ENG 190
Contract Law – Lecture 1

January 23, 2013

ENG 190 Topic List

- Introduction
- Promise
- Subjective and Objective
- Offer & Acceptance
- Statute of Frauds
- Parol Evidence Rule
- Interpretation of Written Contracts

Introduction
Common Law

- Historically, a common-law body of law.
- Developed by courts applying and extending or limiting precedent, rather than by legislatures enacting laws (statutes).
- However, statutes are becoming increasingly important to contract law.

Introduction
Common Law: Reasoning from Cases

- Because Contracts is a common-law discipline, reasoning from cases is very important.
- We can generalize to some degree about how cases with certain shared characteristics have been treated in the past.
- *E.g.*, if we notice that whenever communications are vague, a court finds no contract, we can generalize to say that vagueness will prevent formation of a contract.

ENG 190 Topic List

- Introduction
- **Promise**
- Subjective and Objective
- Offer & Acceptance
- Statute of Frauds
- Parol Evidence Rule
- Interpretation of Written Contracts

Promise
Contract and Promise

- The study of contracts is often called the study of legally enforceable promises.
- A “promise” can be defined as a commitment to act or refrain from acting in a certain way, so made as to justify the recipient in believing that a commitment has been made.

Promise
"Magic Words" and Promise

- "A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."
  - Restatement (Second) of Contracts, § 4

- It's not all about magic words.

Promise
Example of Promise/Opinion

- Physicians' statements about the likely outcome of treatment are often the subject of dispute.
- "I guarantee a perfect hand after this operation."
  - Made by a physician who had made repeated efforts to get the patient's consent to allow him to try an experimental operation.
- "The operation could produce a knee that was stronger than before and you could play ball again."
  - Made by a physician who did not request to be allowed to perform the surgery and who told the plaintiff he could have another physician perform the surgery.

Promise

Summary of Opinion v. Promise

- In distinguishing between "opinion/prediction" and promise, look at the overall facts to decide whether the statement was a promise. Factors that may be relevant:
  - Was the speaker trying to persuade the other party to enter the deal?
  - Is the alleged promise specific or vague?
  - Use of words of guarantee?

ENG 190 Topic List

- Introduction
- Promise
- **Subjective and Objective**
- Offer & Acceptance
- Statute of Frauds
- Parol Evidence Rule
- Interpretation of Written Contracts

Subjective and Objective In Contract Formation

- Subjective = based on an individual's state of mind
- Objective = not based on an individual's state of mind.
  - Practically, objective standards are usually "reasonable person" standards.
  - In the contract formation context, that's how a reasonable person would have interpreted the other person's words and actions (that is, his/her "manifestations").
  - The question: Is it reasonable for each side to believe that the other side manifested assent?

Subjective and Objective Example

- A says, “I promise to pay $50 tomorrow if you deliver your Criminal Law book,” but means a Civil Procedure book, not a Criminal Law book. It’s a slip of the tongue.
- B says, “I so promise.”
- Objective theory = Contract exists to sell Criminal Law book, assuming it was reasonable for B to believe that A meant the usual meaning of his words.
- Subjective theory = No contract, because no agreement on the same thing. A meant one thing, B another.

Subjective and Objective Caveat

- The same evidence will often prove subjective assent to enter into a contract and objective reasonableness of inferring assent.
- The questions are often quite similar from a court's perspective:
  - "Do the facts support a finding that B reasonably understood A as intending assent?"
  - "Do the facts support a finding that A intended assent?"

Subjective and Objective
Objective Is Basic Approach To Formation

- In the words of an authoritative source: "An offer is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it."
  - Nothing in there about actual willingness to enter a bargain.
- But if you have reason to doubt that words reflect intention, you won't be able to hold the person to the words.
  - In previous example, what if B had reason to know that A meant Civil Procedure and not Criminal Law?

