

Chapter 1

INTRODUCTION

§ 1.01 THE MEANING OF CONTRACT

Studying the law of contracts involves studying the law of broken promises.

A contract is nothing more than a promise that the law will enforce.¹ Though this statement appears simple, in the real world it is quite complex. The variety of situations in our society in which promises are made and broken, combined with the complexity of the public policies which might affect the enforceability of a particular promise, sometimes makes the question of whether the law will enforce a promise particularly challenging. When we say that a contract is a promise that the law will enforce, we are also implicitly saying that there must be at least some promises that the law will not enforce. As will be seen, a great deal of contract law deals with the distinctions between agreements or promises that the law will enforce and those which, for various reasons, will not be enforced.

[A] Enforcement of Promises²

One of the most important themes associated with the meaning of contract deals with the concept of the “enforcement” of a promise. If a contract is a promise the law will enforce, it is critical to an understanding of contract law to have an understanding of the mechanism our society uses to “enforce” a promise. The nature and extent of the legal and equitable remedies available to enforce promises are not just an important part of contract law, they are viewed by many as the central point.

If promises were enforced by the threat of a term in prison, breaking a promise would be far more serious than if enforcement were accomplished by a stern lecture. The threat of prison would probably go a long way toward discouraging breach, but it might also discourage parties from entering into contracts in the first place unless they were supremely confident of their ability to perform. The threat of a stern lecture might leave people far too willing to breach and unwilling to place much stock in the meaning of their

¹ Restatement (Second) of Contracts § 1 (1981) (“contract is a promise . . . for the breach of which the law gives a remedy . . .”).

² Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else.”) (*reprinted in* Oliver Wendell Holmes, *Collected Legal Papers* 174 (1920)). Later, however, he seemed to recant: “Breaching of a legal contract without excuse is wrong . . . and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right” *Gaily v. Alabama*, 219 U.S. 219, 246 (1911) (dissent).

promises. Neither remedy would do much good for an injured party who had changed its plans in reliance on obtaining the benefits of performance of the contract.

In a market economy, promises are meaningful only if they can be relied upon by others. Promises can only be relied upon if the state's willingness to provide a remedy for nonperformance is meaningful to the injured party. In a vitally important sense, the entire meaning of a contract depends on the remedy that can be obtained for a breach of a contract.

Only in rare cases will our law compel the breaching party to perform its promise. While "specific performance" is occasionally available, the normal remedy for breach of contract is a court-sanctioned award of money damages. The amount of damages awarded for a breach of contract is based on an attempt to place the injured party in the same economic position it would have been in if the contract had been fully performed.³ However, in some cases this will not be possible and the court's award of damages may have to be limited to the amount necessary to restore the injured party to the position it was in before the contract was ever made,⁴ or at least to the extent necessary to ensure that the breaching party is not unjustly enriched as a result of its failure to perform.⁵ These three methods of calculating damages coincide with three key interests associated with contract law: expectation, reliance, and restitution. Money damages will nearly always be based on one of these three different interests.⁶

An understanding of the law of contract remedies will be crucial in obtaining a fuller understanding of contract law generally. Without understanding of the consequences of a breach of contract it is impossible to understand the meaning of a contract in the first place.⁷

[B] Which Promises to Enforce

A second important feature of contract law is the distinction it makes between promises which the law will enforce and those which it will not. Promises which are a part of an exchange, of the type that typically occur in the marketplace, are generally presumed to be enforceable, while promises which consist of nothing more than a commitment to make a gift are presumed not to be enforceable.⁸

Our free market economy depends on the predictable enforceability of promises that are based on agreed exchanges. Thus, ordinary exchange transactions, such as a promise to work in exchange for a salary, a promise

³ See U.C.C. § 1-305(a) (2001) (formerly U.C.C. § 1-106); Restatement (Second) of Contracts §§ 344(a) & 347 (1981).

⁴ See Restatement (Second) of Contracts §§ 344(b) & 349 (1981).

⁵ Restatement (Second) of Contracts § 344(c) (1981).

⁶ See generally Lon L. Fuller & Robert Perdue, *The Reliance Interest in Contract Damages* (Pts. 1 & 2), 46 Yale L.J. 52, 373 (1936 & 1937).

⁷ See Chapters 14–17.

⁸ See Chapter 3 Consideration.

to sell a house in exchange for a promise to pay a certain price, or even an exchange of services bartered for something else desired by the provider, must be predictably enforceable in order for a market economy to function.⁹ Promises to make gifts, while of great concern to the one who will receive the gift, are of lesser importance to the functioning of a vital economy. For this and other reasons, contract law draws a sharp dividing line between promises made as part of an exchange and promises made as an intended gift.¹⁰

Still, there will be circumstances where the exchange between the parties is tainted somehow, either due to the mental incapacity of one of the parties, or to the unfair or overbearing conduct of one of them, which permits the presumption of enforcement of the exchange to be rebutted.¹¹ In addition, people sometimes take meaningful action in reliance on a promise, even though it is nothing more than an otherwise legally unenforceable promise to make a gift.¹² In other situations, gift promises might be motivated by a desire to achieve some intangible business purpose, which relates to the functioning of the economy. In these situations the presumption that a promise to make a gift is not legally enforceable can also be rebutted.¹³ Thus, although the general rule is that promises which are part of an exchange will be enforced and that promises to make a gift will not be enforced, there are many situations where a promise will not be enforced even though it is part of an exchange and may situations where a promise will be enforced even though it is not a part of an exchange.

[C] Controlling (or at Least Predicting) the Future

Another key aspect of contract law is the role of contracts in assisting members of society in attempting to control, or at least to predict, the future. Our simple definition of a contract as a promise that the law will enforce makes this clear — a contract always involves a promise, and a promise is always a commitment about something which will happen in the future.

A person who makes a promise expresses a willingness to act (or to not act) in some specific way in the future.¹⁴ If Sam promises Barb that he will sell her his BMW if she pays him \$20,000, Sam has made a statement about future action that he is willing to take. He is also saying something about what he would like, in the future, to receive.

Of course in this situation, involving a contract between Sam and Barb for the sale and purchase of Sam's BMW, the contract is likely to be fully performed by the parties in the immediate future. However, many contracts

⁹ See § 3.03 The Essence of Consideration — The Bargained-for Exchange.

¹⁰ See § 3.04 Consideration at the Margins of Contract Law — Promises to Make a Gift.

¹¹ See Chapter 12 Contract Defenses.

¹² See Chapter 4 Promissory Estoppel; Detrimental Reliance.

¹³ See § 8.02 Consideration Required.

¹⁴ Restatement (Second) of Contracts § 2(1) (1981).

involve long-term commitments which may last for months, years, or even decades. If Karen enters into a contract to sell her house to Phil, performance is likely to occur within a month or two of the time the contract was made. But, it is likely to effect the parties' futures for a relatively long time. Having promised to sell her house to Phil, Karen has possibly given up forever the opportunity to remain living in her current home. And Phil has made a substantial commitment, which will probably prevent him from purchasing an alternative house, even if he finds one he likes better than Karen's.

Although most employees are merely "employees at will" who can either be fired or who can resign at any time without breach of either party's obligations, many employment contracts are for a much longer duration. Actors often enter into agreements to appear in movies and thus tie up their schedules for the duration of the time it takes to complete the filming of the project. In doing so, they not only make commitments about how they will spend their future time, they necessarily forego the opportunity to take on another, perhaps more promising project, which would require their participation at the same time. And, the filmmaker, by engaging a particular actor, may be making a commitment upon which the filmmaker's reputation will depend.

In more conventional businesses, an electric producing power plant may enter into a contract to purchase a substantial quantity of coal for an entire generation.¹⁵ This type of contract represents the parties' hopes and expectations for the long-term future, not just with respect to the demand for electricity, but with respect to environmental regulations concerning the use of coal and the price and availability of alternative sources of fuel. With such a contract the seller assures itself of a guaranteed market at a predictable price, and the buyer assures itself of a readily available source of a supply at prices it can reliably predict and use as the basis for a steady rate structure for the electricity-consuming public.

