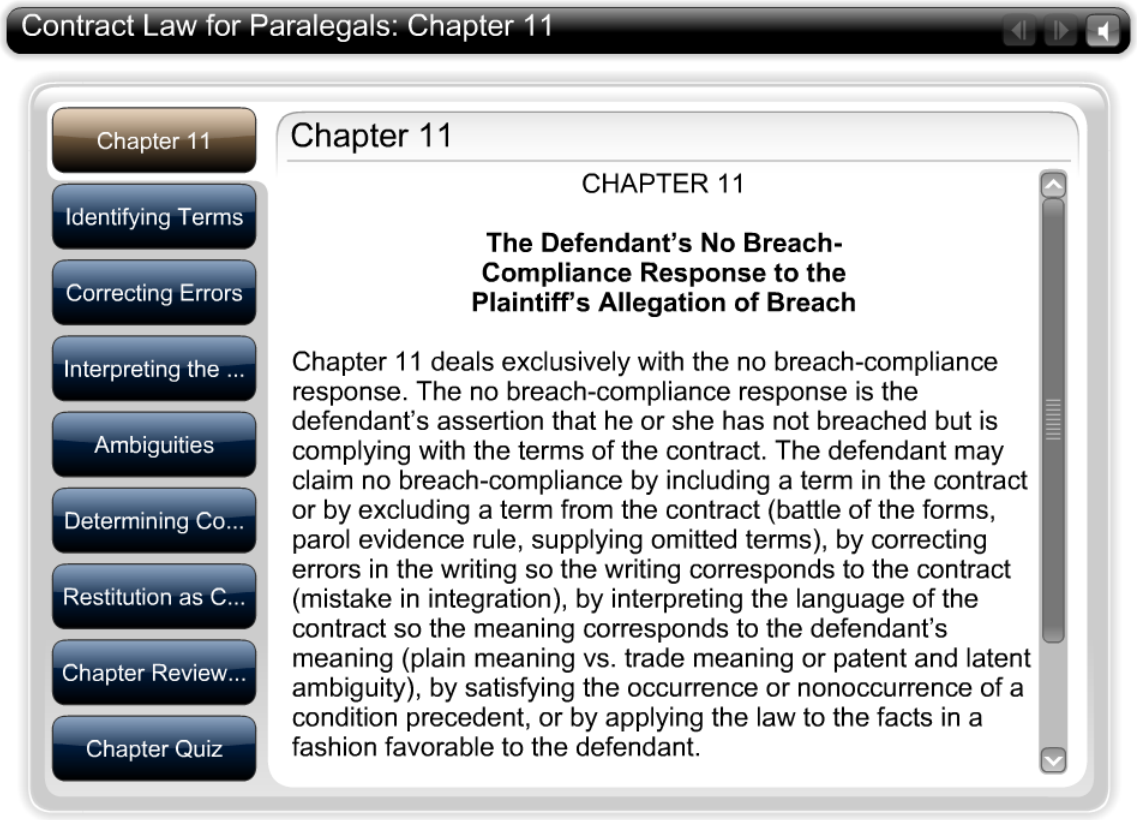
Contract Law for Paralegals: Chapter 11

Chapter 11



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CHAPTER 11

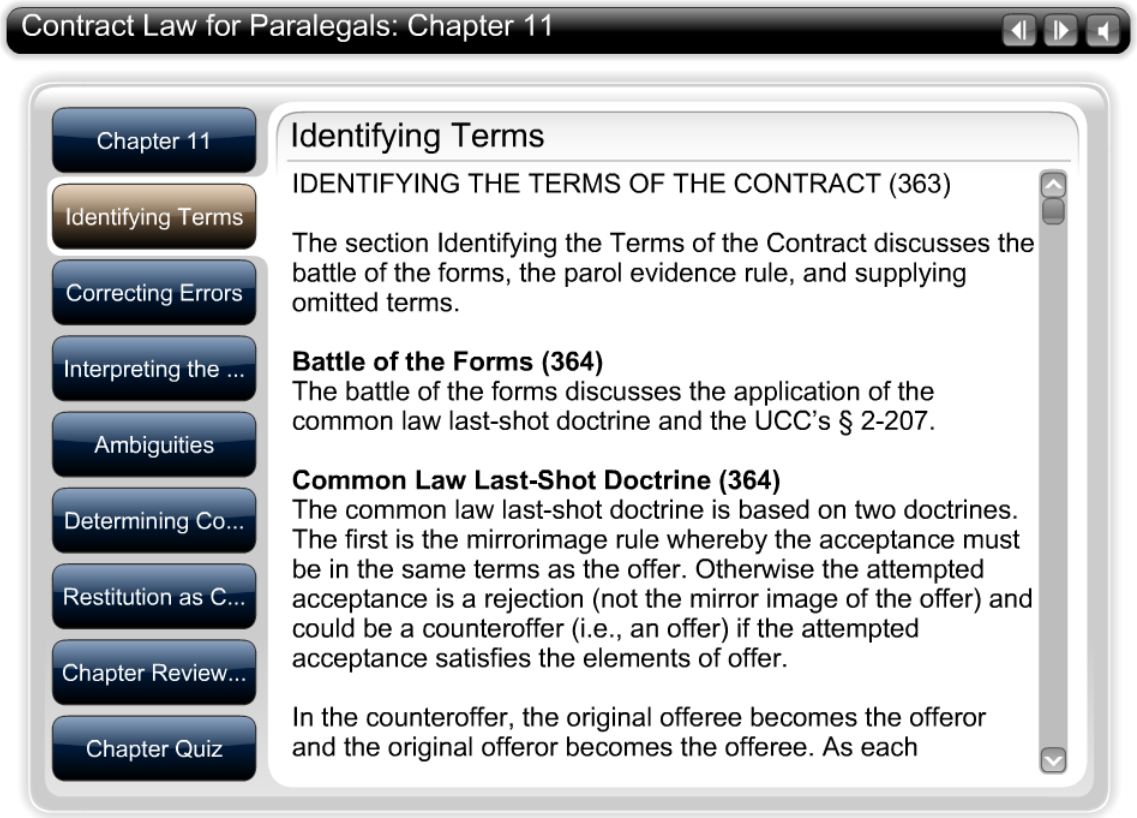
The Defendant's No Breach-Compliance Response to the Plaintiff's Allegation of Breach

Chapter 11 deals exclusively with the no breach-compliance response. The no breach-compliance response is the defendant's assertion that he or she has not breached but is complying with the terms of the contract. The defendant may claim no breach-compliance by including a term in the contract or by excluding a term from the contract (battle of the forms, parol evidence rule, supplying omitted terms), by correcting errors in the writing so the writing corresponds to the contract (mistake in integration), by interpreting the language of the contract so the meaning corresponds to the defendant's meaning (plain meaning vs. trade meaning or patent and latent ambiguity), by satisfying the occurrence or

nonoccurrence of a condition precedent, or by applying the law to the facts in a fashion favorable to the defendant.

Chapter 11 ends with a discussion of whether a restitution cause of action could be maintained when the defendant has not breached but rather is in compliance with the terms of the contract.

Identifying Terms



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IDENTIFYING THE TERMS OF THE CONTRACT (363)

The section Identifying the Terms of the Contract discusses the battle of the forms, the parol evidence rule, and supplying omitted terms.

Battle of the Forms (364)
The battle of the forms discusses the application of the common law last-shot doctrine and the UCC's § 2-207.

Common Law Last-Shot Doctrine (364)
The common law last-shot doctrine is based on two doctrines. The first is the mirrorimage rule whereby the acceptance must be in the same terms as the offer. Otherwise the attempted acceptance is a rejection (not the mirror image of the offer) and could be a counteroffer (i.e., an offer) if the attempted acceptance satisfies the elements of offer.

In the counteroffer, the original offeree becomes the offeror and the original offeror becomes the offeree. As each subsequent non-mirror-image writing (form)

is received, the previous offer is rejected and the new writing becomes the counteroffer. The last form received is the last counteroffer.