Subjective and Objective
Lucy v. Zehmer

- Mr. Lucy and Mr. Zehmer get into a dispute in a bar over whether Lucy has $50,000 to buy Zehmer's farm.
- Zehmer writes a document that purports to be an agreement to sell a farm to Lucy for $50,000 and they both sign.
- When Lucy wants to proceed with the sale, Zehmer refuses to do so and argues there is no contract because he was drunk and "bluffing," or as court interprets it, "jesting."
- Contract is enforced – Zehmer's subjective intent does not defeat objective evidence of contract.
- "The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

ENG 190 Topic List

- Introduction
- Promise
- Subjective and Objective
- **Offer & Acceptance**
- Statute of Frauds
- Parol Evidence Rule
- Interpretation of Written Contracts

Offer & Acceptance
Offer Intro

- Contract formation is often defined in terms of offer and acceptance.
- Start off by defining “offer”: Something that reasonably means, “You and I will have an enforceable deal as soon as you say yes to this.”

Offer & Acceptance
The Offer - General Observations

- To make an offer is to create a "power of acceptance."
  - When you make an offer, you're exposed. The offeree can accept at any time and you're bound.
- "The offeror is master of the offer." The person making the offer controls the circumstances under which s/he will be bound.

Offer & Acceptance
Offers v. Invitations to Deal

- Is a communication an “offer” (“say OK and we’ll both be bound”) or just an “invitation to deal” (“make me an offer, and if I say OK we’ll both be bound”)?
- Price quotations and ads usually are not offers.

Offer & Acceptance
Offer or Invitation to Deal? – Case Comparison

- Buyer - Will you sell this property to me for $6,000?
- Seller - I can't sell it for less than $16,000.
  - Not an offer

- Buyer: Will you sell this property to me, and if so for how much?
- Seller: I need 900 pounds.
  - Not an offer

- Buyer : For what will you sell us Mason jars?
- Seller: For $4.50 a dozen, pint; $5.00, quarts…
  - Offer

Offer & Acceptance
Advertisements as Offers

- Traditional common-law rule is that ads, like price quotations, are not offers. Instead, they are usually invitations to make offers.
- Rationale: Seems unlikely that advertiser intends to put itself in breach if it runs out of stock.
- Despite this common-law rule, statutes and administrative decisions prohibit refusing to sell at advertised price and deliberately failing to stock enough to meet reasonably anticipated demand unless the ad states that supplies are limited.

Offer & Acceptance
Ads and Offers - Lefkowitz Case

- Store places ad: "Saturday, 9 a.m., 1 Black Lapin Stole … $1 … FIRST COME, FIRST SERVED."
- Lefkowitz shows up first and tries to claim stole.
- Store declines because of "house rule" that stoles are for women only.
- Court finds that ad was offer that Lefkowitz accepted by showing up with $1.

Offer & Acceptance
Ads and Offers – Lefkowitz (cont'd)

- A clear, definite, and explicit ad that leaves nothing open to negotiation and promises something in return for something requested is an offer.
- In Lefkowitz:
  - The ad above was clear, definite, and explicit in stating "first come, first served," thus solving the problem of multiple inconsistent acceptances.
  - Also definite quantity (1)
  - Nothing left to negotiation – no requirement that anyone approve the transaction.

Offer & Acceptance
The Acceptance – Intro

- Key point: The offeror controls the offer and determines how it can be accepted.
- Recall: Offer is something that makes it reasonable for the other side to believe that saying “OK” or doing something specific (such as showing up to buy a stole) will conclude the bargain.

Offer & Acceptance
Acceptance - Intro (II)

- Acceptance = assent to the terms of the offer. (Restatement, § 50(1))
  - Can be promise or performance. (§ 50(2))
  - Starting performance may imply a promise to finish.
- The offer controls the mode of acceptance. (§ 30(1)).
  - Whether accepted by promise or performance.
  - What means of communication.
  - "The offeror is master of the offer."
- If the offer is silent as to mode of acceptance, any reasonable mode is OK. (§§ 30(2), 32)

Ex. – Acceptance by Promise, Perf, Promise Implied from Perf

- Offer: "I'll pay you $500 to paint my house."
- Probably can be accepted by promising to paint the house (promise) or by starting to paint the house (performance).
- Contrast: "I'll pay you $500 to paint my house. This offer can be accepted only by e-mail."
  - Probably can't be accepted by starting to paint (offeror is master of offer), unless offeror acquiesces.