In all of these situations the legal enforceability of the promises made by the parties permits them to provide some assurances against an uncertain future. Sam can be sure that he has found someone to purchase his car and can confidently go ahead with his plans to buy a different vehicle knowing how much money he will have to spend. Barb, for her part, will be assured of reliable transportation and can quit spending her time car shopping. In the transaction between Karen and Phil, Phil can be confident that he will have a place to live and Karen can set aside her fears of what might happen if she is forced to leave town for that new job, still saddled with the responsibility of owning her existing home. And, both the coal mine and the public utility can make plans for the future, knowing that they need not worry about a volatile market for the price of coal.

¹⁵ *E.g.*, Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986) (contract for sale and purchase of 1.5 million tons of coal every year for 20 years); Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (21 year contract for purchase of "alumina").

In each of these situations the parties have used a contract to minimize their concerns about an uncertain future.¹⁶ Contract law thus deals with our use of promises to limit the degree of doubt that we all face in our lives. In this regard, contracts play a major role in helping us plan for the future. If promises were not enforceable in some way it would be much more difficult to plan around many of the risks inherent in life. Without contracts, life itself would be less certain.

[D] Obligations Voluntarily Assumed

Another critical theme in contract law is the voluntary nature of the obligations a contract imposes. To the extent that there are legal consequences that follow from making or breaking a promise, they are the result of the parties' voluntary decisions to enter into the contract. Contracts are obligations which are voluntarily assumed — they are not imposed by society. In this respect, contract law makes it possible for us to transform our intentions into legally binding obligations as an extension of the voluntary expression of our free will.¹⁷ Contract law is thus fundamentally different from the law of torts, which deals with obligations that are imposed on us externally by society.

The voluntary nature of contract liability has implications for many sub-topics of contract law. If the law determines that a party's promise was not truly a voluntary act, the promise will not usually be enforced. For example: a promise made by a minor, (a 17 year old's promise to pay for a car, for example)¹⁸ or one made under the a threat of violence,¹⁹ will not be enforceable because our society chooses to conclude that such obligations were not voluntarily undertaken. Minors are deemed incapable of undertaking the responsibility of a contractual obligation. Individuals who make commitments "with a gun to their head" should not be bound to perform when their agreement was made pursuant to compulsion.

Other examples where promises may not be enforced include those induced by fraud²⁰ or undue influence,²¹ where truly voluntary consent is missing. Likewise, unusually one-sided obligations may not be enforceable due to unconscionability where there was a gross disparity in the bargaining power between the parties at the time the agreement was made.²²

¹⁶ The Restatement (Second) of Contracts defines a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2 (1981).

¹⁷ See generally J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1968); James Gordley, *Contract Property, and the Will — The Civil Law and Common Law Traditions*, in *The State and Freedom of Contract* 66, 79–83 (H. Scheiber ed. 1998).

¹⁸ See § 12.03[A] Minors.

¹⁹ See § 12.04[C] Improper Threats.

²⁰ See § 12.04[B] Fraud, Misrepresentation, and Non-Disclosure.

²¹ See § 12.04[D] Undue Influence.

²² See § 12.05 Unconscionability.

[E] Outward Manifestations of Intent

By their very nature as well, promises are outwardly manifested expressions of intent that usually involve words that may either be spoken, written, or both.²³ Contract law includes an extensive set of rules that are used to assist courts in determining the meaning and legal effect of what we say and do. Some of these rules deal with whether words or actions are properly even considered promises — whether they can be reasonably interpreted by others as commitments about the future.²⁴ Many of them deal with the offer and acceptance process that is the principal touchstone in contract law for determining whether there has been mutual assent between the parties.²⁵ Other rules are designed to assist in the interpretation of the language used by the parties.²⁶ Similarly, the “parol evidence rule” facilitates the enforceability of written contracts by imposing restrictions on the evidence a party can use to attempt to contradict the terms of a written contract intended by the parties to be the final expression of the terms of their agreement.²⁷

[F] Significance of Reliance

Another key theme in contract law deals with the likelihood that promises will be relied upon by others. The recipient of a promise often relies on what has been said. This reliance takes the form of a change in plans or in expenses incurred on the faith that a promise will be performed. Likewise, people sometimes refrain from doing something they otherwise might have done because of their confidence that a promise will be performed, or at least that the law will enforce it.²⁸

Many common examples exist: a prospective employee may quit her current job in reliance of a promise of a new one; an employee may decide to retire in reliance on a promise of a pension to be paid; a homeowner might quit making calls in search of a favorable interest rate in reliance on a mortgage broker’s promise to make a loan to refinance her home; a college might make plans for the future development of its programs or facilities in reliance on promises from donors even before it has the donations in hand. As we will see later, each of these situations presents a serious question about whether a contract has been formed and whether the promises made should be enforced. Given the devastating consequences of the failure by these promisors to perform, it is not surprising to learn that a significant portion of contract law deals with efforts to protect those who

²³ See § 5.02 Objective Theory of Contract Formation.

²⁴ See § 5.03 Determining Whether an Offer has been Made.

²⁵ See § 5.01 Introduction to Mutual Assent.

²⁶ See § 6.01 Determining the Terms of a Contract.

²⁷ See § 6.05 The Parol Evidence Rule.

²⁸ Sidney W. DeLong, *The New Requirement of Search Term Begin Enforcement Reliance Search Term End in Commercial Promissory Estoppel: Section 90 as Catch 22*, 1997 Wis. L. Rev. 943, 1016.

have taken some action in reliance on the promises of others, even though a complete contract may not have been made.²⁹

The fact that people are likely to rely on promises made by others plays an important role in contract law. In the view of many, promises are enforceable primarily because they are relied upon — or at least because of the foreseeable likelihood that they may be relied upon by others. In another sense, it may be possible to justify enforcing promises because the reliance on them is based on an assumption that the promise is enforceable in a court of law (this is the standard contract situation). If it turns out that reliance was not justified, such as where the defendant’s promise was procured through duress, enforcement is not warranted. Thus, reasonable and foreseeable reliance on a promise may serve to make a promise enforceable even though the promise might not otherwise satisfy all of the requirements that would cause it to be part of a “contract” and therefore enforceable.

[G] Freedom of Contract

Finally, and perhaps most importantly, the “freedom of contract” is one of the large themes associated with contract law. As Sir Henry Maine famously noted in 1861 “the movement of the progressive societies has hitherto been a movement from Status to Contract.”³⁰ Because legally enforceable promises are voluntarily made based on our outward expressions of our free will, we are generally free to enter into contracts on any terms we wish, with the confidence that the contract and its terms will be enforced.³¹ This freedom, based on the economic principle that each individual is in the best position to know what is in his or her own best interest, and should be free to pursue that interest, has been the great engine of commerce in the western world.

Still, much of contract law deals with the extent of societal limitations on the freedom of contract. The doctrine of consideration, which generally prevents promises to make gifts enforceable, imposes a significant limit on our freedom to make certain types of legally binding promises. Members of society can freely enter into nearly every imaginable type of exchange transaction; they can make a present gift of whatever property they own,

²⁹ See Chapter 4 Promissory Estoppel: Detrimental Reliance.

³⁰ Henry Maine, *Ancient Law* 182 (Sir Frederick Pollock ed., 1930); see also Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 641 (1943) (on the return to the significance of status).

³¹ P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Michael J. Trebilcock, *The Limits of Freedom of Contract* (1993); Harold C. Havighurst, *Limitations Upon Freedom of Contract*, 1979 Ariz. St. L.J. 167; Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401, 407–09 (1964); Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 641 (1943); See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. Rev. 263, 265 (1999); Samuel Williston, *Freedom of Contract*, 6 Cornell L.Q. 365, 379 (1921).

so long as it does not harm their creditors,³² but promises to make a gift in the future are generally not enforceable absent some reasonable and foreseeable reliance on the promise.³³ Likewise, public policy regulates the form in which contracts are created by requiring certain types of particularly important contracts to be in writing.³⁴ Other public policies regulate the manner in which warranties may be disclaimed,³⁵ the extent to which remedies may be limited,³⁶ and the ability of parties to specify the amount of damages that will be owed for a breach of contract.³⁷ Still other public policies are likely to intervene, depending on the subject matter of the contract, such as those relating to family relationships,³⁸ those dealing with employment,³⁹ or those involving consumers.⁴⁰

Further, although the doctrine of consideration enhances freedom of contract by generally refusing to inquire into the adequacy of the amount of consideration given for a promise,⁴¹ the doctrine of “unconscionability” sometimes intervenes to prevent enforcement of a contract where the terms are “unfair” and when there was some flaw in the bargaining process that led to the formation of the contract.⁴²

Nearly every sub-topic of contract law involves some balancing of the principle supporting freedom of contract and societal restraints on that same very freedom.⁴³

§ 1.02 TYPES OF CONTRACTS

Contracts can be classified in many different and sometimes overlapping ways. Contracts are sometimes characterized as express or implied, as bilateral or unilateral, as void or voidable, or as executory. These characterizations are frequently helpful in resolving issues related to the characterizations.

