Ursuline College Accelerated Program

CRITICAL INFORMATION!
DO NOT SKIP THIS LINK BELOW . . .

BEFORE PROCEEDING TO READ THE UCAP MODULE, YOU ARE EXPECTED TO READ AND ADHERE TO ALL UCAP POLICY INFORMATION CONTAINED ON THIS LINK BELOW

URSULINE COLLEGE
Created by J. Price 6/10

Division: UCAP

Academic Department and/or Program: Legal Studies

Catalog Number and Title: LS 250 Contract Law

Number of Credit Hours: 3

Course Description:

The general principles of the common law of contracts are examined, including the concepts of offer, acceptance, consideration, contractual intent, third party contracts, and the determination and availability of remedies in the event of breach. The course will also include a review of Articles I, II, and IX of the Uniform Commercial Code (“UCC”) and drafting of contracts.

Prerequisites: None

Term and Cycle: Fall or Spring, Every year

Instructional Objectives:

Knowledge

The student will:

1. Acquire knowledge of the principles governing contract law, and gain practical experience in drafting contracts.

2. Learn to identify and apply the following basic contract requirements:
a. Offer  
b. Acceptance  
c. Consideration  
d. Legality of subject matter  
e. Capacity  
f. Intent.

3. Understand and recognize the classifications of contracts based on:
   a. Types of Obligations  
   b. Method of Creation  
   c. Type of Form  
   d. Timing  
   e. Enforceability

4. Be able to analyze contractual clauses to determine parties’ rights and obligations by distinguishing between covenants and conditions, applying rules of construction, the Statute of Frauds, and the Parole Evidence Rule.

5. Understand the basic guidelines to be used when applying the UCC and the statutory basis of various areas of contract law as found in the UCC.

6. Become familiar with third party contracts and understand the relationships of the parties, how the interests of a third party arose and the effect of the UCC on the contracts.

7. Identify the circumstances that give rise to a discharge of obligations as compared to a breach of contract.

8. Understand damages for breach of contract, including the ability to distinguish between legal and equitable remedies, understanding when specific performance may be sought, the effect of rescission and restitution, quasi-contractual remedies, and the effect of waivers.

9. Learn the basics of drafting of simple contracts.

Skills

The student will:

1. Have an understanding of key legal terms and a working knowledge of key contractual theories, including special terminology associated with the law of contracts;
2. Understand how to transform a party’s understanding of an agreement with another into a written contract agreement between the two;

3. Learn and apply basic drafting principles and work on practical projects which involve writing contracts and contract provisions;

4. Appreciate the importance of determining all the circumstances surrounding the creation of a contractual relationship; and

5. Acquire an understanding of specific construction and drafting considerations in the preparation of contract documents, and learn some practical negotiation strategies.

**Attitude**

The student will:

1. Obtain an understanding of and appreciation for the fact that the law of contracts is one of the most complex, yet most elemental, of all areas of the law;

2. Recognize that without all six elements necessary to create a valid contract parties are not in a contractual relationship;

3. Understand how the law of contracts intersects with other areas of law;

4. Learn to take a comprehensive approach to the contract process, which includes hearing the client’s needs and expressing those needs in a formal agreement that accurately reflects the intent of the parties to the agreement; and

5. Appreciate the need to address all potential issues that may arise when drafting a contract.

**Values**

The student will:

1. Understand how the law of contracts forms the basis of most people’s daily existence and is therefore of paramount importance as a field of study;

2. Create a catalogue of standard contract language, and determining when “boilerplate” legalese should be replaced by plain language that is easier to understand;

3. Understand that the same ethical considerations that bind attorneys apply to paralegals, and that no legal work can be done on a client’s behalf without the
supervising attorney’s knowledge and consent and to perform within services without crossing the boundaries of the practice of law; and

4. Learn good communication practices with clients, courts, opposing parties, and with the supervising attorney.

Need: This course introduces the student to fundamental principles of the common law of contracts and the statutory law of contracts. The course is designed to teach students the legal concepts of contracts and how to draft contracts. On completion of the course, a student should be able to draft a simple contract with full understanding of its enforceability, as well as potential remedies available in the case of a breach. Finally, Contract Law is a fundamental building block course that crosses and joins other areas of law such as Torts, the Uniform Commercial Code, Real Property, Domestic Relations and Probate Law.

Course Description:

This course examines the general principles and concepts of the common law of contracts, including the required elements of a contract, the types of contracts, rules of construction, the Statute of Frauds and parol evidence, application of the Uniform Commercial Code (“UCC”) to contract law and remedies for breach of contract.

Prerequisites: Introduction to Legal Studies or departmental approval

Recommended: Legal Research and Writing

Term and Cycle: Fall or Spring every year.

Required Textbook:


RECOMMENDED: Legal dictionary.

Student Evaluation Techniques:

Students are graded on class participation, in class and online assignments, knowledge and understanding of the material in class review discussions, written projects and Final Examination. Students are expected to have a command of proper grammar, punctuation, spelling and English usage appropriate to a University level course.
The final grade will be based on the following percentages assigned to major portions of the work required in the class:

Homework Exercises 15%
Online Case Analysis and Discussion 15%
Draft Contract Analysis 20%
Contract negotiation and drafting project (in class negotiation 15%; and final draft of agreement 15%) 30%
Final exam 20%

Special Projects:

In addition to the assigned reading, there will be class assignments including:

- Analysis of Draft Contract
- Negotiation of Contract
- Draft Contract

Methods of Instruction:

This course will include lectures but will emphasize student participation. Supplemental material on contract law, sample contracts and contract provisions will be provided.

Course Outline:

Class assignments and content are listed below, with an approximate allocation of classroom time spent on particular topics. Please note that all homework assignments are to be completed before the class indicated. Late assignments will not be accepted.

<table>
<thead>
<tr>
<th>Class:</th>
<th>Topic:</th>
<th>Time:</th>
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| Session 1: | Read: Chapter 1, *Overview of Contracts*  
Chapter 2, *Offer*  
Chapter 3, *Acceptance* |       |
| Assignment | Complete Exercises 1-5 on page 17  
Complete Exercises 1-5 on page 42  
Complete Exercises 1-5 on page 73  
(Written responses are due at the start of the first class) |       |
| Read and be prepared to discuss the Cases for Analysis in each |
Classroom: Requirements and expectations for the course; Introduction to Contract Law.

Discuss overview of Contract law; elements and requirements of contracts; and types of contracts as to formation.

Discussion of essential terms of a valid offer, how the UCC affects the requirements, illusory promises, revocation, the Mailbox rule and termination.

Review questions presented in Cases for Analysis

Session 2:

Assignment
Read Chapter 4, Consideration
Chapter 5, Legality of Subject Matter and Contractual Capacity
Chapter 6, Contractual Intent

Complete Exercises 1-5 on page 105
Complete Exercises 1-5 on page 128
Complete Exercises 1-5 on page 149
(Written responses are due at the start of class)

Read and be prepared to discuss the Cases for Analysis in each chapter

Classroom: Discuss contract elements of consideration, capacity, and intent; review cases assigned and questions following the cases.

In class exercises on contract formation and negotiations; In class analysis of draft contract – students will complete a written analysis of agreement, including identification of contract elements incorporated into agreement, and areas of concern with respect to breach, failure of performance and remedies.
Session 3:

Assignment
Read Chapter 7, *Contract Provisions*
Chapter 8, *the Uniform Commercial Code*
Chapter 9, *Third Party Contracts*

Complete Exercises 1-5 on page 177
Complete Exercises 1-6 on page 213
Complete Exercises 1-5 on page 255

(Written responses are due at the start of class)

Read and be prepared to discuss the Cases for Analysis in each chapter

Classroom:
Discuss assigned cases and questions. Discuss Rule of Construction, conditions, Statute of Frauds and Parol Evidence Rule. Review the UCC and its impact on contract formation. Identify third party contracts and limits on transfers.

Preview discharge of obligations and Remedies. Discussion on drafting and negotiating technique; how to identify and accomplish client objectives.

Review Draft Contract Analysis Project

Session 4:

Assignment
Read Chapter 10, *Discharge of Obligations*
Chapter 11, *Remedies*

Chapter 12, *Drafting Simple Contracts*

Prepare for team negotiation session by identifying:
- the issues you intend to pursue;
- your client’s goals;
- issues the opposing side will raise;
- your strategy for overcoming the opposition; and
- how to arrive at the best outcome for your client
Complete Exercises 1-5 on page 289
Complete Exercises 1-5 on page 328
Complete Exercises 1-4 on page 353

(Written responses are due at the start of class)

Read and be prepared to discuss the Cases for Analysis in each chapter

Classroom: Negotiation project completed during class.
Conduct simulated negotiation sessions. 2.5

Discuss negotiation session. Review discharge of obligations, remedies and contract drafting. 1.5

Session 5:

Assignment Draft Contract based on Week 4 negotiations (Bring 3 copies of contract to class);

Final Exam (Exam will be posted at the conclusion of Session 4. Students will have until Sunday August 22, 2010 at 11:59 p.m. to complete online exam)

Review of course materials and critical concepts. 1.5

Classroom: Exchange of draft contracts and continue negotiation. Finalize draft contracts. 2.5
DRAFT CONTRACT FOR ANALYSIS

COLLABORATION AGREEMENT

This Agreement is made and entered into this day of 200_ by and between Jones (Jones) whose address is and Smith (Smith) whose address is .