Offer & Acceptance
Acceptance - Notice

- When acceptance is by promise, notice of acceptance generally is required.
- When acceptance is by performance, notice of acceptance generally is not required.
  - Exception: When the performance won't naturally come to the attention of the offeror.
  - No notice required if you start to paint house, but what it's a vacation house hundreds of miles away that the person won't visit for a long time?
- In either case, the offeror can waive notice of acceptance.

Offer & Acceptance
Acceptance - Silence

- Silence usually is not acceptance. Why?
  - Usually not reasonable to think that people intend to accept offers by doing nothing
  - Don't want to foist unwanted contractual liability on people
- Exception: prior dealings (filling orders or paying for goods without saying anything in the past) can make it reasonable to treat silence as acceptance.
- Exception: Agreement that subsequent offers to modify an agreement can be accepted by silence (credit card agreements).
- Exception: Surrounding circumstances – e.g., if it is customary to accept offers this way in the industry.

Offer & Acceptance
Termination of Offer - Intro

- The offer creates a power of acceptance.
- This power of acceptance can be terminated, so that the offer can no longer be accepted:
  - Lapse
  - Revocation
  - Rejection
  - Death

Offer & Acceptance
Termination of Offer - Lapse

- Offer may lapse by its terms ("expiration")
  - "This offer expires at midnight December 31."
- Absent specification, offer lapses after reasonable time.
  - How long is it reasonable for the offeror to be subject to a power of acceptance?
  - Usually close of conversation if made face to face.
  - Fast-changing circumstances make it reasonable to think offers are meant to be held open for shorter times.

Offer & Acceptance
Termination of Offer - Revocation

- Common-law rule is that offeror can revoke an offer at any time.
- The power to accept ends when the revocation is received (in most jurisdictions).
- Revocation can occur through a reliable information about actual inconsistent action given by a third party.
  - E.g.: "That house he offered to sell you? He sold it to someone else."

Offer & Acceptance
Termination - Irrevocability

- Though usually revocable, an offer can become irrevocable in a number of ways:
  - Promise to keep open (may have to be in writing or separately paid for)
    - This is called an "option contract."
    - Frequently used in land sale agreements.
  - Beginning of performance
    - Famous example: "I will pay you $100 if you completely cross the Brooklyn Bridge."
    - Under common-law rule, offer can be revoked up until completion, so you could cross half way and end up with nothing if the offeror revokes at that point.
    - Modern rule would say that beginning performance gives you the right to finish.

Offer & Acceptance - Irrevocability Bidding in Construction Contracts

- Frequently in construction contracts you have a prime contractor and subcontractors.
- A prime contractor who is bidding on a project will take bids from subcontractors and combine those together to compute its own bid.
- The prime contractor's bid is often irrevocable because of statutes (e.g., in CA bids on public construction contracts generally are irrevocable).
- In this case, the subcontractor's bid, though it's an offer and normally would be revocable, becomes irrevocable when the prime contractor uses the subcontractor's bid in computing its bid for the project.

Offer & Acceptance
Termination - Death

- Restatement, § 48:
  - "An offeree's power of acceptance is terminated when the offeree or offeror dies…."
- No requirement that offeree know of the death or incapacity.

Offer & Acceptance
Termination - Rejection

- Offer is terminated if rejected.
- A “counteroffer” (new offer with different terms) also terminates the original offer.
  - The old offeror is now the offeree and vice versa.
- Seller: “I’ll sell you my car for $400.”
- Buyer: “No, but I’ll buy it for $350.”
  - Buyer has rejected seller’s $400 offer and can no longer accept it.
  - The Buyer is now the offeror for a $350 deal which the seller can accept.

Offer & Acceptance
Termination – Mirror Image Rule

- Old rule: Acceptance that does not exactly match offer (i.e., not simple "OK") equals rejection plus counteroffer.
  - Seller: "I will sell you my car for $400. I'll deliver it Tuesday."
  - Buyer: "I accept for Monday delivery."
- Courts sometimes mitigate by finding that the the offeree's language relating to an additional or different term is only suggestive.

