* **Introduction**
* **Contract**: a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty
* Sources of Contract Law
	+ **Restatement of Contracts**—important source for legal promissory obligation
		- Compilation of general common law contract principles
		- Persuasive authority
			* With a high degree of persuasion
	+ **Statutes**—such as the Uniform Commercial Code, governing all cases dealing with the sale of goods
* The purpose of remedies
	+ Three protected interests:
		- **Expectation**—the goal of protecting this interest is to put the person back in as good a position as they were in before they entered into the contract
		- **Reliance**—if the promisee’s situation is altered detrimentally as a result of his/her reliance on the contract, they must be paid back
		- **Restitution**—any benefit incurred by the promisor as a result of the contract must be paid back
	+ **Hawkins v. McGee**
		- Hairy hand case
		- Demonstrates some of the most fundamental elements of contracting
			* Reliance
			* Capacity
			* Promise
			* Acceptance
			* Exchange
			* Breach
	+ **Consideration**—thing of value that is the idea of people’s agreement to be bound
		- People don’t enter into contracts without giving up something, otherwise it’s just a gift
		- Giving up demonstrates intention to enter into the contract
	+ **R2d 1-4**
		- **A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty**
		- **Promise; promisor; promise; beneficiary**
			* **A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made**
			* **The person manifesting the intention is the promisor**
			* **The person to whom the manifestation is addressed is the promise**
			* **Where performance will benefit a person other than the promise, that person is a beneficiary**
		- **An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances**
		- **A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct**
* **Consideration**
	+ **Fundamentals**
		- **Requirement of exchange**
			* **Consideration**—a performance or a return promise must be bargained for—or else it’s just a gift.
				+ It has many different previous meanings, but for the purposes of US law, it refers to an element of EXCHANGE between parties that would satisfy the legal requirement of a contract
			* **Bargain/bargained for**
				+ The consideration induces the making of the promise, and the follow-through of the promise induces the follow-through of the consideration
				+ Mutual assent—each party manifesting an intention to follow-through
				+ both parties have to follow through
			* **Bargain/gift**
				+ Ordinarily, courts don’t hone in on bargain v. gift (lack of consideration)
				+ Acceptance of a promise to receive a gift given to you by someone else does not make the gift a bargain
				+ However, sometimes there may be no bargain, but there may be consideration if performance occurs or reliance of one party on the other or if the unjust enrichment of the other party occurs
			* **Types of consideration**
				+ Performance or return promise
				+ Third person—it doesn’t matter who gets or gives the consideration, if it is bargained for and given in exchange for a promise, it’s not a gift.
		- **Adequacy of consideration; mutuality of obligation**
			* If the requirement of consideration is met, then **you don’t need** a gain/benefit to the promisor or a loss/detriment to the promise (quid pro quo idea from common law not necessary); equivalence in the values exchanged; or “mutuality of obligation” (both parties are bound or neither is bound).
		- **5 categories of contractual agreements:**
			* Family Contracts
			* Contracts for sales of goods
			* Real estate transactions
			* Construction contracts
			* Employment agreements
		- **Hamer v. Sidway**
			* Family Contract
			* Forbearance (giving up) of a right amounts to a detriment, and thusly a consideration, and the fact that he did so relying on the strength of his uncle’s promise, there was consideration and the agreement was valid (uncle promised nephew money if he abstained from drinking, etc. until his 21st birthday)
		- **Forbearance without surrender**
			* Forbearance without promise is not an acceptance
		- **R2d 71**
			* **To constitute consideration, a performance or a return promise must be bargained for**
			* **A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise**
			* **The performance may consist of**
				+ **An act other than a promise, or**
				+ **A forbearance, or**
				+ **The creation, modification, or destruction of a legal relation**
			* **The performance or return promise may be given to the promisor or to some other person. It may be given by the promise or by some other person.**
		- **R2d 79**
			* **If the requirement of consideration is met, there is no additional requirement of**
				+ **A gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or**
				+ **Equivalence in the values exchanged; or**
				+ **“Mutuality of obligation.”**
	+ **Gratuitous promises**
		- **Requirement of good faith**
			* The settlement of an honest agreement is upheld, but if you bring a disagreement to court and you already knew that it was questionable, then it doesn’t necessarily make the claim doubtful
		- **Must be present for a contract to be enforceable**
		- **Fiege v. Boehm**
			* Fiege sued Boehm for child support on the condition that she would refrain from prosecuting him for bastardy.
			* The surrender of/ forbearance to assert and INVALID claim by one who has not an honest and reasonable belief in its possible validity is not sufficient consideration for a contract
			* A promise not to prosecute on a claim that is not founded on good faith is not an exchange and is not valid consideration because it is only release from unfounded litigation and mere annoyance
			* A woman who is expecting a child can make a promise that she will not initiate bastardy proceedings against a man if she truly believes at the time that he is the father of her child (makes the charge in good faith)
		- **Feinberg v. Pfeiffer**
			* Feinberg and the company agreed that her almost 40 years of service to the company were not consideration for the payments after retirement (because she got paid for that?)
			* The plaintiff’s continuing to work for the defendant after learning of the promise was not necessary and did not count as mutuality of obligation because she could have quit as soon as she learned of the contract—no need for her continued employment to receive the benefits
		- **Normille v. Miller**
			* Offers AND counteroffers must be supported by consideration to be enforceable.
		- **R2d 71**
			* **(See above)**
		- **R2d 74**
			* **Forbearance to assert or the surrender of a claim or defense which proves to be in valid is not consideration unless**
				+ **The claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or**
				+ **The forbearing or surrendering party believes that the claim or defense bay be fairly determined to be valid**
			* **the execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.**
	+ **Exchange**
		- Returned promises must be bargained for
		- The promisee’s performance must be sought by the promisor and given by the promise in exchange for the promise.
		- Contracts are voluntary exchange relationships involving reciprocal promises or performances
	+ **Past action**
		- Past performance does not constitute consideration
	+ **Moral obligation**
		- Doesn’t usually count as consideration, but at times reliance upon it can count as consideration
		- We don’t really enforce promissory estoppel in NC
		- When there’s a material benefit of the promisor, there can be consideration
		- **Mills v. Wyman**
			* Sometimes moral obligation is sufficient consideration to support an express promise, but not in this case
			* A promise made in recognition of a moral obligation (Mills caring for Wyman) arising out of a benefit previously received (the care) is not enforceable
			* Benefit conferred before a promise is made is not consideration
			* If morality was the sole guide in enforcement, then all promises would be enforced
		- **Webb v. McGowin**
			* Assumpsit—a promise by which someone undertakes an obligation to another person
			* A moral obligation is sufficient consideration to support a promise to pay where the promisor has received a material benefit (staying alive), although there was no original duty or liability
				+ Receipt of material benefit constitutes consideration in this case
			* The idea that there must be a prior obligation in order for moral obligation to support a promise to pay is subject to qualification in cases like this one
				+ Promise to pay in these cases is affirmance of the services rendered and thus carries with it the presumption that these services were requested
		- **Harrington v. Taylor**
			* There is no consideration for a promise to reimburse a plaintiff for injuries suffered by her when the plaintiff interposed herself between the defendant and another in order to break up a fight
			* The court ruled that while the defendant morally owed the plaintiff, but that this moral obligation was not sufficient consideration to support the promise to repay or for her to recover at law
		- **R2d 82-83**
			* **Promise to pay indebtedness; effect on SoL**
				+ **A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations**
				+ **The following facts operate as such a promise unless other facts indicate a different intention**

**A voluntary acknowledgment to the oblige, admitting the present existence of the antecedent indebtedness; or**

**A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the oblige, made as interest on r part payment of or collateral security for the antecedent indebtedness**

**A statement to the oblige that the statute of limitations will not be pleaded as a defense**

* + - * **An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.**
		- **R2d 85-86**
			* **Except as stated in §93, a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise, is binding**
			* **Promise for benefit received**
				+ **A promise made in recognition of a benefit previously received by the promisor from the promise is binding to the extent necessary to prevent injustice**
				+ **A promise is not binding under section 1 if**