³² Uniform Fraudulent Transfer Act §§ 4–5 (1984).

³³ See § 3.04 Consideration at the Margins of Contract Law — Promises to Make a Gift.

³⁴ See Chapter 7 Is a Writing Required? — The Statute of Frauds.

³⁵ See U.C.C. § 2-316 (2001); § 9.07 Disclaimers of Warranties.

³⁶ See U.C.C. § 2-719 (2001); § 9.07[C] Limited Remedies.

³⁷ See U.C.C. § 2-718 (2001); Restatement (Second) of Contracts § 356 (1981); § 16.03 Liquidated Damages.

³⁸ See § 12.02[A][4] Contracts Affecting Family Relationships.

³⁹ See § 17.04 Balancing the Equities: Practicality and Fairness.

⁴⁰ See § 1.02[G][2] Rules Governing Transactions with Consumers.

⁴¹ See § 3.05 The Insignificance of the Relative Values of a Bargained-For Exchange.

⁴² See § 12.05 Unconscionability; Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741 (1982).

⁴³ Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763 (1983).

[A] Express and Implied Contracts⁴⁴

Courts sometimes characterize contracts as “express” or “implied.” Implied contracts are sometimes further characterized as implied “in fact” or implied “in law.”

If a contract is made in express oral or written terms it is sometimes said to be an “express contract.” Express contracts take many forms, ranging from a detailed multi-page contract negotiated over many months for the sale of a large business⁴⁵ to a simple agreement for the sale of a used car concluded with a handshake. On the other hand, contracts “implied in fact” are created far more informally, perhaps through nothing more than a nod of the head or a wave of the hand. A patron in a bar might, for example, hold up two fingers, indicating to the bartender that he wants to purchase another round of drinks for him and his companion, thus implying his agreement to pay the standard price for the drinks. As one court explained:

A contract implied in fact is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties. However, all of the elements of an express contract must be shown by the facts or circumstances surrounding the transaction — mutuality of intent, offer and acceptance, authority to contract — so that it is reasonable, or even necessary, for the court to assume that the parties intended to be bound.⁴⁶

There is no legal difference between an express contract and a contract implied in fact.⁴⁷ Both are true contracts, based upon the expressed intentions of the parties to enter into a voluntary obligation. The only distinction between the two is the manner in which the parties’ intent is expressed.

A contract “implied in law” on the other hand, is not really a contract at all.⁴⁸ A contract implied in law, or a “quasi-contract” as it is sometimes

⁴⁴ Willard L. Boyd III & Robert K. Huffman, *the Treatment of Implied-in-law and Implied-in-fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 Cath. U. L. Rev. 605, 629 (1991).

⁴⁵ *E.g.*, *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423 (7th Cir. 1989).

⁴⁶ *Prudential Ins. Co. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); *see also* *B. & O. Ry. Co. v. United States*, 261 U.S. 592, 597 (1923) where the United States Supreme Court said:

The “implied[-in-fact] agreement” . . . is not an agreement “implied in law,” more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement “implied in fact,” founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.

⁴⁷ Arthur Linton Corbin, 1 *Corbin on Contracts* § 1.19 (1993).

⁴⁸ *See* *Martin v. Little, Brown and Co.*, 450 A.2d 984, 988 (Pa. Super. Ct. 1981); *Continental Forest Prods v. Chandler Supply Co.*, 518 P.2d 1201, 1205 (Idaho 1974).

called, is based on the law of restitution.⁴⁹ The law of restitution seeks to prevent “unjust enrichment” and thus does not depend on the voluntary consent of the parties.

A clear example of this is found in *Cotnam v. Wisdom*.⁵⁰ The plaintiffs were surgeons who performed emergency surgery on Mr. A.M. Harrison, who hit his head when he was thrown from a street car. Mr. Harrison never became conscious and was never able to express his willingness to pay for the emergency medical services rendered by the plaintiffs in an effort to save Mr. Harrison’s life. Mr. Harrison’s estate was nevertheless liable, on a theory of quasi-contract, for the value of the benefit received by Mr. Harrison as a result of the doctor’s efforts, even though there was no agreement between the parties and thus no real contract.

When the parties are both conscious, and capable of expressing their consent, the distinction between a contract implied in law and a contract implied in fact is more difficult to draw. When the owner of a house undergoing renovation asks the contractor to make a change or makes a request for additional work, it might be unclear whether the contractor’s claim for payment for the extra work is based on the unjust enrichment to the owner that would otherwise occur or on the owner’s implied consent to pay for the additional work.⁵¹ Not only may the remedy be slightly different, but the existence of an express contract dealing with the project might impose a barrier to recovery based on a contract implied in law.⁵²

Other cases are more clearly based on unjust enrichment and not on the parties’ informal expressions of assent. In *Schott v. Westinghouse Electric Corp.*,⁵³ an employee submitted a suggestion to his employer pursuant to a company program which encouraged employees to make suggestions by holding out the possibility of a cash award. The suggestion form signed by the employee contained an express disclaimer of contractual liability, making it clear that there was no agreement by the employer to pay for the suggestion. Thus, the only possible basis for the employee’s recovery was on a theory of quasi-contract based on any unjust enrichment of the employer who used the suggestion to its benefit.

Another important distinction between express contracts and contracts implied in fact on the one hand, and contracts implied in law on the other, is the remedy provided. In a true contract, based on the voluntary assent of the parties, remedies are based on the injured party’s expectations.⁵⁴ When the court finds a quasi-contract the remedy is based on the value of the benefit conferred on the party who was enriched, in an effort to prevent any enrichment which otherwise would be unjust.⁵⁵

⁴⁹ See *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332 (N.J. Super. Ct. 1966).

⁵⁰ 104 S.W. 164 (Ark. 1907).

⁵¹ See *Associated Builders, Inc. v. Oczkowski*, 801 A.2d 1008 (Me. 2002).

⁵² *Hall Contracting Corp. v. Entergy Services, Inc.*, 309 F.3d 468 (8th Cir. 2002).

⁵³ 259 A.2d 443 (Pa. 1969).

⁵⁴ See § 14.02 Damages based on the Injured Party’s Expectations.

⁵⁵ See, § 14.01[B] Purposes of Contract Remedies: Expectation, Reliance, and Restitution Interests.

[B] Formal and Informal Contracts

The distinction between “formal” and “informal” contracts has two meanings. The traditional distinction was based on whether the formation of the contract adhered to certain ritualistic formalities⁵⁶ such as the impression of melted wax on a written contract with an impression known as a “seal.”⁵⁷ In this sense the term “formal contract” was used to refer to the form of the agreement and played a critical element in its enforceability or other attributes.⁵⁸ Modern examples are negotiable instruments, negotiable documents, and letters of credit, all of which are governed by special provisions of the Uniform Commercial Code.⁵⁹ In this traditional sense, the term “informal contract” was used to refer to all other contracts, regardless of whether they were written or oral, or whether they were simple or complex.⁶⁰

In the more modern sense a formal contract is one which is in a carefully negotiated and expressed in a final written document.⁶¹ An informal contract is one formed more casually, possibly not bothering with any kind of a writing.⁶² Thus, when one of your authors hired a local home renovation construction firm to build an addition to his house he signed an elaborate printed contract providing for a wide variety of possible contingencies and allocating responsibilities between the parties with respect to many details associated with the project. On the other hand, the agreement he made with his landscaper to install an array of perennial flowers, shrubs, and trees, consisted of little more than a drawing with a price scribbled in the corner. And, his wife’s agreement (she is also an attorney) to pay a caterer for a large private party was even more informal: they settled on a date, a time, a place, a menu, the number of people who would be attending, and a price. The differences in the degrees of formality do not effect the enforceability of the agreement, though, as will be seen, they may have a bearing on the admissibility of evidence of promises which were never incorporated into any final written version of the parties’ agreement.⁶³

⁵⁶ See, e.g., Harold D. Hazeltine, *The Formal Contract of Early English Law*, 10 Colum. L. Rev. 806 (1910).