The second involves the acceptance of this counteroffer (the last form received). Since this counteroffer is an offer for a bilateral contract (promise for a promise), the acceptance must be the mirror image (i.e., the offeree's promise for the offeror's promise).

The offeree's promise must be a promise although it may be an express promise or an implied promise (i.e., a promise implied for the offeree's performance). The offeree's performance need not be the same performance that the offeror demanded. It only need be a performance that implies the offeree's promise (i.e., the acceptance).

Example 11-1 (364) involves Amy's written offer for a bilateral contract. Since the offer is the offeror's promise for the offeree's promise, the acceptance must be the offeree's promise for the offeror's promise. The offeree must make a promise to accept (unless the offeror has provided another method of acceptance which was not the case here). The offeree's promise may be either an express promise ("I promise for your promise" or simply "OK") or a promise implied from performance. Note the performance is not the acceptance as it would have been (if full performance) had the offer been for a unilateral contract (offeror's promise for the offeree's performance). The performance is used to imply the promise. In this case, Blue Moon's sending the check was performance that implied the promise to pay $100,000 plus royalties. Note also, the performance that implies the promise need not be the performance of the offeree's promise. It may be something quite different so long as it implies the offeree's promise (offeree's promise for the offeror's promise). In this case, the performance was only a part of the offeree's promise since the offeree had promised to pay $100,000, which was done with the check, and royalties, which was not, and could not be done, at the time the performance (the check) implied the promise to pay both the $100,000 and royalties.

Example 11-2 (364) begins with the same offer as in Example 11-1 (Amy's offer-promise to sell the copyright for Blue Moon's promise to pay $100,000 and 15% royalties). Blue Moon's letter promising to pay $75,000 and 12% royalties is a rejection and counteroffer since at common law, Blue Moon's response must be the mirror image of the offer. Amy's depositing the check was a performance that implied her promise to accept Blue Moon's counteroffer. Blue Moon's terms (the terms in the last shot)
govern.

UCC § 2-207 (365)
The location of UCC § 2-207 in the analysis creates some problems since section 2-207 spans two steps in the road map. First, section 2-207 involves contract formation (Step 2). UCC § 2-207(1) deals with contract formation

(acceptance) in two situations: a written offer and a written acceptance and an oral contract followed by a written confirmation.

UCC § 2-207(3), sentence 1, deals with contract formation when the writings do not establish a contract but the parties, by their conduct, recognize the existence of a contract.

Second, section 2-207 involves identifying the terms to this contract (Step 5).

What are the terms of the contract formed under section 2-207(1)? What are the terms of the contract formed under section 2-207(3), sentence 1? In the section 2-207(1) contract, the answer is based on whether the term under consideration is in the offer but not in the acceptance, is in the acceptance but not in the offer (i.e., an additional term), or the term in the acceptance conflicts with a term in the offer (i.e., a different term).

Examples 11-3 and 11-4 illustrate the two types of situations covered in UCC § 2-207(1). Example 11-3 (365) illustrates a simple battle of the forms with the seller, ABC, sending its purchase order and the buyer, Southwest, responding with an acknowledgment form. Under UCC § 2-207(1), the bargained-for terms agree (therefore, a definite expression of acceptance) and Southwest's acknowledgment form is the acceptance (even though it was not the mirror image of ABC's offer). This example only illustrates contract formation. The term issue will come a little later.

Example 11-4 (366) illustrates the second type of UCC § 2-207(1) problem-oral contract followed by a written confirmation. As noted, the fact that the confirmation acts as the acceptance is a bit of literary license since an acceptance already exists if there was an oral contract. The oral contract was followed by the written confirmation.

In Example 11-5 (367) the boilerplate term in dispute (reservation of all express and implied warranties) is in the offer but not in the acceptance. Southwest's acknowledgment form is the acceptance under UCC § 2-207(1). Since UCC § 2-207(2) deals with additional terms, which this is not (not in the acceptance but rather in the offer), and since neither comments 3 nor 6 apply (deal with different terms), the term is in the contract since the offeree has not objected in its acknowledgment form.

