accord and satisfaction.

*** Note that each of these are contracts themselves, and therefore must meet all the requirement of a valid contract to be effective.

B. **RESCISSION**

1. **Rescission** is where both parties agree to cancel a contract.

2. In order for rescission to be valid, it has to be done *before* either party has completed performance.

Example — You contract with handyman Frank to re tile your bathroom for $500 with payment to be made when the work is completed. Before Frank finishes the work, you and he agree to rescind the contract.

→ In this case, the contract has been rescinded; therefore, both parties are discharged from the contract and Frank cannot recover for any work he's done.

Example — However, let's assume that Frank completed re-tiling the bathroom, and then you and he agree to rescind the contract.

→ In this case, the rescission would not be valid because Frank has already completed performance; therefore, Frank will still be able to recover the $500.

C. **RELEASE**

1. A **release** is simply where one party lets another party get out of the contract.

2. In order for a release to be valid, it must be supported by *consideration*.

Example — You contract with handyman Frank to re tile your bathroom for $500 with payment to be made when the work is completed. After Frank has finished the bathroom, he wins the lottery, says you don't have to pay him, and releases you from the contract. A few months later, Frank goes broke and sues you for the $500.

→ In this case, Frank will be able to recover the money from you because the release, which was not exchanged for consideration, was not valid.

D. **ACCORD AND SATISFACTION**

1. **Accord and satisfaction** occurs when parties to a contract agree that one party will perform a new promise to be released from a debt obligation.

a. The new agreement is called the *accord*.

b. Once the accord has been *satisfied* — which means it has been performed — then the parties are discharged from the original contract.

Example — Willy Loman owes the Bank $10,000 under a contract. Willy and the bank agree that if Willy gives his home to the bank, then the debt will be excused. This new agreement is an accord. If Willy then deeds his home to the bank and the Bank accepts it in settlement of the debt, there is satisfaction of their accord. At this point, the original contract has been discharged.

2. **If an accord is not satisfied**, then there is no discharge, and the party who failed to perform the accord can be sued based on the *original contract* or based on the *accord*, but not for both.

3. Accord and satisfaction is distinguishable from **modification** of a contract.

a. When a contract is modified, the original contract has been immediately discharged. However, an accord does not discharge the original contract until the accord has been satisfied.

► In this chapter, we discussed how parties can discharge themselves from performance by rescission, release, and accord and satisfaction.

(i) We learned that **rescission** cancels a contract and must be done before any party has completed performance.

(ii) We learned that **release** discharges a party from a contract but must be supported by consideration.

(iii) And we also learned that an **accord and satisfaction** allows parties to agree on a new performance, which if completed, will discharge the original contract.

CHAPTER 30. THIRD PARTY BENEFICIARIES

A. A contract binds the parties who entered into the contract when it was formed. However, third parties may become involved with and bound to a contract in several situations:

(i) Third party beneficiaries,
(ii) Assignments,
(iii) Delegations, and
(iv) Novations.

B. **Third party beneficiary**

1. A **third party beneficiary** is a person who is not a party to a contract but has legal rights to enforce the contract or share in proceeds from the contract.

a. A common third party beneficiary contract is a *life insurance policy*.

Example — Timmy's grandfather takes out a life insurance policy with insurance company. The contract provides that grandfather will make monthly payments of $50 and the insurance company will pay Timmy $50,000 on grandfather's death.

→ In this case, Timmy is the third party beneficiary. Grandfather is called the promisee. And the insurance company is the promisor. Under this contract, Timmy benefits from the insurance policy, and if the insurance company refuses to perform, Timmy can sue as a third party beneficiary.

2. There are 2 types of third party beneficiaries:

a. **Intended third-party beneficiary** — a party who is intended to benefit from the contract. Meaning the promisor and the promisee entered into the contract with the idea that the third-party will benefit from the contract.

Example — Timmy would be an intended beneficiary, because grandfather and the insurance company entered into the life insurance policy with the intent that Timmy will benefit from it.

b. I**ncidental beneficiary** — a party who may indirectly benefit from a contract, but that was not the intent of the parties at contract formation.

Example — Landowner hires contractor to build a house, and they agree that the contractor will use Mr. Edison as the electrician because he has a good reputation.

