CONTRACTS

RULE-STATEMENT CHECKLIST

I. FORMATION OF CONTRACTS

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A. GOVERNING LAW AND MUTUAL ASSENT

GENERAL RULE A contract requires mutual assent (offer and acceptance) and consideration or a recognized substitute; the UCC Article 2 governs contracts for the sale of goods, while the common law governs contracts for services and real estate.

- ☐ **Governing law.** Article 2 of the UCC governs transactions in goods (movable, tangible things); the common law governs services, real estate, and intangibles. For mixed contracts, apply the predominant purpose test, and the entire contract is governed by whichever aspect predominates.
- ☐ **Merchant status.** A merchant is one who deals in goods of the kind or otherwise holds itself out as having special knowledge or skill as to the goods or practices involved; several UCC rules (firm offers, 2-207 additional terms, implied warranty of merchantability) apply only to merchants.
- ☐ **Mutual assent.** Mutual assent is judged by an objective standard: the outward manifestations of the parties, not their subjective secret intent, control whether a contract was formed.
- ☐ **Intent to be bound.** Advertisements, price quotes, and invitations to bid are generally invitations to deal, not offers, unless they are clear, definite, and explicit and leave nothing open to negotiation (for example, a reward or a specific-quantity first-come offer).

B. OFFER

GENERAL RULE An offer is a manifestation of present willingness to enter a bargain, so made as to justify another in understanding that assent will conclude it, communicated to the offeree.

- ☐ **Definiteness (common law).** At common law an offer must be reasonably certain in its essential terms: parties, subject matter, price, quantity, and time for performance.
- ☐ **Definiteness (UCC).** The UCC allows a contract to be formed even if terms are left open, so long as the parties intended to contract and there is a reasonably certain basis for a remedy; the court fills gaps (price, place, time), but quantity generally must be stated.
- ☐ **Requirements and output contracts.** Requirements and output contracts are enforceable under the UCC despite the open quantity; the quantity is measured by the buyer's good-faith requirements or the seller's good-faith output, and no quantity unreasonably disproportionate to a stated estimate or prior demand may be tendered or demanded.
- ☐ **Termination of the offer.** An offer terminates by rejection, counteroffer, lapse of a stated or reasonable time, revocation, or the death or incapacity of either party before acceptance.
- ☐ **Revocation.** An offer is freely revocable any time before acceptance, even if it states it will remain open, unless it is an option supported by consideration, a UCC firm offer, or reliance has made it temporarily irrevocable; revocation is effective on receipt.
- ☐ **Indirect revocation.** An offer is revoked when the offeree receives reliable information that the offeror has taken action inconsistent with an intent to contract (for example, selling the subject property to another).
- ☐ **Option contract.** An option is a promise to hold an offer open that is itself supported by separate consideration; it makes the offer irrevocable for the stated period even at common law.
- ☐ **Firm offer (UCC).** A merchant's signed written offer to buy or sell goods that gives assurance it will be held open is irrevocable without consideration for the time stated, or a reasonable time, not to exceed three months.

C. ACCEPTANCE

GENERAL RULE Acceptance is a manifestation of assent to the terms of the offer in the manner invited or required by the offer, made by the offeree who has knowledge of the offer.