Whereas the parties to this Agreement are collaborating on the book for a music theatre work entitled “ ” (Musical) and the parties wish to define their respective rights and obligations,

Now, therefore, the parties do agree as follows:

1. The parties agree that Jones and Smith will jointly write the book for the Musical. The parties hereto further agree that Jones and Smith will jointly register and own the copyright in the book for which each will be entitled to fifty percent (50%) of all receipts derived from all so-called “small performing rights” as well as all publishing and recording rights.

2. Except to the extent that the material is in the public domain in the United States, each of the parties represents and warrants that the material either written or hereafter written, or both, by such party for the Musical shall be original with such party and shall not violate or infringe the copyright, common law copyright, right of privacy, or any other personal or property right whatsoever of any person or entity, or constitute a libel or slander, and that such party fully owns and controls such material and all rights therein and has the full right to enter into this Agreement and all production contracts and other contracts and consents to be entered into hereunder.

3. No contract for the use of the Musical, any part thereof, or the disposition of any right connected with the Musical, shall be valid without the approval and signature of both parties to this Agreement, except that either party may grant the right to such Musical for a limited run performance not to exceed three (3) weeks or twenty-one (21) consecutive performances, whichever is greater, without the approval of the other party but must inform the other party in writing of making such grant within five (5) business days.

4. Duplicate contracts concerning the Musical, including but not limited to the production thereof or the disposition of any rights in the Musical, shall be given to both parties to this Agreement. Payment to each of the parties shall be made in accordance with the specific instructions from each party.
5. With respect to any agreement for a production of or based on the Musical or for the disposition of any rights therein, the parties agree that there will be inserted in such agreement clauses providing that on all programs, billings, posters, advertisements, or in printed billing credit used in connection with any production or other use thereof in any manner the names of Jones and Smith as co-book writers appear, and where one name appears the other must appear in equal size, boldness and prominence of type. The billing credit shall be in the following form:

Book written by Jones and Smith and Brown

The right of Brown to receive such credit is based on a separate agreement entered into between Smith and Brown, and Brown has no other rights under this contract. Jones is in no way obligated to Brown.

It is expressly agreed, however, that in no event shall the name of either party appear as book writer without the other name.

6. Anything to the contrary herein notwithstanding, the contributions of the respective parties hereto shall be owned by the contributors thereof, and the written consent of both parties to this Agreement shall be required for a sale, lease, license or other disposition of the Musical except as noted in Paragraph 3. For any disposition that results in a commercial production of the Musical before a paying audience, and which opens and runs for at least twenty-two (22) consecutive paid performances, the respective contributions of the parties to the Musical shall be deemed merged for all dramatic purposes (that is the Grand Performing Rights) in that no party may thereafter deal with the Musical or any part thereof except as herein provided, and the term of this Agreement shall be co-extensive with the life of the copyright in and to the Musical.

7. In the event of the death of either of the parties to this Agreement during the existence of this Agreement, the survivor of the parties shall have the sole right to change any part of the book, music and lyrics of the Musical, negotiate and contract with regard to the disposition thereof, and act generally with regard thereto as though he were the sole author thereof. However, in such event, the name of the deceased party shall nonetheless always appear as provided in Paragraph “5” of this Agreement, and the survivor shall cause to be paid to the heirs or legal representatives of the deceased party the agreed upon proportion of the receipts of the Musical as set forth in this Agreement, and shall furnish true copies of all agreements to the personal representatives of such deceased party.

8. No change or alteration shall be made after completion in the book of the Musical without the written consent of Jones. Approval of the director(s) and cast members of the Musical and all other artistic decisions pertaining to the Musical, within the control of Jones and Smith as Book writers of the Musical will require the consent of both parties to this Agreement.
9 (a). In the event that either party hereto desires to sell, pledge, lease or assign, or otherwise dispose of or encumber his respective share of income derived from royalty, stock, or subsidiary interests, motion picture interests, foreign interests or the like, or any, part or portion thereof, (other than the small performing rights and publishing and recording rights reserved to each) it is agreed that such party (called the “selling party”) shall give to the other (called the “buying party”) in a written notice with full particulars, sent by certified mail, an option for a period of thirty (30) days which the buying party may equally purchase such rights in the Musical as may be offered, at a price and upon such terms as stated in such written notice. Should the buying party fail, within such thirty (30) days, to exercise such option in writing, or if the option is exercised, fail to complete the purchase upon the terms and conditions stated in such notice, then the selling party may sell such rights to any other person at the price and upon the identical terms stated in such notice, subject to the conditions set forth in Paragraph “9(b)” of this Agreement.

(b) Before the consummation of the sale to any other person, the selling party must give the other party to this Agreement written notice containing the name of all conditions of the proposed sale to such third party, and must give the other party to this Agreement thirty (30) days within which to match such offer in all respects. If such offer is not matched within such period, then the selling party may complete the sale to the third party upon such terms and conditions, and a copy of the contract for the sale of such rights shall be sent to the other party hereto.

10. All expenses which may reasonably be incurred pursuant to this Agreement shall be mutually agreed upon in advance in writing and shall be shared equally by the parties. Any tax or assessment levied on the Musical by any labor or professional guild, or any similar organization shall likewise be shared by the parties to this Agreement in the manner set forth in this Paragraph “10”.

11. Neither party to this Agreement may assign this Agreement or any rights herein without the prior written consent of the other party, except that either party may freely assign his financial interest in this Agreement in accordance with the provisions of paragraph “9” hereof, provided such assignment shall not relieve the assigning party of his duties and obligation herein provided.

12. Any claim, dispute, misunderstanding or controversy or charge of unfair dealing arising under, in connection with, or out of this Agreement, or, the breach thereof, shall be submitted to arbitration before one arbitrator, to be held under the rules and regulations of the American Arbitration Association. Judgment upon the award rendered may be entered in the highest court of any forum, State or Federal, having jurisdiction. The arbitrator is directed to award to the prevailing party reasonable attorney’s fees, costs and disbursements including reimbursement for the cost of witnesses, travel and subsistence during the arbitration hearings. Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered by the appropriate court of the forum having jurisdiction.

13. This Agreement, regardless of its place of execution, shall be construed, interpreted and enforced in accordance with the laws of the State of applicable to agreements executed, delivered and to be performed within such State.
14. This Agreement constitutes the entire understanding between the parties hereto and may not be modified except by a written instrument duly executed by the parties hereto or the their assignees or authorized representatives.

15. Nothing herein contained shall constitute a partnership or joint venture between the parties hereto. No party shall act in any manner contrary to the terms of this clause and no party shall become liable by any representation, act or omission of the other contrary to the provisions hereof.

16. (a) Jones shall indemnify Smith, his respective successors, assignees and licensees and hold each of them harmless against any liability, damage, cost or expense (including costs and reasonable attorneys’ fees) occasioned by or arising out of any third party claim, demand or action inconsistent with this agreement, representation, grant or warranty made or assumed by Jones. Jones agrees to give prompt written notice to Smith upon any and all third party claims regarding the warranties, representation and indemnity provisions to this Agreement.

(b) Smith shall indemnify Jones, his respective successors, assignees and licensees and hold each of them harmless against any liability, damage, cost or expense (including costs and reasonable attorneys’ fees) occasioned by or arising out of any third party claim, demand or action inconsistent with this agreement, representation, grant or warranty made or assumed by Smith. Smith agrees to give prompt written notice to Jones upon any and all third party claims regarding the warranties, representation and indemnity provisions to this Agreement.

17. No waiver by any party hereto of any breach of this Agreement by the other shall be deemed to be a waiver of any preceding or succeeding breach of the same term or any other breach of this Agreement. No delay on the part of a party hereto in exercising any right, power, or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power, or privilege hereunder preclude any further exercise thereof or the exercise of any other right, power, or privilege. The rights and remedies expressly specified in this Agreement are cumulative and not exclusive of any other rights or remedies either party would otherwise have.

In witness whereof, the parties have duly executed this Agreement on the day and year first above written.

___________________________ Jones ____________________________

___________________________ Smith ____________________________
FACT PATTERN FOR NEGOTIATION SESSION

PROJECT: Negotiating a publishing contract.

You will represent either the author or the publisher. You will negotiate a book contract for the author. The basic facts for both parties are listed below. You may be as creative with the facts as you see fit. You may add to the fact situation for your client. You may not add to the facts for the other party to the contract.

AUTHOR

Aurora Pinetree has led a remarkable life. She grew up in a single parent household, her mother left when she was 4. Her father raised Aurora and her two brothers on a bricklayer’s salary. Money and time with Dad were tight. To escape, Aurora read books. She received a scholarship to Antioch College in Yellow Springs, OH where she majored in political science and English.

