

CONTRACTS, FALL 2006 – OUTLINE

RELEVANT SECTIONS OF THE UCC

- § 1-101 *Title – General Provisions*
- § 1-102 Application of Article 1 when other articles apply
- § 1-103 *Purpose of UCC*
- § 1-106 *Pluralization and gender*
- § 1-201 *Definitions*
 - (3) **Agreement**
 - (12) **Contract**
 - (20) **Good faith**
 - (27) **Person**
- § 1-302 *Variation by agreement: Good faith, diligence, reasonableness, and care* cannot be disclaimed. Parties (reasonably) determine the standards. Other provisions may be varied by agreement.
- § 1-303
 - (a) **course of performance** – sequence of future conduct.
 - (b) **course of dealing** – sequence of past conduct.
 - (c) **usage of trade** – standard relevant practice.
 - (d) *the above are relevant in ascertaining the intent of the parties when they made their agreement.*
 - (e) whenever possible, (a)-(c) and the express terms of the agreement will be construed as consistent with each other. If not possible:
 - (1) express terms prevail over CoP, CoD, & UoT.
 - (2) course of performance prevails over CoD & UoT.
 - (3) course of dealing prevails over UoT.
 - (f) CoP shows a waiver/mod of any express term inconsistent with CoP.
- § 1-304 *Obligation of good faith*
- § 1-305 *Remedies*
 - (a) Remedies are to be liberally administered, generally seeking a return to the status quo for the aggrieved party.

- § 2-101 *Title - Sales*
- § 2-102 Article applies to transactions in goods.
- § 2-104 *Definitions*
 - (1) **Merchant**
 - (3) **Between merchants**
- § 2-105
 - (1) **goods** – anything moveable at time of identification to contract, including unborn young and growing crops.
 - (2) goods must be **existing and identified**. Any goods not existing or identified are *future goods*.
 - (3) sales in part interests of goods is possible.

- (4) a *specified share* of a bulk of goods is sufficiently identified even if the *bulk is not determined*.
- (5) **lot** – parcel or single article that is subject of a sale.
- § 2-106 *Definitions*
 - (1) For this section, **contract** and **agreement** relate to the present or future sale of goods. **Sale** consists in the passing of title.
- § 2-204 *Formation*
 - (1) A contract for sale of goods may be made in *any manner sufficient to show agreement*.
 - (2) An agreement sufficient to constitute a contract may have an *undetermined time of formation*.
 - (3) Even if one or more terms are left open, the contract does not fail for indefiniteness if *the parties have intended to contract and there is a reasonably certain basis for giving an appropriate remedy*.
 - (4)
 - (a) A contract may be formed by the *interaction of electronic agents of the parties*.
 - (b) A contract may be formed by the *interaction of an electronic agent and an individual*.
- § 2-206 Offer and Acceptance
 - (1) *Unless otherwise unambiguously indicated by the language or circumstances:*
 - (a) an offer invites acceptance *in any manner and by any medium reasonable in the circumstances*.
 - (2) When one may accept by performance, the offeror may treat the offer as having lapsed if he is not notified of acceptance within a reasonable amount of time.
- § 2-206 *revised*
 - (1) ``
 - (a) ``
 - (2) ``
- § 2-308 *Absence of specified place for delivery*
- § 2-309 *Absence of specific time provisions*
 - (1) **reasonable time**

CASE LAW

- Sources of Contract Law
 - Common Law
 - *Lucy v. Zehmer*
 - Δ Zehmer drafted and signed a contract for the sale of his farm to π Lucy. The court held that the contract was enforceable, even though Δ said that he was kidding when he made the contract. **The court uses an objective standard when determining the intent of the parties to a contract.**
- Contract Formation – Establishing Promissory Liability