- ☐ **Mirror image rule (common law).** At common law an acceptance must mirror the offer exactly; a response that adds or changes terms is a counteroffer and a rejection, not an acceptance.
- ☐ **Battle of the forms (UCC 2-207).** Under 2-207 a definite and timely expression of acceptance forms a contract even if it states additional or different terms, unless acceptance is expressly conditioned on assent to the new terms.
- ☐ **Additional terms between merchants (2-207).** Between merchants, additional terms become part of the contract unless the offer expressly limits acceptance to its terms, the new terms materially alter the deal, or the offeror objects within a reasonable time.
- ☐ **Conduct forming a contract (2-207).** If the writings do not form a contract but the parties' conduct recognizes one, a contract exists on the terms on which the writings agree, supplemented by the UCC's gap-filler provisions (the knockout approach to conflicting terms).
- ☐ **Method of acceptance.** Unless the offer clearly requires a specific method, acceptance may be made in any reasonable manner and by any medium reasonable under the circumstances.
- ☐ **Shipment as acceptance (UCC).** An order to buy goods for prompt shipment may be accepted either by a promise to ship or by prompt shipment; shipment of nonconforming goods is both an acceptance and a breach unless the seller seasonably notifies the buyer that the shipment is offered only as an accommodation.
- ☐ **Mailbox rule.** Acceptance is effective on dispatch (when properly sent); rejections, revocations, and counteroffers are effective on receipt. The mailbox rule does not apply to option contracts, where acceptance must be received by the deadline.

- ☐ **Acceptance by silence.** Silence generally is not acceptance, unless prior dealings or trade usage make it reasonable, or the offeree takes the benefit of offered services with a reasonable chance to reject and knowledge that compensation was expected.
- ☐ **Unilateral contract acceptance.** A unilateral offer, which seeks acceptance only by performance, is accepted by completing performance; once the offeree begins performance, the offer becomes temporarily irrevocable for a reasonable time to allow completion.

D. CONSIDERATION AND SUBSTITUTES

GENERAL RULE Consideration is a bargained-for exchange in which each party incurs a legal detriment or confers a legal benefit; where consideration is absent, promissory estoppel or other substitutes may make a promise enforceable.

- ☐ **Bargained-for exchange.** Consideration requires that the promise induce the detriment and the detriment induce the promise; gifts, past consideration, and moral obligation generally are not consideration.
- ☐ **Legal detriment.** A legal detriment is doing, or promising to do, something one is not legally obligated to do, or forbearing from something one has a legal right to do; courts do not weigh the adequacy of consideration.
- ☐ **Illusory promise.** A promise that leaves performance entirely to the promisor's discretion is illusory and is not consideration, but an implied duty of good faith (as in requirements, output, and exclusive-dealing contracts) can supply the needed commitment.
- ☐ **Pre-existing duty rule (common law).** A promise to do what one is already legally bound to do is not consideration; a modification therefore needs new consideration unless there are unforeseen circumstances or an honest dispute, or the duty runs to a third party.
- ☐ **Modification (UCC).** Under the UCC a good-faith modification of a contract for the sale of goods needs no new consideration to be binding.
- ☐ **Promissory estoppel.** A promise is enforceable without consideration if the promisor should reasonably expect it to induce action or forbearance, it does induce such reliance, and injustice can be avoided only by enforcement; recovery may be limited to the reliance interest.
- ☐ **Promise to pay barred debt.** A new written promise to pay a debt barred by the statute of limitations or discharged in bankruptcy is enforceable without new consideration, to the extent of the promise.

E. IMPLIED AND QUASI-CONTRACT

GENERAL RULE Where no enforceable express contract exists, a court may impose a contract implied in fact from conduct, or a quasi-contract to prevent unjust enrichment.

- ☐ **Implied-in-fact contract.** A contract implied in fact arises from the parties' conduct and surrounding circumstances that objectively manifest agreement, and it is as binding as an express contract.
- ☐ **Quasi-contract (restitution).** Quasi-contract is an equitable remedy imposed to prevent unjust enrichment where one party confers a benefit on another with a reasonable expectation of payment and it would be unjust for the recipient to retain it without paying; recovery is the reasonable value of the benefit conferred.

IV. PERFORMANCE, BREACH, AND DISCHARGE ~25% tested

A. CONDITIONS

GENERAL RULE A condition is an event, not certain to occur, that must occur (unless excused) before performance under a contract becomes due; failure of a condition suspends or discharges the duty.