After graduation, Aurora began writing professionally. She has been published extensively in mainstream magazines in the United States and in Europe. Her work to date has dealt with non-fiction stories about people, places and things. She is a world-renowned travel writer. She has never written nor sold any fiction.

In 2006, she wrote a best-selling book about her experiences living in Latin America. She received an advance of $250,000 for her book. The book spent 8 weeks on the New York Times Bestseller List. The book was translated into 17 different languages. Jody Foster bought the film rights for $1.5 million and the film will be released next year.

She has now decided to write a novel. She intends to write a novel about living in different countries. She plans to base her protagonist on herself and her own experiences.

Aurora is demanding a minimum advance of $1,000,000 and 60% of the gross profits. She has a draft of the novel ready. Even though she has never written fiction, she believes her previous success, as a travel writer is sufficient to justify these demands.

PUBLISHER

Redstone Publishing is a small firm with a reputation for excellence. Its founder, Roberta Ferligini, left a cushy job with a major publishing firm to go out on her own. She has a reputation for hard-nosed negotiations with authors. Redstone is known for publishing fiction bestsellers. James Patterson and Stephen King are among the stable of writers published by Redstone.
Ferligini is interested in the topic of Aurora Pinetree’s book but is concerned about her ability to write fiction. She is worried that Aurora will be a difficult author to work with and wonders if she is capable of taking the direction new novelists require.

Redstone editors pride themselves on their commitment to authors. First-time novelists wrote several of their most successful books.

The quality of their work is reflected in the sales figures for the last three books. Those books resulted in over $625 million in sales. And all were turned into blockbuster films. The last one, “It Happens In The Spring” received 18 Academy Award nominations and brought home 16, including Best Picture. Every book published by Redstone has been listed on the New York Times Bestseller’s List.

Redstone is known for low advances, usually in the low six figures and complicated contracts that limit the royalties paid. This is especially true for first time novelists.
Defendant, ANR Freight System, Inc., appeals from the jury verdict in favor of plaintiff, Helen Tuttle, on her claim of breach of a written employment contract based on defendant's “Employee Guidelines” and her implied contract claim. We affirm.

Plaintiff, a former employee of defendant, brought this action against defendant seeking damages for lost wages, merit increases, and benefits. Plaintiff's claims for breach of oral contract, breach of implied contract, breach of written contract, and promissory estoppel were submitted to the jury. The jury found that there was an oral contract which was breached and awarded Tuttle $1 in damages on that claim. It also found that there was a breach of a written or implied contract based upon the “Employee Guidelines” and awarded Tuttle $26,000 in damages on those claims. The jury did not reach a verdict on the claim of promissory estoppel.

Plaintiff worked as an accountant with another trucking company that was purchased and taken over by defendant. When the other company was purchased, defendant approached many of the employees of the pre-existing company and offered them continued employment. Plaintiff, one of these employees, agreed to work for defendant and moved from Wisconsin to Denver.

Plaintiff testified that, both at the time she initially discussed employment and thereafter, the defendant informed her of a commitment to gender equality in employment. Additionally, advancement as well as the pay scale was to be based on the responsibilities of the job and the individual's performance.

Plaintiff contends that this commitment or promise is largely presented through an employee handbook, known as “Employee Guidelines,” and constituted an offer for terms of employment which she accepted. On that basis, she asserts the defendant is liable for breach of contract as a result of violating the terms of employment.

Plaintiff also testified that, when she assumed the duties and responsibilities of higher paid employees and received excellent evaluations, she reasonably expected to be compensated at the same rate as those employees. The source of this expectation was, in large part, statements contained in the employee handbook.

Defendant, on the other hand, maintains that the employee handbook was denominated “Employee Guidelines” because it did not consider its contents to consist of concrete promises to the employees. Rather, the statements made therein were merely guidelines or aspirational goals of the company, and therefore, it argues they cannot serve as a basis for either a breach of written contract or implied contract claim.
I.

A.

Defendant argues that, as a matter of law, its “Employee Guidelines” lacked the certainty or specificity necessary to constitute an offer and, therefore, the trial court erred in not granting its motion for directed verdict or for a judgment notwithstanding the verdict as to plaintiff's breach of written contract claim. We disagree.

In ruling on a motion for judgment notwithstanding the verdict, the court must determine whether there is sufficient evidence for a reasonable person to reach the same verdict as the jury. In making this determination, the court must consider the evidence in the light most favorable to the prevailing party. *Ekberg v. Greene*, 196 Colo. 494, 588 P.2d 375 (1978).

An employee handbook may alter at-will employment, and provisions of the handbook may create an enforceable contract. However, liability for breach of contract exists only if the employee can prove all the elements of the formation and breach of a contract. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo.1987).

When the existence of a contract is in issue and the evidence is in conflict or admits of more than one inference or conclusion, then it is for the jury to decide whether a contract exists. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882 (Colo.1986). Also, whether an employer and employee have entered into a contract based upon an employee handbook is generally a question of fact for the jury. See *DeRubis v. Broadmoor Hotel, Inc.*, 772 P.2d 681 (Colo.App.1989); *Cronk v. Intermountain Rural Electric Ass'n*, 765 P.2d 619 (Colo.App.1988). And, whether the parties intended to enter a contract is a factual question. *Chambliss/Jenkins Associates v. Forster*, 650 P.2d 1315 (Colo.App.1982).

Here, defendant's employee handbook stated the company would not discriminate on the basis of race, sex, religion, or national origin. In conjunction with this statement, the handbook also states:

“[w]e *commit* to provide you with a fair and equitable working environment....” (emphasis added)

*Webster's Third New International Dictionary* 457 defines “commit” as: “to obligate or bind to take some ... course of action” and “to pledge to some particular course or use: contract or bind by obligation to a particular disposition.” Hence, defendant's use of that word demonstrates a promise by defendant to follow an equal employment program within the company.

Plaintiff also assertedly relied on the section entitled “Compensation Position,” which states:

“It is the objective [of defendant] to assure that individuals are fairly compensated on the basis of their own performance and that all positions are appropriately graded in terms of both internal alignment and competitiveness with external labor markets.”
The handbook describes in detail three main tools that are used to determine salaries: (1) job evaluation or position description, (2) salary ranges, and (3) performance appraisal.

Furthermore, defendant placed great emphasis on this handbook in dealing with plaintiff. For example, the handbook was read line by line to her at the beginning of her employment. This factor and other evidence demonstrate that defendant highlighted the handbook as an integral part of the parties' employment relationship.

Whether the language of a promise is sufficiently clear to constitute an offer is a matter for the jury to decide. Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985); Finley v. Aetna Life & Casualty Co., 5 Conn.App. 394, 499 A.2d 64 (1985).

Under circumstances involving more general language, other courts have construed the terms of employee handbooks as being too vague to constitute an offer and, therefore, determined that no contract was created between the employer and employee. See Sanchez v. The New Mexican, 106 N.M. 76, 738 P.2d 1321 (1987); Bauer v. American Freight System, Inc., 422 N.W.2d 435 (S.D.1988). However, we find the handbook here to be significantly more detailed than was the case in these contrary holdings. Here, it establishes with specificity defendant's commitment not to discriminate in either employment or remuneration. Thus, the terms of the employee handbook are not so vague that we are compelled to usurp the jury function of determining whether a contract right has been created.

B.

Defendant next argues that plaintiff did not rely on the employee handbook to her detriment and that she gave no consideration therefor. We disagree.

An employee can accept an employer's unilateral offer of terms in an employee handbook by continued service, and similarly, continued service may constitute consideration. Continental Air Lines, Inc., v. Keenan, supra.

It is disingenuous for defendant to argue that its sexual equality and pay guidelines, which it uses as integral parts of its employment scheme, have no legal significance and, therefore, do not provide consideration or a basis for an offer of employment to prospective employees.

Indeed, from the evidence presented here, the jury could readily have concluded the opposite is true. From plaintiff’s testimony and actions the jury could have readily concluded that persons, like plaintiff, who have historically been discriminated against in the work place, seek employment with those companies which purport to offer equal employment opportunity and pay.

C.

Defendant also argues that, even if a contract was formed, there was not sufficient evidence for the jury to find a breach of contract. We disagree and, instead, conclude there is support in the record for finding noncompliance with the terms of the handbook.
Therefore, based upon the language of the “Employee Guidelines” and evidence regarding defendant's use of these guidelines, we conclude the trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict. See Ekberg v. Greene, supra. The evidence presented at trial supports the jury's conclusion and will not be disturbed on appeal. See Virgil v. Pine, 176 Colo. 384, 490 P.2d 934 (1971).

II.

The jury was asked to answer a special interrogatory which stated:

“Do you find that there was a written or implied contract based upon the employee guidelines?”

It answered this interrogatory in the affirmative.

Although the interrogatory may be ambiguous as to whether the jury found for the plaintiff upon a written or upon an implied contract, or both, since neither party objected to the interrogatory at trial, effect must be given to the entire verdict. See Boynton v. Fox Denver Theaters, Inc., 121 Colo. 227, 214 P.2d 793 (1950).