**The promise conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or**

**To the extent that its value is disproportionate to the benefit**

* + **Requirement of a bargain**
		- Differentiates gifts from bargained-for exchanges
		- Promisor is always getting something in exchange for her promise
		- Performances or promises of the parties must induce each other
			* Inducement gleaned from the manifestation of intent; motive for transaction is apparent
		- Contracts are voluntary exchange relationships involving reciprocal promises or performances; it means nothing if a party suffers a legal detriment unless the parties agree that it is the price for the promise
		- Bargain=agreement
		- **Kirksey v. Kirksey**
			* One justice said that he believed that the detriment the plaintiff incurred in giving up of her property and moving to the defendant’s property was consideration enough to support the promise
			* However, the court ruled that the promise made was a mere gratuity and therefore, the breach of the gratuity could not be pursued in court.
		- **Employment agreements**
			* **Lake Land v. Columber**
				+ Non-competition agreement is essentially a proposal to renegotiate the terms of the at-will employment
				+ If the employer presents the non-competition agreement and the employee agrees to it, the employee assents to the new terms of employment and consideration exists to support the noncompetition agreement
				+ The employee’s assent to the agreement is given in exchange for forbearance of the employer from terminating the employee (the employee agreeing to the contract so the employer won’t fire him)
				+ Noncompetition agreements may be voidable or unenforceable for reasons besides lack of consideration
				+ When Columber signed the agreement instead of quitting in 1991, consideration was provided through his continuing to work for Lake Land; therefore the agreement was not void for want of consideration
		- **Rewards**
			* A reward offer may be accepted by anyone who performs the service called for when the acceptor knows that it has been made and acts in performance of it, but not otherwise.
	+ **Promises as consideration**
		- **Mutuality of obligation**
			* **When consideration consists of the exchange of mutual promises, the undertakings on both sides must be real and meaningful; if the promise of one party has qualifications or limitations so strong that they negate it, it is really no commitment at all.**
			* **Bilateral contracts**
				+ Contracts where both parties make promises
				+ A bilateral contract is such because at the point of contract formation, both parties have outstanding promises to be performed in the future
			* **Unilateral contracts**
				+ Promise exchanged for an immediate performance
				+ Only the promisor has an outstanding obligation at the instant of contract formation
				+ Option contracts, contracts voidable by one party on the basis of minority, incapacity, bargaining impropriety, or mistake
		- **What constitutes a promise?**
			* **A promise that is bargained for is consideration if the promised performance would be consideration.**
		- **Illusory promises**
			* Promise subject to condition, therefore no real commitment
			* **Strong v. Sheffield**
				+ **Nudum pactum**—“naked promise”—not sufficient for consideration
				+ Discretion is entirely Strong’s

If discretion is entirely Strong’s, then there’s no consideration

He can call the debt whenever he likes

Therefore, it’s an illusory promise

Promise to forbear is illusory

* + - **Contracts for the sale of real estate**
			* **Mattei v. Hopper**
				+ Two categories of satisfaction clauses

Commercial/mechanical quality

Personal taste/judgment

* + - * + There were mutual exchanges; the deposit slip was a contract
				+ Satisfaction clause did not render the promise illusory
				+ Personal satisfaction clause that should be treated as binding
		- **R2d 77**
			* **Illusory and alternative promises**
				+ **A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless**

**Each of the alternative performances would have been consideration if it alone had been bargained for; or**

**One of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration**

* + - **R2d 88 (c)—Guaranty**
			* **A promise to be surety for the performance of a contractual obligation, made to the oblige, is binding if**
				+ **(c) the promisor should reasonably expect the promise to induce action or forbearance of a substantial character on the part of the promise or a third person, and the promise does induce such action or forbearance**
		- **Contracts for the sale of goods**
			* **Eastern Airlines v. Gulf Oil**
				+ Requirements contract

Enforceable because it does not lack mutuality of obligation

* + - **Wood v. Lucy, Lady Duff Gordon**
			* She tried to argue that the promise was illusory because there was no express performance clause—he didn’t promise to actually sell anything—he could have done nothing under the agreement and would not have been in breach
			* The plaintiff promised reasonable effort, therefore the contract was implied—his livelihood, unless he gave efforts she could never get anything
			* Ruling for Wood
		- **Substitutes for consideration**
			* A few states recognized some form of writing as substitute for consideration—not anymore
			* Some states make writing a presumptive evidence of consideration
		- **R2d 205**
			* **Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement**
		- **UCC 1-304**
			* **Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement**
		- **UCC 2-103**
			* **Buyer means a person who buys or contracts to buy goods**
			* **Good faith in the case of a merchant means honesty in fact and the observance of reasonably commercial standards of fair dealing in the trade**
			* **Receipt of goods means taking physical possession of them**
			* **Seller means a person who sells or contracts to sell goods**
		- **UCC 2-306**
			* **A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded**
			* **A lawful agreement by either the seller or the buyer for exclusive dealing in the kinds of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale**
* **Reliance (Promissory Estoppel)**
	+ **Promissory estoppel**
		- **The doctrine that provides that if a party changes his or her position substantially either by acting or forbearing from acting in reliance upon a gratuitous promise, then that party can enforce the promise although the essential elements of a contract are not present.**
	+ **Four basic categories of cases involving estoppel:**
		- **Family promises**
		- **Promises to convey land**
		- **Promises coupled with gratuitous bailments**
		- **Charitable subscriptions**
	+ **Estoppel**
		- **When the party changes their position based on the promise made**
		- Can’t go back and re-litigate—the court decides that conduct has to be forced upon someone by virtue of obligations created
	+ **Basis of enforcement**
		- Promise reasonably inducing action of forbearance will be enforced
		- **Reliance is not an alternative remedy to consideration**
	+ **Ricketts v. Scothorn**
		- Just because there’s no consideration, it doesn’t mean the promise is necessarily void
		- Estoppel prevents the defendant from alleging that this agreement lacks a necessary element of the contract
			* The estoppel basically means a change in position—the plaintiff made a change in position when she quit her job in light of the promise of payment by her grandfather—he intentionally influenced her to alter her position for the worse (no job)
		- There is a contract here, and the court decided for Scothorn because her quitting her job put her in a worse-off situation and therefore counted as reliance, which in this case proved sufficient for an enforceable contract
	+ **Feinberg v. Pfeiffer II**
		- Such action on the plaintiff’s part was her retirement from a lucrative position in reliance upon defendant’s promise to pay her an annuity or pension
	+ **Cohen v. Cowles Media**
		- SC affirmed the ruling for the plaintiff, but said that the defendants’ recognition that keeping names unpublished was a hugely ethical concern, and Cohen relied upon this long-standing tradition in asking for and receiving a promise of anonymity
		- Is enforcement of this promise required to prevent injustice? Yes.
	+ **Home Electric v. Hall**
		- The plaintiff alleges a contract, but there was no consideration for the promise, and therefore there was no contract—MUST have consideration
		- NC courts do not recognize promissory estoppel as a substitute for consideration
		- Promissory estoppel is used primarily in defense (to keep from getting thrown out of an apt. because of lease issues) rather than in the affirmative (pay me the difference)
		- No promissory estoppel here
	+ **R2d 90**
		- **A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.**
		- **A charitable subscription or a marriage settlement is binding under the first section (above) without proof that the promise induced action or forbearance.**
* **Restitution**
	+ Broader term used to embrace all of
	+ Gains produced through another’s loss are unjust and should be restored
	+ Prevention of unjust enrichment even when there has been no promise
	+ Quantum meruit—as much as he deserved
	+ **Cotnam v. Wisdom**
		- It was well settled that surgeons may recover the necessaries furnished in good faith to a person rendered in a helpless condition. Surgeons were entitled to recover.
		- Implied contracts are found in the law somewhere between contract and tort and call for a remedy where none is otherwise provided to prevent unjust enrichment.
	+ **Quasi- contract**
		- A contract implied in law
		- A legal fiction originally created for procedural reasons—to allow the formalistic common law courts of a bygone era to use the contractual form of action as a basis for giving relief for unjust enrichment
		- In modern law, quasi-contract is a term to describe one of the forms of an action for unjust enrichment
	+ **Callano v. Oakwood Park Homes**
		- Implied or quasi-contracts are legal fictions and are not true obligations determined by assent to be bound but are made to seem like a contract for the purpose of remedy and arise only from the law. However, the Court states that contracts are to be implied with caution.
		- Defendant is not the proper party to pay for the shrubs and is not liable. The Callanos remedy is against Plaintiff’s estate since they did contract and expect payment from Plaintiff. Quasi-contract will only be used where there is no other remedy. Here, there was properly an action in contract against Plaintiff’s estate.
	+ **Pyeatte v. Pyeatte**
		- Woman agreed to put her husband through law school if he subsequently paid for her grad school
		- Unjust enrichment as a legal concept is not appropriately applied in a marital relationship
* **Assent**
	+ **Objective**
		- Ignoring subjective state of mind
		- If agreement was apparent from manifestations of assent, reasonably interpreted, a contract had been formed on the terms reflected in the manifestation
			* Not necessary or permissible to hear testimony on what either party believed
	+ **Subjective**
		- Contractual obligation should not be imposed on a person who did not in fact agree to be bound
		- If too heavily stressed, then the policy of protecting reliance is undermined
		- A person must be tempered by the goal of protecting the expectations of one who reasonably relied on the appearance of assent
		- **Meeting of the minds**
	+ **Court now accepts evidence of a party’s state of mind, but the objective test is firmly established and a meeting of the minds is not required for contract formation**
		- **Assent is legally sufficient if each party, by the deliberate use of words or conduct, manifested agreement to be contractually bound**
	+ **Look at how the words should have been interpreted reasonably in the context of the transaction, by a person with the knowledge and attributes of the party to whom they were directed**
	+ **Lucy v. Zehmer**
		- Mental assent v. written assent
		- Outward manifestation of intention=assent in this case
		- There is a contract here
			* Mutual intent to be bound, mental assent not required
		- There had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and delivery of the contract
		- The mental assent of the parties is not a requisite for the formation of the contract; when unreasonable meaning is known to the other party, it counts— but he signed it, even if he didn’t really “mean” it, and that’s all that matters
		- If his words and acts, judged by a reasonable standard, manifest an intention to agree, it doesn’t matter what is the real but unexpressed state of mind
	+ **Intent to be bound**
		- A promisor may not be bound if the promise, whether from its content or the circumstances of its making, is insufficiently serious to indicate the promisor’s intent to be bound
	+ Absent an expressed intent that no contract shall exist, mutual assent between the parties, even though oral or informal, to exchange acts or promises is sufficient to create a binding contract
		- To avoid the obligation of a binding contract, at least one of the parties must express and intention not to be bound until a writing is executed
		- Factors that help determine whether the parties intend to be bound:
			* Whether there has been an express reservation of the right not to be bound in the absence of a writing
			* Whether there has been partial performance of the contract
			* Whether all of the terms of the alleged contract have been agreed upon
			* Whether the agreement at issue is the type of contract that is usually committed to writing
	+ **Definiteness**
		- Helps court determine with certainty what the terms of the contract at issue are
		- Indefiniteness can be cured by resort to a term implied by law
		- “good faith” and “reasonable efforts” are regarded as sufficiently definite terms if their content can be determined by reference to some external standard
		- **Toys, Inc. v. F.M. Burlington**
			* The option agreement says that the minimum rental shall be renegotiated to the prevailing rate in the mall—this language sets forth a definite method of determining the price term for the lease extension
			* The price would be determined by agreement
			* Even if defendant is given reasonable doubt, a valid option still existed
			* The test is whether the option agreement contains “all material and essential terms to be incorporated in the subsequent document”
			* In this case, it is not necessary that the option agreement contain all the terms of the contract as long as it contains a practicable, objective method (renegotiation) of determining the essential terms (the price for rent upon renewal)
		- **Flexible pricing**
			* Over a long term a seller wants to be assured of an outlet for a fixed quantity of a product and that a buyer wants to be assured of a source of supply for the same quantity
			* One possibility is to leave the price term open—it will then be a “reasonable price at the time for delivery”
			* Another possibility is an escalator clause under which the price will be fixed according to a formula tied in some way to the market
			* **Oglebay v. Armco**
				+ Assent when the terms become indefinite
				+ Vitality of assent when a flexible price mechanism appears to fail
				+ Three questions:

Did the parties intend to be bound by the terms of the contract despite the failure of the first and second pricing mechanisms?

Can the court establish the $6.25 rate for shipping as reasonable?

Can the trial court continue to exercise jurisdiction through appointing a mediator if they can’t agree later?

* + - * + Yes to all three
	+ **UCC 2-305**
		- **The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if**
			* **Nothing is said as to the price; or**
			* **The price is left to be agreed by the parties and they fail to agree; or**
			* **The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded**
		- **A price to be fixed by the seller or by the buyer means a price for him to fix in good faith**
		- **When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price**
		- **Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account**
	+ **UCC 2-309(1)**
		- **The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.**
	+ **UCC 2-311 (1)**
		- **An agreement for sale which is otherwise sufficiently definite to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.**
* **Offer**
	+ An act whereby one person confers upon another the power to create contractual relations between them…must be an act that leads the offeree reasonably to believe that a power to create a contract is conferred upon him
		- Excludes just negotiations or offers evidently done in jest
	+ Creates the power of acceptance
	+ **5 elements; must be express or implied:**
		- Must necessarily be communicated to the person to whom it is addressed; cannot take effect until it becomes known to the offeree
		- Must indicate a desire to enter into a contract—must specify the performance to be exchanged and the terms that will govern the relationship
			* The creator of the offer is the master of the offer—may also prescribe the manner and time for an effective acceptance
		- Must be directed at some person or group of persons
			* Usually at one specific person, it is legally possible to make an offer to a defined or undefined group—question of interpretation
		- Must invite acceptance—may or may not indicate how and by what time this acceptance is to be communicated
			* If a mode and time for acceptance are prescribed, they must be followed
				+ If these are not set out in the offer, the court must decide whether acceptance was timely or reasonable
		- Must engender the reasonable understanding that acceptance will create the contract—not further approval required from the offeror
	+ **Owen v. Tunison**
		- There can have been no contract for the sale of the property desired, no meeting of the minds of the owner and prospective purchaser, unless there was an offer or proposal of sale
		- Formalistic—they look at one phrase and make their decision
		- Less formalistic—how did the recipient of the offer/reply feel? Less objective
	+ **Harvey v. Facey**
		- Mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry.
	+ **Fairmount Glass Works v. Crunden-Martin Woodenware**
		- Price quotes are not normally offers
		- In order to determine whether a communication constitutes an offer, the court must determine the contractual intent of the parties and the true meaning of the correspondence must be determined by reading it as a whole.
		- The expression “for immediate acceptance” in Fairmount’s telegram, taken in context with Crunden’s request for a price quotation, indicates that it was meant to be an offer which formed a binding contract when accepted. Fairmount’s telegram was not merely a quotation of prices. It was a definite offer to sell on the terms indicated and could not be withdrawn after the terms had been accepted.
	+ **Advertisements as offers**
		- General rule is that an advertisement is not an offer, but rather an invitation by the seller to the buyer to make an offer to purchase
		- **Leflkowitz v. Great Minneapolis Surplus Store**
			* Can an advertisement ever be an offer?
			* The advertisement clearly stated that Defendant would sell the fur garments at a definite price to the person who came first. Plaintiff arrived first, thus, accepted the offer.
			* The “house rule” was not mentioned in the advertisement. While offers can be modified, one cannot, after acceptance, impose new, arbitrary conditions.
			* The court held that a newspaper ad could be considered an offer under certain circumstances, particularly when the actions needed to accept the offer are clear. In this case, the advertisement was clear, definite, and leaves nothing to be left open for negotiation.
	+ **UCC 2-328**
		- **In a sale by auction if goods are put up in lots each lot is the subject of a separate sale**
		- **A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bidthe auctioneer by in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer as falling.**
		- **Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer’s announcement of completion of the sale, but a bidder’s retraction does not revive any previous bid.**
		- **If the auctioneer knowingly receives a bid on the seller’s behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.**
* **Acceptance**
	+ A voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and thereby creates the set of legal relations called a contract
	+ Offeror is no longer free to change its mind and withdraw from the relationship without incurring liability
	+ Power is capacity to change legal relationship
	+ **International Filter v. Conroe Gin, Ice & Light**
		- The “OK” was an approval by the executive and that the paper then became a contract.
		- The offeror has the power to express the terms and determine the acts which will constitute acceptance. Courts will construe those terms according to their plain meaning. Here, the terms required executive approval but did not require the offered to give notice of the acceptance.
	+ **White v. Corlies & Tiff**
		- Although Plaintiff mentally intended to accept and immediately purchased materials and began work, none of this was an indication of acceptance made and communicated to the Defendant in a reasonable time and or in an appropriate manner to form an agreement.
		- The offer did not specify a means of acceptance. But the language and type of transaction suggested that “upon agreement” might mean that Defendants could demand an agreement. The offer did not say go to work upon receipt of the note.
	+ **R2d 30**
		- **An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance**
		- **Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by an medium reasonable in the circumstances**
	+ **R2d 32**
		- **In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses**
	+ **R2d 50**
		- **Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer**
		- **Acceptance by performance requires at least part of what the offer requests be performed or tenderd and includes acceptance by a performance**
		- **Acceptance by a promise requires that the offeree complete every act essential to the making of the promise**
	+ **R2d 54**
		- **Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification**
		- **If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonably promptness and certainty, the contractual duty of the offeror is discharged unless**
			* **The offeree exercises reasonably diligence to notify the offeror of acceptance, or**
			* **The offeror learns of the performance within a reasonable time, or**
			* **The offer indicates that notification of acceptance is not required**
	+ **R2d 56**
		- **Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably**
	+ **R2d 60**
		- **If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded**
	+ **R2d 62**
		- **Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance**
		- **Such an acceptance operates as a promise to render complete performance**
	+ **Ever-Tite Roofing v. Green**
		- When a contract does not specify a time limit for acceptance, a reasonable time must be allowed with regards to the circumstances of the particular situation
	+ **Notification of acceptance in unilateral contracts**
		- If the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification
	+ **Allied Steel & Conveyors v. Ford**
		- Acceptance of an offer by part performance in accordance with the terms of the offer is sufficient to complete the contract
		- If an offeror merely suggests a permitted method of acceptance, other methods of acceptance are not precluded
		- Indemnity provision
		- A binding contract resulted in this case when Allied began performance
	+ **Shipment of goods as acceptance**
		- **Corinthian Pharm. V. Lederle**
			* An accommodation is an arrangement or engagement made as a favor—the shipment of vials was an accommodation, not consideration, therefore, there was no consideration
			* Price lists are not offers; mere accommodation *can* constitute a counteroffer
	+ **Silence not ordinarily acceptance**
	+ **Acceptance must mirror the terms of the offer**
		- **New terms by offeree convert deal into a new offer (counteroffer)**
		- **Bilateral—mutual obligation—contracts are accepted when the acceptance terms in the agreement are met mutually**
	+ **Acceptance of Unilateral contract**
		- **by performance**
		- **by stating an acceptance**
		- **promise**
	+ **R2d 69**
		- **Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:**
			* **Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation**
			* **Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer**
			* **Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept**
		- **An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him**
	+ **UCC 2-204**
		- **A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract**
		- **An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined**
		- **Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy**
	+ **UCC 2-206**
		- **Unless otherwise unambiguously indicated by the language or circumstances**
			* **An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances**
			* **An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer**
		- **Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance**
	+ **Termination of power of acceptance**
		- **Lapse of an offer**
			* After some period of time, an offer lapses
			* If no period of time is specified in the contract, then the offer lapses after a reasonable time
			* A reasonable time depends on the circumstances
			* Rapid fluctuation in price shortens the time it takes for an offer to lapse
			* An offer made during face to face conversation is deemed to continue only until the end of the conversation
		- **Termination of offers**
			* **Rejection**
			* **Counteroffer**
			* **Offeror’s death or mental disability**
				+ The death or incapacity of the offeror does not terminate the offeree’s power of acceptance under an option contract
				+ The death of a party after a contract has been formed may, depending on how pivotal the person’s role in the enterprise, affect obligations under the contract
			* **Revocation**
			* **An offeror can terminate an ordinary offer at any time before acceptance by revoking it (according to common law)**
				+ Exception to this rule is “firm offer”
			* **Option contracts**
				+ **A promise made by an offeror that effectively limits the offeror’s power to revoke is called an option contract**
				+ Can be created through “firm offers,” under the UCC, and through reliance by the offeree
			* **Dickinson v. Dodd**
				+ When no consideration is given for a promise to hold until a certain day an offer to sell, the contract is not binding
			* **Firm offers**
				+ An offer that the offeror undertakes not to revoke for a stated or reasonable time
				+ At common law, such an undertaking is not binding on the offeror unless the offer qualifies as a valid option, but under the UCC Article 2, a firm offer is binding under defined circumstances
		- **R2d 43**
			* **An offeree’s power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect**
		- **R2d 45**
			* **Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it**
			* **The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer**
		- **R2d 36-42 (skim)**
			* **Methods of termination of power of acceptance**
				+ **An offeree’s power of acceptance may be terminated by**