Offer & Acceptance
"Battle of Forms"

- Modern rule: Contract can be formed when the acceptance doesn't exactly match the offer, as long as the parties aren't too far apart.
  - For example, seller and buyer may form a contract by exchanging preprinted forms, even if the forms have minor variations.
  - If there is a dispute over one of the terms that the forms differ on, court will have to decide which term prevails.

Offer & Acceptance
"Rolling Contracts"

- Sometimes in consumer contracts the terms are not disclosed to the consumer until the product is paid for.
  - They arrive with the box.
- One influential approach to this situation has been to treat the terms contained with the product as an offer that the consumer may reject by returning the product within a specified reasonable time, or may accept by retaining the product.

ENG 190 Topic List

- Introduction
- Promise
- Subjective and Objective
- Offer & Acceptance
- **Statute of Frauds**
- Parol Evidence Rule
- Interpretation of Written Contracts

Statute of Frauds
Intro

- Not all contracts must be in writing.
- For some contracts, the objective theory of formation probably requires writing.
  - E.g., may not be reasonable to think that someone would make a purely oral contract to sell a $50 billion corporation.
- But in addition to that …

Statute of Frauds
Intro (II)

- … we have a statute that specifically says that certain contracts are not enforceable unless evidenced by a writing signed by the party against whom enforcement is sought.
- These are contracts that are
  - important enough that we don't think people enter into them lightly, or
  - likely to be falsely or mistakenly asserted.

Statute of Frauds
Intro (III)

- If a contract is “within” the Statute of Frauds, there has to be a signed writing (or exception).

Statute of Frauds – Categories

- Here are some contracts that are "within" the Statute of Frauds and thus require a signed writing:
  - Contracts that can't be performed in a year.
  - Contracts for the sale of real estate.
  - Contracts for the sale of goods for $500 or more.
  - In CA, real estate brokerage contracts.

Statute of Frauds - Categories
One-Year Rule

- Agreement that cannot be completed by its terms on one side or the other within one year of the making of the agreement.
- Example of agreements in this category:
  - "I agree to hire you for a term of two years."
  - "I agree to be a subscriber to this cellphone company for two years."
- Example of agreements not in this category:
  - Contracts of indefinite duration
  - Agreement to perform a task that will almost probably, but not necessarily, take more than one year.

Statute of Frauds - Categories
Real Estate Hypo

- Agreements for the sale of real estate are within the Statute of Frauds.
- Buyer and Seller agree orally that Buyer will purchase Seller's house for $500,000.
- Seller draws up and signs a contract, and sends it to Buyer.
- Before Buyer signs it:
  - Assume Seller changes mind. Is Buyer barred from enforcing the contract by the Statute of Frauds?
  - Assumer Buyer changes mind. Is Seller barred from enforcing the contract by the Statute of Frauds?

Statute of Frauds - Categories
Sale of Goods for $500 Or More

- Agreements for the sale of goods for a price of $500 or more.
  - Exception: Statute of Frauds can't be raised as a defense if goods received and accepted or payment made and accepted.

Statute of Frauds - Categories
Real Estate Brokerage

- Agreement to pay a commission to a real estate broker.

Statute of Frauds - The Signature

- Signature: A “symbol executed or adopted by a party with the present intention to authenticate a writing.”
- You wrote or used the identifying thing to show that the writing is from you.
- Doesn’t have to be a formal signature.
- Post-agreement signatures are fine.
- Even the use of letterhead is probably fine.

Statute of Frauds - Electronic Signatures

- "Electronic signatures" count as "signatures."
  - Electronic "sound, symbol, or process" "executed" with "intent to sign." (UETA, § 2(8)).
  - Examples: Typing name at end of e-mail
  - Typing "/s/" over typed name at end of letter in Word.
  - Pressing "1" when the electronic voice on a phone system tells you "Press 1 to accept."
  - Maybe your e-mail address on a message you send.

Statute of Frauds - Exceptions

- The following are potential exceptions to the Statute of Frauds:
  - Performance
    - If one side has already done all or part what it's supposed to, the other side may not be able to use the Statute.
  - Reliance
    - If the recipient of the promise has relied on it in some major way, the promise may be enforced despite Statute.
  - Waiver
    - E.g., if we have an oral deal and I treat it as binding even though it's within the Statute, I may be treated as having waived it.

