

# Remedial Contracts (and some Contract Remedies)

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# Road Map

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1. Contract formation
2. Contract interpretation
3. Defenses to contract liability
4. Contract remedies

“The law of contract asks and answers the following questions: (1) Have the parties through their behavior created legally recognizable expectations in one another? (2) If so, how should those expectations be characterized and understood? (3) Have the understandings between the parties been faithfully carried out? (4) If not, what should the law do about it?”

*Nellis v. Farmers Ins. Co. of Arizona*, 2012-NMCA-020, ¶ 40, 272 P.3d 143, 151

# Contract Formation

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# Elements of Contract Formation

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“Ordinarily, to be legally enforceable, a contract must be factually supported by [i] an offer, [ii] an acceptance, [iii] consideration, and [iv] mutual assent.” *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, 669, 857 P.2d 776, 780 (1993).

Plus, the English Statute of Frauds is part of New Mexico common law. *Childers v. Talbott*, 16 P. 275, 276, 4 N.M. (Gild.) 336, 339 (1888).

# Mutual Assent

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## Subjective versus Objective Assent

“An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.” *Lucy v. Zehmer*, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954) (citing 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515).

## Duty to Read

“Each party to a contract has a duty to read and familiarize himself with its contents before he signs and delivers it, and if the contract is plain and unequivocal in its terms, each is ordinarily bound thereby.” *Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, ¶ 13, 98 N.M. 541, 545, 650 P.2d 825, 829.

# Offers

## Unilateral and Bilateral

Carlill v. Carbolic Smoke Ball (Q.B. 1893)

*Strata Prod. Co. v. Mercury Expl. Co.*,  
1996-NMSC-016, ¶ 14, 121 N.M.  
622, 627, 916 P.2d 822, 827 (holding  
an oil and gas farmout agreement to  
be a unilateral contract)



## £100 REWARD

WAS RECENTLY OFFERED BY THE

## CARBOLIC SMOKE BALL CO.

To any person who contracted Influenza, Coughs, Colds, Catarrh, Asthma, Bronchitis, Sore Throat, Hoarseness, Loss of Voice, Throat Deafness, Croup, Whooping Cough, or any Disease caused by taking Cold, after having used the Carbolic Smoke Ball according to the printed directions.

Many thousand Carbolic Smoke Balls were sold on these advertisements, but only three persons claimed the reward of £100, thus proving conclusively that this invaluable remedy will prevent and cure the above-mentioned diseases.

THE CARBOLIC SMOKE BALL CO., Ltd.,

NOW OFFER

## £200 REWARD

to the person who purchases a Carbolic Smoke Ball and afterwards contracts any of the following diseases, viz.—

INFLUENZA  
COUGHS  
COLD IN THE HEAD  
COLD ON THE  
CHEST,

CATARRH  
ASTHMA  
BRONCHITIS  
SORE THROAT  
HOARSENESS

THROAT DEAFNESS  
LOSS OF VOICE  
LARYNGITIS  
SNORING  
SORE EYES

DIPHTHERIA  
CROUP  
WHOOPIING COUGH  
NEURALGIA  
HEADACHE

or any disease caused by taking cold while using the Carbolic Smoke Ball. This offer is made to those who have purchased a Carbolic Smoke Ball since Jan. 1, 1893, and is subject to conditions to be obtained on application, a duplicate of which must be signed and deposited with the Company in London by the applicant before commencing the treatment specified in the conditions. This offer will remain open only till March 31, 1893.

As all the diseases mentioned above arise from one cause, they can therefore be cured by the remedy which stops the cause, viz.—

**THE CARBOLIC SMOKE BALL.**

One CARBOLIC SMOKE BALL will last a family for several months, making it the cheapest remedy in the world at the price—10s. post free.

The CARBOLIC SMOKE BALL will be refilled and returned, post free, the same day, on receipt of Money or Postal Order for 6s.

ADDRESS—

**CARBOLIC SMOKE BALL CO., LTD.,**  
27, PRINCES STREET, HANOVER SQUARE, LONDON, W.

PARIS DEPOT—14, Rue de la Paix.

AMERICAN DEPOT—196, Broadway, New York.

CANADIAN DEPOT—71 & 72, Front Street, Toronto, Ontario.



# Acceptance

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Mirror Image Rule

Mailbox Rule

Revocation

“It is to my mind quite clear that before there was any acceptance by Dickinson he was perfectly aware that Dodds had changed his mind, and had in fact agreed to sell the property to Allan. It is impossible, therefore, to say that there was that continuance of the same mind between the two parties which is essential in point of law to the making of the agreement.” *Dickinson v. Dodds* (Chancery Div. 1876).

# Consideration

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## Benefit/Detriment Test

"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." *Hamer v. Sidway*, 124 N.Y. 538 (1891)

## Past Consideration; Preexisting Legal Duty

*Collins v Godefroy*, 109 E.R. 1040 (H.C. 1809): Promisor's promise to pay a witness to testify at trial held not binding because the witness was already subject to a valid subpoena

*Stilk v. Myrick*, 170 E.R. 1168 (1809): Captain's promise to pay extra wages to the few remaining sailors who had not deserted if they brought the ship into port held not binding because the sailors were already bound by their contract to sail back and to meet emergencies of the voyage.