⁵⁷ See Restatement (Second) of Contracts § 6(a) (1981).

⁵⁸ See Arthur Linton Corbin, 1 Corbin on Contracts § 1.5 (1993); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. Rev. 695, 696 n. 5.

⁵⁹ See Restatement (Second) of Contracts § 6 (1981).

⁶⁰ Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 Wis. L. Rev. 695.

⁶¹ See William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wis. L. Rev. 931, 938.

⁶² See Robert Childres & Stephen J. Spitz, *Status in the Law of Contracts*, 47 N.Y.U.L. Rev. 1, 4 (1972); Wendell H. Holmes, *The Freedom Not to Contract*, 60 Tul. L. Rev. 751, 790 (1986).

⁶³ See Robert Childres & Stephen J. Spitz, *Status in the Law of Contracts*, 47 N.Y.U.L. Rev. 1 (1972).

[C] Bilateral and Unilateral Contracts

Contract law sometimes distinguishes between “bilateral” and “unilateral” contracts.⁶⁴ A bilateral contract involves two promises; a unilateral contract involves only one. The distinction was abandoned by the Restatement (Second) of Contracts,⁶⁵ and was never found in the Uniform Commercial Code. Though of questionable utility, the distinction is still sometimes drawn.⁶⁶

Its most common use is in connection with the manner in which a contract is created. In a bilateral contract, a contract is formed through an exchange of promises. Thus, when Rhonda’s Roofing promises to install a new roof on Julie’s house, in exchange for the Julie’s promise to pay for the work, a bilateral contract is formed. The contract exists as soon as the parties’ promises are exchanged for one another. Both parties have made an enforceable promise: Rhonda’s Roofing will be liable to Julie if Rhonda fails to perform the promised work and Julie will owe a debt to Rhonda’s Roofing if she fails to make timely payment for the work.

In a unilateral contract, only one of the parties makes an offer which can only be accepted by performance: “If you find my lost cat, and return him to me safely, I’ll pay you \$100.” The owner of the cat has made a promise, but has not sought a return promise in exchange. The contract is not concluded by an exchange of promises. Instead, it is concluded when the requested performance is complete — when the cat is found and safely returned. Until the cat is found, there is no binding contract.⁶⁷ Thus, the offeree is free to abandon his search for the missing cat at any time, without liability for breach.

Modern decisions treat the distinction primarily as a question of the manner in which acceptance is made. If the offer does not invite acceptance in the form of a return promise, but instead insists on performance as the exclusive manner of acceptance, the contract is not generally regarded as formed until completion of the requested performance.⁶⁸ Still, as will be seen, a promisee who begins performance in reliance on the promise may be prevented from attempting to revoke the promise, until a reasonable time for completion has passed.⁶⁹

⁶⁴ Restatement of Contracts § 12 (1932).

⁶⁵ See Restatement (Second) of Contracts § 1 (1981).

⁶⁶ *Brannan & Guy, P.C. v. City of Montgomery*, 828 So. 2d 914, 921 (Ala. 2002); *D.L. Peoples Group, Inc. v. Hawley*, 804 So. 2d 56 (Fla. Ct. App. 2002); *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399 (9th Cir. 1993).

⁶⁷ See, e.g., *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399 (9th Cir. 1993); *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

⁶⁸ See Restatement (Second) of Contracts § 32 cmt. b (1981).

⁶⁹ See Restatement (Second) of Contracts § 45(1) (1981); see generally § 5.05[B][3] Acceptance by Performance Without a Return Promise — Unilateral Contracts.

[D] Executory Contracts

An “executory contract” is one that has not yet been substantially performed.⁷⁰ An “executed contract” on the other hand, is one in which the obligations have been at least substantially if not fully performed.⁷¹ If Karen and Phil enter into an agreement that Phil will purchase Karen’s home for \$225,000, the contract is still fully “executory” during the time between the creation of the contract and the “closing” when Karen delivers a deed to the house to Phil and Phil pays Karen the promised sum of money.

A contract may be fully executory, with both parties having substantial duties remaining to be performed, or it might be fully performed by one party with the other having duties remaining to be performed. Thus, if Sam promises to sell his auto to Barb, for a price of \$20,000, Sam may have delivered the goods on Monday and waited for Barb to pay him for the car on Tuesday.⁷² Likewise, a construction company may have completed work on the owner’s house, but not yet received payment for its work.

Whether a contract remains fully or partially executory is relevant to several issues including the enforceability of a modification made without consideration,⁷³ the avoidance of a contract entered into by a party who is intoxicated⁷⁴ or affected by a mental disability,⁷⁵ and whether the contract can be rescinded⁷⁶ or modified after it has been assigned.⁷⁷ Whether the contract remains fully executory also affects the doctrine of anticipatory repudiation.⁷⁸

Courts sometimes also refer to the “execution” of a written contract to refer to whether the contract has been signed, using “executed” as synonymous with “signed” or “authenticated.”⁷⁹

[E] Adhesion Contracts

Adhesion contracts are those in which one of parties has little or no opportunity to bargain over the specific terms of the agreement.⁸⁰ Instead,

⁷⁰ *E.g.*, Gaugert v. Duve, 579 N.W.2d 746 (Wis. App. 1998).

⁷¹ Smith v. Allen, 436 P.2d 65 (Cal. 1968).

⁷² As Wimpy from “Popeye” used to say: “I will gladly pay you Tuesday, for a hamburger today.”

⁷³ See Restatement (Second) of Contracts § 89 (1981).

⁷⁴ See Restatement (Second) of Contracts § 16 cmt. b (1981).

⁷⁵ See Restatement (Second) of Contracts § 15(2) (1981).

⁷⁶ Restatement (Second) of Contracts § 148 (1981).

⁷⁷ See Restatement (Second) of Contracts § 338 cmt. f (1981).

⁷⁸ See Restatement (Second) of Contracts § 253 cmt. c (1981); *see also* § 11.06 Anticipatory Repudiation.

⁷⁹ See *also* U.C.C. § 9-102(a)(7) (2001).

⁸⁰ See *generally* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429 (2002); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173 (1983); Edwin Patterson, *The Delivery of a Life Insurance Policy*, 33 Harv. L. Rev. 198, 222 (1919).

the party who has drafted the contract presents it on a “take-it-or-leave-it” basis, leaving the other party with the choice of entering into the contract as written, or walking away from the transaction completely. Such contracts are usually in a “standardized form” with the same terms offered to every customer.

Insurance policies are good examples of adhesion contracts. The insured has a choice of whether to agree to the terms of the policy or to shop around for a better deal from someone other insurance company. Apart from the availability of a limited number of standardized additional protections or “riders,” the purchaser is not usually able to negotiate over the specific terms of the protection offered by the policy. Likewise, many employment contracts are contracts of adhesion, with the employee bound by the terms supplied by the employer to all of its employees, and not usually susceptible to negotiation by the employee.⁸¹

When the terms of a contract of adhesion are oppressive or overly one-sided, they are sometimes unenforceable under the doctrine of “unconscionability.” In *Henningsen v. Bloomfield Motors, Inc.*⁸² terms purporting to limit the liability of the seller of a defective automobile, contained in a form contract with terms standardized throughout the automobile industry, were held unenforceable due to their oppressive nature and the gross inequality in bargaining power between the parties.⁸³

Despite decisions like *Henningsen*, life would be both difficult and expensive if all contracts of adhesion were unenforceable.⁸⁴ The use of standardized forms simplifies the contracting process by reducing the transaction costs associated with creating many contracts. Likewise, they permit institutional parties who enter into many similar transactions with a wide variety of customers to plan the delivery of the goods and services they provide. Tailoring the terms of each individual transaction to the particular and sometimes idiosyncratic desires of every customer would make the process of entering into contracts cumbersome and the process of fulfilling the terms of those contracts extraordinarily difficult. This is particularly true when most customers desire essentially the same terms. The costs savings experienced as a result of the advantages of employing standardized terms will be passed on, at least in a competitive market, to customers in the form of lower prices.⁸⁵ Accordingly, most contracts of adhesion are fully enforceable.