ENG 190: Parol Evidence Rule and Interpretation

- Frequently you will have no dispute that a contract exists, but fierce dispute over what its terms are – what each party is required to do.
- There are a few subjects to address here:
  - Does creating and adopting a written contract document bar evidence that there are aspects of the deal that are not in the document?
  - What kinds of evidence can be used to interpret the agreement?
  - What should be done when there is no discernible interpretation, when the agreement is silent?

ENG 190 Topic List

- Introduction
- Promise
- Subjective and Objective
- Offer & Acceptance
- Statute of Frauds
- **Parol Evidence Rule**
- Interpretation of Written Contracts

Parol Evidence Rule
Parol Evidence Rule Intro

- The basic idea is that when you go to the trouble of writing down your contract, that writing should be protected to some extent from external attack.
- Specifically, when you have a written agreement and you have a dispute over that agreement, arguments of the form, “It’s not in the written agreement, but we agreed to it!” are quite suspect.
- The parol evidence rule doesn’t let such arguments go to the jury.

Parol Evidence Rule
Parol Evidence Rule Intro (II)

- The parol evidence rule in many cases precludes arguments that the parties agreed to things that are not in the writing.
- The parol evidence rule can be understood as a rule about protecting the parties' security that when they think they're entering into a written contract, the writing actually contains the terms of the contract.
- The parol evidence rule is about what adopting a writing as the expression of the agreement does to prior agreements.

Parol Evidence Rule
Earlier Contradictory Agreements

- The easier problem: If the parties did adopt a writing as the expression of their agreement, that probably supersedes and eliminates earlier inconsistent agreements.
  - E.g., I orally agree to buy a car for $400, and then write down and sign an agreement for $500, with full understanding of what I am doing. The parol evidence rule will prohibit me from arguing that the agreement is “really” for $400.

Parol Evidence Rule
Earlier Different Agreements

- The harder problem is when the alleged prior agreement is not inconsistent, just different.

Parol Evidence Rule

Parol Evidence Rule Example – Mitchill v. Lath

- Written agreement for the sale of a farm. The sellers also own an ugly icehouse on land near the farm.
- The written agreement doesn't say anything about removing the icehouse.
- But the buyers claim that there was a prior oral agreement in which the sellers agreed to remove the icehouse.
- Question: Should the buyers be able to tell the jury about the alleged oral agreement to remove the icehouse, even though there's no such agreement in the writing?
  - Not inconsistent with writing, just different.

Parol Evidence Rule
Statement of Parol Evidence Rule

- Majority approach: Look at the writing and at the alleged unwritten part of the agreement together and decide:
  - "If the unwritten part were real, would reasonable people in the position of the parties normally have included it in the written agreement?"
- You don't get to tell the jury about things that probably would have been in the writing if they existed at all.

Parol Evidence Rule Application - Mitchill v. Lath

- In this case, the majority concluded that reasonable buyers and sellers in the position of the parties normally would have included the icehouse-removal agreement in the farm sale contract if the agreement to remove the icehouse existed at all.
- So the buyers were not allowed to argue to the jury that the oral agreement to remove the icehouse was ever made.

Parol Evidence Rule
"In the Position of the Parties"

- The modern trend is for courts to take seriously the idea that reasonableness should be judged relative to the position of the parties.
- Ex: I sell an option to buy land to my brother, we're unsophisticated.
  - Later, I want to argue that he can't assign the option to someone else because the idea was to keep the land in the family.
  - Even if sophisticated, arm's length parties would normally put a nonassignability clause into a land option, the court might decide that related, unsophisticated parties might not put the clause into the option.

Parol Evidence Rule
Parol Evidence Rule - Limits

- Does not apply to writings that are not adopted as a statement of the parties' agreement.
  - Won't apply to a simple receipt that doesn't contain any contract terms, but may apply to an invoice that contains the terms of the agreement.
- Does not apply to agreements made after a written contract – contract modification.
  - If the argument in *Mitchill v. Lath* had been that they agreed orally to remove the icehouse after signing the contract of sale, the parol evidence rule wouldn't have applied.