Plaintiff argues that, since defendant's appellate brief is directed solely at the “written contract,” this case should be affirmed on the ground that defendant is not contesting the validity of the implied contract. This suggests that the written and implied contracts are different conceptually and factually.

Defendant claims that the arguments made in regard to the “written contract,” i.e., the guidelines are a statement of policy and are too vague to constitute an offer, there was no acceptance of the offer by plaintiff, and there was no breach of the contract, also apply to the implied contract. Defendant essentially argues that within the context of this case the terms “written” and “implied” are the same thing. We agree with defendant that its arguments also apply to the implied contract, but disagree that the written and implied contracts are based on the same evidence (the handbook) and are thus one and the same.

When parties manifest their agreement by either written or oral words, the contract is generally said to be express. When the agreement is manifest by conduct, it is said to be a contract implied in fact. Colo-Tex Leasing, Inc. v. Neitzert, 746 P.2d 972 (Colo.App.1987).


When the existence of a contract is in issue and the evidence is in conflict or admits of more than one inference or conclusion, then it is for the trier of fact to decide whether a contract exists. I.M.A., Inc. v. Rocky Mountain Airways, Inc., supra.

Here, it appears the term “written contract” was intended as a basis for the jury to determine
whether solely under the employee guidelines there had been an offer and acceptance. We note, however, since the acceptance of the contract was by the conduct of the plaintiff in taking and keeping her job, see Continental Air Lines, Inc. v. Keenan, supra, the contract may be more properly denominated as an implied in fact contract, rather than a written or express contract. The jury may have concluded that the guidelines in conjunction with other statements and actions of the parties constituted an implied in fact contract. See A.R.A. Manufacturing Co. v. Cohen, supra.

Accordingly, since the implied contract theory of recovery includes evidence other than the employee handbook and since we have already determined that the evidence supports the jury verdict on an express contract theory, we conclude that the evidence supports the jury verdict as to an implied contract between plaintiff and defendant.

Judgment affirmed.
Some time during the fall of 1947 Fulton Cook of St. Marias, Idaho, sold a ranch near St. Marias to L. D. Johnson of Rosalia, Washington. The ranch was located in the lowlands and the drainage ditch had become somewhat clogged. Cook owned a dragline and, after the sale, negotiations were carried on between the two for Cook to move his equipment to the ranch and clean out and extend the ditch.

December 20, 1947, Johnson wrote Cook:

‘Mr. Fulton Cook
‘St. Marias Idaho.

‘Dear Mr Cook

‘I thought I would drop you a line today. I hope this finds you folks all O.K. with best wishes to you and family. I am about the same as ever. I am planning to go on away the first of the year somewhere

‘Bout the ditch you was to do on my farm go head and do the work what you think to be needed and I will pay you later on when you send me the bill I may not see you before I go away

‘your Truly

‘[signed] L. D. Johnson’

Cook replied December 23rd:

‘If everything progresses satisfactorily and we do not have too much extreme weather conditions we will be at your ranch ready to extend the ditches for you by about January 20th. I have something like three weeks work with my machine on my ranch before I can get to your work but you can count on me doing the work as I promised you just as soon as I can get to it.’

January 22, 1948, Johnson sold the ranch under a conditional sales contract to Harry Fink and shortly thereafter Fink went into possession. Johnson then went to California and returned March 27th or 28th.

At the time he wrote the letter of December 20th, Johnson was negotiating the contract with Fink. He did not notify Cook, however, of this fact. He never at any time notified Cook concerning the contract with Fink or the change of possession. He never at any time attempted to revoke his offer to Cook.
Cook learned of the contract of sale shortly after it was made, and knew that Fink was in possession. He testified that he did not contact Johnson because he did not know where he was.

Cook moved his equipment onto the ranch the early part of April and worked from April 19th to May 19th. The court found that the charge of $1,790 for work and labor performed was reasonable. Cook testified that the delay in commencing the work was due to an unusually heavy frost that year.

Upon Johnson's return from California, before going on to Rosalia, he spent a few days in Spokane. Fink met him there and made a payment on the contract. He told Johnson that Cook was on the ranch, preparing to commence the work. Fink testified: ‘* * * I asked Mr. Johnson about the deal on the ditching and he said to go ahead, to tell Mr. Cook to go ahead as agreed.’

He testified that he so advised Cook (who was then at the ranch ready to start) upon his return that evening.

As to this conversation, Johnson testified: ‘* * * he wanted to know what bargain I had made with Cook to do this ditching that Cook did and I said the ditching was to be done at cost and he would have to talk to Cook himself about getting a price on it, I had nothing to do with it any more.’

Shortly after June 1st Johnson, in response to a letter from Fink, went to St. Maries. While there he was handed a statement by Cook for the work performed. This was the first time the two had met or had corresponded with each other since the exchange of letters the previous December. Their testimony as to what transpired at this meeting is so conflicting that a recounting of it would serve no useful purpose. However, upon his return home, Johnson wrote Cook on June 10th:

‘June 10, 1948

‘Mr. Fulton Cook

‘St. Mery's Ida.

‘Dear Mr. Cook

‘I never node what was goen on when I was talken to you the other day till it was two late bout this steem shuvell work it seems like Finch thinks I was to pay for that work I cant under stand how he got that idey less Watkins led him to beeleva this when I sold this place threu watkins I was to have sow much Clear and now back Bills to come up he sed he Had Ryle Part fixed that way he acts couney dum on that questen sow dos Fink but never come rite out with it but talked bout thee work quite freely last spring he asked me what deal I had with you I told him you spoke of doen thee work at cost and I didnt have eney plan to tell him.

‘Of Corse if I was to pay it it make eney diference what prise it wood be of corse things has
turned out quite different now and maybe things look different. I have told Watkins I didn't want eney tales tide on my Deals. I will see you later on about this deal. I can let him have some money some time if he gits up again eney thing but I fige thee best way is to drift a long for a while and see how things goes.

‘Best wishes

‘[signed] L. D. Johnson’

To this letter Cook replied:

‘Big Meadow Ranch

‘St Maries, Idaho

‘June 21st, 1948

‘Mr. L. D. Johnson,

‘Rosalia, Wash.

‘Dear Mr. Johnson:

‘In reply to your letter of the 10th inst. relative to account for ditching on the ranch I sold to you, there is some misunderstanding about who is to pay the account apparently between you and Mr. Finck.

‘In your letter to me dated December 20th 1947 you stated in regard to the ditching as follows:

‘About the ditching you was to do on my farm go ahead and do the work what you think to be needed and I will pay you later on when you send me the bill’

‘I answered your letter of Dec. 20th and stated that I would get to this work as soon as possible. I also asked Mr. Fink who was to pay for this work and he stated that he had talked with you about this ditching and that you would help him if he needed it.

‘Naturally, with your letter of Dec. 20th instructing me to do this work and send you the bill and you would pay for it and Mr. Finck saying to go ahead with the work I do not see where there is any question about the payment. I do not care who pays for the work, either Mr. Fink or you that is immaterial. I think you and Mr. Finck should get together and settle this matter as I do not wish to have any trouble over it.

‘I have a great deal of expense this year and need the money so, I will expect an immediate reply.

‘Yours truly,'
Upon trial of an action by Cook against Johnson the trial court concluded that there was no valid contract or meeting of minds between the parties as a result of the exchange of letters of December 20, 1947 and December 23, 1947, and entered judgment dismissing the action with prejudice. This appeal follows.

The law recognizes, as a matter of classification, two kinds of contracts—bilateral and unilateral. A bilateral contract is one in which there are reciprocal promises. The promise by one party is consideration for the promise by the other. Each party is bound by his promise to the other. A unilateral contract is a promise by one party—an offer by him to do a certain thing in the event the other party performs a certain act. The performance by the other party constitutes an acceptance of the offer and the contract then becomes executed. Until acceptance by performance, the offer may be revoked either by communication to the offeree or by acts inconsistent with the offer, knowledge of which has been conveyed to the offeree. An example of this class of contract is the offer of a reward. 17 C.J.S., Contracts, § 8, page 326; 1 Page on Contracts 65, § 51; Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 187 P. 370, 190 P. 330, and cases cited therein; Higgins v. Egbert, 28 Wahs.2d 313, 182 P.2d 58.

The letters between the parties indicate that they had negotiated for some time with reference to appellant cleaning out and extending the ditches. Those negotiations culminated in an offer by respondent to pay upon performance by appellant and upon appellant's submission of a bill to him. Up to that point appellant was not obligated to perform. He could have accepted the offer by performance. But he went further than that and promised to do the work. The promises of the two men thereby became reciprocal and binding, each upon the other. The two letters constitute a binding reciprocal agreement between the parties. There was a definite proposal by respondent which was unconditionally accepted by appellant. The minds of the parties met. See Lost Lake Lumber Co. v. Smith, 29 Wash. 713, 70 P. 134.

In Mowbray Pearson Co. v. E. H. Stanton Co., supra, the Stanton Company executed and delivered the following offer in writing: ‘In consideration of Mowbray Pearson Company soliciting and delivering ice in Spokane north of the Spokane river to Olive Street bridge and north of N. P. R. R. east of Olive Street bridge and south of Cora avenue west of Division street, and Dalton avenue east of Division street, E. H. Stanton Company agrees to sell pure merchantable ice to Mowbray Pearson Company for $1.50 per ton at their plant for their requirements during 1916, and further agrees not to sell any other dealer for distribution in that district.’