→ In this case, Mr. Edison is an incidental beneficiary, because neither the landowner nor the contractor is entering into the contract with the intent to benefit Mr. Edison.

c. The **distinction** between intended and incidental beneficiaries is important because only an intended third-party beneficiary has the *right to sue* to enforce the contract.

Example — Therefore, in our previous example, if grandfather dies, Timmy may sue the insurance company if they refuse to pay, because he is an intended beneficiary.

Example — However, in our other example, because the electrician is only an incidental beneficiary, he has no rights under the contract and cannot sue if he does not get hired for the job.

3. **Cancellation** and **modification** of third party beneficiary contracts

a. The general rule is that if the contract contains a **clause** that allows the parties to modify or cancel the contract, then they may do so at any time.

b. However, if the contract does not contain such a clause, the original parties (the promisor and promise) may cancel or modify the contract up until the third party's rights have **vested**.

1) A third party beneficiary's rights **vest** once he becomes aware of the contract and relies on the contract. And from this point on, the contract cannot be canceled or modified unless the beneficiary consents.

Example — Let's assume that the insurance policy taken out by grandfather does not contain a clause about the right to modify or cancel. Timmy become aware of the insurance policy contract and in reliance on receiving the insurance proceeds, he borrows money from a friend and tells him that he will pay him back once he collects on the life insurance.

→ In this case, because Timmy is an intended beneficiary who knows about the contract and has relied upon it, the parties cannot cancel or modify the policy unless Timmy consents.

4. If an intended third party beneficiary sues the promisor to enforce the contract, the promisor can assert any **defense** to the contract that could be asserted against the promisee.

Example — Timmy's grandfather dies, but he stopped paying the monthly life insurance payments a few months prior to his death. The insurance company refuses to pay, and Timmy sues.

→ In this case, the insurance company will be excused from paying because grandfather improperly performed when he stopped making his monthly payments.

► In this chapter, we discussed **third party beneficiary contracts**.

CHAPTER 31. ASSIGNMENTS

When a contract is formed, it creates *rights* and *duties*. Parties to a contract have duties that they are obligated to perform, and they have rights to receive certain benefits.

Contractual rights and contractual duties may be transferred to third parties. If a party transfers its duties under a contract to a third party, that is known as a **delegation**, which we will discuss in the next chapter. In this chapter, we will discuss **assignments**, which occur when a party transfers its rights to a third party.

A. **Assignment** — a party transfers its **rights** to a third party.

B. There are 3 parties to an assignment:

(i) *Assignor* — the party who transfers their rights under the contract.
(ii) *Assignee* — the third party who receives rights.
(iii) *Obligor* — an original party to the contract who still has duties under the contract.

Example — Wayne offers to wash his friend Garth's car for $20, and Garth accepts. Under this contract, Wayne have a duty to wash the car and a right to receive payment. Garth has a duty to pay $20 and a right to have his car washed. Let's assume that Wayne owes his sister $20, so Wayne assigns his right to payment of the $20 to his sister and she agrees.

→ In this case, Wayne becomes the assignor, his sister is the assignee, and Garth is the obligor.

C. Assignments may be created with or without **consideration**.

1. Assignments that are not supported by consideration are commonly called *gratuity assignments*.

2. It is important to distinguish between gratuitous assignments and assignments that are supported by consideration because:

a. **Assignments supported by consideration are not revocable**, but
b. **Gratuitous assignments may be revoked**.

Example — After Wayne enters into the contract with his friend Garth to wash his car for $20, Wayne is feeling charitable, and assigns his right to payment of the $20 to the American Red Cross.

→ In this case, even though the assignment lacks consideration, Red Cross can recover the money from Garth. Note, however, that at the same time, Wayne may revoke the assignment to the charity because it lacks consideration.

D. **Assignments are permitted, unless expressly prohibited by the contract**.

1. When a contract is *silent* on assignments, all rights are assignable unless they **materially change** the duty of the obligor.

a. This means that a party can always assign the right to receive *payment*, but a party cannot usually assign the right to receive *performance*.

Example — Wayne enters into the contract with Garth to wash his car for $20. There is no assignment provision in the contract. Afterwards, Garth assigns the right to have his car washed to Trucker John. Garth owns a small compact car, but Trucker John owns a monster truck.