⁸¹ *E.g.*, *Fittante v. Palm Springs Motors, Inc.*, 29 Cal. Rptr. 2d 659 (Cal. 2003). Your own agreement with your law school is just such a contract. You are not able to negotiate over which courses you will take, at least during your first year; nor are you likely to find the school’s tuition structure subject to negotiation — apart, at least from whatever financial aid award you have received.

⁸² 161 A.2d 69 (N.J. 1960).

⁸³ *Id.* at 75; see generally § 12.05 Unconscionability.

⁸⁴ Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. Miami L. Rev. 1263, 1269–70, 1275 (1993).

⁸⁵ See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991).

Although most adhesive contracts are not unconscionable, they are nevertheless subject to closer scrutiny than contracts in which all or most of the terms have been separately negotiated by the parties. For example, ambiguities in contracts of adhesion are usually construed against the party who drafted the unclear language.⁸⁶ Likewise, courts might insist that adequate notice be provided with respect to particularly one-side or otherwise onerous terms, such as a forum selection clause which would force the party lacking any bargaining power to pursue any litigation in a distant and inconvenient forum.⁸⁷ However, despite these occasional limitations, adhesive contracts are generally fully enforceable according to their terms.

[F] Void, Voidable and Unenforceable Contracts

Some contracts are illegal.⁸⁸ Moreover, otherwise legal contracts are sometimes tainted by the lack of capacity of the parties, due either to their age or mental condition,⁸⁹ or because of the use of improper means of obtaining consent, including fraud, duress, undue influence, or unconscionability.⁹⁰ On other occasions performance is excused due to mistake, impossibility, or frustration of purpose.⁹¹

These circumstances may either make the contract “void ab initio” (void from the outset) and thus completely invalid, or, on the other hand, merely “voidable” at the election of one of the parties.⁹² When a contract is said to be “unenforceable” it means that there is no remedy for breach, but that the existence of the contract may be recognized in some other way,⁹³ such as the basis for an action in tort for interference with a contractual relationship.⁹⁴

When the agreement between the parties is completely illegal, such as an agreement to commit a crime or a tort, the agreement is “void.”⁹⁵ There might have been an agreement, but there was ever a “contract.” Neither party can enforce the agreement and there is nothing the parties can do

⁸⁶ *E.g.*, Grinnell Mut. Reinsurance Co. v. Jungling, 654 N.W.2d 530, 536 (Iowa 2002); Howard v. Federal Crop Insurance Corp. 540 F.2d 695 (4th Cir. 1976).

⁸⁷ *See, e.g.*, Hunt v. Superior Court, 97 Cal.Rptr.2d 215 (Cal. Ct. App. 2000); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

⁸⁸ *See* § 12.02 Contracts Unenforceable Due to Conflict With Public Policy; Illegal Contracts.

⁸⁹ *See* § 12.03 Incapacity.

⁹⁰ *See* § 12.04 Obtaining Assent Improperly: Fraud, Duress, and Undue Influence.

⁹¹ Restatement (Second) of Contracts § 7 cmt. b (1981); *see* Chapter 13 Excuse: Mistake and Change of Circumstances.

⁹² Restatement (Second) of Contracts § 7 (1981).

⁹³ *See* Restatement (Second) of Contracts § 8 (1981)

⁹⁴ *See* Daugherty v. Kessler, 286 A.2d 95, 97 (Md. 1972); Arthur Linton Corbin, 1 Corbin on Contracts §§ 1.6, 1.7, & 1.8 (Interim ed. 1993); Abraham M. Levin, *The Varying Meaning and Legal Effect of the Word “Void,”* 32 Mich. L. Rev. 1088 (1933).

⁹⁵ *See* § 12.02 Contracts Unenforceable Due to Conflict With Public Policy; Illegal Contracts.

to make the agreement valid. Such agreements are sometimes referred to as “void contracts” even though this term is a bit of a misnomer.

When there is some other problem with the agreement, but it is still enforceable by one of the parties, the contract is said to be “voidable.” However, until the party with the right to disaffirm the contract acts to exercise its right, the contract remains valid. And, the party with the right to disaffirm the contract, seeing advantages in the deal, might decide to ratify the contract and go ahead with its performance.

A good example of a contract which is voidable at the election of one of the parties is an agreement with someone who, like a child or a person suffering from a mental disability, lacked the legal capacity to enter into the contract.⁹⁶ Thus, the court-appointed guardian of an Alzheimer’s patient may seek to disaffirm a contract the patient previously entered into with a nursing home, on the grounds that the patient was not capable of understanding the nature of the agreement she made.

On the other hand, there may be no reason to disaffirm the contract. If the nursing home is providing the patient with good care at a reasonable price it may make more sense to leave the contract in place. Likewise, a 17 year old, who is satisfied with the car he contracted to buy, may want to keep it despite his legal power to disaffirm the deal and give the car back to the seller. In these situations, where the contract is merely voidable, not void, the party suffering from the lack of contractual capacity will have the option of disaffirming the contract or enforcing it. If the party lacking capacity wants to enforce the contract, the other party remains bound.

[G] Contracts Involving “Merchants” and Those for “Consumer Goods or Services”

The law of contracts does not apply uniformly to everyone. Article 2 of the Uniform Commercial Code in particular, frequently draws distinctions between contracts involving one or more business professionals, or “merchants,” and those lacking any particular business expertise. In addition, special statutory provisions or common law rules are frequently applicable to transactions involving consumers.

[1] Rules Applicable to Merchants⁹⁷

Special rules apply to merchants because of their expertise in connection with either the subject matter of the transaction or with the practices involved in the transaction. U.C.C. § 2-104 defines a merchant as

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar

⁹⁶ See § 12.03[B] Mental Incapacity.

⁹⁷ Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 Harv. L. Rev. 465 (1987); John F. Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 Wash. U.L.Q. 1.

to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.⁹⁸

Thus, a person may acquire the status of a merchant due to knowledge or skill he has which is particular to the goods involved in the transaction. Likewise, depending on the context, a person may be a merchant because of his expertise in connection with the business practices involved in the transaction, even though these are general business practices which would be familiar to anyone in business.⁹⁹ Moreover, an unsophisticated person, without expertise, may be saddled with the responsibilities of a merchant by representing himself as a person with special knowledge or skill. One's occupation alone may be sufficient for this purpose. Finally, a person may be treated as a merchant if he engages an employee or other agent who represents himself as having specialized knowledge or skill relevant to the transaction.

Where applicable, these specialized rules rest on the premise that greater reliance is usually placed on a person who either has expertise or who represents him or herself as having expertise related to the transaction.

Whether someone is a merchant sometimes depends on the context in which the issue arises. The Official Comments to U.C.C. § 2-104 point out three separate contexts in which designating someone as a merchant may be important.¹⁰⁰ The definition of a merchant applies somewhat differently in each setting.

Although Article 2 of the U.C.C. generally governs all contracts for the sale of goods, several provisions of Article 2 of the U.C.C. impose special rules governing the contract formation process when one or both of the parties qualifies as a merchant. These rules include the statute of frauds,¹⁰¹ rules relating to firm or irrevocable offers,¹⁰² the "battle of the forms,"¹⁰³ and modifications of contracts.¹⁰⁴ All of these rules require little expertise beyond that which would normally be expected of anyone who is in business, such as the usual business practice of responding to mail.¹⁰⁵

A second context in which a person's status as a merchant is important is in connection to the implied warranty that goods will be of merchantable

⁹⁸ U.C.C. § 2-104(1) (2001).

⁹⁹ U.C.C. § 2-104 cmt. 2 (2001).

