

Contracts outline essay



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Nd Contracts Outline Professor Murray 1. Contract Remedies (Chapter One)

What is a contract? – promise or set of promises, for breach of which the law gives a remedy or the performance of which the law recognizes as a duty.

Types of contracts- a. express: formed by language, oral or written b.

implied: formed by manifestations of assent other than oral or written

language; by conduct. c. quasi: not contracts at all, construed by courts to

avoid unjust enrichment, by permitting plaintiff to bring an action in

restitution to recover the amount of the benefit conferred on defendant.

Critical Elements of a Contract: . promise- undertaking or commitment that

something shall or shall not be done b.

exchange-something the law recognizes as value is exchanged c.

enforcement-the law sanctions such promissory exchanges by putting

coercive machinery behind them. d. mutual assent “ meeting of the minds”

2.

The Agreement Process (Chapter Two) INTENTION TO BE LEGALLY BOUND

Mutual Assent: an expression of agreement or among the parties Agreement:

a manifestation of mutual assent on the part of 2 or more Bargain: an

agreement to exchange promises or to exchange a promise for a

performance or the exchange performancesA. Objective Theory (when it is

ambiguous as to whether a contract is formed.) Courts do not care what was

the intent of the parties. (can not possibly prove what we were thinking-not

objective) Therefore courts look at objective evidence. 1. What would a

reasonable person think? We have to use because we cannot use anything

else.

2. Court will re-create the scene. (CSI-Pittsburgh: Contracts Scene Investigation) RULE: An act creates a power of acceptance and is therefore an offer when it satisfies these elements- (1) An expression of will or intention 2) An act that leads to the offeree reasonably to conclude that a power to create a contract is conferred. (3) This applies to the content of the power as well as to the fact of its existence.

RULE: An agreement made in jest is not an offer when a reasonable person would conclude that it is not. RULE: A basic rule of contracts holds that whether an offer has been made depends on the objective reasonableness of the alleged offeree's belief that the advertisement or solicitation was intended as an offer B. Interpreting Statements to Determine Legal Consequences Should a party who makes statements that appear to be serious always be understood as intending legal consequence? DOCTORS RULE: If physicians make a promise, it should be interpreted by a reasonable person as " I will use my best professional effort to ascertain a cure, but can not promise a 100% cure. " DOMESTICS RULE: Parties who make agreements, even with consideration, and do so under circumstances where they do not intend to be legally bound and never intended to be sued upon are outside the realm of contracts altogether and therefore not legally enforceable. C.

Express Statements Concerning Legal Consequences The typical letter of intent will merely express the intention of the parties in a continuing negotiation and will not constitute a binding contract. However, the fact that the parties have signed a document captioned ' letter of intent' will not preclude the finding of a contract between them if they manifest their

intention to be bound to such contract. Letters of Intent may not bind the parties into reaching a final agreement, but does bind the parties to try to make a deal in good faith. RULE: The finding of good faith is treated as a finding of fact and is reviewed under clear error. D. Contemplation of Final Writing When looking at a final writing between two parties, you have to look at objective evidence.

Not conclusive but goes to a manifestation of intention. RULE: A question of intention of the parties is a question of fact. Questions to ask.... 1. Was the 'agreement in principle' intended to be a binding agreement BEFORE all the implementing details were effectuated? E.

Agreements to Agree (missing terms) RULE: If the court can legitimately fill in missing term(s) then the agreement will be enforceable if these two elements are met... 1. intention to be legally bound AND 2. courts have sufficient basis to afford remedy UCC will use 'gap fillers' §2-305- can insert price o§2-308- absence of delivery time o§2-307- shipment terms ANATOMY- OFFER & ACCEPTANCE A. Preliminary Negotiations v.

Offers A contract includes not only what the parties said but also what is necessarily to be implied from what they said. Any conduct of one party, from which the other may reasonably draw the inference of a promise, is effective in law as such. RULE: When deciding if an offer has been made you look at: 1. Language used (words of promise, undertaking, or commitment) 2.

Determination of the party(ies) to whom the purported offer has been addressed (less like an offer with indefinite group). . The definiteness of the

proposal itself RULE: If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance; it is merely an invitation to trade. 1.

They ask for offers which the proposer has a right to accept or reject as he pleases. ADVERTISEMENTS Generally ads are not offers but merely an invitation to offers RULE: Advertisements are usually not an offer but it can be when two elements are satisfied... a. A definite offeree b. Promise to offeree RULE: To have a binding contract, there must be both an offer and acceptance. One party, the offeror makes an offer and the party to whom the offer is made, the offeree accepts. ASK: Was there a commitment manifested to do something in the future? Is that promise sufficiently definite? THEN you have created a power of acceptance.

- A critical factor will be if there was any commitment. (If there is NO commitment to do something in the future; just an announcement) CORBINS EFFECT OF THE OFFER The offeror is the creator of the power and at the time of its creation, he has full control over its existence and its terms. The offeror also has the power of determining what constitutes acceptance. After he creates the power, the legal consequences are out of his hands, and he may be brought into consequences that he did not intend, but which he consented, and therefore are contractual. B.

Identifying the Offeror & Offeree By identifying who has the power of acceptance you can decipher who is the offeree and who is the offeror.

Offeree has power of acceptance. RULE: When an agreement in a bilateral

contract is formed and takes the form of a written instrument, the acceptance is only valid when it has been signed and delivered unless there was clear intention that conversations prior were meant to be binding.

MIRROR RULE: In a bilateral contract, it is essential that the facts of acceptance be communicated to the offeror. Acceptance has to mirror the offer (terms).

C. Duration of Offers MASTER OF OFFER RULE: As the master of the offer, the offeror may place any time restriction upon the power of acceptance he chooses and upon expiration of that power of acceptance, it terminates.

RULE: When an offeror does not specify a time for acceptance, the offer should be open for a reasonable time. 1. Dependant on the circumstances which are matters of fact; to be determined by a jury. 2.

Matter of law when the time taken is so clearly reasonable or unreasonable as to present no doubt. **RULE:** An acceptance must come to the knowledge of the party to whom they are addressed before they are given legal weight and when they are, a valid contract is formed only when the acceptance is communicated within the specified time limit. 1. YOU need to receive it to be an OFFEREE. 2.