→ In this case, Garth is the assignor, Trucker John is the assignee, and Wayne is the obligor. Since, Wayne's duty went from washing a small car to washing a monster truck, his duty has materially changed, and the assignment will not valid.

E. Once there has been a valid assignment, the **assignee stands in the shoes of the assignor**; and therefore may sue the obligor. At the same time, the **obligor may assert all the defenses** against the assignee it could assert against the original assignor.

Example — Wayne contracts with Garth to wash his car for $20 to be paid upon completion. Wayne assigns your right to payment of the $20 to his sister. When Wayne washes Garth's, he forgets to rinse off the soap, and the car ends up dirtier than before. Garth refuses to pay and Wayne's sister sues.

→ In this case, since an assignee may sue the obligor, the Sister has a right to recover against Garth. However, since an obligor may assert any defense he has against the assignor, Garth can argue that Wayne's failure to adequately wash the car serves as a defense, and sister may not be able to collect the money.

► In this chapter, we discussed **assignments**, which occurs when a party transfers *rights* under a contract to a third party.

CHAPTER 32. DELEGATION

A. **Delegation** — a party transfers duties under a contract to a third party.

B. There are 3 parties in a delegation:

(i) *Delegator* — the party who transfers their duties.
(ii) *Delegatee* — the third party who is now obligated to perform the duties.
(iii) *Obligee* — the original party to the contract who has the right to receive the benefits of the duties.

Example — You contract with Captain Ron to clean his sailboat for $100. After the contract formed, you and younger brother Billy agree that Billy will clean the boat.

→ In this case, you have delegated your duty to clean the boat to Billy. You are the delegator, Billy is the delegatee, and Captain Ron is the obligee.

C. **Delegations are permitted unless the contract expressly prohibits delegations or assignments**.

1. If there is no provision in a contract regarding delegations or assignments, then all duties under the contract may be delegated.

2. However, duties that require particular *skill or judgment* (like for lawyers, doctors, or portrait painters) cannot be delegated.

D. A delegator **always remains liable** on the contract after the delegation of duties.

Example — You delegate the duty to clean Captain Ron's boat to your brother Billy. Billy never cleans the boat.

→ In this case, Captain Ron can still recover from you for breach of contract.

E. The obligee can also **sue** the delegatee for **breach of contract**, but only when *consideration* has been exchanged for the delegation.

Example — You contract with Captain Ron to clean his boat by the end of the day for $100. The contract is silent on delegations and assignments. You and your younger brother Billy agree that Billy will clean the boat that day because Billy is a nice guy. Billy never cleans the boat.

→ In this case, because Billy did not receive any consideration, Captain Ron cannot recover from Billy, he can only recover from you, the delagator.

Example — However, let's assume instead that you and Billy agree that Billy will clean the boat and you will pay him $50. Billy never cleans the boat.

→ In this case, Captain Ron can sue because the delegation was supported by adequate consideration.

► In this chapter, we discussed **delegation**, which occurs when a party transfers contractual *duties* to a third party.

CHAPTER 33. NOVATION

A. N**ovation** — one party to a contract agrees to accept performance from a third party, instead of performance from the original party.

B. Once there has been a novation, the original party who has been excused from performing is **no longer liable on the contract**.

Example — You contract with NASA to wash their space ship for $5000. Afterwards, you, NASA, and Han Solo, agree that Han Solo will wash the spaceship instead. Han solo fails to wash the spaceship.

→ In this case, because there has been a valid novation, you have been totally excused from the contract and therefore, NASA can only recover from Han Solo.

C. *** Note that in comparing novation to delegation, there are important **differences**:

1. Novation requires the consent of BOTH parties to the original contract, delegation does not.

2. In a novation, the party who has been excused from the contract is no longer liable; however, in a delegation, that party will ALWAYS remain liable.

► In this chapter, we discussed **novation**, which occurs when parties to a contract agree that a third party will perform under the contract.

CHAPTER 34. BREACH OF CONTRACT REMEDIES — EXPECTATION DAMAGES

When a valid contract has been created, and a party has failed to perform according to the terms of the contract, this is called a **breach of contract**. When a contract has been breached, the nonbreaching party can sue to recover money damages.

A. **Types of money damages** (expectation damages, consequential damages, and incidental damages):

1. **EXPECTATION DAMAGES** (also called compensatory damages)

a. The most common type of money damages

b. Expectation damages are awarded in order to place the injured party in the position he would have been in had the contract been performed.