- ☐ **Types of conditions.** A condition precedent must occur before a duty arises; a condition subsequent discharges an existing duty when it occurs; concurrent conditions are mutually dependent duties to be performed at the same time.
- ☐ **Express conditions.** Express conditions must be strictly and literally satisfied; substantial performance does not satisfy an express condition.
- ☐ **Constructive conditions.** Constructive (implied) conditions of exchange are imposed by law to order performance; they are satisfied by substantial performance, so a minor deviation does not excuse the other party.
- ☐ **Satisfaction clauses.** A condition of personal satisfaction as to matters of taste or judgment is measured by the promisor's honest, good-faith satisfaction; as to mechanical fitness or value, it is measured by reasonable satisfaction.
- ☐ **Excuse of conditions.** A condition may be excused by waiver, estoppel, prevention or hindrance by the party benefited, actual breach, anticipatory repudiation, or the avoidance of a disproportionate forfeiture.

B. BREACH: MATERIAL VS MINOR (COMMON LAW)

GENERAL RULE A breach that is material discharges the nonbreaching party's remaining duties and permits suit for total breach; a minor breach permits suit for damages but the nonbreaching party must still perform.

- ☐ **Material breach.** A breach is material when the nonbreaching party does not receive the substantial benefit of the bargain; factors include the extent of deprivation, adequacy of compensation, degree of forfeiture, likelihood of cure, and good faith.
- ☐ **Substantial performance.** A party who substantially performs, falling short only in a minor way, has committed only a minor breach and may recover the contract price less damages caused by the deficiency; a material breacher who has not substantially performed cannot recover on the contract.
- ☐ **Divisible contracts.** If a contract is divisible into paired parts of roughly equivalent value, a party may recover for each performed unit even if it breaches as to others.
- ☐ **Time of the essence.** Late performance is a minor breach unless the contract makes time of the essence or timing is critical, in which case delay is a material breach.

C. UCC PERFORMANCE AND PERFECT TENDER

GENERAL RULE Under the UCC the seller must tender conforming goods and the buyer must accept and pay; unlike the common law substantial-performance standard, sales of goods are governed by the perfect tender rule.

- ☐ **Perfect tender rule.** If the goods or tender fail in any respect to conform to the contract, the buyer may reject the whole, accept the whole, or accept any commercial units and reject the rest.
- ☐ **Cure.** A seller may cure a nonconforming tender within the original time for performance; the seller may cure beyond that time if it had reasonable grounds to believe the tender would be acceptable, with or without a money allowance.
- ☐ **Installment contracts.** In an installment contract the buyer may reject an installment only if the nonconformity substantially impairs the value of that installment and cannot be cured, and may treat the whole contract as breached only if the defect substantially impairs the value of the whole.
- ☐ **Rejection.** The buyer must reject within a reasonable time after delivery and seasonably notify the seller; a merchant buyer must follow reasonable instructions as to rejected goods and, absent instructions, make reasonable efforts to sell perishables held for the seller's account.
- ☐ **Acceptance of goods.** The buyer accepts by signifying that the goods conform or will be kept despite nonconformity, by failing to make an effective rejection, or by acting inconsistently with the seller's ownership; accepted goods must be paid for at the contract rate.
- ☐ **Revocation of acceptance.** A buyer may revoke acceptance if a nonconformity substantially impairs the value of the goods and acceptance was based on a reasonable assumption the defect would be cured, or was induced by difficulty of discovery or the seller's assurances; revocation must occur within a reasonable time before any substantial change in the goods.
- ☐ **Risk of loss.** Absent breach: in a shipment contract risk passes to the buyer when the goods are delivered to the carrier; in a destination contract when the goods are tendered at the destination; for a merchant seller when the buyer takes physical possession, otherwise on tender of delivery. A breaching seller bears the risk until cure or acceptance.

D. ANTICIPATORY REPUDIATION AND ASSURANCES

GENERAL RULE A clear and unequivocal repudiation before performance is due lets the nonbreaching party treat the contract as breached immediately, subject to the duty to mitigate.