If the offeror does not put on date- Court is going to assume he has from the time he became an offeree (** when he received offer) 3. Reasonableness of the time an offeree takes to accept an offer is measured from the perspective of the offeree. 4. UCC 2-309: Absence of Specific Time Provisions; Notice of Termination: (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. (2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party. CISG: [contracts for international sale of goods]: period of time for acceptance begins to run the moment the telegram is handed in for dispatch or from the dates shown on the letter.

TERMINATION OF POWER OF ACCEPTANCE A. Rejection RULE: An offer is extinguished upon rejection. 1. You can respond without completely rejecting. You want to write and not reject offer so you do not lose power of acceptance; “ we would like to continue to consider your offer” 2.

Offeror can state the offer remains open ‘ regardless of any statement of rejection;’ in cases like this the rejection does not mean the offer is extinguished. The master of the offer [offeror] can include any stipulations he/she likes. 3. Just because the word “ reject” is used doesn’t mean the offer is extinguished. If offeree says something like “ I’m rejecting your offer for the time being, but I will reconsider it later,” the offer [in most cases] will remain open for acceptance.

B. Mailbox Rule/Revocations/Acceptances RULE: A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards. 1. An offer is not a contract to keep an offer open for a certain period of time. MAILBOX RULE: An acceptance is effective when it is mailed.

The risk of transmission falls on the offeror b/c only the offeror could have controlled that risk. 1. Master of the offer should take and control risk of

transmission. He could have said he had to receive it to be effective, set a specific date, required a phone call, etc.

2. Mailbox rule gone if you 1st put letter of rejection in box. Going to be up to which one arrives 1st. 3. You cannot have benefit of mailbox rule and not disadvantages. 4.

Mailbox rule cannot be overtaken by a faster form of communication, once acceptance is mailed, it cannot be rejected by phone/fax, unless that phone/fax caused the offeror to make other considerations. If you put your acceptance mail in the mailbox, then call to reject, and the offeror contracts with someone else (based on your rejection phone call), the original offer will be considered as rejected. * CISG [contracts for the international sale of goods]: rejects this law; required acceptance to actually reach the offeror; offeree must be able to prove that the acceptance reached the offeror within the controlling time frame. C. Indirect Revocation What is the criteria for a third person who tells you that an offer has been revoked? ? Two elements for a third party revocation -person must be reliable -information must be correct
RULE: A offeror can terminate the power of acceptance by showing an expressed lack of 'meeting of the minds' and does not have to actually and expressly retract an offer.

D. Counter Offer The power of acceptance is terminated if the acceptance is not definite and unequivocal and it is not enough that the words of a reply justify a probable inference of intent. MIRROR IMAGE RULE: A response that varies the terms of the offer cannot be an acceptance. If it is not an acceptance, then the only common law category left is a counter offer.

1. Can make requests and suggestions but have to be careful and very clear that you ARE accepting offer. Cannot start adding new terms. You have power of acceptance for that offer, not some other offer. A conditional acceptance is a counteroffer; There is no such thing as a conditional acceptance.

Conditional Acceptance = Counteroffer E. Death When an offeror dies, he in effect, revokes his offer or causes it to lapse and there is a termination of the power of acceptance for the offeree doesn't know. 1. Can't have a meeting of the minds when you are dead. a. DOES NOT revoke irrevocable offers [such as option contracts] MAKING OFFERS IRREVOCABLE Five ways to make an offer irrevocable 1.

Option Contract . Firm Offer (UCC 2-205) 3. Promissory Estoppel 4. Section 45 of Restatement; Part Performance 5.

Statutes Usually offers are revocable! Do not think of broadly! A. Option Contracts Not broad, usually offers are revocable. a. Difference between option contract and right of first refusal Right of first refusal is conditioned upon another person making an offer and it is dormant until a condition occurs and then the right is activated. When that happens then your right wakes up and you have right of first refusal [such as a lessee having the first option to buy a place when offered for sale]What is the consideration? -You pay rent and the consideration is whatever you are paying the rent.

You're getting two things for your rental. Two promises for your consideration (rent + right of first refusal) b. Cannot breach an options contract Offeree retains the power of acceptance throughout the time limit

on the irrevocable offer. Option Contracts are separate contracts for the purpose of making the offers irrevocable. It not only creates a duty not to revoke , but also deprives him of the power to revoke the main offer ? A rejection, counteroffer, revocation, or death will not discharge an option contract.

* If the optioner were to justifiably rely upon a rejection by the optionee, the option contract might be discharged. [optionee must be excruciatingly clear in explaining that he has no intention/ability to exercise his option] ? Mailbox rule does not apply to option contracts ? If there is no time specified for the performance of the act, then the law implies that it must be done within a reasonable time which depends on the circumstances [can include time stipulations, such as “ you will have 30 days to respond”] ? Bid bonds: special types of contracts formed when subcontractors submit bids to general contractors, making them bound to the bid they gave due to general contractor’s reliance on that bid when submitting his own overall bid. Subcontractor issues bid in HOPE of the general contractor being awarded the job. B. Firm Offers a.

UCC §2-205 Remember only applies to sale of goods. (Merchants) Written offers assuring irrevocability are firm offers, No actual reliance is needed to be shown. Requires more than a mere statement of duration, but an assurance that it will be held open during the time stated or a reasonable time (no more than 3 months). Requires that any such form be signed separately so a party does not inadvertently agree to this; situations where a party is using another party’s pre-printed forms, etc. C. Promissory Estoppel A device that will make the promise enforceable if the promise justifiably

suffers a detriment by changing his position in reliance on the promise where the promisor should reasonably have expected his promise to induce such reliance.

? If an offeree can prove they actually relied or acted on the offer, then the offer may become irrevocable through reliance. Must be shown that: 1. there was a clear offer . offeree does rely 3.

offeree suffers a detriment When you have an offer that is made to a party and you know even before that offer can be accepted that a person is going to rely on that offer, then the offer is irrevocable. Reliance has to be real. ***

General/Sub-Contractor situations D. Part Performance-ALL ARE LIES

Creation of option contract fiction; cannot revoke after part performance b/c it would be unfair 1.

As soon as you start to perform there is a contract, however, the duty to pay or do what your supposed to do, does not need to be done until it is complete. (Restatement 45) 2. Going to pretend there is an option contract (Restatement 2nd 45) 3. ' Bi-lateral theory (also a lie) The part performance is a promise to complete the duty and contract is formed. Side note...