Example 11-6 (368) illustrates the additional term problem with the acceptance disclaiming the disputed boilerplate term (disclaimer of warranties) and the offer being silent as to warranties. Since the offer was accepted under UCC § 2-207(1), the additional term is handled under UCC § 2-207(2). Applying the first sentence of subsection (2), the additional term is in the contract. If the parties are not both merchants for UCC § 2-207(1) purposes, the analysis ends and the term is in the contract. If both parties are merchants for UCC § 2-207(1) purposes, the

second sentence of subsection 2 must be consulted. The term is not in the contract unless subsection (a), (b), or (c) applies.

Example 11-7 (369) has ABC's purchase order as the offer. The purchase order is silent as to warranty. Southwest's acknowledgment form is the acceptance (bargain for terms agree) under UCC § 2-207(1). The disclaimer of warranties in the boilerplate of the acknowledgment form is an additional term (in the acceptance but not in the offer).

Therefore, UCC § 2-207(2) applies. Under the first sentence of (2), the disclaimer is a counteroffer. Assuming that both parties are members of an industry where the practice is purchase order followed by acknowledgment form, subsection (2), sentence 2 applies and the disclaimer is a term of the contract unless (a), (b), or (c) applies. Subsection (b) requires a material alteration and this will be determined by the industry practice as to warranties. See UCC § 2-207, comments 4 and 5.

Example 11-8 (370) is a different term problem. The purchase order is the offer and contains warranties. The acknowledgment form is the acceptance under UCC § 2-207(1) and has a disclaimer of warranties. If comment 3 is to be believed, the different term problem is resolved through UCC § 2-207(2), even though this section states "additional terms." We assume that the second form to deal with the warranty issue (in this case the acknowledgment form) is treated as the additional term.

If comment 6 is to be used, even though this is not a confirmation situation, the conflicting terms knock each other out and the terms of the contract are supplemented with the gap fillers of the code. (This is a double KO situation with each term knocking out the other.)

If neither comment is used, a simple solution proposed by some scholars is to use the first and delete the second since the offeree had an opportunity to control the terms and did not.

In Example 11-9 371), Southwest's acknowledgment form contained the phrase "this acknowledgment form was not an acceptance unless ABC assented to all of Southwest's terms," a phrase that prevented the acknowledgment form from being the acceptance under UCC § 2-207(1). The acknowledgment form becomes the counteroffer and ABC must accept to form a contract. In that case, the terms will be those of Southwest.

Example 11-10 (372) considers UCC § 2-207(3). No contract is formed under subsection (1) because the bargain-for terms do not agree. The first sentence of subsection (3) is contract formation-if the conduct of the parties indicates a contract although the writings do not form a contract. The second sentence of subsection (3) is about which terms are in the contract. Match the terms in the

writings. Those terms that agree are in the contract and everything else (additional terms, different terms, and terms in the first writing and not in the second) are out. Supplement with the gap fillers of the Code (see UCC §§ 2-300s).

Example 11-11 (373) further illustrates an application of UCC § 2-207(3).

Parol Evidence Rule (374)
Before discussing the parol evidence rule, we make it clear to the class that the parol evidence rule has nothing to do with the Statute of Frauds, although both are concerned with writings. If the contract is the type within the Statute of Frauds, the contract must be in writing to be enforceable. The parol evidence rule does not concern itself with whether a contract must be in writing to be enforceable. Rather, the parol evidence rule deals with contracts that are in writing (whether they need to be or not and the writing is a final writing (integration). The parol evidence rule investigates whether this final writing includes the parol term in issue.

The parol evidence rule is a substantive rule and not a rule of evidence. Parol evidence should not be confused with the parol evidence rule. The parol evidence rule comes into play when the contracting parties have a final writing (an integration). The issue arises when one party contends that a term is a term of the contract even though the writing does not include it. The final writing does not state all of the terms of the contract. The contract, therefore, is in two parts: the terms in the final writing and the parol terms.

The parol evidence rule is not an evidentiary rule because it goes to the contents of the contract and not to how evidence of the terms of the contract is admitted at trial. If the inclusion of the term would violate the parol evidence rule, the contract will not include that term.