- ☐ **Anticipatory repudiation.** An unequivocal statement or voluntary act indicating a party will not perform lets the other party sue at once, suspend its own performance, or await performance for a commercially reasonable time; but if the nonrepudiating party's only remaining duty is to pay money in installments, it must wait until performance is due.
- ☐ **Retraction.** A repudiating party may retract until the other party materially changes position in reliance, indicates it considers the repudiation final, or sues; a valid retraction reinstates the contract.
- ☐ **Prospective inability and assurances.** When reasonable grounds for insecurity arise, a party may in writing demand adequate assurance of performance and, under the UCC, suspend its own performance until it receives it; failure to provide assurance within a reasonable time, not exceeding thirty days, is itself a repudiation.

E. IMPOSSIBILITY, IMPRACTICABILITY, AND FRUSTRATION

GENERAL RULE Duties may be discharged when an unexpected event, whose nonoccurrence was a basic assumption of the contract, makes performance impossible or impracticable, or destroys the purpose of the deal, without the fault of the party seeking discharge.

- ☐ **Impossibility.** Performance is discharged when it becomes objectively impossible due to an event whose nonoccurrence was a basic assumption, such as the death or incapacity of a person essential to performance, destruction of the specific subject matter, or supervening illegality.
- ☐ **Impracticability.** Performance is excused when an unforeseen event whose nonoccurrence was a basic assumption makes performance extremely and unreasonably difficult or expensive; mere increased cost or ordinary market shifts do not suffice.
- ☐ **Frustration of purpose.** A duty is discharged when a supervening event, whose nonoccurrence was a basic assumption, substantially destroys the value of the performance to a party, even though performance remains possible, and both parties understood that purpose.
- ☐ **Casualty to identified goods (UCC).** If goods identified when the contract was made are destroyed without fault before risk passes to the buyer, the contract is avoided; partial loss lets the buyer inspect and either treat the contract as avoided or accept the goods with a price allowance.

F. DISCHARGE

GENERAL RULE A contractual duty may be discharged by full performance or by an agreed or operative event other than performance.

- ☐ **Accord and satisfaction.** An accord is an agreement to accept a different performance in satisfaction of an existing duty; the original duty is discharged only when the accord is satisfied (performed). If the accord is breached, the other party may sue on the original duty or the accord.
- ☐ **Novation.** A novation substitutes a new party for an original party by agreement of all, including the obligee, and discharges the replaced party's duties.
- ☐ **Modification and rescission.** Parties may discharge or alter duties by a mutual rescission or a valid modification; a modification of a contract still executory on both sides needs no new consideration only under the UCC, while the common law generally requires it.
- ☐ **Release and account stated.** A release discharges a duty by agreement, generally requiring consideration or a signed writing; an account stated is a binding agreement fixing the balance due on prior transactions.

V. REMEDIES

~12-13% tested

A. DAMAGES MEASURES AND LIMITATIONS

GENERAL RULE The default remedy for breach is expectation damages, awarded to put the nonbreaching party in the position it would have occupied had the contract been fully performed, subject to the limits of causation, foreseeability, certainty, and mitigation.

- ☐ **Expectation damages.** Expectation damages equal the loss in value caused by the breach plus any other loss (incidental and consequential), less any cost or loss avoided by not having to perform.
- ☐ **Reliance damages.** Where expectation damages are too speculative, the nonbreaching party may recover reliance damages: the expenditures made in reasonable reliance on the contract, restoring it to its pre-contract position.
- ☐ **Restitution.** Restitution measures recovery by the benefit conferred on the breaching party, preventing unjust enrichment; it is available to a nonbreaching party and, in many jurisdictions, to a breaching party for benefits conferred beyond the damages caused.
- ☐ **Incidental damages.** Incidental damages are the reasonable costs incurred in dealing with the breach, such as expenses of inspection, transportation, care, and arranging a substitute transaction.
- ☐ **Consequential damages and foreseeability.** Consequential damages, including lost profits, are recoverable only if they were a foreseeable result of breach at the time of contracting, either arising naturally or from special circumstances the breaching party had reason to know.
- ☐ **Certainty.** Damages must be proven with reasonable certainty; lost profits of a new or untested business are often denied for lack of a reliable basis, though modern courts allow any reasonable method of proof.
- ☐ **Mitigation.** A nonbreaching party may not recover damages it could have avoided by reasonable effort; it need not take undue risk or humiliation, and an employee wrongfully discharged need accept only comparable employment.
- ☐ **Nominal and punitive damages.** Nominal damages are available for a breach causing no actual loss; punitive damages generally are not available for breach of contract unless the conduct is also an independent tort.