# Contract Interpretation

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# The Modern Approach

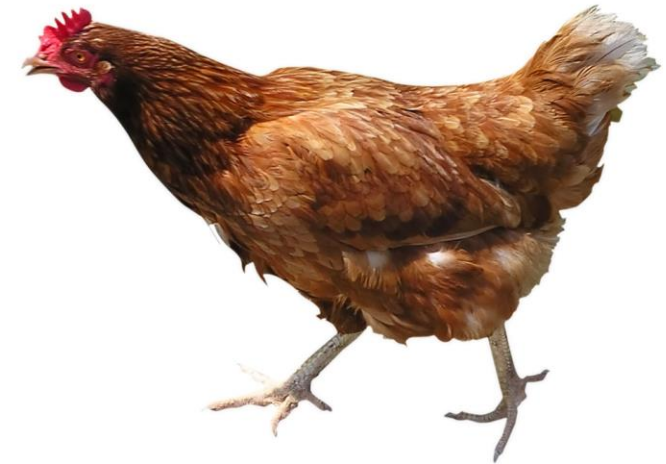
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## Traditional/Plain Meaning/Four Corners Approach

- 1) Examine and harmonize express language
- 2) Apply canons of construction
- 3) Admit extrinsic evidence

## Modern Approach

“Recognizing the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding, numerous courts have eschewed strict application of the four-corners standard. . . . We hold today that in determining whether a term or expression to which the parties have agreed is unclear, **a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance.** New Mexico case law to the contrary is hereby overruled.” *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 15, 112 N.M. 504, 508–09, 817 P.2d 238, 242–43



# Parol Evidence Rule

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Parol evidence of parties' prior or contemporaneous agreements is generally admissible to contradict or supplement the terms of a written contract, with major exceptions:

When the parties adopt a writing as a final but not comprehensive statement of the terms of their agreement (partially integrated writings):

No parol evidence of prior or contemporaneous agreements is admissible to contradict written terms; may admit evidence to supplement the terms.

When the parties intended their writing not only to be final but also to be comprehensive (fully integrated writings):

No parol evidence admissible to contradict or supplement the written terms.

Extrinsic evidence is admissible under *C.R. Anthony* to determine whether the contract is partially or fully integrated. *Nellis v. Farmers Ins. Co. of Arizona*, 2012-NMCA-020, ¶ 40, 272 P.3d 143, 151.

# Contract Defenses

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# In General

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“New Mexico also has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals. Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties.”

*United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 1989-NMSC-030, ¶ 14, 108 N.M. 467, 471, 775 P.2d 233, 237 (quoting *City of Artesia v. Carter*, 94 N.M. 311, 314, 610 P.2d 198, 201 (Ct.App.1980)).

## Recognized Defenses:

- ❖ Fraud
- ❖ Duress and undue influence
- ❖ Unconscionability
- ❖ Illegality
- ❖ Incapacity
- ❖ Mistake

# Unconscionability

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“[T]he fact that some of the terms of the agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable where it was negotiated at arm's length.” *Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, ¶ 14, 98 N.M. 541, 545, 650 P.2d 825, 829

*Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 43, 304 P.3d 409, 420:

## Substantive Unconscionability

A substantively unconscionable contract provision as one that “is grossly unreasonable and against our public policy under the circumstances.”

## Procedural Unconscionability

A court considers the “factual circumstances surrounding the formation of the contract, including the relative bargaining strength, sophistication of the parties, and the extent to which either party felt free to accept or decline terms demanded by the other.”

“[A]n adhesion contract is procedurally unconscionable and unenforceable when the terms are patently unfair to the weaker party.”

# Breach and Remedies

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# Material Breach/Substantial Performance

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“The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture.” *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921)

“Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another.”

“Where the line is to be drawn between the important and the trivial cannot be settled by a formula. ‘In the nature of the case precise boundaries are impossible.’” 2 Williston on Contracts, § 841.



# Money Damages

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

The measure of recovery “is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended.”

“The extent of plaintiff’s suffering does not measure this difference in value. The pain necessarily incident to a serious surgical operation was a part of the contribution which the plaintiff was willing to make to his joint undertaking with the defendant to produce a good hand. It was a legal detriment suffered by him which constituted a part of the consideration given by him for the contract.”

# Money Damages

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In a construction defect case like *Jacob & Youngs, Inc. v. Kent*, the expectation measure of damages might be the costs of completing full performance or correcting a defective performance.

But . . . the Economic Waste Rule

- “. . . *unless* the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value.”
- “In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing.” *Jacobs & Youngs v. Kent*.

“We follow the measure of damages as stated by Justice Cardozo.” *Camino Real Mobile Home Park P'ship v. Wolfe*, 1995-NMSC-013, ¶ 23, 119 N.M. 436, 443, 891 P.2d 1190, 1197.