**Rejection or counter-offer by the offeree, or**

**Lapse of time, or**

**Revocation by the offeror, or**

**Death or incapacity of the offeror or offeree**

* + - * + **In addition, an offeree’s power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer**
			* **Termination of power of acceptance under option contract**
				+ **Notwithstanding §38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, unless the requirements are met for the discharge of a contractual duty**
			* **Rejection**
				+ **An offeree’s power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention**
				+ **A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement**
			* **Counter-offers**
				+ **A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing form that proposed by the original offer**
				+ **An offeree’s power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree**
			* **Time when rejection or counter-offer terminates the power of acceptance**
				+ **Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer**
			* **Lapse of time**
				+ **An offeree’s power of acceptance is terminated at the time specified in the otter, or, if no time is specified, at the end of a reasonable time**
				+ **What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made**
				+ **Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in § 49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received**
			* **Revocation by communication from offeror received by offeree**
				+ **An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract**
		- **UCC 2-104 (1)**
			* **Merchant means a person who deal in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill**
		- **UCC 2-105 (1), (2)**
			* **Goods means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and other things in action. Goods also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.**
			* **Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are future goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.**
		- **UCC 2-205**
			* **An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no even may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror**
		- **Mirror Image Rule**
			* An acceptance must be on the terms proposed by the offer, without the slightest variation
			* A response that does not exactly mirror the terms of the original offer is a rejection and act as a counter-offer
			* A court may decide that what seemed to be an additional or different term in the acceptance was really an implied term in the offer, so that language at first appearing to vary the terms of the offer did not really do so
			* A court may conclude that the language of the acceptance relating to an additional or different term is only suggestive
			* Even when neither of the above 2 mitigating techniques is available and no contract has been made, parties often act on the assumption that their promises are binding and the transaction is carried out without incident
			* Disputes arise in two cases
				+ One party claims that a contract was made while the other maintains the contrary
				+ Some performance has taken place, following an exchange of messages showing that the parties believed they had reached a contract; but the terms proposed by the parties were never an exact match
		- **Mailbox Rule**
			* Dispatch of the acceptance is the crucial point at which the contract is made; when they put the letter of acceptance in the post—when it’s irrevocably out of the offeree’s control.
			* **Ragosta v. Wilder**
				+ Because the plaintiffs had not tendered performance and did not establish the elements for the application of equitable estoppel, the defendant was entitled to withdraw his offer
		- **R2d 36-37**
			* **(See above)**
		- **R2d 40**
			* **(See above)**
		- **R2d 48**
			* **An offeree’s power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract**
* **Battle of the Forms and the UCC**
	+ Terms and conditions; boilerplate contracts
	+ UCC abandons mirror image rule
		- Attentive to inconsistent boilerplate language exchanged between parties intending to enter into contract
	+ Differing terms v. additional terms
	+ **Dorton v. Collins & Aikman**
		- Issue is how the arbitration term found its way into the agreement
		- Court had to decide whether the defendant’s forms were acceptance or confirmations—court directed trial court to decide whether oral agreements were reached by the parties prior to the sending of the forms
			* Also whether or not if additional or different terms made acceptance conditional
				+ Court believes that these terms were intended to apply to an acceptance which reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror’s assent to the additional or different terms
		- Additional terms treated as proposals, contract recognized because the additional terms were not expressly conditional on the buyer’s assent
	+ **Materiality**
		- There exists a material alteration if the result is a surprise
		- Length of warranty alteration is material
		- What counts as material differs from state to state
		- **C. Itoh v. Jordan**
			* Another arbitration clause on the back of the form
			* Court said there was no contract in this case; arbitration clause not binding
			* Had to determine whether arbitration is a supplementary term
			* Terms which fall outside the realm of “terms on which the parties agree” cannot be brought back into the contract under the guise of “supplementary terms”
			* “expressly conditional” clause beneficial to the seller—he can protect himself by not performing his half of the contract—but he must also accept the risk that he might not get his additional terms if he proceeds with the performance without first getting the buyer’s assent
			* Because the seller injected ambiguity into the contract, he must be the one to bear the consequence of the ambiguity
	+ **Different terms**
		- **Northrop v. Litronic**
			* **There is no consensus on the question at hand**
			* **There is a contract because acceptance is effective even though it contains different terms—but which terms should be considered part of the contract**
			* **There are three views about which terms should be part of the contract:**
				+ **Delete offeree’s additional terms and replace them with default terms**
				+ **Delete offeree’s additional terms and substitute the offeror’s terms**
				+ **Different terms are the same as additional; offeror’s terms prevail—whether the new terms in the contract are materially different from the terms in the offer (material alteration must be a surprise)**
			* **This court prefers the third option**
	+ **UCC 2-207**
		- **A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms**
		- **The additional terms are to be construed as proposals for addition to the contract, between merchants such terms become part of the contract unless:**
			* **The offer expressly limits acceptance to the terms of the offer**
			* **They materially alter it; or**
			* **Notification of objection to them has already been given or is given within a reasonable time after notice of them is received**
		- **Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.**
* **Precontractual Liability**
	+ **Revocability and reliance**
		- **Back to promissor estoppel**
	+ **Drennan v. Star Paving**
		- Reliance characterized in a way that it gives the plaintiff promissory estoppel
		- Reasonably expected that Drennan was going to rely on this offer
		- Subcontractor wants his bid to be relied upon
		- Court held that this was an option contract that had been held out by the subcontractor
		- Saying “this bid is revocable any time before acceptance” would have prevented promissory estoppel
		- An option contract can take place in promissory estoppel where there have been exchanges
		- Defendant submitted the bid with knowledge of the substantial possibility that it would be used by the plaintiff; defendant could foresee the harm that would ensue from an erroneous underestimate of the cost—also, defendant was motivated by its own business interest
	+ **Liability when negotiations fail**
		- If benefit conferred, then restitution
	+ **Hoffman v. Red Owl**
		- Question is whether the promise necessary to sustain a cause of action for promissory estoppel has to entail all details of a proposed transaction so that a binding contract would be the result
		- 3 questions:
			* Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?
			* Did the promise induce such action of forbearance?
			* Can injustice be avoided only by enforcement of the promise?
		- 1st two are factual questions for the jury to decide; third is for the court to decide and they concluded that injustice would result if the plaintiffs were not granted some relief because of the failure of the defendants to keep their promises which **induced plaintiffs to act to their detriment.**
		- The court should award just enough to prevent injustice, nothing more
			* Because justice does not require that damages awarded him should exceed any actual loss sustained measured by the difference in sales price and fair market value
	+ **R2d 45**
		- **Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it**
		- **The offeror’s duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer**
	+ **R2d 87**
		- **An offer is binding as an option contract if it**
			* **Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms, within a reasonable time; or**
			* **Is made irrevocable by statute**
		- **An offer which the offeror should reasonable expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice**
* **Statute of Frauds**
	+ **Introduction: Contracts that have to be in writing**
		- Agreement for any performance that cannot be completed within one year from the making of the agreement
		- An agreement for the transfer of an interest in real estate, other than the grant of a lease, and one for the grant of a real-estate lease for a period of one year or more
		- Agreement for the sale of goods for a price of $500 more
		- An agreement for the lease of goods providing for rent of $1000 or more
		- An agreement by person or firm to be surety for debt or other obligation of another
		- An agreement by which personal property is to stand as security for an obligation
		- An agreement the performance of which is not to be completed before the end of a lifetime
		- An agreement to pay commission for the services of a real estate broker
		- An agreement by which a person or firm undertakes to extend credit to another
	+ **One-year performance**
		- **C.R. Klewin v. Flagship Properties**
			* The one year provision seems to be out of date and is viewed with disfavor in the courts
			* Narrow view of the one-year provision by the court in this case
				+ Unless it appears from the agreement itself that it is not to be performed within a year, the statute does not apply
				+ Contracts of uncertain duration are excluded from this statute; only those which cannot possibly be completed within a year are covered by the provision
	+ **Sales of goods**
		- No longer covered by the SoF, but in UCC 2-201
		- A contract for the sale of goods over $500 is not enforceable unless it is in writing
		- If writing affirming the contract has been received within a reasonable time it’s enforceable
			* Application depends on circumstances (6)
				+ Recipient of a message has let 10 days go by without responding or objecting