B. LIQUIDATED DAMAGES AND AGREED REMEDIES

GENERAL RULE Parties may fix damages in advance if the clause is a reasonable estimate and not a penalty.

- ☐ **Liquidated damages.** A liquidated damages clause is enforceable if actual damages were difficult to estimate at contracting and the stipulated amount is a reasonable forecast of the anticipated or actual loss; a clause that operates as a penalty to coerce performance is void.

C. EQUITABLE REMEDIES

GENERAL RULE Where the legal remedy of damages is inadequate, a court may order specific performance or an injunction.

- ☐ **Specific performance.** Specific performance is available when the legal remedy is inadequate, typically for land (deemed unique) and for unique goods; it is subject to equitable defenses such as laches and unclean hands and requires definite terms and feasible enforcement.
- ☐ **Personal services.** Courts will not specifically enforce a personal-service contract, but may enjoin the breaching party from working for a competitor if the covenant is reasonable in scope, geography, and duration.
- ☐ **UCC specific performance.** A buyer may obtain specific performance where the goods are unique or in other proper circumstances, and may replevy identified goods after reasonable but unsuccessful efforts to cover or where cover is unavailable.

D. UCC SELLER'S REMEDIES

GENERAL RULE On the buyer's breach, the seller's remedies aim to give the seller the benefit of the bargain, chosen according to whether the seller resells, keeps the goods, or the buyer has accepted.

- ☐ **Resale.** An aggrieved seller may resell the goods in good faith and in a commercially reasonable manner and recover the contract price less the resale price, plus incidental damages, less expenses saved.
- ☐ **Market damages.** Alternatively the seller may recover the contract price less the market price at the time and place for tender, plus incidental damages, less expenses saved.
- ☐ **Lost volume seller.** If resale damages are inadequate to give the seller its bargain, as for a lost-volume seller who could have made both sales, the seller recovers its lost profit plus incidental damages.
- ☐ **Action for the price.** The seller may recover the full contract price for goods the buyer has accepted, for conforming goods lost or damaged after risk passed to the buyer, and for goods the seller cannot reasonably resell.
- ☐ **Withhold and stop delivery.** On breach or discovery of the buyer's insolvency, the seller may withhold delivery, stop goods in transit, and identify goods to the contract; a seller may reclaim goods from an insolvent buyer if it demands them within ten days of receipt (or without time limit if the buyer misrepresented solvency in writing within three months before delivery).

E. UCC BUYER'S REMEDIES

GENERAL RULE On the seller's breach, the buyer may cover, recover market-based damages, or, for accepted goods, recover for breach of warranty, plus incidental and consequential damages.

- ☐ **Cover.** The buyer may in good faith and without unreasonable delay buy substitute goods and recover the cost of cover less the contract price, plus incidental and consequential damages, less expenses saved.
- ☐ **Market damages.** If the buyer does not cover, it may recover the market price at the time it learned of the breach less the contract price, plus incidental and consequential damages, less expenses saved.
- ☐ **Damages for accepted goods (warranty).** For accepted nonconforming goods, the buyer, after seasonable notice of breach, recovers the difference between the value of the goods as accepted and their value as warranted, plus incidental and consequential damages.
- ☐ **Consequential damages for buyers.** A buyer may recover consequential damages, including foreseeable lost profits and injury to person or property proximately resulting from a warranty breach, that could not reasonably be prevented by cover.