The parol evidence rule deals with whether a term that was discussed by the parties prior to or at the time the contract was formed and that did not appear in the final writing could still be a term of the contract.

Although cases commonly discuss whether a writing is a total or partial integration of the contract, this is conclusionary and does not deal with the real issue. The issue should focus on whether the parol term in question, although not a term in the writing, is a term of the contract. If the parol term is a term of the contract, the writing is not a total integration of the contract's terms. If, however, the parol term is not a term of the contract, the writing may still not be a total integration since another parol term, one not under consideration at this time, may be a term of the contract.

The parol evidence rule has the following elements:

(1) a final writing
(2) the transaction is devoid of evidence of fraud, duress, or mutual mistake of fact
(3) the parol evidence rule will only apply to the terms of the contract that are in writing so if the parties intended only some of the terms to be in writing, the parol evidence rule will only apply to those terms
(4) the parol term was made prior to or contemporaneous with the drafting of the final writing
(5) the parol evidence is not offered to clarify or interpret a term of the writing
(6) the parol term is not a term of the contract if it contradicts a term in the writing
(7) the parol term is not a term of the contract if it cannot be demonstrated that the intent of the parties was to include that term in the contract.

See Exhibits 11-2 and 11-3 (376).

In Example 11-14 (377), the contract had been reduced to a final writing (i.e., an integration)-the letter. The Geoquest court considered whether the terms of the contract were only those in the integration (the letter of July 26th) or whether the terms of the contract also included a guarantee that the parties discussed but did not have in the letter. The Example walks students through a parol evidence rule analysis.

Some care must be taken when referring to the term “contract.” The parol evidence rule deals with the terms of the contract. These terms may be only those in the integration (the final writing) or may be those in the integration plus parol (oral or in nonfinal writings). Often, the term “contract” is used when the term “final writing” or “integration” should be used. Only after the parol evidence rule has been applied would the terms (and not necessarily all the terms) of the “contract” be known.

PARALEGAL EXERCISE 11.1 (378) demonstrates that the agreement must be reduced to a final writing (integration) for the parol evidence rule to apply. Here the parties did not have a final writing (the agreement was totally verbal-by telephone) and therefore the parol evidence rule is inapplicable.

PARALEGAL EXERCISE 11.2 (378) changes the facts in PARALEGAL EXERCISE 11.1. The parties now have reduced their agreement to a final writing. Because the parties reduced their agreement to a final writing and the discussion of the garage occurred prior to the integration (the final writing), the parol evidence rule is applicable.

[The parol evidence rule issue now becomes whether the term about the painting of the garage adds to or contradicts those terms that appear in the final writing. If painting the garage is a term that contradicts a term in the final writing or adds to

the final writing in a way that is not supported by the intent of the parties, the term concerning the painting of the garage is not a part of the contract.]

The case of *Gianni v. R. Russell & Co.,* 281 Pa. 320, 126 A. 791 (1924), illustrates how a court applies the parol evidence rule to a set of fact. Gianni involves whether the lessee was granted a certain exclusive right under a lease. The right claimed was parol while the lease was written.