- Offer
 - *Sullivan v. O'Connor*
 - π Sullivan was a patient of Δ O'Connor. O'Connor contracted to perform cosmetic surgery on Sullivan's nose over the course of two operations; after three operations, π 's nose was worse than it had been before. The court ruled that π was entitled to recover reliance damages. **In a breach of contract involving doctor and patient, an award of monetary damages may include OOP expenses, compensation for worsening of condition, pain and suffering, and costs associated with procedures beyond what was originally in the contract.**
 - *Restitution damages.*
 - Non-breaching party recovers benefit conferred upon breaching party by the contract.
 - *Policy.* Prevent a windfall to the nonbreaching party – no unjust enrichment.
 - *Reliance damages.*
 - Restores the non-breaching party to the position held prior to the contract.
 - Compensates non-breaching party for losses suffered as a result of relying on the contract.
 - *Policy.* Detrimental reliance on a contract should allow the non-breaching party to be made whole to whatever extent possible.
 - *Expectancy damages.*
 - Puts the non-breaching party in the position he would have been in if the contract had been fulfilled.
 - *Policy.* Law is interested in giving someone the benefit of the bargain but not letting them get a windfall.
 - *Leonard v. Pepsico*
 - Δ Pepsico produced a television advertisement that appeared to offer a Harrier Jet for redemption as a prize, which π Leonard attempted to claim. The court ruled that the TV ad was not an offer, and Δ was under no obligation to accept π 's offer of payment. **An offer only becomes a binding contract when acceptance is tendered.**
 - *Lonargan v. Scolnick*
 - Δ offered a property for sale; π expressed interest, and initial negotiations were conducted, though Δ sold it to someone else. π sued for breach of contract; the court ruled

that there was no contract. *See Restatement §25. A meeting of the minds is required for the formation of a contract.*

- *Fairmount Glass Works v. Grunden-Martin Woodenware Co.*
 - π sought a price quote from Δ . Δ responded with an offer “for immediate acceptance,” to which π promptly replied, only to have Δ say that the order could not be completed. Court ruled that a contract had been formed. **The presence of sufficiently definite terms in an offer combined with an emphasis on prompt acceptance creates a binding contract if the offer is accepted promptly.**
- Acceptance
 - *State v. Malm*
 - π Malm furnished information to Δ State which led to a criminal conviction. Δ subsequently issued an offer of reward for such information, which π attempted to collect. Court ruled that π could not collect because the offer was made subsequent to performance. **In order to claim a reward as the offeree of a contract, performance must be completed after the offer is made.**
 - *Industrial America, Inc. v. Fulton Industries, Inc.*
 - π specialized in mergers, and orchestrated a merge that Δ had been seeking. π sought payment; Δ declined, saying the offer had not been accepted; court ruled for π . **Performance of a requested service in a unilateral contract constitutes acceptance unless the offeree manifests clear intent not to accept.**
 - *Carlill v. Carbolic Smoke Ball Co.*
 - Δ placed an ad in a paper offering a reward with language specifically crafted to show seriousness. π accepted offer; Δ refused to pay on the grounds that there had been no notification of acceptance. Court ruled that acceptance by performance was sufficient means of accepting offer. **Public offers of unilateral contracts require no notification of acceptance; acceptance by performance is sufficient.**
 - *Gem Broadcasting, Inc. v. Minker*
 - π performed services for Δ and had drawn up a contract that Δ declined to sign. π attempted to collect payment, but Δ said there was no payment due. Court ruled that there was a contract and payment was due, despite not having a fixed payment schedule. **A contract implied in fact is based on an unwritten agreement and promissory conduct by both parties and is binding.**
 - *Hobbs v. Massasoit Whip Co.*
 - π sent Δ eel skins, as π had done before with payment from Δ , but in this case π never heard back, nor did Δ return the

skins. Court ruled that π could recover. **A recipient of unordered merchandise does not need to buy the merchandise, but a prior course of dealing established by the parties creates an obligation for the recipient to respond.**

- *ProCD, Inc. v. Zeidenberg*

- Δ bought software manufactured by π and did not follow the enclosed license agreement. Δ claimed the license agreement was not binding because it was not visible at the time of purchase. Court ruled that the agreement was binding because Δ had had an opportunity to return the software and thereby reject the license terms before installing and using the software. **Shrinkwrap licenses are enforceable contracts.**

- Revocation of offer

- *Petterson v. Pattberg*

- Δ offered π a unilateral contract. When π made it clear that he was ready, willing and able to perform, Δ revoked the offer. Court held that Δ had the power to revoke. **The offeror of a unilateral contract retains the power to revoke until the acceptance has been tendered.**