II. DEFENSES TO ENFORCEABILITY

~12-13% tested

A. CAPACITY AND FORMALITIES

GENERAL RULE Even where mutual assent and consideration exist, a contract may be voidable or unenforceable because a party lacked capacity or the required formalities are missing.

- ☐ **Minority.** A contract by a minor is voidable at the minor's option; the minor may disaffirm before or within a reasonable time after reaching majority, but is liable in quasi-contract for the reasonable value of necessaries.
- ☐ **Mental incapacity.** A contract by one who lacks the mental capacity to understand the nature and consequences of the transaction is voidable; if the person did not know of the incapacity and the terms are fair, avoidance may be barred where the parties cannot be restored to their prior positions.
- ☐ **Intoxication.** A contract made while so intoxicated that a party cannot understand the nature of the transaction is voidable only if the other party had reason to know of the intoxication.

B. STATUTE OF FRAUDS

GENERAL RULE Certain contracts are unenforceable unless evidenced by a writing signed by the party to be charged; the writing must reflect the essential terms and identify the parties and subject matter.

- ☐ **Contracts within the statute.** The statute covers contracts in consideration of marriage, that cannot be performed within one year, for the sale of an interest in land, of an executor to pay estate debts personally, of suretyship (to answer for another's debt), and, under the UCC, for the sale of goods of five hundred dollars or more.
- ☐ **Sufficiency of the writing.** The writing need not be a formal contract; it suffices if it is signed by the party to be charged and states the essential terms, and it may consist of several documents read together. For the sale of goods it must state a quantity, and it is enforceable only up to the quantity stated.
- ☐ **Merchant's confirmatory memo (UCC).** Between merchants, a signed written confirmation sufficient against the sender also binds the recipient who has reason to know its contents unless the recipient objects in writing within ten days.
- ☐ **UCC exceptions.** A contract for goods otherwise within the statute is enforceable without a writing to the extent of specially manufactured goods not suitable for resale, an admission in pleadings or testimony, or payment made and accepted or goods received and accepted.
- ☐ **Common-law exceptions.** Full performance of a one-year contract, and part performance of a land-sale contract (typically payment plus possession or improvements), can take a contract out of the statute; reasonable reliance may also estop a statute-of-frauds defense.

C. MISTAKE

GENERAL RULE A mistake is a belief not in accord with the facts existing at the time of contracting; relief depends on whether one or both parties were mistaken about a basic assumption.

- ☐ **Mutual mistake.** A contract is voidable by the adversely affected party where both parties are mistaken about a basic assumption with a material effect on the exchange, unless that party bore the risk of the mistake (for example, by contracting in conscious ignorance).
- ☐ **Unilateral mistake.** A unilateral mistake generally does not permit avoidance unless the other party knew or had reason to know of the mistake or caused it, or enforcement would be unconscionable and the other party has not relied.
- ☐ **Distinguish mistake of value and prediction.** A mistake about future events, market value, or predictions is not a mistake of existing fact and generally provides no ground for relief.

D. MISREPRESENTATION AND NONDISCLOSURE

GENERAL RULE A contract is voidable if assent was induced by a misrepresentation on which the party justifiably relied.

- ☐ **Fraudulent misrepresentation.** A contract is voidable where a party makes a knowing or reckless false assertion of a material fact, intending to induce assent, and the other party justifiably relies to its detriment.
- ☐ **Material misrepresentation.** Even an innocent or negligent misrepresentation makes a contract voidable if it is material and induces justifiable reliance.
- ☐ **Nondisclosure and concealment.** Silence is not misrepresentation unless there is a duty to disclose, as where there is a fiduciary or confidential relationship, active concealment, a party has information correcting a prior assertion, or nondisclosure would violate good faith.

E. DURESS AND UNDUE INFLUENCE

GENERAL RULE A contract induced by an improper threat that leaves no reasonable alternative, or by unfair persuasion of a vulnerable party, may be avoided.