Begins at receipt of the message

Must be clear objection

* + - * + Reason to know contents of the message

Recipient will rarely lack reason to know the message’s contents—usually only when the envelope looks like junk mail would they lack reason

* + - * + Sufficient against the sender –writing in confirmation of the contract

Whether the claimant is a buyer or seller, how the case would stand if the parties were reversed

* + - * **Reasonable time**
				+ **St. Ansgar Mills v. Streit**

Whether the contract was received within a reasonable time

Writing is still required, but it does not need to be signed by the party against whom the contract is sought to be enforced

All relevant circumstances, including custom and practice, must be considered in determining what a reasonable time is

It’s usually a jury question

Reasonableness of the conduct is determined by the facts and circumstances existing at that time

* + - Now the UCC 2-201 dictates the statute of frauds
		- **UCC 2-201**
			* **Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.**
			* **Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection 1 against such party unless written notice of objection to its contents is givent within 10 days after it is received**
			* **A contract which does not satisfy the subsection 1 but which is valid in other respects is enforceable**
				+ **If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller’s business and the seller, before notice of repudiation is received and other circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for the procurement; or**
				+ **If the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or**
				+ **With respect to goods for which payment has been made and accepted or which have been received and accepted**
* **Policing the Bargaining Process**
	+ 3 types of policing concerns—status of the party seeking relief, behavior of the parties during the bargaining process, and the substance of the resulting bargain
	+ **Capacity**
		- Minority and mental infirmity
		- Women used to be part of it, but not anymore
		- **Kiefer v. Fred Howe**
			* The rule is in place to protect minors because they can’t necessarily make mature decisions, and they require some sort of protection from the pitfalls of the marketplace
			* Contractual disabilities for a purchase made in the minority should not be removed from a minor just because he is emancipated
		- **Ortelere v. Teachers’ Retirement Board**
			* The mental incompetence of a contracting party renders the contract voidable for that party, provided the other party knew or should have known of the incompetence.
		- **Cundick v. Broadbent**
			* Mental capacity to contract depends upon whether the allegedly disabled person possessed sufficient reason to enable him to understand the nature and effect of the act at issue; even average intelligence is essential to a valid contract—it’s relevant in determining overreaching and defrauding
			* Mental incompetence at the time of contracting (a factual question) creates a contract that is voidable at the incompetent party’s option.
		- **Gastonia v. Rogers**
			* We do not think that the services of a professional employment agency may be considered "necessary" so that a minor may not disaffirm a contract for such services. It makes no difference that the defendant has profited by the efforts of the plaintiff. He is still free to disaffirm the contract. The plaintiff's services were advantageous to the defendant, and clearly he was in need of a job when they were rendered; however, it does not appear that they were necessary for him to earn a livelihood.
	+ **Overreaching/pressure**
		- **Duress**
			* Impermissible pressure exerted by one party over another either during pre-contractual bargaining or during the attempted renegotiation of an existing deal
			* Includes economic coercion now
				+ Exploitation of a temporary monopoly
			* 2 limitation to the use of duress
				+ The insistence upon a reasonable degree of temerity in the face of a threat—at least some resistance
				+ Substance of the threat—threats to business interests, life, or limb—but threat of a lawful action is not duress (threat of a lawsuit) in most cases
			* **Pre-existing duty rule**—performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration
				+ **Alaska Packers’ v. Domenico**

When a party merely does what he has already obligated himself to do (work on the boat) he cannot demand an additional compensation

Even if he takes advantages of the necessities of his adversary and gets the promise for more money, it is a nudum pactum (naked promise) and is not valid

* + - * + **Avoiding the pre-existing duty rule**

In an existing contract is terminated by consent of both parties and a new one executed in its place and stead, a rescission followed shortly afterwards by a new agreement in regard to the same subject-matter would create the legal obligations provided in the subsequent agreement

**Watkins & Son v. Carrig**

If the plaintiff was unwise in taking chances, he is not relieved on the ground of mistake, from the burden incurred in being faced with them

There is a difference between a bare promise and a promise in adjustment of a contractual promise already outstanding

Defendant intentionally and voluntarily yielded to demand for a special price; defendant yielded to threat to break contract if no higher price was paid and made a new arrangement—he relinquished his rights, he should be held to the new contract

* + - **R2d 89**
			* **A promise modifying a duty under a contract not fully performed on either side is binding**
				+ **If the modification is fair and equitabl in view of circumstances not anticipated by the parties when the contract was made; or**
				+ **To the extent provided by the statute; or**
				+ **To the extent that justice requires enforcement in view of material change of position in reliance on the promise**
		- **UCC 2-209(1)**
			* **An agreement modifying a contract within this article needs no consideration to be binding**
		- **Accord and Satisfaction**
			* A settlement of an existing claim under which the parties agree that one of them (the debtor) will give, and the other (the creditor) will accept a lesser performance than that originally claimed by the creditor. The agreement of settlement is the accord, and its execution by rendition of the settled performance is the satisfaction. Until the settlement is satisfied by performance, it is known as an executor accord.
	+ **Yielding to threat**
		- Ordinary firmness required
		- Question of degree of the severity of the circumstances
		- Some courts have a test of whether or not the person is deprived of free will
	+ **New Consideration (Avoiding pre-existing duty rule)**
		- Offer to pay part of the debt before maturity, for example
	+ **Partial payment**
		- Where part of a debt has been paid as part of the creditor’s agreement for forgiving the rest
		- Must make it apparent to plaintiff the intention to pay no more than the partial payment (like “paid in full”—can’t put it in the fine print)
	+ **Pre-existing duty to a third party**
		- Where the contractual duty is owed to a third party
		- A promise by A to B to induce him not to break his contract with C
	+ **Duress in business**
		- **Economic duress**

**Austin Instrument v. Loral**

This is a classic case of economic duress; Loral did everything right—it was not required to ask the Navy for an extension and demonstrated that it could not get the parts it needed elsewhere in a reasonable amount of time (it would have been too late) ; Loral sued in a reasonable period of time

Loral had no choice when the prices were raised by Austin except to take the gears at the coerced prices and then sue to get the excess back

Loral agreed to the price increases in consequence of the economic duress employed by Austin, remanded to trial court for computation of damages