¹⁰⁰ *Id.*

¹⁰¹ U.C.C. § 2-201 (2001); *see* § 7.06[B] Confirmatory Memorandum Between Merchants.

¹⁰² U.C.C. § 2-205 (2001); *see* § 5.09[D] Firm Offers Under U.C.C. § 2-205.

¹⁰³ U.C.C. § 2-207 (2001); *see* § 5.10 Mirror-Image Rule and the Battle of the Forms Under U.C.C. § 2-207.

¹⁰⁴ U.C.C. § 2-209(2) (2001); *see* § 8.04[B] Agreements That Modifications Must be Written.

¹⁰⁵ U.C.C. § 2-104 cmt. 2 (2001).

quality.¹⁰⁶ The warranty applies only if the seller is not only a merchant, but if the seller is a “merchant with respect to goods of [the] kind” involved in the transaction.¹⁰⁷

A third set of rules impose slightly elevated responsibilities on merchants in a variety of general and specialized settings, ranging from the overall duty of good faith¹⁰⁸ to the specific duties imposed on a merchant to follow the seller’s instructions with respect to defective goods in the merchant buyer’s possession.¹⁰⁹ When used in these and other contexts, the more general or specific sense of the definition of merchant can apply.¹¹⁰

[2] Rules Governing Transactions With Consumers

[a] Consumer Protection Legislation

Special rules sometimes also apply to transactions with consumers. Most of these rules are not part of the general law of contracts. Instead, they are found in a myriad of state and federal legislative and regulatory provisions which afford greater protections to consumers than are available under the common law of contracts. Foremost among these rules are those found in federal Consumer Credit Protection Act, which includes provisions related to consumer loan transactions,¹¹¹ credit reporting,¹¹² debt collection practices,¹¹³ and electronic funds transfers.¹¹⁴ The federal Magnuson-Moss Warranty Act is responsible for the form in which many consumer product warranties appear.¹¹⁵ Many of these statutes are accompanied by complex administrative regulations.¹¹⁶

Likewise, the Federal Trade Commission (FTC) has adopted trade regulation rules pursuant to its authority under the Federal Trade Commission Act.¹¹⁷ The FTC’s Regulations for Sales Made at Homes¹¹⁸ are particularly important. They give consumers the right to rescind a sale made at the consumer’s home if the consumer cancels the transaction within three business days after the contract is made.¹¹⁹ This three-day

¹⁰⁶ U.C.C. § 2-314 (2001); *see* § 9.03 Implied Warranty of Merchantability.

¹⁰⁷ U.C.C. § 2-314 (2001); *see* § 9.03[A] Seller a Merchant with Respect to Goods of the Kind.

¹⁰⁸ U.C.C. § 1-304 (2001).

¹⁰⁹ U.C.C. § 2-104 cmt. 2 (2001).

¹¹⁰ *Id.*

¹¹¹ The Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2000).

¹¹² The Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681u (2000).

¹¹³ The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692o (2000).

¹¹⁴ Electronic Funds Transfer Act, 15 U.S.C. §§ 1693–1693r (2000).

¹¹⁵ 15 U.S.C. §§ 2301–2312 (2000).

¹¹⁶ *See generally* Howard J. Alperin & Roland F. Chase, *Consumer Law* (1986).

¹¹⁷ 15 U.S.C. § 45 (2000).

¹¹⁸ 16 C.F.R. §§ 429.0–429.3 (2002).

¹¹⁹ 16 C.F.R. § 429.1 (2002).

right of rescission, applicable only to sales concluded in the consumer's home, is the source of the common misconception that any consumer transaction can be rescinded within a three-day period.¹²⁰ A similar three-day cooling-off period is available for certain home equity mortgage loan transactions.¹²¹

In addition, there are many special state consumer protection statutes covering a wide variety of topics such as home renovation contracts,¹²² automobile repairs,¹²³ and consumer loans¹²⁴ to name a few. These statutes vary considerably state to state. The most important of these statutes are the Uniform Consumer Credit Code,¹²⁵ adopted in seven states,¹²⁶ and the Uniform Consumer Sales Practices Act,¹²⁷ adopted in only three states.¹²⁸

With minor variations, the scopes of these various statutes are quite similar. They apply to agreements which are primarily intended for personal, family, or household purposes.¹²⁹ Thus, it is not the nature of the goods which controls whether consumer protection law applies to the transaction. Instead, it is the purpose of the agreement. For example, the purchase of a computer at an electronics store, for installation in the buyer's home to be used to play games, keep track of the family checking account, and to surf the Internet for fun and amusement would be for personal, family, or household purposes and would be subject to most consumer protection laws. The purchase of an identical computer for use in a home office for exclusively business purposes, would not be covered by most of these statutes.¹³⁰

An important exception is the Magnuson-Moss Consumer Warranty Act.¹³¹ Most of its provisions apply to transactions involving products “normally

¹²⁰ Nearly every year one of my Contracts students approaches one of your authors seeking information “for a friend” about the friend's ability to rescind a contract for the purchase of an automobile.

¹²¹ Truth in Lending Act § 125, 15 U.S.C. § 1635 (2000).

¹²² *E.g.*, Ohio Rev. Code Ann. § 1345.21–1345.28 (Anderson 2002); FTC Door-to-Door Sales Regulations 16 C.F.R. §§ 429.0–429.3 (2003).

¹²³ *E.g.*, 107 Ohio Admin. Code § 109:4-3-13 (2001).

¹²⁴ *See*, Elizabeth R. Schiltz, *the Amazing, Elastic, Ever-expanding Exportation Doctrine and its Effect on Predatory Lending Regulation*, 88 Minn. L. Rev. 518 (2004).

¹²⁵ *See, e.g.*, Colo. Rev. Stat. Ann. §§ 5-1-101 to 5-9-103 (LexisNexis 2003).

¹²⁶ States adopting the act are Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming. It has also been enacted in Guam.

¹²⁷ *See, e.g.*, Ohio Rev. Code §§ 1345.01–1345.51 (Anderson 2002).

¹²⁸ Ohio, Kansas, and Utah have adopted the Uniform Consumer Sales Practices Act. *E.g.*, Ohio Rev. Code Ann. §§ 1345.01–1345.50 (Anderson 2002).

¹²⁹ *E.g.*, Truth in Lending Act § 103(h), 15 U.S.C. § 1602 (2000).

¹³⁰ An important exception is the Magnuson-Moss Consumer Warranty Act, 15 U.S.C. §§ 2301–2312 (2000). It applies to transactions involving products “normally used for personal family or household purposes” 15 U.S.C. § 2301(1) (2000).

¹³¹ 15 U.S.C. §§ 2301–2312 (2000).

used for personal family or household purposes”¹³² Thus, because personal computers are “normally used” for personal, family, or household purposes, the sale of a computer for use in either a home office, or a conventional office located at a business, would be governed by the Act.

[b] Consumer Contracts

The 2003 revisions to Article 2 of the Uniform Commercial Code added a new set of rules regarding “consumer contracts.” Under these rules, a consumer contract is a contract between a “merchant seller” and a “consumer.”¹³³ Thus, Article 2’s new provisions governing consumer contracts only apply when the seller is a merchant¹³⁴ and the buyer is a consumer. Transactions between two merchants and transactions between two consumers are not governed by these new provisions.

Among the new provisions governing consumer contracts are those specifying the manner of disclaiming warranties,¹³⁵ those limiting a seller’s right to cure after the buyer justifiably revokes acceptance,¹³⁶ those protecting a consumer buyer from liability for any consequential damages suffered by a merchant seller,¹³⁷ and a provision preventing sellers from reducing the duration of the limitations period in such contracts.¹³⁸

[c] Unconscionability

Apart from these types of statutory and regulatory provisions, contract law usually applies uniformly to consumers and non-consumers. A possible important exception is the law of “unconscionability.”¹³⁹ A contract or one of its terms may be unenforceable due to unconscionability if the terms of the agreement unreasonably favor one party and if, due to an inequality in bargaining power or other flaws in the bargaining process, the other party was unable to make a reasonable choice about entering into the transaction.¹⁴⁰

¹³² 15 U.S.C. § 2301(1) (2000) (emphasis added).