Unilateral v.

Bilateral Contracts Bilateral Contract: where parties exchange promises to form a contract b/c there are two promisors and two promises with the formation of the contract occurring at the moment the promises are exchanged, assuming that other basic requirements are met. Unilateral Contract: Quite Rare; Only one promisor and one promise. One right and one duty. 1.

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where the offeror says you can only accept doing an act 2. here it is assumed that the offeror only wants an act example: rewards cases NATURE OF ACCEPTANCE A. Knowledge and Motivation RULE: A person must have knowledge of an offer in order to accept it. ? If an offer is made that can only be accepted by doing an act, and you knew about the offer but you did the act for reasons other than the offer, then you are still accepting the offer. [Such as knowing about a reward for catching a fish, but going fishing merely because you love to fish, and you wind up catching the fish.

You're entitled to the award.] ? Reward offers are contract offers; can only be accepted if you knew about it. *** Mutual assent ? Even if you have a remote motivation, even if it is not your primary motivation, you still plan to accept. REBUTTABLE PRESUMPTION TO ACCEPT: Unless there is some evidence or external manifestation not to perform, then it is presumed that you are accepting the offer, if you knew about it and you did the act.

B. Requirement of Volition The acceptance must be done volitionally. The only way you can accept the offer is by doing the act asked of; doing precisely what you can voluntarily do- There can be conditions attached to a duty (An event that has to occur in order to make the duty activated. In order for the duty to become effective, the duty has to be activated by the condition) RULE: If the offeror implies that the act is the acceptance, the performance of the stipulated condition is sufficient acceptance without the notification of it and the contract is binding. [*** Carbolic Smoke Ball case; Carbolic offers 100 pounds to anyone who uses their medicine according to directions and subsequently becomes sick. By using the medicine, then

becoming sick (involuntary = no volition) you are entitled to the 100 pounds]

MANNER OF ACCEPTANCE A.

The Radical Change Restatements and common law assumed that an offer had to be accepted in a particular way, either by promise or performance. a. UCC § 2-206: Promise or Performance Said the normal offeror does not care how you accept the offer. RULE: Any reasonable manner that the offeree accepts unless otherwise unambiguously indicated is okay.

? Now true for all contracts. Courts now follow law that contracts are indifferent as to the manner of acceptance, promise or performing. o“ We don’t care how you accept. If you begin to perform however, the offer cannot be revoked.

Accept however you like, unless:” ? UNLESS a manner is indicated! ***

Offeror is the master of the offer However, even if the manner is indicated, anyone who has a legal right can waive it and if you give it up then you are no longer indicating a certain manner of acceptance. ? There is certain conduct on the part of the offeree that could constitute assent towards fulfilling a contractual obligation which may bind the parties in certain circumstances. *LOOK AT FACTS- Did the offeror overtly act like there was a contract even though the manner of acceptance indicated was not performed??? Exception – If by its nature, the offeror obviously did not want a promise, they wanted performance. b.

UCC § 2-206(b): Non-conforming Goods If a person makes an offer for goods, and the offeree ships out goods that are non-conforming, then they are accepting the offer and breaching the contract at the same time...UNLESS

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they send a seasonable [within a reasonable time; usually around 4 weeks] notification and then it is a counteroffer. *** AGREEMENT: the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance

B. Silence as Acceptance If the offeror indicates that acceptance can be through silence or inaction, then the offeree's silence can serve as acceptance by their own discretion (b/c that is a stupid offer, only offeree knows for sure) When an offeree fails to reply to an offer, his silence and inaction operates as acceptance ONLY when- ? Where offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with expectation of compensation. ? Where offeror has stated or given the offeree reason to understand that assent may be manifested through silence or inaction.

Where b/c of previous dealings, it is reasonable that the offeree should notify the offeror if he does not intend to accept [For example, you order for years from a wholesaler and always have your orders shipped within 10 days. If, all of a sudden, they don't ship and you find out 2 weeks later that the offer (order) was rejected, they should have informed you previously – problem #4, pg 179] C. Notice RULE: Where the offeree chooses to accept by performance, notice to the offeror is required when the offeror would not have otherwise been promptly aware of acceptance through performance. Notice is not part of acceptance, but is a condition to activate the duty [by offeree].

? Otherwise, treat offer as having lapsed [Petersen v. Thompson –pg180: notification that Thompson had picked up a tractor may not have come in a

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reasonable time, thus letting the offer lapse] ? In the course of prior dealings, notice is required of not accepting an offer. ***In response to an offer that can be accepted by either promise or performance, if you start performance then you are impliedly promising to accept the offer. **However, if the offer can only be accepted by performance, then when you start you have NOT impliedly promised b/c the only way to accept is by performance and you CAN stop performance in this place. D.

Warranty a. UCC –§ 2-313 Express warranty May be created by a promise or affirmation of fact by the seller relating to some quality or feature of the goods which are the subject matter of the contract of sale. *** Do not need to show reliance. Meaning you do not have to prove you bought the goods for that particular reason, just as long as you saw the ad that is enough. Kinds of express warranties- •Description of goods are facts! All express warranties, you are describing what you are going to sell to me.

•A sample of goods or a model are express warranties, the one you buy has to be the same as the sample or model. b. UCC § 2-314 Implied warranty of merchantability Has to be from merchant; can't be buying from a friend or neighbor down the street. Any merchant who sells goods [of the kind in question] on a regular basis. •Establishes the basic, legally-recognized quality of goods which the buyer is entitled to receive. “ Must be fit for the ordinary purposes for which such goods are used.

” •Requires goods to be of fair, average quality Requires that goods must be adequately packaged and labeled •The UCC allows a certain level of defective goods in a shipment but it must not exceed a reasonable level, i. e.

5% of goods... •REQUIRES a careful examination of reasonable standards of quality under all the surrounding circumstances. c. UCC § 2-315 Implied warranty of fitness for a particular purpose While implied warranty requires goods meet standards of ordinary fitness, there are occasions when a seller knows or has reasons to know of a particular purpose which the buyer of goods expects the goods to fulfill.

Certain facts must be present. Must show real reliance •You rely on the seller's expertise or skill or judgment •Example: You need a drill to specifically drill through concrete. You go to a store, and tell the salesman what you need. He sells you a certain model, for the purpose stated, and it doesn't do what you needed it for, even though it works ' normally' in every other situation.