The Pearson Company wrote the word ‘accepted’ upon the contract. It was contended that that made the contract bilateral. We pointed out, however, that by writing the word ‘accepted’, the Pearson Company merely agreed to the terms of the writing and did not promise to solicit and deliver ice in the district defined. Here appellant went further than merely agreeing to the terms of respondent's writing. He did more than to indicate an intention to accept respondent's offer by performance. He promised to do the work. His promise was just as binding as that of the respondent.
In Dement Brothers Co. v. Coon, 104 Wash. 603, 177 P. 354, the following writings occurred:


‘I sell to Dement Bros. Co. 6,000 bushels of Bluestem wheat basis No. one grade, 201 sacks turkey red wheat basis No. one grade and 500 bushels fortyfold wheat basis No. one grade all at $1.03 1/2 per bushel f. o. b. Reese or Welland seller's option. Delivery to be made on or before Sept. 30, 1916.

‘Confirmed: Carl Coon.

‘Dement Bros. Co.,

‘By Morrison.’

‘We, the undersigned, hereby agree to an extension of time of delivery on the wheat contract of Aug. 4, 1916, to Dec. 1, 1916, instead of Sept. 30, 1916. All other conditions of contract to remain the same.

‘Dement Bros. Co.

‘By Morrison.

Carl Coon.’

No wheat was delivered and in an action for damages the plaintiff recovered. Upon appeal the first error assigned was that the contract was void for want of mutuality. We said:

‘As to the first contention: The contract is an executory one, and evidently it was intended to be and is bilateral. Appellants argue that the contract contains no promise on the part of respondent to receive the wheat nor to pay for it. We are satisfied to the contrary. By the writing, signed by Carl Coon, he said that he sells wheat to respondent, future delivery, at a stated price, f. o. b. at either of two places the seller prefers. Respondent wrote the word ‘confirmed’ and signed it. Thereafter there was written on the instrument an agreement extending the time for delivery of wheat and a reaffirmance of all other conditions of the contract, which was signed by both parties. The rule by which we determine the intent of the parties and the meaning or lack of meaning of such a written instrument does not encourage an attempt to charm or transform it into a word puzzle, nor to do otherwise than take the words and signatures in their ordinary, everyday, popular sense. The contract is not an option given by Carl Coon, nor is it a unilateral agreement, such as the offer of a reward. By it Carl Coon said he sells wheat, future delivery, at a certain price, to Dement Bros. Company. It is impossible to sell unless at the same time there is a purchaser. The one obligation must have its corresponding and correlative obligation. Therefore, when Carl Coon signed the contract he obligated himself to sell wheat, future delivery, at the price stated, to Dement Bros. Company, and, when the latter wrote on it the word ‘confirmed’ and then signed it, respondent entered into the correlative obligation of purchasing wheat, future
delivery, at the price stated, from Carl Coon. The same may be said with reference to the obligation of respondent to receive the wheat.'

In a unilateral contract the offer may be revoked by the offeror before acceptance by performance by the offeree. Mowbray Pearson Co. v. E. H. Stanton Co., supra. But such an offer may not be revoked by either party to a bilateral contract. A bilateral contract may be rescinded, but only with the consent of both parties. Parks v. Elmore, 59 Wash. 584, 110 P. 381. That was not done here.

Respondent contends that it became appellant's duty, after learning of the conditional sale to Fink, coupled with Fink's possession of the property, to contact respondent before performing-that, under the circumstances, he proceeded with the work at his peril. That might have been true if the contract were unilateral. However, we are here considering the reciprocal promises of the parties, each to the other-a bilateral contract. It was respondent's duty, if he wished to be relieved of his obligation to pay for the work, to contact appellant and attempt to have him agree to a rescission. Furthermore, although the testimony as to what transpired at the meeting in Spokane between respondent and Fink is so conflicting as to make it impossible to determine what was said, respondent then knew that appellant was on the ranch ready to perform and that he had not performed up to that time. He did nothing to stop performance or to protect any rights which he might have claimed under the contract.

In Auve v. Wenzlaff, 162 Wash. 368, 298 P. 686, 688, we said:

‘There is no question but that respondents consented to the respective assignments. But respondents were never the moving parties. When they would demand money from the parties originally liable, they would then be referred to some other subsequent party. Respondents always insisted that the payments be made as provided in the contract and, of course, did not care who actually made the payments. Respondents' acquiescence in such assignments, unless they agreed to release the original parties, could not have the effect of nullifying the written contract.

‘In a very early case, Wooding v. Crain, 10 Wash. 35, 38 P. 756, 758, this court said:

“The second proposition of appellant-that the respondent could escape his liability by assigning his interest in the contract to a third party-cannot be sustained under any authority we know of. There is a vast difference between the rights of the assignee and the liability of the assignor under the original contract. The contracting party assumes certain obligations which the party with whom he has contracted has a right to enforce, and he certainly cannot escape these obligations by any assignment, and compel the original contractor to look to other parties than the parties with whom he contracts. * * * And it would be a strange and novel principle of law that would compel him to look to an irresponsible person for the performance of a contract, and for damages for its breach, when he had taken the precaution to contract with a responsible person.”

We do not feel that the correspondence between the parties in June, 1948, showed an intention on appellant's part to relieve respondent of his obligation and look to Fink for payment. He
merely stated that he did not care who paid for the work; but he most certainly did not release appellant.

Here the appellant discharged his obligation by performance in accordance with the terms of the agreement between the parties. The trial court found the charge for the work done to be reasonable.

No complaint was made by respondent that the performance was not timely. It is true the appellant promised to commence the work about January 20th, provided ‘we do not have too much extreme weather conditions.’ The testimony showed that due to frost conditions it would not have been expedient to have commenced the work sooner. Under the circumstances, there was not an unreasonable delay in the performance of the work.

The judgment is reversed and remanded with directions to award judgment to appellant as prayed for in his complaint.
ATKINS v. BRIDGEWATER

803 So. 2d 290; 2001 La. App. LEXIS 2935

Following trial, the trial court dismissed plaintiffs' claim to annul their deceased mother's deed based upon her lack of contractual capacity. Finding that the trial court correctly applied Civil Code Article 1926 to end the attack on the non-interdicted decedent's contract, we affirm.

Facts

On April 11, 1995, Ophelia Hunter executed a warranty deed (hereinafter the "Deed") in favor of defendants, Anthony Ray and Sharon Johnson Bridgewater. The Deed was executed in authentic form at the Madison Parish Courthouse and recorded immediately thereafter. The Bridgewaters paid $4,500 in certified funds in exchange for Mrs. Hunter's interest (recited to be an undivided 1/18th interest) in 480 acres of land, known as "The Dunn Place" and/or "Gold Dust Plantation." Mrs. Hunter died on January 28, 1997, or about 21 months after executing the Deed.

Appellants, Charles Atkins and Irealous C. Hunter, are the two surviving children of Mrs. Hunter. Appellants filed this suit, No. 35,453 n1 to nullify the Deed because of Mrs. Hunter's incapacity at the time of its execution. They also alleged that Mrs. Hunter did not execute the Deed and that no price was paid to her.

Contemporaneously with the filing of this proceeding, a second petition for declaratory judgment was filed by Edward Hunter Estate, Inc. against Samuel Thomas, Administrator of the Succession of Evelyn J. McFadden, PD 3672, Sixth Judicial District Court, Madison Parish and Shandelier Yarn, Executrix of the Succession of Lillie Mae Mitchell, PD 3710, Sixth Judicial District Court, Madison Parish. Subsequently, the Bridgewaters moved the court to consolidate the suit to set aside the deed with the suit for declaratory judgment and the two probate proceedings, alleging that all four of the proceedings affected ownership of the identical property and should all be tried together. Although all four proceedings were consolidated, the trial testimony focused exclusively on the circumstances surrounding Ophelia's execution of the deed and the issues of her lack of capacity or lack of understanding; the judgment appealed from seems plainly confined to the issues presented by Docket 35,453, namely, the presumed validity of the Bridgewater deed.

At trial, Anthony Bridgewater testified concerning the circumstances under which he had offered to buy Mrs. Hunter's interest in the land beginning in 1993. In 1995, she accepted his offer of $4,500 for her undivided interest in the land. The Bridgewaters met Mrs. Hunter at the Madison Parish Clerk's Office the next day, and executed and recorded a deed which an attorney had prepared. The deputy clerk who notarized the deed testified at trial. Appellant, Charles Atkins, testified concerning his mother's medical history, consisting of a series of strokes during the early 1990's which he believed may have left her incapacitated.
After hearing the evidence adduced at trial, the trial court dismissed the suit to set aside Mrs. Hunter's deed on its own motion, for failure to state a cause of action under *La. C.C. art. 1926*. Alternatively, the trial court found that the appellants failed to present clear and convincing evidence sufficient to overcome Mrs. Hunter's presumed capacity to contract or to indicate that the Bridgewaters had any reason to suspect Mrs. Hunter's capacity to contract.