- *State v. Wheeler*

- Δ sought specific performance of an offer of π . Court denied Δ 's motion. **Only a detrimental reliance upon an offer of a unilateral contract constitutes acceptance.**

- *Marchiondo v. Scheck*

- Δ made an offer of a unilateral contract, with partial performance by π . Δ revoked the offer; π filed suit for breach. Court found that partial performance created a nonrevocable contract. **In an offer for a unilateral contract, partial performance creates a binding "option contract" wherein the offeror is liable for potential damages in the event of a breach.**

- *Cantu v. Central Education Agency*

- π was hired as a teacher by Δ . π hand delivered note of resignation; Δ mailed acceptance of resignation; π later hand delivered another letter withdrawing resignation; Δ did not accept the withdrawal. Court ruled that Δ 's acceptance of resignation was final. **Mailbox rule: properly addressed acceptance of an offer (in this case, acceptance of offer to resign) is effective when deposited in the mail, unless otherwise agreed or provided by law.**

- *Fujimoto v. Rio Grande Pickle Co.*

- π threatened to quit his job if Δ did not increase compensation. Δ drew up a contract for increased compensation, signed it, and gave it to π , who signed but

did not return it. π later sued Δ for not following the contract. Court found for π . **If an offeror does not specify a mode of acceptance, the law only requires that there be some clear and unmistakable expression of offeree's intent to accept.**

- Indefiniteness

- *Haines v. City of New York*

- Δ New York agreed to provide a sewage system to be maintained for an unspecified duration. π said that the duration was indefinite; Δ said it was terminable at will. Court ruled that the duration was of a "reasonable length," i.e., until clean water was no longer needed or desired by the city. **In the absence of express terms fixing duration, courts inquire into intent of the parties and supply a duration if one may be fairly and reasonably fixed by surrounding circumstances.**

- *Wagenseller v. Scottsdale Memorial Hospital*

- π was employed by Δ and terminated against her will. Court found that "bad cause" is an insufficient reason for termination of an at-will employment contract. **Any of three exceptions to the at-will doctrine may give rise to a cause of action for wrongful termination:**

- *Public policy exception.*

- If an employee is terminated as a result of refusal to participate in an act that would violate public policy. Clear definition of the public policy being violated is essential to a successful suit.

- *Personnel Policy Manual exception.*

- If an employer's PPM explicitly outlines disciplinary procedures, those procedures become a binding part of the employee contract. Exceptions to the disciplinary policy do not destroy the general policy; once a policy is articulated, an employer may not treat it as illusory.

- *"Good faith and fair dealing" exception.*

- GF&FD protects parties to a contract from injury that would prevent the other party from receiving the benefits of the contract. GF&FD does not protect at-will employees from no-cause termination because tenure is not inherent in an at-will employment relationship. GF&FD protects at-will employees only from termination for "bad cause," giving rise to expectancy and

reliance damages only insofar as the can reasonably be determined.

- E-Commerce
 - *Specht v. Netscape Communications Corp.*
 - π downloaded and installed software authored by Δ with an attached license agreement. π had no notice of the license agreement, though Δ claimed it was binding. Court found for π . **License agreements, like contracts, require a mutual manifestation of assent for formation.**
- Consideration
 - *Hamer v. Sidway* (p. 188)
 - **The relinquishment of a legal right is valid consideration.**
 - *Kirksey v. Kirksey* (p. 191)
 - **A conditional gift is not consideration.** (Consider relationships btw π and Δ)
 - *Gottlieb v. Tropicana Hotel and Casino*
 - **Only minimal consideration necessary – “a rose, a hawk, or a peppercorn” – so long as it is what the promisor asked for and is not illegal.**
 - *Feinberg v. Pfeiffer* (TW)
 - **Reliance does not constitute consideration.** (cf. promissory estoppel)
 - *Fiege v. Boehm* (p. 206)
 - **One must have an honest and reasonable belief that the claim/right being surrendered in consideration is valid—determined by the surrounding circumstances—though this good faith claim need not *actually* be valid.**
 - *Angel v. Murray* (p. 216)
 - Pre-existing duty rule: consideration =! agreeing to do something already legally bound to do
 - **Courts will waive the requirement of consideration in modifications if: (1) incomplete performance on both sides. (2) unanticipated circumstances. (3) enforcement of modification would be fair and equitable.**
- Accord and Satisfaction
 - *Kibler v. Frank L. Garrett* (p. 229)
 - **When a dispute over payment follows full performance by one party, a compromise is sufficient, but not an inadvertent compromise; such a counteroffer requires offer, acceptance, and consideration.**
 - *Wood v. Lucy* (p. 252)
 - **A promise to make a good-faith effort to fulfil one’s contractual obligations is fairly to be implied.**
 - *Mezzanotte v. Freeland* (p. 253)