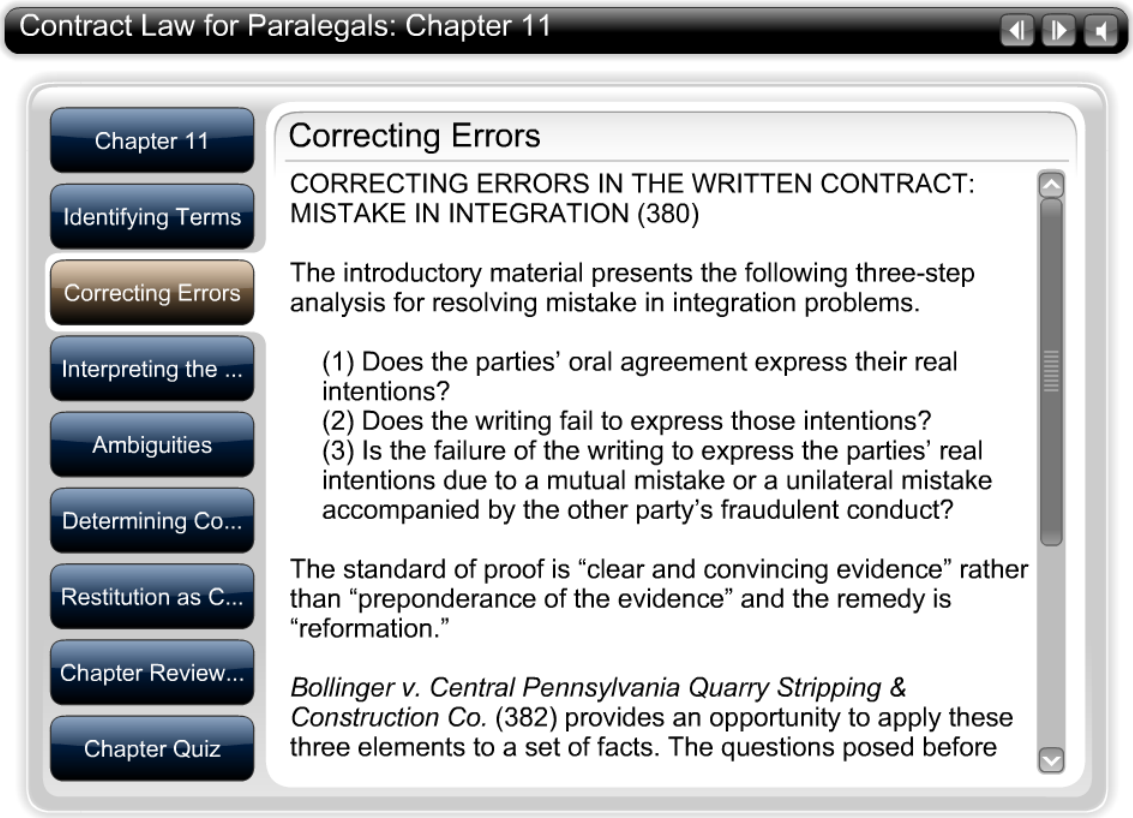
PARALEGAL EXERCISE 11.3 (379) changes the facts to move the discussion concerning the painting of the garage beyond the time of the making of the final writing. To be within the parol evidence rule, the parol evidence must be prior to, or contemporaneous with, the making of the final writing. Therefore, since the discussion of the painting of the garage occurred after the drafting of the writing, the problem does not involve the parol evidence rule although parol evidence is involved.

PARALEGAL EXERCISE 11.4 (379) involves a dispute regarding the meaning of a term. The parol evidence rule does not apply to parol evidence that can be used to interpret terms. The parol evidence rule only deals with terms that contradict a term in the final writing or attempts to add a parol term to a final writing.

Supplying Omitted Terms (379)

The terms of a contract include not only what the parties have agreed upon but also terms not discussed by the parties. The first subsection deals with the common law's good faith term. The second subsection develops the Article 2 gap fillers. Example 11-15 (380) uses UCC § 2-314 (implied warranty of merchantability and usage of trade) as illustrations of Code gap fillers.

Correcting Errors



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CORRECTING ERRORS IN THE WRITTEN CONTRACT:
MISTAKE IN INTEGRATION (380)

The introductory material presents the following three-step analysis for resolving mistake in integration problems.