Parol Evidence Rule
Parol Evidence Rule - Limits

- Does not apply to use of evidence to interpret the written agreement.
  - If the farm sale agreement in Mitchill v. Lath had said, "Sellers will improve neighboring property to improve aesthetics," evidence of the icehouse-removal agreement probably could have come in to interpret this somewhat vague language.
- Does not apply to arguments that there was a mistake in writing down the agreement.
  - If the buyers had argued that the parties had instructed a lawyer to draft the agreement with the icehouse-removal clause and the lawyer had failed to do so by mistake, the case probably would have come out differently.

Parol Evidence Rule
Parol Evidence Rule - Limits

- Does not apply to proof of issues that would invalidate the contract: fraud, duress, undue influence, etc.
  - Premise is existence of an enforceable agreement.
- Ex: You say to me, “this house has no termites.” In fact, it has termites. I sign a contract of sale. The parol evidence rule should not bar me from telling the jury what you told me no matter what the writing says.

Parol Evidence Rule
Merger Clauses

- Many written contracts (maybe most) contain "merger clauses."
- "Merger clauses" say that the writing is the entire agreement between the parties and that prior agreements are eliminated.
  - The idea is that the old agreements are "merged" into the new one.
- Ex: If the contract in Mitchill v. Lath had had a "merger clause" the sellers could have used it to argue that the icehouse removal agreement was eliminated.
- Most courts seem to give significant weight to merger clauses. Merger clauses make it more likely that if there was an agreement, it would be in the writing.

Parol Evidence Rule
Parol Evidence Rule- Controversy

- Many leading scholars have criticized the parol evidence rule -- the argument is that juries are perfectly capable of deciding whether an oral agreement was actually made or not.
- However, most authorities state that most courts continue to apply the parol evidence rule.

ENG 190 Topic List

- Introduction
- Promise
- Subjective and Objective
- Offer & Acceptance
- Statute of Frauds
- Parol Evidence Rule
- **Interpretation of Written Contracts**

Interpretation
Written Contract Interpretation Intro

- Frequently the court will be called upon to interpret (determine the meaning of) a written contract.
- There are several principles and maxims courts have used to do this.
- If the writing has more than one possible meaning (is ambiguous), the court also may look at evidence outside the writing (extrinsic evidence) to determine the meaning.

Interpretation
Written Contr. Interp. Example

- Buyer and seller sign written contract for sale of 125,000 pounds of "US Fresh Frozen Chicken, Grade A, Government Inspected," 2 ½ - 3 pounds.
- Young chickens are suitable for broiling and frying; older, tougher chickens are suitable only for stewing.
- Whether it's OK to ship the older, tougher chickens depends on the interpretation of the word "chicken" in the contract.

Interpretation
Principles of Interpretation

- Absent contrary evidence, use generally prevailing meaning of words
  - But use technical meaning if appropriate in context
- Interpret writing as a whole
- Interpret writing to make contract lawful and effective.
  - Attempt to reconcile apparently contradictory terms.

Interpretation
Principles of Interpretation (II)

- Specific terms take precedence over general ones
- Try to effect contract's purpose
  - Often contracts have statements of purpose ("recitals") that can be used to determine the contract's purpose.
- Public interest
- Separately negotiated or added terms are given greater weight

Interpretation
Maxims - Lists

- List with catchall term: When you have a list of examples followed by catchall language, usually interpret the catchall language to mean items in the same family as the examples.
  - If tenant can keep "sheep, cows, pigs and other animals," probably cannot keep tigers.

Interpretation
Maxims - Lists

- List without catchall term. Probably does not include something similar but not within the listed categories. Inclusion of one example tends to exclude the other.
  - If tenant can keep “cats and dogs” in an apartment, probably can’t keep a rabbit.
- List without catchall term. Probably does not include something technically within the listed categories but different from the list members.
  - If tenant may keep “sheep, cows, and pigs” on a farm, a wild boar probably isn’t included even though it is technically a pig, because the term “pig” is “known by its associates,” which in this case are farm animals.

Interpretation
Maxims – Interpretation vs. Drafter

- Interpretation against the drafter. Courts often tend to interpret written contracts against the drafter.
  - Important in insurance contracts.
  - Many highly negotiated contracts don't have a "drafter" as both sides contribute to the document.