Example — Magician Harry Houdini agrees to perform at a birthday party for $500 on Friday night. Houdini performs and is not paid.

→ In this case, Houdini may recover $500 in expectation damages, which will put him in the position he would have been in had the contract been performed.

2. **CONSEQUENTIAL DAMAGES** (also known as special damages)

a. Consequential damages are any foreseeable damages that resulted from the breach of contract. The most common type of consequential damages are *lost profits*.

b. An injured party will be able to recover consequential damages ONLY IF, at the time the contract was made, *the breaching party either knew or should have known that these damages would likely result* from the breach.

Example — A crankshaft has broken at a mill owned by Mr. Hadley and needs to be repaired. Without a working crankshaft, the mill cannot produce flour. Mr. Hadley arranges to have the broken crankshaft fixed, and hires a courier by the name of Mr. Baxendale to deliver the crankshaft on a certain date. Mr. Baxendale fails to deliver the crankshaft on time. As a result, Mr. Hadley cannot run the mill, he loses business, and he sues Mr. Baxendale for consequential damages based on the lost profits. (*see Hadley v. Baxendale* (1854))

→ In this case, Mr. Hadley will not be able to recover consequential damages. (Consequential damages can only be recovered if the breaching party knew or should have known that the damages would result from the breach.) In our case, the mere fact that a party is sending something to be repaired does not indicate that they would lose profits if it were not delivered on time. Therefore, because the losses were not foreseeable and because Mr. Baxendale did not know that Mr. Hadley would suffer any damages from the late delivery, Mr. Hadley cannot recover lost profits.

3. **INCIDENTAL DAMAGES**

a. Incidental damages arise when the nonbreaching party accumulates costs after there has been a breach.

Example — Dentist Dan is wrongfully fired from his office where he was under contract to work for another year. After Dentist Dan is fired, he accumulates $400 in travel costs looking for a new job.

→ In this case, Dentist Dan may recover $400 in incidental damages.

B. In order to recover any money damages, the damages must be able to be calculated with **reasonable certainty**.

1. This becomes an issue for *lost profits*.

a. When the injured party is an established business, lost profits can be estimated based on past profits. However, a new business with no past profits to review will have a harder time calculating lost profits with reasonable certainty.

C. Note that the UCC *sets out specific remedies for buyers and sellers* when there has been a breach of a sale of goods contract.

1. The UCC generally attempts to put the nonbreaching party in the position they would have been had there been no breach — similar to expectation damages under the common law. However, under the UCC, the exact amount of money damages that are recoverable varies depending on which party has the goods and which party has breached the contract.

► In this chapter, we discussed damages that a nonbreaching party can recover for a breach of contract. We learned about **expectation damages**, **consequential damages**, **incidental damages**.

CHAPTER 35. DUTY TO MITIGATE DAMAGES

Once there has been a breach of contract, the nonbreaching party cannot just sit around and allow damages to accumulate. The nonbreaching party has a duty to mitigate damages.

A. The **duty to mitigate damages** requires that the nonbreaching party take reasonable actions to decrease losses.

1. Therefore, any damages that could have been avoided by the nonbreaching party will NOT be recoverable.

B. The duty to mitigate damages arises in several circumstances:

1. **For sale of goods contracts** — when the seller does not deliver goods on time, the buyer is required to mitigate damages by trying to find substitute goods.

a. If the buyer suffers damages that could have been avoided by finding substitute goods, the damages are not recoverable.

2. **Under the common law** — a nonbreaching party who is required to perform a service must mitigate damages after a breach by ending performance and trying to find similar work

a. This is common for construction contracts and employment contracts.

Example — If a contractor continues to work after breach by the other party, the contractor will not be able to recover costs associated with continuing to work.

Example — When an employee is wrongfully fired, the employee has a duty to mitigate damages by adequately looking for a new job and accepting any offer for a substantially similar job.

► In this chapter, we discussed a party's duty to mitigate damages.