It doesn't meet your specific need, which the salesman promised it would do.

E. Self-Service Contracts Although not adopted by the courts a legal fiction for analyzing self-service contracts is that when a potential buyer walks into a store, an option contract is formed. They have the option to buy and the consideration is walking into their store instead of a competitor. -alternative reasonable method of acceptance to be applied in a certain situation. F.

Auctions a. with reserve: BIDDER = Offeror; Auctioneer = Offeree (who can reject any bid) can remove until he announces completion of sale *** typical type of auction b. without reserve: BIDDER = Offeree item cannot be withdrawn unless no bids are made within a reasonable time *** In either case, BIDDER can retract his bid until the auctioneer's announcement of

completion of sale; BIDDER's retraction does not revive any previous bid.

DEVIANT ACCEPTANCE “ battle of the forms” A. Matching Acceptance .

Under traditional analysis, where the acceptance does not mirror the terms of the offer, there is no contract. B. Last Shot Rule Generally there is a matching acceptance of ‘ dickered’ terms but the boilerplates usually do not match. Problems arise b/c the parties have failed to incorporate into one formal, signed contract the explicit terms of their contractual relationships.

C. §2-207 ADDITIONAL TERMS IN ACCEPTANCE OR CONFIRMATION 1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as 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.

(2) [You only get here if you have a contract under #1] The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless... (a) the offer expressly limits acceptance to the terms of the offer b) they materially alter it [things like negating warranties, etc.] (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received (3) 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 cases 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. SECTION TWO- ? MATERIAL ALTERATIONS

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Disclaimer of warranty clause- YES Exclusion of consequential damages clause- USUALLY Arbitration clause- USUALLY It is highly preferable to be the offeror rather than the offeree in a battle of the forms situation under the current interpretation. You do not need two forms!!! A.

When: PO is silent (buyer) And Acknowledgement has additional terms:

(seller) Then... 1. The PO's silence under UCC are 'implied terms'

[considered additional terms and UCC §2-207(2) applies]—NOT different. 2.

Check if there is a contract under §2-207 (1)? 3. If there is then go to §2-207

(2). 4.

Courts will look to see if they materially alter contract. [some courts yes and

some no] B. When: PO expressly limits or expressly objects to additional

terms (buyer) And Acknowledgement has additional terms: (seller) Then... 1.

§2-207 2(a) excludes any different or additional terms (material or

immaterial) 2. None of the terms would become part of contract 3. §2-207(c)

would have same effect and either would result in contract w/out additional

terms of the buyer.

C. When: PO has expressed terms (buyer) And Acknowledgement has

expressly additional terms: (seller) Then... 1. "Knockout Rule" 2. Only applies

when both sides have expressly conflicting terms (such as conflicting

claimed warranties) 3. Different does not apply to §2-207 (2); only additional

4.

Knocked out and UCC gapfillers a. *** The buyer can win with the 'knockout

rule' every time!!! All you have to do is state in your purchase order that

your offer expressly includes the UCC remedies [warranty of merchantability,

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resolution in the courts, etc.]; if the seller responds with different terms, all involved terms will be ‘knocked out’ and you’ll get the UCC gap fillers anyway!!! D. When: There is a RFP (buyer) w/ a Response w/ Quotation/Offer w/ disclaiming terms (seller) And Silent PO as response to Quote/Offer (buyer) [with no response but shipment from the seller] Then... 1. The buyer is now the offeree and the Seller is now the offeror 2. Even if the PO would have implied terms; they would be different and §2-207 (b) would apply under material alterations 3.

Seller would win E. When: There is a RFP (buyer) w/ a Response w/ Q/O w/ DT (seller) And PO which expressly limits acceptance to precise terms of offer (buyer) Then... 1. NO counter-offer when PO expressly limits terms [does not convert PO used as acceptance] 2. Would need to use phrase from §2-201(1) “ expressly conditioned on seller’s assent” 3. Ames loses battle 4. However- If Buyer says expressed or conditioned on buyers assent-then I.

PO is a counteroffer II. §2-207 (3) is activated [applies] III. Non-matching terms would be excised leaving for UCC gap fillers F. When: There is a RFP (buyer) w/ a Response w/ Q/O w/ DT (seller) And PO writes in expressly different terms Then... 1. Terms are different so ‘ Knockout Rule” applies . Buyer ends up w/ favorable terms G.

When: Silent PO (buyer) And Acknowledgement w/ Additional Terms that is expressly conditioned on buyer’s assent (seller) Then... 1. Clause converts into counteroffer-NO contract under §2-207 2. Contract by conduct §2-207(3) [§2-207(2) never comes into play] 3. Can only accept contract by ‘ expressly’ assenting [merely accepting goods not acceptance] 4. Under §2-207(3)

determine terms match, terms that do not use UCC gapfillers 5. Remember they precede w/ conduct of contract otherwise no contract.

Confirmations of Contracts already formed- When a contract was formed over the phone or at lunch and the buyer ships the goods with additional terms then §2-207 applies. Confirmations are treated the same way that acceptances are. 3. The Validation Process (Chapter Three) The Seal If you have a sealed instrument then you do not need consideration.

RULE: If a party signs their name next to a “ SEAL” in a jurisdiction where it is still recognized, then the seal will be enforced, consideration will not have to be shown, and the statute of limitations will be longer. UCC- Contract for the Sale of Goods does not recognize the seal (UCC 2-203) •When you are trying to make a gift promise legally enforceable, then you would want the seal (I want to be legally bound to this promise). CONSIDERATION- The Elements of Consideration- 1. LEGAL VALUE (benefit to the promisor or detriment to the promisee) promise must induce the detriment and detriment induces the promise 2.

BARGAIN FOR EXCHANGE (quid pro quo) Sometimes we can't be sure that there is a benefit to the promisor; always look for the detriment to the promisee, then you have consideration. There is usually a benefit to the promisor but if you cannot find it, don't worry yet, look for the detriment to the promisee. COURTS WILL NOT LOOK FOR EQUIVALENCE IN VALUE!

Consideration exists when the promisee, in exchange for his promise, does anything he is not legally bound to do, or refrains from doing anything he has a right to do, whether there is any actual loss to him as a benefit to the

promisor. Two Basic Elements of Consideration 1. Benefit to Promisor OR detriment to promisee AND Bargain for Exchange It is not enough that the promise induce the detriment, the detriment has to induce the promise.