Appellants appeal the judgment of dismissal, alleging that the trial court erred in granting its own exception of no cause of action, and further erred in its finding that the evidence was insufficient to show Ophelia's lack of capacity to execute the deed.

**Discussion**

Addressing an attack on the contractual capacity of a deceased party, *La. Civil Code article 1926* provides as follows:

A contract made by a non-interdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous, or it evidences lack of understanding, or was made within thirty days of his death, or when application for interdiction was filed before his death.

In appellants' petition, they alleged Mrs. Hunter's lack of capacity at the time of the Deed and the lack of payment by the Bridgewaters of the $4,500 cash price recited in the Deed. Appellants now argue that a cause of action was alleged and that the trial court erred in its reliance upon Article 1926 in dismissing their claim. We disagree.

The trial court's ruling that "the petition fails to state a cause of action" under Article 1926 may arguably be an overstatement in view of the allegation of no consideration. Nevertheless, the trial court's ruling occurred after the trial in which the Bridgewaters produced the duplicate copy of the $4,500 cashier's check payable to Mrs. Bridgewater and appellants offered insufficient evidence proving nonpayment. The Deed and the evidence show that the contract was not gratuitous.

Mrs. Hunter was not interdicted nor was there an application pending for her interdiction at the time the Deed was executed. The cash sale deed is regular on its face, and the testimony of the notary confirms that execution of the Deed was properly conducted. Finally, the Deed was executed many months before Mrs. Hunter's death. The trial court therefore correctly applied Article 1926 as a bar to appellants' attempt to annul the Deed based upon the claim of lack of contractual capacity.

Accordingly, the trial court's ruling dismissing appellants' claims against the Bridgewaters is affirmed. Costs of appeal are assessed to appellants, Charles Atkins and Irealous C. Hunter.

**AFFIRMED.**
In this case, one of first impression in this court, the issue presented is the enforceability of a provision in a commercial sales contract which (1) stipulates that the seller may recover the reasonable value of attorney's fees incurred as a result of the buyer's breach and (2) attempts to liquidate such sum at 30% of the amount recovered by the plaintiff in the event that the buyer's failure to make payments due under the contract requires the services of an attorney for collection.

Plaintiff, a lumber company, entered into a contract with defendant, a builder and developer, in which plaintiff agreed to supply defendant with lumber and building materials required for construction projects on various plots of land in Suffolk County. The agreement, executed by defendant's president, a member of the New York Bar, described the material to be provided and specified the purchase price. On the reverse side of the contract in a section entitled "TERMS AND CONDITIONS", the following provision was also specified:

"If the Buyer breaches this contract and the enforcement thereof, or any provision thereof, or the collection of any monies due thereunder is turned over to an attorney, the Buyer herein agrees to pay, in addition to all of Seller's expenses, a reasonable counsel fee; and in the event the matter turned over is the collection of monies, such reasonable counsel fee is hereby agreed to be thirty (30%) per cent. The guarantor shall also be liable for such counsel fee and expenses."

(Emphasis in original.)

Defendant took delivery of quantities of lumber and materials which it used in its construction projects. Thereafter, defendant refused to pay for this merchandise, terminated its operations and abandoned its office. Plaintiff instituted suit in the Supreme Court, Kings County, for the recovery of the purchase price of the materials and the attorney's fees stipulated in the contract. Defendant denied liability on the ground that the goods were not of "merchantible quality". Upon plaintiff's motion for summary judgment, however, Special Term found that defendant was liable to plaintiff in the amount of $ 3,936.42, the unpaid purchase price of the goods sold and delivered; and the court held that plaintiff was entitled to recover the reasonable value of attorney's fees as provided in the contract, but declined to enforce the provision designating 30% of the amount recovered as a reasonable fee. Rather, the court conducted a hearing on the nature and extent of the services performed by plaintiff's attorney and determined that a maximum of 10 hours was required to handle the matter properly. The court then set the reasonable value of attorney's fees at $ 450 (approximately 11% of the amount recovered). The Appellate Division modified the award, raising the amount of attorney's fees recoverable by the plaintiff to $ 750 and, as so modified, affirmed the judgment of Special Term. Plaintiff now appeals to this court claiming that both courts below erred in disregarding the provision liquidating attorney's fees at 30%.

Because the contract in this case is one for the sale of goods, all its provisions are controlled by the rules governing remedies for breach of contract set forth in article 2 of the Uniform Commercial Code (L 1962, ch 533, eff Sept. 27, 1964). [HN1] Generally, attorney's fees are not
recoverable as damages in an action for breach of contract under the Uniform Commercial Code or otherwise, unless expressly agreed to by the parties (see Uniform Commercial Code-Sales: Part 7, Remedies, §§ 2-702-2-725; 13 NY Jur, Damages, § 144). The parties here have expressly agreed that the seller may recover reasonable attorney's fees from the buyer upon the latter's breach. Such variations on the code's damages scheme are permitted by subdivision (1) of section 2-719 which provides, in pertinent part, that:

"Subject to the provisions [of subsections (2) and (3) and] of the preceding section on liquidation limitation of damages,

"(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article".

It has been recognized that this provision confers upon the parties a "broad latitude within which to fashion their own remedies for breach of contract" (Wilson Trading Corp. v David Ferguson, Ltd., 23 NY2d 398, 403). Despite the degree of latitude permitted under subdivision (1) of section 2-719 of the code, article 2 contains express limitations on the ability of the parties to alter its damages rules. Two primary restrictions may be found in sections 2-302 (pertaining to unconscionability) and 2-718 (governing liquidated damages clauses) of the Uniform Commercial Code.

Subdivision (1) of section 2-718 of the Uniform Commercial Code provides:

"(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."

The test adopted by the Uniform Commercial Code is similar to that proposed by authorities prior to the code's enactment (see Restatement, Contracts, § 339; 51 NY Jur Sales, § 190; 3 Williston, Contracts [rev ed], § 779).

The first sentence of subdivision (1) of section 2-718 focuses on the situation of the parties both at the time of contracting and at the time of breach. Thus, a liquidated damages provision will be valid if reasonable with respect to either (1) the harm which the parties anticipate will result from the breach at the time of contracting or (2) the actual damages suffered by the nondefaulting party at the time of breach (see 1 Hawkland, A Transactional Guide to the Uniform Commercial Code, § 1.280101, pp 170-172). n4 Interestingly, subdivision (1) of section 2-718 does, in some measure, signal a departure from prior law which considered only the anticipated harm at the time of contracting since that section expressly contemplates that a court may examine the "actual harm" sustained in adjudicating the validity of a liquidated damages provision (see Duesenberg & King, 3A Bender's UCC Service, Sales and Bulk Transfers, § 14.08, pp 14-62 and 14-64). Thus, decisions which have restricted their analysis of the validity of liquidated damages clauses solely to the anticipated harm at the time of contracting have, to this extent, been abrogated by the Uniform Commercial Code in cases involving transactions in goods. (See, e.g., City of Rye v Public Serv. Mut. Ins. Co., 34 NY2d 470, 473; Ward v Hudson Riv. Bldg. Co., 125 NY 230, 235; 3 Williston, Contracts [rev ed], § 783.)

Having satisfied the test set forth in the first part of subdivision (1) of section 2-718, a liquidated damages provision may nonetheless be invalidated under the last sentence of the section if it is so unreasonably large that it serves as a penalty rather than a good faith attempt to pre-estimate
damages (see 5 Corbin, Contracts, § 1063; 3 Williston, Contracts [rev ed], § 783, pp 2204-2207; Nu Dimensions Figure Salons v Becerra, 73 Misc 2d 140). Plaintiff may not manipulate the actual amount of damages by entering into any exorbitant fee arrangement with its attorney and, thus, it may be necessary to look beyond the actual fee arrangement between plaintiff and counsel to determine whether that arrangement was reasonable and proportionate to the normal fee chargeable by attorneys in the context of this case (cf. 3 Williston, Contracts [rev ed], § 786, pp 2215-2216; Mechanics' -American Nat. Bank v Coleman, 204 F 24, 29-30).

Our courts have, in the past, refused to enforce a liquidated damages provision which fixed damages grossly disproportionate to the harm actually sustained, or likely to be sustained, by the nonbreaching party (14 NY Jur, Damages, § 162; see, e.g., Wirth & Hamid Fair Booking v Wirth, 265 NY 214; Seidlitz v Auerbach, 230 NY 167; Weinstein & Sons v City of New York, 264 App Div 398, 399, affd 289 NY 741; Parker v Dairymen's League Co-operative Assn., 222 App Div 341, 346). In Wirth & Hamid Fair Booking (supra, p 223), this court noted that "[liquidated] damages constitute the compensation which, the parties have agreed, must be paid in satisfaction of the loss or injury which will follow from a breach of contract. They must bear reasonable proportion to the actual loss. * * * Otherwise an agreement to pay a fixed sum upon a breach of contract, is an agreement to pay a penalty, though the parties have chosen to call it 'liquidated damages,' and is unenforceable."