- **When a condition of one party's performance is dependent on a third party, the court will use an objective standard to determine whether that condition was met.**
 - *Texas Gas Utilities v. S.A. Barrett* (p. 257)
 - **A clear intention to contract will prevent a contract from being voided for lack of mutuality based on apparently overbroad exculpatory language.**
- Promissory Estoppel
 - *Feinberg v. Pfeiffer* (p. 292)
 - See Rest. § 90. Promissory estoppel is rarely invoked despite its doctrinal power.
 - *Salsbury v. Northwestern Bell* (p. 301)
 - **Charitable contributions are enforceable.** (Policy: strong public support of enforcement of charitable subscriptions; many public-sector services/benefits rely on private charitable contributions)
 - *Deli v. University of Minnesota* (p. 315)
 - **Emotional damages are not recoverable in a promissory estoppel action absent an independent tort claim.**
- Statute of Frauds
 - "Gatekeeper doctrine" – developed at a time when evidentiary rules were crudely fashioned
 - Writing is particularly effective recordkeeping
 - Guards against fallibility of memory
 - Prevents perjury
 - "Within the statute" – SoF applies – K must be written to be enforceable
 - "Without the statute" – SoF does not apply – unwritten K is enforceable
 - **Contracts impossible to be performed within a year of contract formation must be written to be enforceable.**
 - *Ehrlich v. Diggs* (p. 845)
 - Performance is actual performance or termination (if it is terminable at will).
 - A contract involving ongoing obligations is not terminable at will.
 - **A contract must be in writing unless the Δ can discharge all contractual obligations within a year.**
 - *Crabtree v. Arden* (p. 852)
 - **The basic document must contain all essential terms of the contract, but need not be a formally written contract; the record need only contain evidence of the disputed term.**

- Different approaches to constructive documentary evidence of a contract
 - 1. Requirement of reference from signed to unsigned documents – aids in authenticity of unsigned documents; assuages worries about perjury
 - 2. Sufficient connection shown by reference to same subject matter or transaction; oral testimony can be used to draw the connection – stronger protection against fraudulent alterations of what was originally mutually intended to be binding
- *McIntosh v. Murphy* (p. 865)
 - **Promissory estoppel may bar the use of the Statute of Frauds as a defense if Δ has made a promise that foreseeably prompted reasonable detrimental reliance by π.**
- Parol Evidence Rule
 - UCC § 2-202
 - Terminology
 - **Partial integration** – some but not all terms final or included; **consistent additional terms OK**
 - **Full integration** – complete and exclusive expression of terms; **no additional terms OK**
 - **Contradictory terms are never admissible.**
 - *Val-Ford Realty v. J.Z.'s Toy World* (p. 337)
 - **Parol evidence can be used to show that an apparent contract is not actually a contract.**
 - *Alaska Northern v. Alyeska Pipeline* (TW)
 - Determining whether terms are admissible in a partially integrated contract
 - **Hunt test – to be inconsistent, a term considered for admission as parol evidence must contradict or negate a term of the writing.**
 - **Snyder test – inconsistency means “the absence of reasonable harmony in terms of the language and respective obligations of the parties.”**
 - Contradictions can be argued as modifications.
- Interpretation
 - *Frigalment* (TW)
 - Determining the meaning of a term
 - 1. Dictionary
 - 2. Use within the contract context
 - 3. Language used in negotiations (parol evidence)
 - 4. Usage of trade (must be proved that the responsible party knew or should have known of a given meaning)