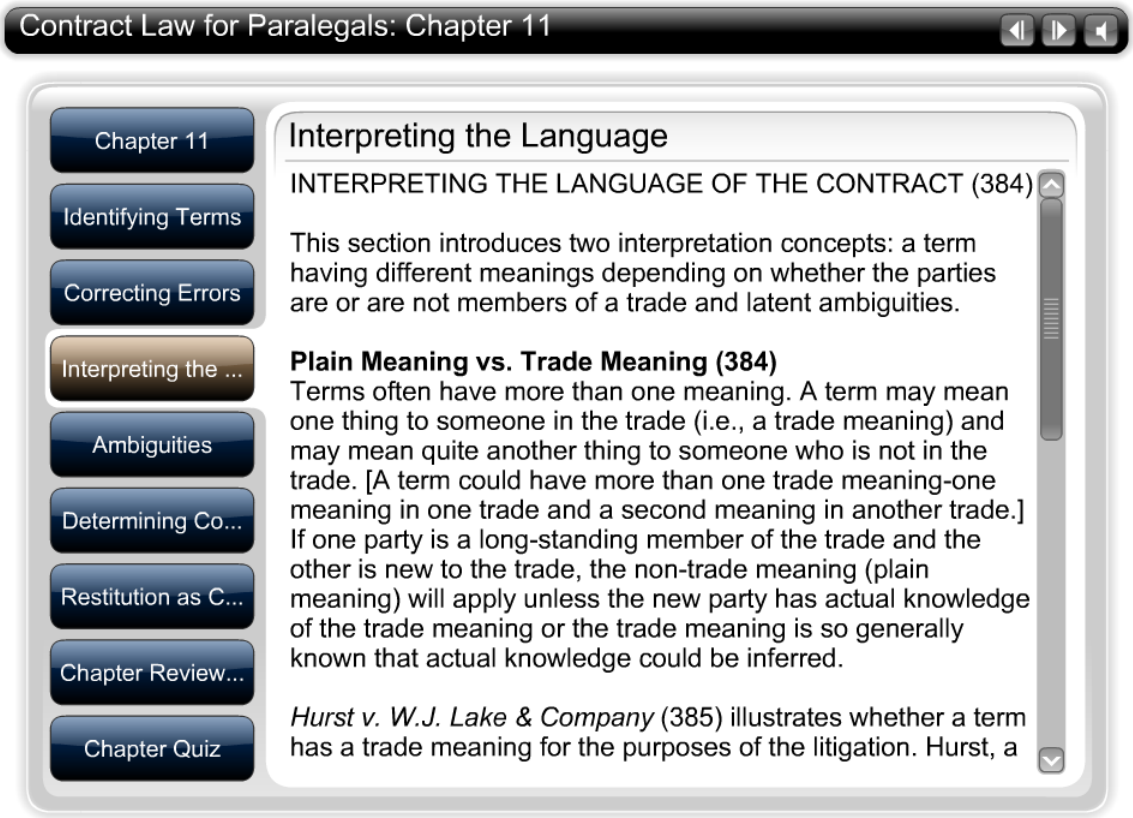
(1) Does the parties' oral agreement express their real intentions?
(2) Does the writing fail to express those intentions?
(3) Is the failure of the writing to express the parties' real intentions due to a mutual mistake or a unilateral mistake accompanied by the other party's fraudulent conduct?

The standard of proof is "clear and convincing evidence" rather than "preponderance of the evidence" and the remedy is "reformation."

Bollinger v. Central Pennsylvania Quarry Stripping & Construction Co. (382) provides an opportunity to apply these three elements to a set of facts. The questions posed before the case help focus attention on the three-step analysis.

The section ends by drawing a distinction between a parol evidence rule and a mistake in integration. The parol evidence rule questions whether the contract includes a term that is not in the final writing (the integration). The mistake in integration involves a final writing (the integration) that incorrectly states a term of the contract. Example11-16 (383) illustrates the difference in framing each issue.

Interpreting the Language



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INTERPRETING THE LANGUAGE OF THE CONTRACT (384)

This section introduces two interpretation concepts: a term having different meanings depending on whether the parties are or are not members of a trade and latent ambiguities.

Plain Meaning vs. Trade Meaning (384)
Terms often have more than one meaning. A term may mean one thing to someone in the trade (i.e., a trade meaning) and may mean quite another thing to someone who is not in the trade. [A term could have more than one trade meaning-one meaning in one trade and a second meaning in another trade.] If one party is a long-standing member of the trade and the other is new to the trade, the non-trade meaning (plain meaning) will apply unless the new party has actual knowledge of the trade meaning or the trade meaning is so generally known that actual knowledge could be inferred.