CHAPTER 36. OTHER MONEY DAMAGES

A. RELIANCE DAMAGES

1. Damages that are awarded to a party who has foreseeably relied on a promise and has suffered damages as a result.

2. Reliance damages are usually awarded when expectation damages are too uncertain to calculate.

Example — Acme movies is a new movie production company that intends to make a western film. They sign John Wayne to a contract, in which he agrees to play the lead role. Now that they have a big name actor to play the lead character, Acme spends $10,000 dollars on pre-production for the movie, including hiring personnel and promoting the movie. John Wayne then backs out of the contract and refuses to act in the film. Acme sues for breach of contract, seeking $10,000 in reliance damages.

→ In this case, since Acme lost $10,000 relying on John Wayne's promise to act in the film, Acme can recover the money from John Wayne as reliance damages.

B. **LIQUIDATED DAMAGES**

1. Liquidated damages are damages that are stipulated to in the contract. In other words, the parties have agreed on the amount of damages for a breach.

2. *** Note that liquidated damage provisions in contracts will be enforced only if the damages were difficult to calculate at the time the contract was made and if the amount of damages is reasonable.

C. **NOMINAL DAMAGES**

1. Nominal damages are awarded when a party's rights have been violated by the other's breach of contract, but the nonbreaching party has not suffered any damages.

a. Therefore, nominal damages are very small awards and are typically awarded to acknowledge that the nonbreaching party has been wronged.

D. **PUNITIVE DAMAGES**

1. Punitive damages are awarded to punish a wrongdoer and deter future similar conduct. Since the goal of contract remedies is to compensate the nonbreaching party, and not to punish anyone, punitive damages are typically not awarded in contract law.

E. **RESTITUTION**

1. Restitution damages are awarded when one party has been unjustly enriched at the other's expense. Restitution is similar to a quasi-contract.

Example — Alison contracts with Mr. Handyman to build a deck for her house. They agree that Alison will pay Mr. Handyman $4000 for the deck once it has been completed. Mr. Handyman begins working on the deck. Halfway through construction, Mr. Handyman becomes paralyzed in a car accident, and is unable to complete the deck. Alison refuses to pay Mr. Handyman for the partially build deck and Mr. Handyman sues.

→ In this case, since the contract states that payment shall be made when the deck has been completed, Alison is not contractually obligated to pay anything to Mr. Handyman for the unfinished deck. However, Alison has been unjustly enriched with a partially built deck at the expense of Mr. Handyman. Therefore, the court will award Mr. Handyman restitution damages in the amount of the value of the partially built deck.

► In this chapter, we discussed reliance damages, liquidated damages, nominal damages, punitive damages, and restitution.

CHAPTER 37. SPECIFIC PERFORMANCE

Although money damages are the most commonly awarded remedy for breach of contract, sometimes the nonbreaching party wants the breaching party to actually follow through on the contract. This is called specific performance.

A. **Specific performance** — a court ordered remedy that requires the breaching party to perform according to the contract, rather than pay money for their breach.

1. Specific performance is very rare as a contract remedy and is typically awarded only when money damages are not adequate — for instance when the subject of the contract is **unique**.

a. Specific performance may be awarded in contracts for *land* and *real estate* because land and real estate are always considered to be unique.

Example — Buyer contracts with seller to buy a house. After contracting, the seller changes his mind and refuses to sell the house.

→ In this case, buyer may be entitled to specific performance because real estate is unique, and the court can order the seller to deed the house over to the buyer.

b. Aside from land and real estate, goods can be unique too. *Unique goods* include custom-made items and art and antiques.

Example — An owner of a Picasso painting contracts to sell the painting to a buyer. The owner breaches the contract and refuses to deliver the painting.

→ In this case, the court can award specific performance and order the owner to deliver the painting to the buyer.

4. Specific performance is not available as a remedy for **service contracts**.

a. Courts cannot force a party to perform a service against their will. However, the court may prohibit or enjoin the breaching party from providing his services to others for a certain period of time. This is called an **injunction**.

Example — An Irish Pub enters into a contract with banjo Barry to play at the pub five nights a week for 1 month. One week later, Banjo Barry breaches and informs the Pub that he will not perform for them. The Pub sues.

→ In this case, the court cannot force Banjo Barry to perform at the Irish Pub. However, the court could issue an injunction and prohibit Banjo Barry from performing anywhere else for the remainder of the month.

► In this chapter, we discussed the remedy of **specific performance** in contract law. We learned that for breach of contracts when the subject property of the contract is unique, money damages may not be an adequate remedy and the nonbreaching party may be entitled to specific performance.