Was the promisor induced to make the promise? A. ADEQUATE CONSIDERATION RULE- Court will not look into the adequacy of consideration. B/c all the time someone is going to come out better. (Stock market) Anyone could walk into the court and complain, do not inquire into the relative values of exchange. Every contract you have risks, can't talk about adequate consideration.

NO SUCH THING AS SUFFICIENT CONSIDERATION 1. Exception: Courts of Equity The 3 bases for a court of equity to refuse specific performance of a contract are: 1. The consideration for it is grossly inadequate or its terms are otherwise unfair or 2. its enforcement will cause unreasonable or disproportionate hardship or loss to the defendant or to third person, or 3. it was induced by some sharp practice, misrepresentation, or mistake. 2.

Exception: Money ? There is no consideration for an exchange of money for money. THE MONEY EXCEPTION-I did not want the one cent, there is no bargain for exchange, it is a sham, (the promise to pay \$200 is not induced by the payment of the one cent, there is no bargained-for exchange) It is a GIFT. You are not bargaining for the one cent. ? Not really an exception b/c there is not any consideration AT ALL.

Cannot say that there was b/c none of it was consideration, it is not that the consideration was inadequate. ? If you can't find anything in the exchange that shows the promisor REALLY wanted to exchange one cent for \$200, you

must question if he really wanted to extend this ‘ unfair’ promise. It’s a matter of common sense. ? In the above case, the promisor just wanted to make it “ look good” by having an exchange of one cent for the \$200. ? There MUST be a bargained-for exchange; in the above case there was no bargain. The promisor merely said, “ if they give a cent I’ll give \$200.

This is NOT a bargained-for exchange. *** Unless I WANT WHAT YOU HAVE, the detriment is NOT inducing the promise

B. EMPLOYMENT CONTRACTS

RULE: The normal employment contract is terminable at will The mere giving up on a job by one who decides to accept a contract for alleged life employment is but an incident necessary on his part to place himself in a position to accept and perform the contract; it is not consideration for a contract of life employment. “ Terminable at will” contract: The normal job contract, when you could leave or be fired at any time. PA very strong terminable at will jurisdiction! Question: What did you do to deserve the longer period? **RULE** created by Wood: That a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.

1. Exceptions: Cannot terminate someone for civil rights violations. ? You can be fired w/out being given a reason, or just b/c someone does not like you. But if you can prove that the person fired you for your race, color, religion, or age, then you have a case. 2. The terminable at will contract is a contract.

? While a plaintiff cannot sue for breach of an at-will employment contract simply b/c his contract was terminated, contracts terminable at will do create

enforceable rights. 3. Lack of an agreed upon duration does not invalidate the underlying contract itself. 4.

Employee Handbooks RULE: An employee handbook is a unilateral contract when three elements are present: 1. the handbook is sufficiently definite in its terms to create an offer 2. the handbook is communicated to and accepted by the employee so as to constitute acceptance 3. the employee handbook provides consideration ? exception to the general rule that you have to know what an offer is ? Unilateral contract theory-Once you get the handbook, by continuing to work you are accepting the contract terms. C.

RECITALS RULE: An option contract not supported by consideration is merely a revocable offer to sell Majority Rule: Where the recited consideration has not been paid and no other consideration has been given, the contract fails for want of consideration. Minority Rule: Recital of consideration gives rise to an implied promise to pay it. An option in writing and signed by the offeror which recites consideration was given is binding notwithstanding the fact that no such consideration was given or expected. (restatements). ? PA-You are estopped from denying consideration or saying you never received it b/c there is a writing to say otherwise. ? GA- “ Implied promise” of payment for option contracts.

? We are enforcing these contracts even without the consideration b/c of the ‘ form’ (option contracts) ? Usually they are for a short time so courts are not really going to inquire too far into whether or not there was a bargain for exchange or whether the money was nominal. Illusory Promises RULE: Unless both parties are bound, there is no contract If one party has the

unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the promise of the other. ? A promise to perform an act unless the promisor changes his mind promises nothing. Example-If a buyer does not have to buy the car he says he is going to buy, then he is not bound. Similarly, a seller could change his mind and not sell the car b/c if the buyer was not obliged to buy so the seller should not have to sell. 1.

Executory bi-lateral contract- If there is a contract to do something in the future and each party promises the other to do something in the future but they can back out at anytime, then there is no consideration or contract. -If a 'notice' put in the contract that if a party wants to back out then they have to give a certain amount of notice (ie 30 days) then there is consideration. 2. Conditions- There are rights and duties as soon as the contract is made, but there is still the condition.

In the meantime, you are bound to the contract. IF the condition does not occur, my duty is discharged. Condition is like a sleeping potion, when the condition occurs the potion wears off and the duty awakens. If the condition does not occur the potion remains and the duty dies.

E. Requirement and Output Contracts RULE: In addition to good faith there is a 'best efforts' requirement in output and requirements contract. A lawful agreement by either the seller or the buyer for the exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale. Quantity term is usually missing at the

time of the contract; estimates are often included however – courts view this as sufficient 1.

Uniform Commercial Code: §2-306 (1) A term which measures the quantity by the output of the seller or the requirement 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. 2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale. Exclusive Dealings: F. CAPACITY RULE: No one can be bound by contracts who has not legal capacity to incur at least voidable contractual duties. 1. Included People -person not 18 -person suffering from mental illness -people who made contracts under fraud or duress A person may have some understanding of a transaction but such understanding is affected by mental illness, the critical question is whether a reasonably competent person might have made such a contract.

2. Power of Avoidance The legal protection is afforded by providing the party lack capacity with a power of avoidance or a disaffirmance. The contract is said to be voidable by the party lacking the capacity. Similarly a contract induced by fraud or duress is voidable by the innocent party. What about consideration? The courts will enforce such promises which are enforceable until the party with the power of avoidance chooses to disaffirm.

The fact that a rule or law renders a promise voidable or unenforceable does not prevent it from being consideration. This comes from the belief that a person who lacks capacity is making the contract w/ consideration, but the courts believe they need some protection. Fraud in the Execution (Factum)- Contracts that are VOID not VOIDABLE; goes past typically fraud in the inducement (someone holding a gun to your head or someone having someone who cannot see sign a paper) 3. Losing Power of Disaffirmance IF the person reaches the age of maturity and then enjoys the benefits of the contract for a period of time, they then lose their power of disaffirmance. (ratification or disaffirmance must occur w/in a reasonable time after the infant reaches maturity.