¹³³ Revised U.C.C. § 2-103(1)(d) (2003).

¹³⁴ U.C.C. § 2-104 (2003); see § 1.02[G] Contracts Involving “Merchants” and Those for “Consumer Goods or Services.”

¹³⁵ Revised U.C.C. § 2-316(2) (2001); see Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 Del. L. Rev. 41, 69 (2003).

¹³⁶ Revised U.C.C. § 2-508 (2003); see Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 Del. L. Rev. 41, 74–75 (2003).

¹³⁷ Revised U.C.C. § 2-710(3) (2003); see Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 Del. L. Rev. 41, 86 (2003).

¹³⁸ Revised U.C.C. § 2-725(1) (2001); see Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 Del. L. Rev. 41, 89 (2003).

¹³⁹ See § 12.05 Unconscionability.

¹⁴⁰ See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

Although this doctrine is not strictly limited to transactions involving consumers¹⁴¹ it is most frequently applied to transactions made for personal, family, or household purposes.¹⁴² Many courts have been unwilling to apply the unconscionability doctrine to contracts between businesses.¹⁴³

§ 1.03 HISTORY OF CONTRACT LAW¹⁴⁴

An entire history of the law of contracts is far too detailed and complex to be covered in more than a cursory fashion here. However, a basic understanding of the origins and development of contract law in England and the United States will be of help to those attempting to learn its intricacies today.

[A] Roman Law of Contracts

The Roman law of contracts, like all contract law, distinguished between promises which were legally enforceable and those which were not. However, Rome never developed a comprehensive set of rules governing contracts.¹⁴⁵ Instead, Rome had a wide variety of doctrines which made promises of various types enforceable.

One of the most important was “stipulatio,” or in modern parlance, “stipulation.” Stipulatio was a type of unilateral contract. It imposed an obligation on one party and created a corresponding right in favor of the other party. It was created by exchanging a precise series of formal questions and answers,¹⁴⁶ similar in fashion to the manner in which very traditional Christian baptismal ceremonies are still performed.¹⁴⁷ What we would recognize today as a bilateral contract could only be accomplished only through an exchange of two separate sets of questions and answers with each party taking his turn in making a reciprocal “stipulations.”¹⁴⁸

¹⁴¹ See *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

¹⁴² See generally Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 50 Sw. L.J. 1065 (1986).

¹⁴³ E.g., *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370 (Mass. 1980); but see *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114 (Ct. App. 1982).

¹⁴⁴ P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576 (1969); Grant Gilmore, *The Death of Contract* (1974); W.S. Holdsworth, *Debt, Assumpsit, And Consideration*, 11 Mich. L. Rev. 347 (1913); Morton Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917 (1974); A.W.B. Simpson, *The Horowitz Thesis and the History of Contracts*, 46 U. Chi. L. Rev. 533 (1979); A.W.B. Simpson, *A History of the Common Law of Contract* (1987); Tony Weir, *Contracts in Rome and England*, 66 Tul. L. Rev. 1615, 1620 (1992).

¹⁴⁵ Russ Versteeg, *Law in the Ancient World* 349 (2002).

¹⁴⁶ W.W. Buckland & Arnold D. McNair, *Roman Law and Common Law* 194–95 (2d ed. 1965); see also Robert W. Lee, *The Elements of Roman Law* 345–46 (1956).

¹⁴⁷ Tony Weir, *Contracts in Rome and England*, 66 Tul. L. Rev. 1615, 1620 (1992).

¹⁴⁸ W.W. Buckland & Arnold D. McNair, *Roman Law and Common Law* 195 (2d ed. 1965); Parviz Owisa, *The Notion and Function of Offer and Acceptance Under French and English Law*, 66 Tul. L. Rev. 871, 874 n.3 (1992).

Roman Law also provided for a number of so-called “real” contracts: *mutuum*, *commodatum*, *depositum*, and *pignus*.¹⁴⁹ They are referred to as “real” because they were based on the delivery of a thing or a “res” and thus the obligation to return the thing or its value.¹⁵⁰ “Mutuum” involved the delivery of money goods and the corresponding obligation to deliver an equivalent quantity (but not necessarily the same items) of money, or goods of the same kind, at a later date. “Commodatum” was akin to a bailment or lease of goods, with the bailee required to return the specific goods that had been delivered.¹⁵¹ “Depositum” on the other hand was more akin to a modern bailment, or even, as the name suggests, a deposit in a bank account, where the res was delivered for safekeeping.¹⁵² Finally, “pignus” was similar to the modern possessory security interest or “pledge,” with the creditor’s obligation to return the goods dependent on the debtor’s payment or performance of an obligation.¹⁵³

The Romans also recognized a variety of more informal consensual contracts that resembled many modern transactions, including contracts for the sale of goods (*emptio venditio*), agreements for the lease of land or goods (*locatio conductio rei*), contracts for the completion of a specific task, such as construction of a building (*locatio operus faciendi*), or for more unskilled tasks (*locatio conductio operarum*).¹⁵⁴ This category included partnership agreements or joint ventures (*societas*).¹⁵⁵

There were, as well, a variety of unnamed or “innominate” contracts, which were enforceable, so long as one of the parties had already performed its side of the bargain.¹⁵⁶ However, these more informal obligations never expanded to make a simple exchange of executory promises legally enforceable.¹⁵⁷

[B] Limitations of the Early English Writs to Enforce Executory Promises

One might have thought that English law would have picked up where Roman law left off. This, however, did not occur.¹⁵⁸ Instead, the English system developed along a different track.

¹⁴⁹ Russ Versteeg, *Law in the Ancient World* 351 (2002); Alan Watson, *The Law of Obligations in the Later Roman Republic* 157, 167, 179 (1984).

¹⁵⁰ E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 *Colum. L. Rev.* 576, 589 (1969).

¹⁵¹ Russ Versteeg, *Law in the Ancient World*, 352 (2002).

¹⁵² Russ Versteeg, *Law in the Ancient World* 352 (2002); W.W. Buckland & Arnold D. McNair, *Roman Law and Common Law* 277 (2d ed. 1965).

¹⁵³ W.W. Buckland & Arnold D. McNair, *Roman Law and Common Law* 314 (2d ed. 1965).

¹⁵⁴ Russ Versteeg, *Law in the Ancient World*, 352 (2002).

¹⁵⁵ *Id.* at 353.

¹⁵⁶ W.W. Buckland & Arnold D. McNair, *Roman Law and Common Law* 310 (2d ed. 1965).

¹⁵⁷ E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 *Colum. L. Rev.* 576, 590 (1969).

¹⁵⁸ *Id.* at 591.

The early English common law writ system was not particularly hospitable to the enforcement of promises. To obtain relief from the common law courts, a plaintiff had no alternative but to frame his complaint within the scope of one of the available forms of action. If the wrong the plaintiff had suffered did not fit within one of the available writs, relief was not available. Accordingly, much of the history of the development of the our modern law of contracts is the history of the stretching and manipulation of the forms of action that existed in England in the fifteenth and sixteenth centuries to accommodate the needs of society for a general theoretical foundation for enforcing promises.

The principal difficulty encountered by the forms of action was that none of the existing writs fit the common modern circumstances of breach of an unperformed executory exchange of promises. An owner of goods who had promised to sell them to a buyer simply had no recourse if the buyer reneged on his promise to pay for them when the time for delivery arrived.¹⁵⁹

The common law writ of “covenant” made the parties’ promises enforceable, but only if they were made in a writing to which the promisor had affixed his wax “seal.”¹⁶⁰ Physical production of the sealed document eventually became a necessity, thus limiting the general utility of the writ of covenant for more informal promises.¹⁶¹ Furthermore, like the Roman *sitipulatio*, the form of the promise completely governed its substance.¹⁶²

The writ of “debt” was also available to enforce a promise to repay a loan of a specific sum of money. However, it was not available if the sum of money owed was uncertain. Moreover, liability was based more on the injustice that would result if the debtor were permitted to retain the value of the money loaned than on the debtor’s liability for breach of his promise to pay. While it was useful for creditors attempting to collect loans they had made, or for sellers attempting to collect the price of goods which had been sold and already delivered,¹⁶³ “debt” was simply unavailable to enforce an executory exchange of promises where neither party had yet performed.¹⁶⁴

The writ of “detinue” was available in even more limited circumstances, to recover goods which had been delivered to a bailee and then wrongfully withheld.¹⁶⁵ A buyer who had paid the price of goods, but had not yet received them from the seller had an action in “debt,” not “detinue.” The

¹⁵⁹ See, e.g., *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972).