Certain lower courts have had occasion to deal specifically with contractual clauses providing for the recovery of attorney's fees in a liquidated amount. Stipulations for the recovery of attorney's fees are commonly found in promissory notes, instruments which are not governed by article 2 of the Uniform Commercial Code. Courts dealing with such provisions have generally examined the reasonableness of the fee in deciding whether they should be enforced (see, e.g., General Lbr. Corp. v Landa, 13 AD2d 804 [20% fee valid]; Franklin Nat. Bank v Wall St. Commercial Corp., 21 AD2d 878 [hearing required to determine reasonableness of 20% fee]; see, also, Scheible v Leinen, 67 Misc 2d 457; Fairfield Lease Corp. v Marsi Dress Corp., 60 Misc 2d 363). These cases, of course, were not governed by the standards set forth in subdivision (1) of section 2-718 of the Uniform Commercial Code.

An alternative ground for invalidating a contractual alteration of the Uniform Commercial Code's damages provisions is section 2-302 of the code which articulates the principle of unconscionability. This section provides in pertinent part:

"If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." The principle underlying section 2-302 is "the prevention of oppression and unfair surprise * * * and not of disturbance of allocation of risks" (Official Comment, McKinney's Cons Laws of NY, Book 62 1/2, part I, Uniform Commercial Code, § 2-302, p 193). It should be emphasized that in contrast to subdivision (1) of section 2-718 of the code discussed above, section 2-302 is limited to and focuses only upon the time of contracting as the vantage point for the determination of unconscionability.

In the proper case a provision that one party to a contract pay the other party's attorney's fees in the event of breach may be unconscionable. Here, however, the parties are commercial entities dealing at arm's length with relative equality of bargaining power. There is no evidence that the
contract is one of adhesion in that its terms were unfair or nonnegotiable, nor has it been shown that defendant would have been unable to obtain building supplies from another supplier without subjecting itself to possible liability for attorney's fees. Defendant cannot claim that it was ignorant of the challenged clause in the contract, especially in light of the fact that the contract was signed by defendant's president, a member of the New York Bar who fled to Spain following defendant's default. Defendant IPA, therefore, cannot assume the posture of a commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company. We are not confronted with the classic case of unconscionability as illustrated in Jones v Star Credit Corp. (59 Misc 2d 189) (see, also, Frostifresh v Reynoso, 54 Misc 2d 119; Denkin v Sterner, 10 Pa D & C 2d 203). Thus, we conclude that, under the circumstances of this case, the provision for payment of attorney's fees does not fail on the ground of unconscionability, although in a case involving disparity of bargaining power or oppressive practices this principle may be the basis for invalidating such a contractual term.

Subdivision (1) of section 2-718 of the Uniform Commercial Code, however, is directly applicable in this case. At the time of contracting the attorney's fees were arguably incapable of estimation. The amount required for attorney's fees would vary with the nature of the defaulting party's breach. For instance, a greater amount would be charged in the event that litigation was necessitated as opposed to settlement; and additional charges might be required for possible appellate procedures.

Special Term ruled that the 30% figure was disproportionate to the amount of time and effort which, according to its estimate, was required by the plaintiff's claim. This approach did not, however, result in the proper measure of damages sustained by the plaintiff. Analysis of the harm suffered by the injured party is the focal point of subdivision (1) of section 2-718 of the Uniform Commercial Code. Under both the "actual" and "anticipated" harm tests, the time expended by the attorney in obtaining collection is not necessarily the correct measure of damages, since an attorney would be expected to bill his client on a contingent fee basis. The liquidated damages provision would prove to be a reasonable pre-estimate of anticipated harm if it is related to the normal contingent fee charged by attorneys in the collection context.

On the other hand, if plaintiff actually entered into a contingent fee arrangement with its attorney for 30%, then the actual harm suffered by plaintiff would be consistent with the liquidated damages provision. However, even if the "actual harm" test is satisfied, it is then necessary, pursuant to the second sentence of subdivision (1) of section 2-718, to determine whether the liquidated damages provision is so unreasonably large as to be void as a penalty. If plaintiff entered into an exorbitant fee arrangement with counsel, knowing that defendant would suffer the consequences, then the liquidated damages provision would be void as a "term fixing unreasonably large liquidated damages". The commercial practice of attorneys in the area of debtor-creditor relations is relevant if plaintiff did, in fact, agree to pay its attorney 30% of the amount recovered on its claim against the defendant. While plaintiff may enter into any fee arrangement it wishes with counsel, it should not be permitted to manipulate the actual damage incurred by burdening the defendant with an exorbitant fee arrangement.

This case, therefore, should be remitted for the resolution of these factual issues: (1) was a 30% fee reasonable in light of the damages to be anticipated by one in the plaintiff's position, that is, was the fee reasonably related to the normal fee an attorney would charge for the collection of plaintiff's claim; or, alternatively, (2) was the fee commensurate with the actual arrangement agreed upon by this plaintiff and its attorney? Even if the 30% fee did correspond to the actual
arrangement between plaintiff and its attorney, the court on remand should determine whether
the amount stipulated was unreasonably large or grossly disproportionate to the damages which
the plaintiff was likely to suffer from breach in the event it did not rely on respondent's
agreement to pay its attorney's fees. If the amount is found to be unreasonably large, then the
provision is void as a penalty.

Accordingly, the order of the Appellate Division should be reversed and the case remitted to
Special Term for proceedings in accordance with this opinion.

Order reversed, without costs, and case remitted to Supreme Court, Kings County, for further
proceedings in accordance with the opinion herein.
HORTON, J. The defendants, David and Elizabeth Hammond and their son, Robert Hammond, appeal the Superior Court's (Fauver, J.) decision denying them right of re-entry and possession of land they deeded to the plaintiff, Red Hill Outing Club (club), subject to a condition subsequent. We affirm.

David Hammond purchased land in Moultonboro in 1956 known as Red Hill, which was subsequently cleared for use as a ski slope. Hammond installed a rope tow and participated in forming the club for the purpose of operating the ski slope. From 1969 to 1979, the club leased Red Hill. During this period, it operated the rope tow and provided free ski lessons to members and Moultonboro residents.

In 1979, David and Elizabeth Hammond conveyed Red Hill by quitclaim deed to the club for nominal consideration. The deed contained the following condition:

The Grantee . . . covenants and agrees that the within described premises shall be maintained and made available to residents of Moultonboro as a ski slope in accordance with its now existing by-laws. If the Grantee fails to provide such skiing facilities to Moultonboro residents for a period of two consecutive years then a breach of this covenant has occurred [sic], provided such failure was not caused by reason of an act of God, such as inadequate snowfall. In the event the Grantee . . . breaches [this covenant], the Grantor shall have the right to re-enter and take possession of said premises . . . .

From 1979 to the mid-eighties use of the ski slope grew. But the popularity of other ski areas, changing interests of families who had previously frequented the slope, inadequate snowfall in some years, and the waning leadership of the club resulted in a noticeable decline in its use after 1988. Consequently, the club ceased offering free ski lessons after the winter of 1988-1989, and did not obtain a rope tow permit for the ski seasons of 1992-1993 and 1993-1994. Red Hill was closed to all skiing during the winter of 1993-1994.

In October 1994, the defendants filed a notice of re-entry and possession, claiming that the club had breached its condition by failing to provide skiing facilities at Red Hill for two consecutive years. In response, the club brought action against the Hammonds, seeking, inter alia, declaratory judgment regarding the parties' relative rights.

After a bench trial, which included a view, the trial court determined that the condition subsequent should be strictly construed. Therefore, to comply with its obligation to provide Red Hill as "skiing facilities," the club needed only to "maintain and make available the premises . . . as a ski slope." Accordingly, the court found that the club had not substantially breached the condition because it had remained in existence as a club and continued to maintain and offer use of the hill as a ski slope. It found that any failure of the club to provide ski facilities from February 1993 to October 1994 was not sufficient in duration to constitute a breach.

On appeal, the defendants argue that the trial court erred by: (1) strictly construing the condition subsequent; (2) construing any ambiguity in the deed against the grantor; (3) finding that the club
did not substantially breach the condition subsequent; and (4) refusing to consider evidence of a breach occurring after the club instituted its action.

The defendants first argue that the trial court should have construed the condition subsequent by determining the parties' intent in light of the surrounding circumstances at the time of the conveyance. They contend that by strictly interpreting the condition to refer only to maintaining and making available the ski slope, the trial court ignored the parties' original intent to include the operation of a licensed ski tow and provision of free ski instruction within the club's obligation to provide "skiing facilities." Although the defendants acknowledge that strict construction of conditions subsequent has long been the rule in this State, they urge us to update this rule consistent with the modern trend in contract interpretation.