Interpretation
Going Outside the Document - “Plain Meaning”

- What I’ve just gone over are principles that can be used without going outside the written document to look at the parties’ likely meaning.
- Courts may very well go outside the written document, but there is a dispute over when it’s appropriate to do this.
- Many courts will allow the jury to hear evidence outside the document (extrinsic evidence) only if the court determines that the document is vague or ambiguous (does not have a “plain meaning”).
- Statutes sometimes require admission of extrinsic evidence.

Interpretation
"Plain Meaning" – Policy Issues

- Pro –plain meaning
  - Evidence of intent proffered after dispute arises is likely to be distorted by the dispute itself: "self-serving recitals based upon fading recollections" (Mosk)
  - Traditional approach may make it easier to draft a secure agreement without having it second-guessed later.
- Anti-plain meaning:
  - Contracts often don't make sense without reference to the external world.
  - The plain-meaning approach risks being arbitrary because the court is deliberately ignoring evidence bearing on the meaning of the contract.
  - Sometimes courts reach opposite conclusions about the "one true meaning" of a term.

Interpretation
Extrinsic Evidence Intro

- Let's say you have a written contract and the parties dispute its meaning. What evidence should the court consider in deciding what it means?
  - Ex: Contractor working on Owner's property promises to "indemnify" Owner for "damage to property."
  - Contractor damaged Owner's property – how do we decide what "indemnify" means?
  - Owner says it means (1) Contractor has to pay Owner for damage to Owner's property; Contractor says it means (2) Contractor has to pay Owner for damage to third parties' property that Owner is responsible for, not damage to Owner's property.

Interpretation
Extrinsic Evidence - Application

- In our case, Contractor wants to show that in other agreements Owner defined "indemnify" to mean only damage to third parties' property.
  - In other words, Contractor's interpretation.
- Court strictly following plain meaning approach wouldn't allow this unless this contract was ambiguous.
  - Depending on the court, the evidence itself may be allowed to establish that the contract is ambiguous.
- Courts that reject the plain meaning approach would allow the jury to hear this evidence without worrying about whether the written contract is ambiguous.

Interpretation
Types of Extrinsic Evidence

- Course of performance – how the parties have performed this contract so far.
- Course of dealing – the parties' conduct in previous transactions establishing a basis for what they meant in this contract.
- Trade usage – how people in the business (not just the parties) use the term in question

**

- Prior negotiations – how the parties used the term when they were negotiating the contract.

Interpretation
Course of Performance Example

- How the parties have performed this contract.
- Ex: A loan contract had a payment schedule and a 9.5% interest provision, but the schedule and the interest provision are inconsistent.
- If the buyer made and the lender accepted payments according to the schedule, that could be a course of performance helping resolve which of the conflicting provisions should prevail.

Interpretation
Course of Dealing Example

- How the parties have performed prior contracts.
- Ex: Wine distributor entered into four different annual contracts with winery to purchase wine. In each contract, the buyer bottled the wine shipped without testing it for mold and the seller apparently knew this. When wine shipped under the fifth contract was moldy, buyer used this course of dealing to show that it didn't have to test.

Interpretation
Trade Usage Example

- How people in the business use the term.
- Ex: In the chicken business, pricing newsletters used the term “chicken” to mean younger birds and “fowl” to mean older birds. This trade usage supported the argument that “chicken” in the contract meant the younger birds.
- A party is held to a trade usage only if it knew or should have known of it.
  - Ex: In the chicken case, the buyer was new to the market so no trade usage.

Interpretation
Prior Negotiations Example

- Ex: Five-year contract provides that buyer will buy from seller 50,000 units in the first year and 100,000 units in the second and later years.
  - Agreement says it is "subject to termination" if buyer does not meet the quotas.
  - Buyer doesn't meet the quota in the first year, and the question is whether the "subject to termination" is the sole remedy or whether damages also are available.
  - Buyer sought to show that the parties discussed this issue during the negotiations and agreed that termination was the sole remedy.

Interpretation
Suspicion of Prior Negotiations

- Prior negotiations are often seen as especially suspect – particularly likely to be manufactured/exaggerated by the parties after a dispute arises and thus less reliable.