* + - **UCC 1-308**
			* **A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as “under protest” or the like are sufficient.**
				+ **Does not apply to accord and satisfaction**
	+ **Concealment**
		- Puffery
		- Non-disclosure
		- Assertion (outright lie)
		- Couching opinion in fact
	+ **Misrepresentation**
		- Leads to reliance on information—misrepresentation contributed significantly to the injury
		- Must be material
		- Defendant must not necessarily have made the assertion knowing it to be false—innocent misrepresentation
		- Must show justifiable reliance
		- Misrepresentation must be one of fact, not opinion
		- Promissory fraud
		- **Swinton v. Whitinsville Sav. Bank**
			* Concealment of the fact that the house had termites
			* The law cannot attempt to determine liability according to varying probabilities of the existence and discovery of different possible defects in the subjects of trade
			* The rule of nonliability for bare nondisclosure has been stated and followed
		- **Kannavos v. Annino**
			* Vendors knew that the vendees were going to use it to rent as apartments and still failed to disclose the zoning and building violations; this was enough affirmatively to make the disclosure inadequate and partial, and intentionally deceptive and fraudulent
			* Where there is reliance on fraudulent representations or upon statements and action treated as fraudulent, cases have not barred plaintiffs from recovery merely because they didn’t use due diligence
			* Responsible for misrepresentation
		- **Vokes v. Arthur Murray**
			* Defendants contend that the contract can only be rescinded if there’s misrepresentation of fact rather than opinion; they say that their misrepresentation was of opinion that she was good
				+ This rule doesn’t apply where there is some sort of fiduciary relationship between the parties or some sort of trickery employed by the representor
				+ It could be reasonably supposed here that defendants had superior knowledge as to whether the plaintiff had “dance potential” and as to whether she was noticeably improving
				+ Should have been aware to the defendants that her outrageous outlay of cash for hundreds of additional hours of instruction was not justified by her slow progress, which she would have been aware of if they had spoken the whole truth
	+ **“Boilerplate” Contracts**
		- **Unfairness**
			* Valuation of certainty regarding the enforcement of promises in commercial affairs
			* Equality of exchange
		- **Standard Form and Adhesion Contracts**
			* Emerged ~ 200 years ago
			* Advantages:
				+ Take advantage of the lessons of experience and enable a judicial interpretation of one contract to serve as an interpretation of all
				+ Reduce uncertainty and save time and trouble
				+ Simplify planning and administration and make superior drafting skills more widely available—efficiency
				+ Make risks calculable and increase that real security which is the necessary basis of initiative and the assumption of foreseeable risks
			* Disadvantages
				+ Unequal bargaining power
			* Controlling the “irrational factor”
			* SFC= contracts of adhesion?
				+ Sticky
				+ Means of imposition of one party’s will on the other

An enterprise may have such disproportionately strong economic power that it can dictate its terms to the weaker party

There may be no opportunity to bargain over terms; take it or leave it contract

Standardized contracts are often used by a party who has the advantage of time and expert advice in preparing it while the other party may have no real opportunity to scrutinize and often no real means to understand the contract

Fine print, obfuscating clauses

* + - * Main question in these cases is “whether a party to a standardized contract can reasonable be held to have seen, understood, and assented to its unfavorable terms, and accordingly be bound by them”
		- **O’Callaghan v. Waller & Beckwith**
			* There will not always be this shortage of housing; court can’t determine public policy based on transitory/temporary circumstances
			* Standard form lease
			* Presumption of enforceability but it has limits with regards to those 2 arguments
			* Total bar of liability
		- **Agreeing to Boilerplate**
			* Everyday disclaimers—parcel room suit
			* Insurance contracts
			* **Graham v. Scissor-Tail**
				+ Contract of adhesion—standardized contract which imposed and drafted by the party of superior bargaining strength relegates to the subscribing party only the opportunity to adhere to the contract or reject it
				+ The contract here may fairly be described as adhesive
				+ The provision requiring arbitration was not contrary to reasonable expectations of Graham; it was wholly consistent with his reasonable expectations upon entering into the contract
	+ **Adhesion Contracts**
		- **The duty to read and the duty to disclose**
			* Under the common law rule, in the absence of fraud, one who signs a written agreement is bound by its terms whether he read and understood it or not, or whether he can read it or not
			* Some legislatures have required different font and colors of font on contracts so that people can see what they are expected to read; some states just say it has to be conspicuous
				+ Still other states have plain language statutes requiring that agreements be

Written in a clear and coherent manner using words with common and every day meanings

Appropriately divided and captioned by its various sections

* + - **Carnival Cruise v. Shute**
			* However, the appeals court overlooks the business relationship in the case referenced; the people in that case were able to bargain their contract while the terms of this contract are a form on a ticket which are not subject to bargaining
			* The respondents do not make any other claims, they have not met the “heavy burden of proof” they are required to satisfy to set aside the clause on the grounds of inconvenience
				+ There is no indication that the petitioner set Florida as the forum state to deter people from pursuing legitimate claims—it’s Carnival’s PPB
				+ There is no evidence that the petitioner obtained respondents’ accession to the forum clause by fraud or overreaching
				+ The respondents have conceded that they were given notice of the forum provision and therefore retained the option of rejecting the contract with impunity
		- **Sources of Policing: courts, legislatures, and agencies**
			* **Judicial measures**
				+ Recognizing a distinction between “dickered” terms and boiler-plate clauses
				+ Unconscionability has been criticized as a cover for smuggling notions of distributive justice into the judicial process
			* **Statutory measures**
				+ Traditional means of constraining the use of economic power in the imposition of contract terms
				+ Protective legislation grouped into 3 types

Fairness of the terms/exchanges as a whole; seeks to control the terms of exchange

Assumption that consumers can best improve their position through well-informed shopping, facilitated by various disclosure requirements

Premised on the idea that consumers suffer systematic handicaps in effective enforcement of their rights—focuses on remedies

* + - * + **Administrative measures**

Agencies use their power to exert control over contract language

* + **Unconscionability**
		- Intends to prevent oppression and unfair surprise
		- Two views:
			* Explication of the doctrine
			* Fundamental objection
		- Procedural unconscionability—unfair bargaining
			* Oppression or surprise due to unequal bargaining power
			* Known lack of understanding
			* Unfair bargaining (leads to…)
		- Substantive unconscionability—unfair contract terms
			* Overly harsh or one-sided results
			* All about the outcome
			* Unfair contract terms
		- **Williams v. Walker Thomas**
			* The parties didn’t really have a reasonable opportunity to understand the terms of the contract; parties of little bargaining power
			* Primary concern is fairness; whether the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place
		- **Price Unconscionability**
			* Price of goods unfair
			* **Jones v. Star Credit**
				+ The defendant knew the very limited financial resources of the purchaser at the time and thus knowing advantage was taken of the plaintiffs
		- **UCC 2-302**
			* **(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.**
			* **(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.**
		- **R2d 208**
			* **If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result**
		- **Unconscionability in Franchises**
			* Number of days of notice before termination of contract (10 is not fair but 90 is)
		- Where imbalance in positions between commercial parties is found
		- Franchisor over franchisee
			* Non-negotiable terms
			* Basic terms of the underlying contract (standard form)
	+ **Arbitration Clauses**
		- Enforceability of mandatory arbitration clauses
			* Employment agreements
			* Consumer transactions
			* **Armendariz v. Foundation Health**
				+ Employees can be compelled, under an arbitration agreement, to arbitrate their claims so long as the arbitration procedures permit the employees to vindicate their statutory rights

But the arbitration must meet certain minimum requirements

* + - * + If the contract is adhesive (it is here—condition of employment, no opportunity to negotiate), must determine if there are other factors present which operate to render the contract unenforceable

If it does not fall within the reasonable expectations of the weaker party

If it is unduly oppressive or unconscionable

* + - * + The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa
				+ Modicum of bilaterality

It’s not fair for the employer to assert arbitration clause regarding wrongful termination over employee and not make itself subject to the arbitration clause too

This one-sided term is unconscionable

* + - * + If an employer has reasonable justification for the arrangement, then the agreement would not be unconscionable; without such justification it is unconscionable
				+ One-sided because the company didn’t have to adhere to the clause
			* **Scott v. Cingular Wireless**
				+ Class action waivers make one-sided contracts
			* **Tillman**
				+ NC outlawed single premium loans shortly after the plaintiff took one out
				+ This was optional insurance; says she wasn’t told it was optional
				+ Is this excessively one-sided?