- 5. Other regulations, statutes, etc.
 - 6. Conduct of the parties
- *Raffles v. Wichelhaus* (p. 353)
 - **If a party is alleging misrepresentation or fraud at the time of contract formation, parol evidence is admissible.**
- Conditions
 - *Generally.*
 - Problems of conditions must be related to the subject matter of the conditions.
 - If the problem is known at the time of contracting, a conditions issue cannot be used to get out of the contract.
 - Putting control of a condition entirely within the will of one party is essentially an illusory promise.
 - *Inman* (p. 442)
 - **Express conditions should be literally enforced (exactly performed).**
 - **Courts should not intervene when a promise is fairly and willingly made.**
 - *Dyer* (p. 461)
 - The clear intention of the parties controls.
 - Ambiguous contracts should be construed against the drafter.
 - Conditions precedent are generally disfavored. (?)
 - Conditions precedent on payment (e.g., subcontractor not to be paid until 5 days after contractor gets paid) are generally interpreted to establish payment *within a reasonable time*, not that payment is completely excused.
 - *Alternative statement. In most subcontract agreements, payment by the owner to the contractor ordinarily is not intended to be a condition precedent to the contractor's duty to pay the subcontractor.*
 - *J.J. Shane, Inc. v. Aetna Cas. & Sur. Co.*
 - **An express statement of intent to condition payment to a subcontractor on payment by the owner to the contractor will be held valid.**
- Constructive Conditions
 - Incomplete performance by one party allows the other party to sue for breach; upon suit, the other party's obligation to perform is discharged.
 - *Stewart*
 - **Express conditions** (written in the contract, or spoken; "I will do this if you will do that") **must be exactly performed.**

- **Constructive conditions, implied by the court** (when promises are written apparently independently), **must be substantially performed.**
 - **Obligation to pay does not arise until substantial performance has been completed.**
 - **Only full performance brings an obligation to pay fully.**
 - **Absent substantial performance, no obligation to pay; can sue for breach.**
- *Monroe Street v. Carpenter* (p. 478)
 - **When two conditions must be concurrently performed, one party may not hold the other in breach without a tender** (showing of being ready, willing and able to pay) **of its own performance.** (esp. escrow transactions)
- *Jacobs & Youngs v. Kent* (p. 480)
 - **The measure of damages when a contractor inadvertently fails to comply with exact contract specifications, when such noncompliance does not materially frustrate the purpose of the contract, is not the cost of replacement, but the difference in value between what was received and what was contracted.**
- *Grun Roofing*
 - Determining substantial performance vs. material breach
 - Was there a deviation from the general plan?
 - Case may turn on the characterization of the general plan.
 - **Deviations from the general plan of a contract are considered material breaches, which will excuse payment of the owner.**
- *K&G Construction*
 - Contracts with set values and periodic payments have mutually dependent promises of payment and labor.
 - **A contractor's failure to pay a subcontractor will be excused if the cost incurred by the sub's breach is greater than the debt that the contractor would owe.**
- Waiver
 - *Clark v. West* (TW)
 - Waiver is the voluntary relinquishment of a right.
 - Distinguishing a condition from consideration
 - **Would the purpose of the contract be frustrated by failure to meet the condition precedent?**
 - **A waiver of a condition precedent requires no new contract to be formed.** The consideration for a contract cannot be waived and would require reformation.
- Conditions of Satisfaction
 - *Western Hills* (p. 575)

- Must make a determination of what kind of satisfaction is required
- **Utilitarian satisfaction implies an objective standard; the court will find the meaning of “reasonably satisfactory” as it relates to the substance of the condition.**
- **Taste or fancy is only reviewable to see if the satisfaction was determined in good faith by the party.**
- Breach by Repudiation
 - *Hochster* (p. 592)
 - **When a contract is breached by repudiation, the other party may either commence an immediate action for the breach or wait until the performance had been requested.**
 - *Policy.* The non-breaching party should not have to “just sit and wait” and “run up the damages” – NBP should be able to “get on with it” without necessarily reducing damages from the breach.
- Compensatory Damages
 - *Hadley* (p. 664)
 - Consequential damages (future, uncertain damages) must be reasonable foreseeable and flow proximately from the breach; any special circumstances must be made known to both parties
 - Also: Actual damages (clearly caused by breach; e.g., lower payment than expected); incidental damages (arise reasonably in the course of mitigation [e.g., costs of replacement services])
 - *Policy.* Notice of special circumstances is required because potential liability affects interest in the contract: price charge, terms, indemnity clauses, insurance.