- ☐ **Duress.** A contract is voidable if assent is induced by an improper threat that leaves the victim no reasonable alternative; physical compulsion renders the contract void, and economic duress requires a wrongful threat, not merely hard bargaining.
- ☐ **Undue influence.** A contract is voidable where one party uses unfair persuasion to overcome the free will of another who is under its domination or reposes special trust in it.

F. UNCONSCIONABILITY, ILLEGALITY, AND PUBLIC POLICY

GENERAL RULE A court may deny enforcement of a contract or term that is unconscionable, illegal, or contrary to public policy.

- ☐ **Unconscionability.** A court may refuse to enforce a contract or clause that is unconscionable when made, judged as of the time of formation; it typically requires both procedural unfairness (absence of meaningful choice) and substantive unfairness (unreasonably harsh terms).

- ☐ **Illegality.** A contract with an illegal subject matter or purpose is generally void and unenforceable; if only the consideration or a term is illegal, or a party is innocent, courts may sever the offending part or grant limited relief.
- ☐ **Public policy.** A contract is unenforceable if its enforcement would contravene public policy, as with certain exculpatory clauses, overbroad covenants not to compete, or agreements that harm the public interest.

III. CONTENT AND MEANING OF CONTRACTS ~12-13% tested

A. PAROL EVIDENCE RULE

GENERAL RULE The parol evidence rule governs the extent to which a written contract may be supplemented or contradicted by prior or contemporaneous agreements.

- ☐ **General rule.** Where a writing is intended as a final expression of the agreement, prior or contemporaneous oral or written agreements that contradict its terms are not admissible; a fully integrated writing also bars evidence of additional consistent terms.
- ☐ **Partial integration.** A partially integrated writing (final but not complete) may be supplemented by consistent additional terms, but not contradicted.
- ☐ **Exceptions.** The rule does not bar evidence offered to explain ambiguous terms, to show a defense to formation such as fraud, mistake, duress, or lack of consideration, to establish a condition precedent to effectiveness, or to prove a later modification.
- ☐ **UCC supplementation.** Under the UCC, even a final writing may be explained or supplemented by course of performance, course of dealing, and usage of trade, and by consistent additional terms unless the writing was intended as complete and exclusive.

B. INTERPRETATION

GENERAL RULE Courts interpret contracts to give effect to the parties' mutual intent, construing terms as reasonable persons would understand them.

- ☐ **Plain meaning and context.** Words are given their ordinary meaning in context; the whole contract is read together, specific terms control over general ones, and negotiated terms control over standardized ones.
- ☐ **Trade usage and dealing.** The meaning of terms may be shown by usage of trade, course of dealing between the parties, and course of performance under the contract, with course of performance given the greatest weight where consistent.
- ☐ **Construction against drafter.** Ambiguities are generally construed against the party who drafted the contract; interpretations that make a contract valid and reasonable are preferred over those that make it void or unreasonable.

C. WARRANTIES (UCC)

GENERAL RULE In a sale of goods, the seller may make express warranties and, absent disclaimer, the law implies warranties of quality.

- ☐ **Express warranty.** An express warranty is created by any affirmation of fact or promise, description of the goods, or sample or model that is made part of the basis of the bargain; mere opinion or puffery is not a warranty.
- ☐ **Implied warranty of merchantability.** A merchant who deals in goods of the kind impliedly warrants that the goods are merchantable: fit for their ordinary purposes, adequately packaged and labeled, and of fair average quality.
- ☐ **Implied warranty of fitness.** Where the seller has reason to know of a particular purpose for which the buyer requires the goods and that the buyer relies on the seller's skill or judgment to select them, there is an implied warranty that the goods are fit for that purpose.
- ☐ **Disclaimers and limitations.** Merchantability may be disclaimed by mentioning merchantability (in a writing, conspicuously) and fitness by a conspicuous writing; language like as is or with all faults disclaims implied warranties, and remedies may be limited unless the limitation fails of its essential purpose or, for consumer personal injury, is unconscionable.