Yes; SC said it was unconscionable

* + - * + Procedural -- There was no mention of credit insurance or the arbitration clause at loan closing. D would have refused to make a loan to P rather than negotiate with them over the terms of the arbitration agreement. The bargaining power was unquestionably unequal.
				+ Substantive -- Because P's damage amounts are so low, it is unlikely that any attorneys would be willing to accept the risks attendant to pursuing these claims. The clause preserves D's ability to pursue its claims in court while denying P that same option. Prohibition of joinder of claims and class actions creates one-sidedness and contributes to the financial inaccessibility of the arbitral forum.
				+ Terms are so oppressive that no honest and fair person would make them on one hand and no reasonable person would accept them on the other
		- Don’t need both procedural and substantive to prove a contract clause unconscionable
	+ **Good Faith**
		- **Dalton v. ETS**
			* A party cannot do something that effectively destroys the other party’s right to receive the fruits of the contract
			* Where exercise of discretion is called for, the party cannot act arbitrarily or irrationally
			* Two things they should have taken into account were the statements that he was there by the witnesses and the consistent diagnostic test; their failure to consider this relevant information resulted in breach of contract through failure to comply in good faith
		- **Eastern Air Lines v. Gulf Oil**
			* **Definition of good faith requires honesty in fact**
			* **No bad faith here**
			* Good faith: honesty in fact in the conduct or transaction concerned—between merchants it means honesty in fact and observance of reasonable commercial standards of fair dealing in the trade
			* Relevant commercial practices here:
				+ **Courses of performance**
				+ **Courses of dealing**
				+ **Usages of trade**
			* Fuel freighting is an established industry practice
				+ And has gone unchallenged by Gulf for many years
			* If the demands are excessive, then refusal to deliver unreasonable amounts is allowed
			* Seller excused from performance if the customer never has any requirements from them
			* Practical interpretation during performance is the best indication of intent
			* This is not a breach of agreement and is consistent with good faith and established commercial practices
		- **Market St. v. Frey**
		- Good faith relates to performance
			* You can exploit your superior knowledge of the market
			* But it’s a different thing to take deliberate advantage of an oversight by your contract partner concerning his rights under the contract
			* Good faith was not MSA’s state of mind
		- **UCC 2-306**
			* **(See above)**
* **Parol Evidence Rule**
	+ Using facts outside the contract to determine the nature of the full agreement between the parties
	+ When applied, this is a rule of substantive law that, when it applies, precludes any proof that the terms of the contract are other than as expressed in the writing
	+ Encourages parties to put all the terms in writing
	+ Defers to last written expression
	+ **Corbin test**
		- If it seems unfair, there’s probably a remedy at law
		- Extrinsic evidence is admissible based on mistakes of parties
	+ Generally a rule of exclusion, but a party can usually provide external evidence to explain or supplement an issue in a contract
	+ **Gianni v. Russell**
		- In cases where the cause of action rests completely on an alleged oral understanding, it is assumed that the writing was intended to set forth the entire agreement
		- Because the written lease is the complete contract of the parties, and since it embraces the field of the alleged oral contract, evidence of the latter is inadmissible under the parol evidence rule
	+ **Masterson v. Sine**
		- When the parties to a written contract have agreed to it as an “integration” (a complete and final embodiment of the terms of an agreement) parol evidence cannot be used to add to or vary its terms
			* When only part of the agreement is integrated, the same rule applies to the integrated part but not necessarily to the rest of the agreement
		- Issue is determining whether there has been an integration by determining whether the parties intended their writing to serve as the exclusive embodiment of the agreement
		- The option clause in the deed of the present case does not explicitly provide that it contains the complete agreement, and the deed is silent on the question of assignability
		- Defendants offered evidence that the parties agreed that the option was not assignable in order to keep the property in the Masterson family; trial court erred in excluding this evidence
		- More nuanced and lenient approach with regards to what can come in under parol evidence
	+ **No-oral-modification clauses**
		- Prohibits further alteration of the contract unless it’s in writing
		- Traditionally not effective
	+ Differences in the Restatement
		- Restatement 213
			* Inconsistent prior agreements
		- Restatement 214
			* Agreements prior to or contemporaneous with the writing are admissible to establish:
				+ Writing is/isn’t an integrated agreement
				+ Integrated agreement is completely/partially integrated
				+ Meaning of writing, whether or not integrated
				+ Illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause
				+ Ground for granting or denying rescission, reformation, specific performance, or other remedy
		- Restatement 215
			* Except as stated in 214, evidence of prior agreements is not admissibly to contradict the term of a writing
		- Restatement 216
			* Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated
			* An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
				+ Agreed to for a separate consideration
				+ Such a term these circumstances might naturally be omitted from the writing
	+ **UCC 2-202**
		- **Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented**
			* **By course of dealing or usage of trade or by course of performance and**
			* **By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement**
	+ **R2d 209-210**
		- **Integrated agreements**
			* **An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement**
			* **Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule**
			* **Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an agreement unless it is established by other evidence that the writing did not constitute a final expression.**
		- **Completely and partially integrated agreements**
			* **A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement**
			* **A partially integrated agreement is an integrated agreement other than a completely integrated agreement**
			* **Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule**
	+ **R2d 213-216**
		- **Effect of integrated agreement on prior agreements (parol evidence rule)**
			* **A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them**
			* **A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope**
			* **An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated**
		- **Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish**
			* **That thy writing is or is not an integrated agreements**
			* **That the integrated agreement, if any, is completely or partially integrated;**
			* **The meaning of the writing, whether or not integrated;**
			* **Illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;**
			* **Ground for granting or denying rescission, reformation, specific performance, or other remedy**
		- **Contradiction of integrated terms**
			* **Except as stated in the preceding section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing**
		- **Consistent additional terms**
			* **Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated**
			* **An agreement is not completely integrated if the writing omits a consistent additional agreed term which is**
				+ **Agreed to for separate consideration, or**
				+ **Such a term as in the circumstances might naturally be omitted from the writing**
* **Extrinsic Evidence and Interpretation**
	+ Admissibility of extrinsic evidence depends upon the plain meaning rule—if a court finds that the contract has a plain meaning, they will not allow extrinsic evidence to contradict its interpretation
	+ **Pacific Gas v. Thomas**
		- Test of admissibility of extrinsic evidence is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible (ambiguity)
		- Extrinsic evidence should be disallowed only if it’s feasible to determine the meaning the parties gave to the words from the instrument alone
		- Extrinsic evidence not permissible to add, detract, or vary the terms of a contract
		- Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties
	+ **Delta v. Arioto**
		- Contract “subject to termination”
		- The meaning is not unclear, but the trial court should have allowed extrinsic evidence to prove the meaning of the termination
	+ **Greenfield v. Philles Records**
		- Extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous
			* Pivotal issue here is whether defendants are prohibited from using the master recordings for synchronization in the absence of explicit language allowing them to use the recordings in this way
			* In this case, there is no ambiguity
		- Plaintiff ruling upheld
	+ **WWW Assoc. v. Giancontieri**
		- When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms
		- Evidence outside of the “four corners” of the document as to what was really intended but unstated is generally inadmissible to try to add/change the writing
			* Doesn’t rely on the infirmity of memory
		- Whether or not a writing is ambiguous is a question for the courts
		- Extrinsic evidence should not be considered in order to create an ambiguity in the agreement
		- Really should look first to what the parties wrote and then reach extrinsic evidence only when required to do so because of an identified ambiguity
	+ **Rules in Aid of Interpretation**
		- The statutory analogy
		- Purpose interpretation
		- Public interest
		- Maxims
	+ **UCC 1-303**
		- **(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:**
			* **(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and**
			* **(2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.**
		- **(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.**
		- **(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.**
		- **(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.**
		- **(e)Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:**
			* **express terms prevail over course of performance, course of dealing, and usage of trade;**
			* **course of performance prevails over course of dealing and usage of trade; and**
			* **course of dealing prevails over usage of trade.**
		- **(f)Subject to Section 2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.**
		- **(g)Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.**
	+ **In Commercial Context**
		- **Frigaliment v. BNS Int’l**
			* Defendant was too new to the business to know the vernacular
			* It is unnecessary to determine the issue here; the plaintiff has the burden of showing that “chicken” was used in the narrower rather than the broader sense
		- **Hurst v. Lake**
			* No reason to exclude evidence of custom and assign to the words their common meaning only, even though the instrument is non-ambiguous upon its face
			* Should include evidence of custom in the industry
		- **Nanakuli v. Shell**
			* Nanakuli said it was implied that price protection would be put in place
			* What has to be shown to avail use of trade extrinsic evidence is evidence of custom (UCC 1-303)
			* A person will be bound by a trade usage if he/she is a member of the trade at issue or is a person who knows or should know of the trade usage. A person should know of a trade usage if he/she has regular dealings with members of the specific trade. A person should also know of a trade usage if he/she is a member of another trade that has some dealings with the relevant trade (e.g., “farmers should know something of seed selling). Although Defendant did not deal in all asphaltic materials, it regularly dealt with Plaintiff, who was a major asphaltic paving contractor. Therefore, Defendant should have known of the practice of price protection in Plaintiff’s industry
		- **UCC 1-303 and 2-202**
			* **(See above)**
			* **(See above)**
	+ **Supplementing:**
		- **Course of Dealing**
		- **Usage of Trade**
			* From Nanakuli: A person will be bound by a trade usage if he/she is a member of the trade at issue or is a person who knows or should know of the trade usage. A person should know of a trade usage if he/she has regular dealings with members of the specific trade. A person should also know of a trade usage if he/she is a member of another trade that has some dealings with the relevant trade (e.g., “farmers should know something of seed selling). Although Defendant did not deal in all asphaltic materials, it regularly dealt with Plaintiff, who was a major asphaltic paving contractor. Therefore, Defendant should have known of the practice of price protection in Plaintiff’s industry
		- **Course of Performance**
	+ **Objective Interpretation and its limits**
		- It makes not the least difference whether a promisor intends that meaning which the law will impose upon his words
		- **Raffles v. Wichelhaus**
			* Since there were two ships of the same name that were leaving from Bombay around the same time, there is ambiguity and thus parol evidence should be allowed
		- **Oswald v. Allen**
			* No contract exists here
			* When any of the terms used to express an agreement is ambivalent, and the parties understand it in different ways, there cannot be a contract unless one of them should have been aware of the other’s understanding
			* Even though no mental assent is required, this case is an exception in which there is “no sensible basis for choosing between conflicting understandings; exchange of letters doesn’t satisfy statute of frauds
		- **Colfax Envelope v. Local No. 458-3M**
			* Colfax should have realized that the contract was unclear and that the union’s interpretation of it was plausible
				+ Had no right to accept the contract on the premise that it meant what he thought it meant
				+ Both parties took a gamble on the interpretation
			* A reasonable person in Colfax’s position would have realized that its interpretation of the term at issue might not coincide with that of the other party or of the tribunal to which a dispute over the meaning of the term would be submitted
				+ Arbitrator, not the court, should determine whether there was a meeting of the minds
		- **Gap-fillers, Warranties, and mandatory terms**
			* **Filling contractual gaps generally**
				+ Implication—if the court is persuaded that the parties shared a common expectation with respect to the omitted case, the court will give effect to that expectation, even though the parties did not reduce it to words
			* **Filling contractual gaps by statute**
				+ Terms that courts imply in the absence of agreement between the parties
			* **Gap filling with respect to product quality—implied warranties**
				+ Caveat emptor
				+ No minimum standard if silent
				+ Recently, however, the court supplies a default term with respect to the standards that a contacting party’s performance must fulfill, even when the parties’ agreement could easily be interpreted and enforced without such a term
				+ Such contract terms implied by law usually are referred to as implied warranties