If the minor lies about their age to enter into a contract, then the contract will not be voidable. Just b/c the contract is voidable, does not mean it is unenforceable. G. PRE-EXISTING DUTY RULE: The performance of a pre-existing duty does not amount to the consideration necessary to support a contract. 1.

Exception: The rule is inapplicable if the promisee undertakes any obligation not required by the pre-existing duty, even if the new obligation involves almost the same performance as the pre-existing duty. 2. Exception: The Doctrine of Unanticipated Difficulties- A modification needs no consideration and is enforceable when it is a voluntary agreement that is fair and equitable, the promise modifying was made before original contract was fully performed and the underlying circumstances were unanticipated by the parties. 3. Uniform Commercial Code §2-209 An agreement modifying a contract needs no consideration to be binding. 4.

Rescission- contract whereby the parties surrender their rights under an existing contract (a method of discharging the extant contract). (rescission is in and of itself a contract-each surrendering your rights and obligations in the former contract) Blows up the first contract and then blows up itself. ? You need to have one moment of time in between b/c if you do not the pre-existing duty will still be there. H. DISPUTED CLAIMS RULE: Where there is an honest dispute in relation to an unliquidated amount owed, the liability itself, or even the method of payment, there is no duty until that dispute has been settled. There is no legal duty to pay anything until the question of the amount, liability, or method has been determined.

1. Accord & Satisfaction- Accord- an agreement to settle to settle the claim Satisfaction-completion of the duty A new contract that is made AFTER the maturity or breach of the original contract. A second contract can immediately end the first contract. OR A second contract only ends the first one when the second one is executed.

RULE: Absent a contrary manifestation of intention, it is presumed that parties do not intend the original obligation to be discharged until the second (the accord) is performed (satisfied). If the event of a breach of the accord by the obligor permits a obligee to bring an action on the original contract or the accord. The obligee has made an implied promise to form the accord. Therefore, if he breaches the obligor is allowed to plead the accord in abatement of an action by the breaching obligee for the original suit. (amounts to specific performance of the accord). 2.

Substitute contracts- A modification of the original contract supported by consideration made before the maturity or breach of the original contract. -

One of the methods of discharging a contractual obligation. In a substitution if there is a breach, you can only bring action for the substituted contract. I.

THE INVALID CLAIM RULE: The requirement that the forbearing party assert the claim in good faith sufficiently protects the policy of law that favors the settlements of controversies.

RULE: The courts will not inquire into the validity of a claim which was compromised in good faith, there must generally be reasonable grounds for a belief in order for the court to be convinced that the belief was honestly entertained by the person who asserted it. Courts usually need to see- 1. Good Faith 2. Some foundation
 Except: If the claim is absurd, then that will be a question of good faith. A Jockey who has to ride a horse and has a pre-existing duty to try his best to win.

Another person who has an interest in the jockey winning the race, promises him \$5, 000 if he wins the race. -There is no consideration but the restatements of second will say that this promise should be enforced.

(another attack on the pre-existing duty rule). PROMISSORY ESTOPPEL-

RULE: The burden of proof that the plaintiff must satisfy to prove promissory estoppel are composed of the following four elements- 1. a clear and definite promise by the promisor . the promise must be made with the expectation that the promisee will rely thereon 3.

the promisee must in fact reasonably rely on the promise 4. detriment of a definite & substantial nature must be incurred in reliance on the promise The

fundamental difference between consideration and promissory estoppel is the ABSENCE OF A BARGAINED-FOR-EXCHANGE in the detrimental reliance situation. The reason the promise is enforced is b/c of the detrimental reliance of the promisee, and the promisor should have reasonably foreseen such reliance. However, will not be limited to non-bargain situations. Totally exclusive validation device that is separate from consideration. A separate basis for making contracts enforceable.

Have to ask “ Should the person have reasonably been expected to induce reliance on the offer? ” Offers are normally revocable. Why is there an exception for contractors. A. Contractors- Subcontractors have every reason to know, expect, and want the contractor to rely on his offer, and the subcontractor is expecting that once he uses the offer and gets the bid, he is relying on me at that price. B.

Land- A gratuitous promise to convey land is not enforceable. EXCEPT- if such a promise is accompanied by the promisee taking possession of the land and making valuable improvement thereon, the promisee will succeed in a suit for specific performance. C. Bailments- If a party (bailor) delivers goods for a particular purpose or for safekeeping to another party (bailee) who promises to keep them or ascertain that something is done with them, and the bailee receives no consideration for this promise, a failure on the part of a bailee to perform could result in liability. D. Charitable Subscriptions- Doctrine of promissory estoppel used a lot.

E. Third Persons: Ordinarily only the promisee and not third persons are entitled to enforce the remedy of promissory estoppel against the promisor.

However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on that promise, it may be quite unjust to refuse to perform the reliance on the promise. F. Damages- Damages in promisor estoppel with respect to pre-contractual promises are limited only to reliance damages, not the expectation interest b/c the contract was not known whether it would actually be performed or not. MORAL OBLIGATION A.

ALREADY COMPLETED SERVICES RULE: Events which occur prior to the making of the promise and not with the purpose of inducing the promise in exchange are viewed as past consideration and are the legal equivalent of no consideration. B. BUSINESS PROMISES RULE: In business, a promise from a grateful corporate board is not bargained for and therefore an unenforceable inchoate gift. C.

PAST DEBTS RULE: A new promise by the debtor to pay his debt, whether then barred by the applicable statute of limitations or not, binds the debtor for a new limitations period. Promise may be expressed or implied -If expressed, it may be unconditional or conditional -But if conditional it is not effective until the condition is performed ? Negotiable instruments presume consideration ? RESTATEMENTS: If it is unjust not to enforce the promise b/c of past benefits, then the promise may be enforced unless the value is disproportionate 4. Operative Expressions of Assent (Chapter Four) Which outward manifestations should be accorded operative effect? Statute of Frauds- Requires certain types of contracts to be evidenced by writing. ? Enforceability ? Proof Validity Oral expression of the parties will not be given effect if they violate the statute. Any requirement that a contract be evidenced by a writing is a statutory requirement.