¹⁶⁰ E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576, 593 (1969).

¹⁶¹ See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 Colum. L. Rev. 1168, 1183 (1986).

¹⁶² See Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941)

¹⁶³ F.B. Ames, *Parol Contract Prior to Assumpsit*, 8 Harv. L. Rev. 252, 260–61 (1894).

¹⁶⁴ W.S. Holdsworth, *Debt, Assumpsit, And Consideration*, 11 Mich. L. Rev. 347, 348 (1913).

¹⁶⁵ B. Shipman, *Handbook of Common Law Pleading* 114–17 (3d ed. 1923).

rigidity of the common law writ system would not permit even this degree of flexibility.

The ultimate problem with all of these forms of action was that none of them provided relief for breach of an informal bilateral contract involving purely executory promises. Covenant was available only if the contract was in the form of a sealed writing. Detinue permitted recovery only to recover chattels previously delivered to a bailee. And, debt was available only to recover a fixed sum owed to a plaintiff who had already fully performed. If neither party had yet performed, the law provided no relief.

Apart from these structural limits, the writ system suffered from a more serious failing. The defendant could successfully avoid liability, regardless of the weight of the evidence, by utilizing the procedure of “wager of law.”¹⁶⁶ If the defendant could find twelve individuals to swear (truthfully or not) that they believed the defendant’s version of the facts, the defendant would prevail.¹⁶⁷

These limitations were ultimately surmounted largely as a result of the success of the common law courts in their competition with the ecclesiastical¹⁶⁸ and the chancery courts¹⁶⁹ for the lion’s share of jurisdiction.¹⁷⁰

[C] Contract From the Law of Torts — The Writ of Assumpsit

The first word of the first case in Prof. Lon Fuller’s original Contracts casebook,¹⁷¹ at the beginning of *Hawkins v. McGee*¹⁷² foretells, for first year law students, the entire history of the modern law of contracts: “Assumpsit.” Assumpsit developed not from the early law of contracts, but instead from the law of torts.

The early common law of torts distinguished between “trespass,” which was available for wrongs involving some actual or implied physical force, such as assault, battery, false imprisonment, abduction, or physical injury to land or goods;¹⁷³ and “trespass on the case,” which was available for

¹⁶⁶ John H. Baker, *An Introduction to English Legal History* 64–65, 265, 268 (2d ed. 1979).

¹⁶⁷ See F. Maitland, *The Forms of Action at Common Law* 34 (1909).

¹⁶⁸ E. Allan Farnsworth, *Parables About Promises: Religious Ethics and Contract Enforceability*, 71 *Fordham L. Rev.* 695, 702 (2002).

¹⁶⁹ See generally Timonty S. Haskett, *The Medieval English Court of Chancery*, 14 *Law & Hist. Rev.* 245 (1996).

¹⁷⁰ W.S. Holdsworth, *Debt, Assumpsit, and Consideration*, 11 *Mich. L. Rev.* 347, 349 (1913).

¹⁷¹ Lon L. Fuller, *Basic Contract Law* 1 (1947).

¹⁷² *Hawkins v. McGee*, 146 A. 641 (N.H. 1929).

¹⁷³ See Benjamin J. Shipman, *Handbook of Common-Law Pleading* 68 (3d ed. 1923).

injuries not involving any kind of force,¹⁷⁴ including defamation, or breach of warranty.¹⁷⁵

An action for trespass on the case could be brought against someone who undertook to render a performance and then performed it badly. The classic example, drawn from an early case involved a promise by a carpenter who made a promise to build a house “good and strong and of a certain form, and yet [made] a house which is weak and bad and of another form”¹⁷⁶ The analogy to the modern construction contract, involving defective work, is readily apparent.¹⁷⁷ Thus, a subcategory of trespass on the case known as “special assumpsit” became available for breach of a promise by poor performance or “misfeasance.”¹⁷⁸

In cases involving non-performance (nonfeasance), rather than poor performance (misfeasance), an action for special assumpsit was not at first available, or in the language of the day, “would not lie,”¹⁷⁹ unless one of the parties had already performed.¹⁸⁰ The earlier misfeasance cases were based on the premise that the promisee had suffered a detriment in reliance on the promise.¹⁸¹ This made it easy to draw an analogy, in cases where no performance had been rendered, permitting enforcement of the promise where the promisee had changed his or her position in reliance on the promise.¹⁸² By the end of the sixteenth century the necessity of detrimental reliance had disappeared and an action in assumpsit was available merely as a result of an exchange of promises, on the theory that the promise made by the plaintiff was a sufficient detriment to make the promisor’s promise enforceable.¹⁸³

At the outset of the seventeenth century, when Elizabeth I was Queen, an action could be brought to recover damages for breach of a simple contract even though neither party had yet performed.¹⁸⁴ Thus, the owner of a house could sue a contractor for the contractor’s failure to commence the promised work even though no payment had been made by the homeowner and was not yet due.

¹⁷⁴ *Id.* at 83; See James B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 8 (1888).

¹⁷⁵ Benjamin J. Shipman, *Handbook of Common-Law Pleading* 95 (3d ed. 1923).

¹⁷⁶ Y.B. 14 Hy 6 [1679 ed.], at 18 (1436), 3 Holdsworth, *History of English Law* 430 4th ed. 1935); see E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576, 594 (1969).

¹⁷⁷ See, e.g., *K & G Constr. Co. v. Harris*, 164 A.2d 451 (Md. Ct. App. 1960).

¹⁷⁸ James B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 5 (1888).

¹⁷⁹ E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 Colum. L. Rev. 576, 595 (1969).

¹⁸⁰ James B. Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 13 (1888).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 596.

¹⁸⁴ *E.g.*, *Strangeborough v. Waener*, 74 Eng. Rep. 686 (Q.B. 1588).

The final ascent of the writ of assumpsit occurred in *Slade's Case* in 1602.¹⁸⁵ *Slade's Case* established that an action could be brought in assumpsit, with its attendant right to a jury trial, to recover an obligation to pay a previously liquidated sum.¹⁸⁶ Such an action could previously only have been brought as an action under the writ of “debt” in which the defendant could avoid liability through “wager of law” with its accompanying risk of perjury.¹⁸⁷ Thus, the writ of “indebitatus assumpsit” or “general assumpsit” was available for the recovery of debts in an action in which a jury would serve as the finder of fact.¹⁸⁸ The right to a jury trial resulted in a shift away from the merchants courts and to the common law courts, jurisdiction over disputes in cases involving what we would today recognize as a commercial contract.¹⁸⁹

Between the time of *Slade's Case* and today, the law of the contracts grew and prospered with the market economy that developed during the last 400 years. The industrial revolution necessitated its further development and expansion. A clear set of rules helps facilitate economic development through private exchanges. Accordingly, the law must change when business and society changes. Thus, although it sometimes may seem as if contract law is difficult to adjust, the Internet and the information revolution of today spurs its continued adaptation to a constantly changing world.

¹⁸⁵ *Slade's Case*, 76 Eng. Rep. 1074 (1602); see 3 William Holdsworth, *A History of English Law* 451 (7th ed. 1965).

¹⁸⁶ A.W.B. Simpson, *The Place of Slade's Case in the History of Contracts*, 74 *Law. Q. Rev.* 381 (1958).

¹⁸⁷ Andrew N. Adler, *Can Formalism Convey Justice? — Oaths, “Deeds,” & Other Legal Speech Acts in Four English Renaissance Plays*, 72 *St. John's L. Rev.* 237, 238–39 (1998).

¹⁸⁸ See Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 *Geo. Mason L. Rev.* 99, 101 n. 11 (2000).

¹⁸⁹ Michael E. Tigar, *Address, Litigators' Ethics*, 67 *Tenn. L. Rev.* 409, 410 (2000).