Implied warranty of merchantability

Warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of the kinds

Implied warranty of fitness for a particular purpose

Entails a finding that the article is reasonably fit for the ordinary uses for which it was manufactured and need only be of “medium quality or goodness”

3 questions:

In what circumstances does article 2 make the warranty part of the contract?

What is the content of the warranty?

May the parties, if they so desire, conclude a contract that does not contain the warranty?

* + - **R2d 201**
			* **Whose meaning prevails**
				+ **Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning**
				+ **Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made**

**That party did not know of any different meaning attached by the other, and the other party knew the meaning attached by the first party; or**

**That party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party**

* + - * + **Except as stated in this section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent**
		- **Supplementing by Law**
			* **Warranties**
				+ **Good Faith Terms**

**Koken v. Black & Veatch (Implied Warranty of Merchantability)**

Question is whether the appellants have carried out their burden of producing evidence sufficient to support a finding that the blanket was “unfit” for this purpose

The question is not the subjective expectations of the particular user (They thought it would work) but the reasonable expectations of an ordinary user

The objective is the standard; no testimony here that the ordinary user reasonably expected a fire blanket to prevent the type of melting that occurred

Because defendants failed to produce evidence establishing the expectations of ordinary users beyond the subjective views of a single individual, summary judgment on the breach of warranty claim was properly granted.

**Lewis v. Mobil Oil (Implied Warranty of Fitness)**

Two requirements for an implied warranty of fitness:

That the seller have reason to know of the use for which the goods are purchased

Yes

That the buyer relies on the seller’s expertise in supplying the proper product

Yes

The damage was caused by a breach of warranty, the seller should not supply a product which is not so suited for the specific purpose, and there is no evidence in the record that the plaintiff’s system was unique or abnormal (the machine worked fine under the previous owner)

**SC Electric & Gas v. Combustion Engineering (Excluding Implied Warranties from the contract)**

Disclaimer must be conspicuous

Several documents were exchanged between SCEG and Combustion, discussing the warranties (SCEG wanted Combustion to adhere to SC warranty laws)

Disclaimer is not ambiguous; in plain language, the disclaimer excludes all warranties other than the express one year warranty and the warranty of title

Court considers the letters to decide whether the language of the disclaimer was unbargained for and unexpected—it was not

SCEG had bargained with Combustion about the warranty; the agreement was reviewed and agreed to by them;

Effective disclaimer was shown

* + - * **UCC 2-305—open price term**
				+ **The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if**

**Nothing is said as to price; or**

**The price is left to be agreed by the parties and they fail to agree; or**

**The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded**

* + - * + **A price to be fixed by the seller or by the buyer means a price for him to fix in good faith**
				+ **When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price**
				+ **Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account**
			* **UCC 2-308 (a)**
				+ **Unless otherwise agreed:**

**The place for delivery of goods is the seller’s place of business or if he has none his residence;**

* + - * **UCC 2-314-2-316**
				+ **Implied Warranty: merchantability; usage of trade**

**(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
(2) Goods to be merchantable must be at least such as**

 **(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promise or affirmations of fact made on the container or label if any.**

 **(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.**

* **Implied warranty: fitness for particular purpose**
	+ **Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that they buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose**
* **Exclusion or modification or warranties**
	+ **(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.o**
	+ **(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."**
	+ **(3) Notwithstanding subsection (2)**
		- **(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and**
		- **(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and**
		- **(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.**
	+ **(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).**
* **Public Policy**
* Two general categories
	+ Contracts that violate specific laws
		- Illegal contracts
		- Private agreement—like taking a hit out on someone
	+ No explicit prohibition against a particular act—statute unclear
		- Courts detect or derive policy from legislation related to the subject
* Promoted through contracts
	+ Government contracts
		- Schools, prison, security
			* Privatization
	+ **Illegal Contracts**
		- **Bovard v. American Horse Enterprises**
			* Burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state or injurious to the morals of its people
			* There is no positive law on which to premise a finding of public policy here
			* 3 factors for violating public policy
				+ Nature of the conduct
				+ Extent of public harm
				+ Moral quality of the conduct with regards to the standards of the community
			* There is no special public interest in the enforcement of this contract
			* It is immaterial that the business conducted by AHE was not expressly prohibited by law when Bovard and Ralph made their agreement since both parties knew that the corporation’s products would be used primarily for purposes which were expressly illegal
			* “Clean hands”
		- **XLO Concrete v. Rivergate**
			* A contract which is legal on its face and does not call for unlawful conduct in its performance is not voidable simply because it resulted from an antitrust conspiracy
				+ Is the contract so integrally related to the agreement that its enforcement would result in compelling performance of the precise conduct made unlawful by the antitrust laws?

This court cannot answer—requires further development at trial

* + - * + Equities of the parties should be examined
			* Public policy in favor of frustrating or discouraging unlawful schemes such as the Club must not be deprecated—danger is reduced where statutory remedies exist
			* **3 types of illegality:**
			* **Inducing Official Action**
				+ Influence peddling
				+ Official corruption
			* **Commercial Bribery**
				+ Contract induced by bribery
				+ Seller bribes buyer to purchase goods, buyer agrees then refuses to pay on grounds of public policy

Buyer retains the goods without paying for them

* + - * **Licensing Laws**
				+ One who is required by law to procure a license to conduct any trade, calling, or profession may not recover for services rendered or property sold without first obtaining such license

Sirkin

Goes too far—when the purpose of a licensing requirement is ascertained to be raising public revenue and not the protection of the public’s welfare, a claimant’s want of a license is generally not a bar

Trade-Winds

* + - **R2d 178**
			* **1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.**
			* **(2) In weighing the interest in the enforcement of a term, account is taken of**
				+ **(a) the parties' justified expectations,**
				+ **(b) any forfeiture that would result if enforcement were denied, and**
				+ **(c) any special public interest in the enforcement of the particular term.**
			* **(3) In weighing a public policy against enforcement of a term, account is taken of**
				+ **(a) the strength of that policy as manifested by legislation or judicial decisions,**
				+ **(b) the likelihood that a refusal to enforce the term will further that policy,**
				+ **(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and**
				+ **(d) the directness of the connection between that misconduct and the term.**
	+ **Judicially Created Public Policy**
		- **Hopper v. All Pet**
			* Restraint is reasonable only if it is no greater than required for the protection of the employer; does not impose undue hardship on the employee; and is not injurious to the public
			* The proven loss of 187 of All Pet’s clients to Hopper’s new practice sufficiently demonstrated actual harm from unfair competition
		- **Termination of at-will employees**
			* **Sheets v. Teddy’s Frosted Foods**
				+ Employees don’t really have the bargaining power to command employment contracts for a definite term and are entitled to a modicum of judicial protection where their conduct as good citizens is punished by their employers
				+ There was a statute, the plaintiff’s position put him in a spot where he either had to violate the statute or tell his employer about the discrepancies
				+ When there is a relevant state statute we should not ignore the statement of public policy that it represents; it is enough to decide that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment
		- **Balla v. Gambro**
			* In-house counsel cannot sue for retaliatory firing
			* In house counsel do not have a choice of whether to follow their ethical obligations as attorneys; extending retaliatory discharge to in-house attorneys would have an undesirable effect on the attorney client relationship that exists between these employers and their in house counsel
		- **Family Relations**
			* **Simeone v. Simeone**
				+ Women are equals now

And so the terms of the pre-nup are binding without regard to whether the terms were fully understood by appellant

* + - * + No merit in the argument that the agreement should be void because she did not consult with independent legal counsel
				+ There was no duress because she’d known about it beforehand

During the time the agreement was being discussed she had plenty of time to discuss it with counsel

* + - * **In re Baby M**
				+ Selling Babies is bad, mmm’kay?
				+ Surrogacy contracts not okay