Types of Contracts that had to be evidenced by writing: 1. A promise to pay a debt barred by the statute of limitations 2. Suretyship Promises 3. Marriage 4.

Contracts that last more than a year 5. Contracts for land 6. Contracts for sale of goods over \$500. 00 a. Suretyship LEADING OBJECT (MAIN PURPOSE) RULE: Exception to the rule that suretyship promises are within the statute of frauds. A promise to pay the debt of another is not within the statute of frauds if the main purpose to subserve some business purpose of their own.

Exception takes an otherwise unenforceable suretyship promise within the statute of frauds takes it out of the statute of frauds. When deciding if a Sharehold's promise to pay company's debt is surety: ? It is a trier of fact from objective manifestations. ? It is your MAIN purpose, you did it exclusively for yourself and you have a benefit ? The fact that the shareholder is a shareholder and may have some benefit is not conclusive. Look in addition at whether benefit is—SPECIAL, DIRECT or IMMEDIATE oMust be clear and convincing evidence, NOT a preponderance, much higher burden to prove. (not likely that it happened but CLEAR that it happened) If a debtor fails to pay and the surety is forced to, then the surety has a c/o/a against the principle debtor. ? However, the surety and debtor relationship must be known to the creditor!!!! Insurance Companies: Before an insurance company becomes legally responsible and they agree on a settlement, it is not a suretyship promise under the statute of frauds.

Four Party Indemity-DAD (sr) ? NEWBORN ? SON (jr.) ? BANK [bank does not [friend who agrees [debtor] like him] to pay if son does not] {surety who

pays when friend's son does not w/ promise that DAD will pay him back}

oWhen Newborn goes back to the friend to get the money that he paid for his son's debt, can he recover? oA surety is only a promise to a creditor. Is Newborn a creditor or a debtor? oJunior should have paid the bank but did not. Therefore, Newborn had to pay the bank and now Junior is indebted to him. So he is both.

A debtor to bank and creditor to Junior. UNANIMOUS decision by courts who have answered this question say that Newborn is primarily a debtor, since he is indebted to bank, the promise between NEWBORN and DAD (sr.) is ENFORCEABLE [b/c not between creditor and debtor but debtor and debtor] ? NOVIATION: When creditor releases a debtor in exchange for a new debtor as a substitute. Original debt is discharged-NOT SURETYSHIP. b.

Marriage ? Certain agreements between couples who co-habitate have been held to be within the marriage clause ? Mutual agreements to marry are not within the statute of frauds ? Pre or Antenuptial agreements are within the statute of frauds Part Performance- RULE: The equitable doctrine of part performance will only be used to take a case out of the statute of frauds when it can be shown by the party that- ? It is of such a character that it is unequivocally referable to the alleged agreement and cannot admit of explanation w/out reference to such agreement ? B/c it would be intolerable in equity If an oral contract within any section of the statute of frauds is fully performed, the statute has no application. Part performance in a marriage clause DOES NOT satisfy the statute. RULE: Part Performance of a marriage contract is not within the statute of frauds. -Usually only recognized w/

respect to contracts that: 1. Cannot be performed in one year 2. Have to deal with sale of land or sale of goods c.

Contract for Sale of Land An interest in land is not limited to transfers of legal estates. Can include— ? Easements ? Rescissions ? Equitable liens ? Assignments and restrictions ? Leases for more than one year [short term leases excluded] ? Commissions to Agents/Brokers Part Performance RULE: In order to enforce a contract for the sale of land w/ out a writing there must be: ? Partial or full payment ? Make valuable improvements on the land ? Take Possession of the Land RULE: An oral rescission for the sale of land falls within the statute of frauds and is NOT enforceable. RULE: Oral leases for more than one year fall within the statute of frauds and is NOT enforceable ? You can use part performance for an action for damages; it is equitable in nature and used for specific performance ? An action for restitution damages when you don't have a breach of contract is a quasi-contract action. ? Difference Between Land and Goods: RULE: IF Seller severs: Its goods IF Buyer severs: Its land However, if it is a growing crop [timber, vegetables...considered good] d. Contracts NOT Performable w/in 1 yr From Formation RULE: To fall within the statute of frauds there must be an express contractual provision specifying that performance will extend for more than one year. RULE: A contract for life not within the statute of frauds b/c you could die w/in a rule. (but a contract for one year and one day is) RULE: Part Performance of a contract under the one year provision of statute of frauds will be enforceable. Alternative Performances: ? If there are different time periods where the contract is subject to terminations [ie- 3 months, 6 months, and then a year] then as long as one of them is before a

year then it is okay PA does not have this provision adopted! e. Contract for the Sale of Goods UCC –§2-201- GENERAL RULE: Plaintiff needs a writing signed by you. RULE: In a sale for goods, if a contract is oral it will not be barred by the statute of frauds if there is a confirming memo sent w/in a reasonable time which is signed by the other party or else not answered for 10 days. RULE: Under the UCC for sale of goods, part performance is a contract for THAT part performance. RULE: A ‘ record’ is not insufficient merely b/c it omits an quantity term but if the ‘ record’ evidence states a quantity term then the contract will not be enforced over that quantity. Exceptions: 1. Specially manufactured goods; not suitable to sell to other buyers [§2-201 (3)] 2. IF the person admits that the contract was made but is still pleading the statute of frauds. 3. When goods for which payment has been made and accepted or which have been received and accepted. REVISIONS- The amount will be raised from \$500 to \$5, 000 When Writings are Sufficient: ? Need a signature [can be anything-name, electronic, thumbprint, stamp] ? The writing need not exist at the time of the formation, a memo following formation is sufficient ? New revisions include broader term to include symbols sounds and encryptions for electronic transactions ? Satisfactory evidence can be shown in more than one writing ? If you admit in court or out of court there was a contract then you lose the statute of frauds. CONTENT-Sufficient if it reasonably identifies the subject matter and the parties, indicates that a contract has been made and sets forth the essential terms w/ reasonable certainty §2-606- What Constitutes Acceptance of Goods- 1. After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity. 2. fails to make an effective