D. OMITTED AND IMPLIED TERMS

GENERAL RULE Courts supply omitted terms that are essential to a fair determination of the parties' rights, and imply certain duties by law.

- ☐ **Good faith.** Every contract imposes a duty of good faith and fair dealing in its performance and enforcement; under the UCC good faith means honesty in fact and, for merchants, observance of reasonable commercial standards of fair dealing.
- ☐ **UCC gap fillers.** The UCC supplies missing terms, including a reasonable price at the time of delivery, delivery at the seller's place of business, payment on delivery, and a reasonable time for performance, so long as the parties intended to contract.
- ☐ **Implied terms at common law.** Courts imply terms necessary to effectuate the parties' intent and reasonable in the circumstances, such as a duty to use best efforts in an exclusive-dealing arrangement.

VI. THIRD-PARTY RIGHTS ~12-13% tested

A. THIRD-PARTY BENEFICIARIES

GENERAL RULE A third party may enforce a contract made for its benefit if it is an intended, rather than merely incidental, beneficiary.

- ☐ **Intended vs incidental.** Only an intended beneficiary, one the contracting parties intended to benefit and give the right to performance, may sue; an incidental beneficiary who merely happens to benefit has no rights.
- ☐ **Creditor and donee beneficiaries.** An intended beneficiary is a creditor beneficiary if the promisee's purpose is to satisfy a debt owed to it, or a donee beneficiary if the purpose is to make a gift; both may enforce the promise.
- ☐ **Vesting.** The parties may modify or rescind the beneficiary's rights until they vest, which occurs when the beneficiary learns of and assents to the contract, materially relies on it, or brings suit.
- ☐ **Defenses and suits.** The beneficiary may sue the promisor, who may assert any defense arising from the contract against the beneficiary; a creditor beneficiary may sue both the promisor on the contract and the promisee on the underlying debt, but a donee beneficiary generally cannot sue the promisee.

B. ASSIGNMENT OF RIGHTS

GENERAL RULE A party may transfer its contract rights to another, who then may enforce them against the obligor.

- ☐ **Assignability.** Contract rights are generally assignable unless the assignment would materially change the obligor's duty or risk, is barred by law or public policy, or is validly prohibited by the contract; a term barring assignment is often read only to bar delegation or to give a right to damages, not to void the assignment.
- ☐ **Effect of assignment.** A valid assignment extinguishes the assignor's rights and transfers them to the assignee, who takes subject to all defenses and setoffs the obligor had against the assignor; the obligor must render performance to the assignee once notified.
- ☐ **Revocability and priorities.** A gratuitous assignment is generally revocable (by later assignment, death, or notice) unless the obligor has performed or the assignee has relied, while an assignment for consideration is irrevocable; as between successive assignees, the first generally prevails, though later assignees may take priority in defined circumstances.
- ☐ **Warranties of assignor.** An assignor for value impliedly warrants that the right exists, is not subject to undisclosed defenses, and will not be impaired by the assignor's own act, but does not warrant that the obligor is solvent or will perform.

C. DELEGATION OF DUTIES

GENERAL RULE A party may have another perform its contractual duties, but delegation does not relieve the delegating party of liability.

- ☐ **Delegability.** Duties are generally delegable unless performance by the delegate would materially differ (as with personal services calling for special skill), the contract prohibits delegation, or the obligee has a substantial interest in personal performance by the delegator.
- ☐ **Continuing liability.** A valid delegation does not discharge the delegating party; the delegator remains liable if the delegate fails to perform, and only a novation, with the obligee's agreement to release the delegator, ends that liability.
- ☐ **Assumption by delegate.** Where the delegate assumes the duty for consideration, the delegate becomes liable to the obligee, who may sue as an intended third-party beneficiary; a mere delegation without assumption does not make the delegate liable to the obligee.