The passage of time has failed to increase the social value of conditions subsequent. Unlike restrictive covenants, conditions subsequent continue to be viewed with disfavor because of their potential to cause a forfeiture of land. See, e.g., MacDonald Properties v. Bel-Air Country Club, 72 Cal. App. 3d 693, 140 Cal. Rptr. 367, 371 (Ct. App. 1977). We disagree with the defendants that the consequences of a forfeiture are "no greater" than those of specific performance of a contract or an attachment on property. A forfeiture by nature is a drastic remedy because in most cases it is widely disproportionate to the breach. See Korngold, For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents, 66 Tex. L. Rev. 533, 551 (1988). In addition, restricted use of the land for a potentially indefinite duration substantially diminishes

The defendants, relying on North Hampton District v. Society, 97 N.H. 219, 84 A.2d 833 (1951), contend that the terms of a defeasible fee should be construed in light of surrounding circumstances. While we agree that North Hampton appears to extend the general rule of contract construction to a deed involving a fee simple determinable, id. at 221, 84 A.2d at 834, we do not read its holding so broadly as to apply to the case before us. North Hampton addressed only the issue of the nature of an estate created by language in a deed, id., not the operation and effect of the particular terms of a forfeiture clause. Compare DeBlois, 117 N.H. at 629, 376 A.2d at 145, with Gage v. School-District, 64 N.H. 232, 234, 9 A. 387, 388 (1886). Here, there is no dispute that the deed contains a condition subsequent. The question before us is the scope of the condition subsequent. North Hampton thus addresses aspects of deed construction that do not concern us here.

The overwhelming majority of courts in other jurisdictions also have continued to strictly construe conditions subsequent in deeds with regard to their capacity to work a forfeiture. See, e.g., Willhite v. Masters, 965 S.W.2d 406, 409 (Mo. Ct. App. 1998); C Company v. City of Westbrook, 269 A.2d 307, 309 (Me. 1970), abrogated on other grounds by Herzog v. Irace, 594 A.2d 1106, 1108 (Me. 1991). Our position conforms to the great weight of authority from our sister States.

Our decision today does not abrogate the guiding rule that the intent of the parties to a deed is to be determined and effectuated when possible. See Chapin and Wife v. School District, 35 N.H. 445, 451 (1857) (parties' intention is controlling); cf. Div. of Labor Stand. Enf. v. Dick Bullis, Inc., 72 Cal. App. 3d Supp. 52, 140 Cal. Rptr. 267, 270 (App. Dep't Super. Ct. 1977) (court will uphold forfeiture where intent clear and terms of contract unambiguous)] When it is a condition subsequent that must be construed, however, the rule of strict construction operates to confine the determination of intent to the face of the deed and resolve all ambiguities against forfeiture. See Hoyt v. Kimball, 49 N.H. 322, 325 (1870). We therefore hold that the trial court did not err in construing the club's obligation as limited to maintaining and making the hill available as a ski area. It was not required to import meanings not apparent on the face of the deed, see Gage, 64 N.H. at 234, 9 A. at 388, such as obligations to provide a rope tow or ski instruction.

The defendants next argue that the trial court erred in resolving ambiguities in the deed against the grantor. The trial court held that "uncertainty or ambiguity in deeds must be resolved in favor of the grantee and against the grantor." This rule of construction applies only as a last resort. See Smith v. Furbish, 68 N.H. 123, 127-29, 44 A. 398, 400 (1897); cf. Centronics Data Computer Corp. v. Salzman, 129 N.H. 692, 696, 531 A.2d 348, 350 (1987) (rule applied when all other means of ascertaining parties' intent have failed). Thus, to the extent the court below misunderstood the appropriate application of this rule of construction, it erred. The trial court, however, apparently did not rely on this rule in its decision, as the defendants concede in their brief. Even if the trial court did apply this rule, the result would have been the same as applying the rule of strictly construing conditions subsequent. We therefore deem any trial court error harmless. See Place v. Place, 129 N.H. 252, 260, 525 A.2d 704, 709 (1987).
Third, the defendants contend that the trial court erred in finding that the club did not breach the condition. Insofar as they argue that the court was required to consider extrinsic evidence of the parties' intent, we disagree in light of the principles of deed construction set forth above. We address the defendants' remaining arguments separately.

The trial court correctly found that the club's substantial compliance with the express language in the deed would satisfy the terms of the condition. Substantial compliance will avoid a breach of a condition subsequent. See *Griggs v. Driftwood Landing, Inc.*, 620 So. 2d 582, 587 (Ala. 1993); *New Orleans Great Northern R. Co. v. Hathorn*, 503 So. 2d 1201, 1204 (Miss. 1987). "To constitute a breach of a condition subsequent in a deed relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition." *Townhouser, Inc.*, 534 N.W.2d at 759.

"We will not substitute our own judgment for that of the trier of fact if it is supported by the evidence, especially when he has been assisted in reaching his conclusions by a view." *Heston v. Ousler*, 119 N.H. 58, 60, 398 A.2d 536, 537 (1979). Here, evidence showed that Red Hill was cleared in the fall from 1991 to 1993 during club work sessions in preparation for skiing, that people skied on the property for a few days in February 1993, and that current facilities at Red Hill include a rope tow, clubhouse, storage shed, lights, and snow-packing equipment. Although it is true the club failed after 1991 to operate a rope tow with a permit in compliance with statutory requirements, see *RSA 225-A:14* (1989), that fact is not dispositive of whether it provided ski facilities under the plain terms of the deed. Since we hold that the club was not required under the deed to provide a tow, its failure to obtain a permit to operate one may have violated a statute but did not breach the condition. Cf. *Hathorn*, 503 So. 2d at 1204 (facility's failure to comply with regulatory mandate would not preclude substantial compliance with condition subsequent). Ample evidence in the record supports the trial court's conclusion that the club did not abandon the property and thus substantially complied with the condition subsequent.

The defendants further contend that according to the deed, the club was obligated to provide skiing facilities "in accordance with its now existing by-laws," and that the trial court should have considered a separate document entitled "Red Hill Outing Club Rules & Regulations" as part of the by-laws. We agree with the trial court that even if this document were considered part of the by-laws, its references to ski lessons and a tow did not require the club to provide these amenities. As the trial court observed, the "Rules & Regulations" merely governed the manner in which skiers were to use the ski slope. Rather than imposing duties on the club, the "Rules & Regulations" enumerates guidelines for patrons to promote the safe and orderly use of the premises.

The defendants also challenge a number of the court's factual findings. They argue that the court erred in finding that "safe skiing" on the entire property required a minimum base of twelve inches of snow, enabling it to find inadequate snowfall and thus to excuse the club from compliance with the condition subsequent during the relevant period. The record reveals that there was conflicting testimony on whether twelve inches was the minimum base for the entire ski slope or only for the higher portions of the hill. "Witness credibility is a finding of fact and will not be overturned unless clearly erroneous or unsupported by the evidence." *Fleet Bank - N.H. v. Christy's Table*, 141 N.H. 285, 288-89, 681 A.2d 646, 648 (1996). The club vice-president, secretary, and treasurer all testified that safe skiing on the slope generally required at least a foot of snow. We find that sufficient evidence to support the trial court's finding.
With respect to the defendants' remaining arguments regarding the factual findings below, we have reviewed the record and find them to be without merit and warranting no further discussion. See Vogel v. Vogel, 137 N.H. 321, 322, 627 A.2d 595, 596 (1993).

Lastly, the defendants assert that by refusing to consider evidence of a breach that occurred after the suit filed by the club commenced, the trial court wrongfully estopped them from claiming the full period of the club's alleged breach of the condition. We disagree. A grantor may not offer evidence of a breach of condition subsequent when that evidence occurred after the grantor brought action to re-enter and terminate the grantee's estate. See Tough v. Netsch, 83 N.H. 374, 381, 142 A. 702, 707 (1928). A grantor who exercises his right to terminate the grantee's estate is deemed to have taken legal possession of the property. See Barker and Wife v. Cobb, 36 N.H. 344, 348 (1858). The grantee's obligations under the deed are in effect suspended until the court orders otherwise or makes a final determination that the conditions have not been breached.

Here, the defendants took legal possession of Red Hill upon commencing legal action in October 1994 to re-enter the property, thereby relieving the club of its obligations under the deed. Further, the defendants' claim of breach was based on alleged acts or omissions occurring up to that time. Additional acts or omissions by the club that occurred after October 1994 are irrelevant to the breach already alleged. The defendants' argument therefore must fail.

Affirmed.
Useful Web Links

The Supreme Court of Ohio Official Website
http://www.sconet.state.oh.us/Default.asp

State of Ohio's Laws, Rules and Constitution Searchable Website
http://www.state.oh.us/ohio/ohiolaws.htm

Cuyahoga County Common Pleas Court Website
http://www.cuyahoga.oh.us/common/Default.htm

The Cuyahoga County Court of Appeals, Eighth Appellate District, Website
http://www.cuyahoga.oh.us/appeals/default.htm

Summit County Court of Common Pleas Website
http://www.summitcpcourt.net/

Geauga County Clerk of Courts Website
http://www.co.geauga.oh.us/departments/clerk_courts.htm

Ohio State Bar Association – Paralegal Area
http://www.ohiobar.org/members/paralegal/

The United States Supreme Court Searchable Website
http://www.supremecourtus.gov/

United States Code Searchable Website
http://uscode.house.gov/usc.htm