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rejection but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them 3. Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him ? Acceptance of a part of any commercial until is acceptance of that entire unit. RULE: When you have an indivisible item [car], then the courts will enforce the contract and allow the plaintiff to prove the agreement. Example-sale for two vats, and a vat cannot be split so it is enforced to the point of the one vat. ? Memo has to evidence a contract for sale was made. a purchase order is only written evidence of an offer and not a contract for sale of goods/so when you use a PO as a confirmation make sure that you state in the boiler plate that this is to be used as a confirmation for a contract] When a person raises the statutes of frauds defense and they have already received a partial payment or full payment, the person is able to get the deposit or money back under the theory of unjust enrichment [quasi-contract]. f. CISG In a domestic situation the rule of law that will be applied will be based on the jurisdiction where there are the most contacts. Where was the contract made. ? Where are the parties located. ? A contract for the sale of goods may be proved by any means including witnesses ? Where US law does not apply and CISG kicks in there would be no UCC writing requirement for a US buyer or seller of goods ? Does not apply to all goods [consumer goods; auction; sheriff's sale; stocks/money/shares; electricity; and ships/vessels/aircrafts] 1. When you apply the contacts theory with one country that has adopted CISG and one that has not, you use the contacts theory and which country had the most contracts with the party, that law would be used. So if that country is a CISG country and they have the most contacts, then the law that will be applied

will be CISG and not the country's law with the most contacts. Exception-IN the United States-The US has opted out of that portion. 2. Parties when they contract are able to opt out but you have to say the law of the US and not the state b/ the law of the state is CISG. 3. Was there a manifestation by the parties to have their impression put upon the writing to show their intent to engage in a contract? Rule for Electronic Means-It has to be retrievable in perceivable form. g. Estoppel and the Statute of Frauds- RULE: If the party can satisfy a clear and convincing standard to the claim of promissory estoppel then the oral contract will not fall within the statute of frauds. {plaintiff's burden} 1. Where the contract is unenforceable , but one party has conferred a benefit upon the other through part performance, courts will grant restitution on the footing that such a recovery in quasi-contract does not undermine the statute of frauds. Exception-brokers 2. What do courts call an agreement when the statute of frauds has been pleaded? -void: no legal effect whatsoever -Voidable: one party has legal power (many times void and unenforceable are used interchangeably) RULE: Since the statute is an affirmative defense it will not be permitted to be raised for the first time on appeal. AUTHORITY- What is the authority for satisfying the statute frauds through the doctrine of promissory estoppel? You don't want to have to argue it but if you do the most persuasive is statute of frauds. I. Good Faith: Least persuasive II. Restatements: More persuasive ?§139 of the restatement of second Circumstances related- 1. The availability of other remedies [particularly cancellation and restitution] 2. The definite and substantial character of the action or forbearance in relation to the remedy sought. 3. The extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise

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established by clear and convincing evidence 4. The reasonableness of the action or forbearance . The extent to which the action or forbearance was foreseeable by the promisor III. UCC §1-103: Most persuasive There is a split in authority on the issue of promissory estoppel. One says that the UCC does not expressly permit the bypassing the statute of frauds by the application of promissory estoppel. The other does. To use the doctrine of promissory estoppel, another principle that can be used is UCC §1-103 which is a way to get around the statute, but courts are split and it does not work all the time. Unless displaced by the particular provision of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principle, and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, or other validating or invalidating cause shall supplement its provisions. New Article 8 does not require any writing. Agent Signatures- If you hire the lawyer as an agent and the agent is authorized to act as your agent, then a signature by the lawyer would be sufficient to satisfy the statute of frauds. . Admitting the Contract RULE: Involuntary admissions can be used to satisfy the statute of frauds under 2-201(3)(b). The language of 2-201 will change to “ if you admit under oath that you made the contract. ” 1. The objective manifestations of unconditional assent to the offer by the defendant is irrelevant, that one thinks that the contract was still be negotiated and he had a subjective desire to impose certain conditions on the manner of payment, does not matter. 2. Voluntary vs. Involuntary admissions-Even though it is not one of the cases where someone comes out and says that they did not make a contract but still want to use the statute of frauds, it does not matter, the legal effect of what he says, there is no question about it-there is a contract. (Once you testify, and admit either

explicitly or implicitly that a contract was made-your done.) i. Statute of Frauds in PA How the statute of frauds is brought up as a defense in PA- Preliminary objection in the nature of a demurrer-Assuming that everything that you said in your complaint is true, there is still no contract. This is not the kind of admission that 2-201 is talking about b/c this is a procedural admission not a substantive admission) -Problem: IF you are allowed to bring up the statute of frauds in this way, then you never have to admit to or not admit to the contract. NOW-You are not allowed to use demurrer now. You have to admit or deny a contract! Now we allow a deposition of a case like Hughes and treat it as the same type of admission as if you were in court. **Area of the law is questionable. Usually would have to ask a judge and explain why you think a deposition is necessary. There are some jurisdictions where you can still use the statute if you admit a contract was made (dying out). Second Semester- Murray -Contracts- Chapter 4-Continued... Operative Expressions of Assent: Parol Evidence Rule- Parol Evidence Rule- When parties to a contract embodied the terms of their agreement in a writing, intending that writing to be the final expression of their agreement, the terms of the writing may not be contradicted by evidence of any prior agreement. Rule that gives the writing the status it deserves- Rule of substantive law and NOT a rule of evidenceCall it a question of law so that juries can't decide, trial court decides [don't trust juries] When one of the parties alleges that the subsequent written agreement was intended to be the final and complete expression of the parties' agreement, the parol evidence machinery is activated- -Then becomes necessary to decide a question of fact. This rule depends on whether the agreement has been integrated. The state has three tests to decide if the agreement has been

integrated. I. Parol Evidence Tests- It's very common for courts to use two or more tests in order to justify their decision. Bullshit A. Appearance Test Simply examining the writing and determining from appearance alone if it is complete. [courts usually never follow it but it still comes up from time to time] Not a conclusive factor but a factor. Judge has to hear the alleged extrinsic agreement and compare it with the writing. Merely an Aide B. Writing Omission [Wigmore] MERELY AN AIDE If extrinsic matter is mentioned, covered or dealt with in the writing, presumably the writing was meant to represent all of the transaction on that element, if not the evidence is admissible. **Dominant Test*** C. Natural Omission (Inclusion) Test [Old Williston Test] DOMINANT TEST If extrinsic agreement is one that might naturally and normally be made as a separate agreement