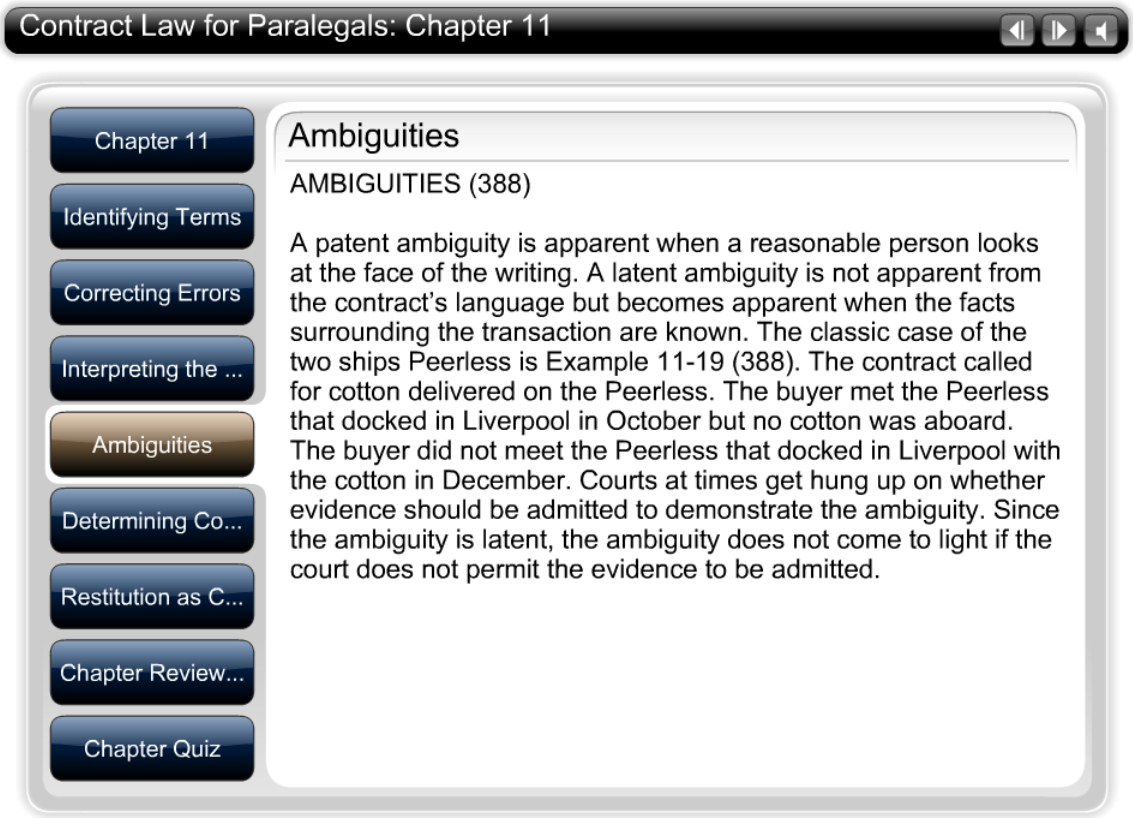
Hurst v. W.J. Lake & Company (385) illustrates whether a term has a trade meaning for the purposes of the litigation. Hurst, a seller of horse meat scraps,

contracted to give W.J. Lake, the buyer, a $5 discount on the price of each ton of horse meat scraps if the scraps analyzed less than 50% protein. When 140 tons of scraps measured from 49.53 to 49.95% protein, Lake paid the contract price less the $5 discount per ton.

Hurst sued Lake for breach of contract claiming as damages the full contract price. Lake defended claiming it complied with the plain meaning of the contract by discounting the price. Hurst responded that in the trade, 50% meant 49.5% and no discount was warranted. Therefore, the full contract price was owed.

Since Hurst is the party claiming the trade meaning, Hurst has the burden of proving the meaning is the trade meaning. All Lake must do is introduce enough evidence to keep Hurst from meeting its burden of proof. Therefore, Hurst must prove both parties are members of a trade, the trade gives the term a meaning other than the plain meaning, and the trade meaning is 50% means 49.5%. Therefore, in Exhibit 11-5 (385), Lake need not prove 50% means 50% but only that Hurst has not established by a preponderance of the evidence that 50% means 49.5%.

Ambiguities



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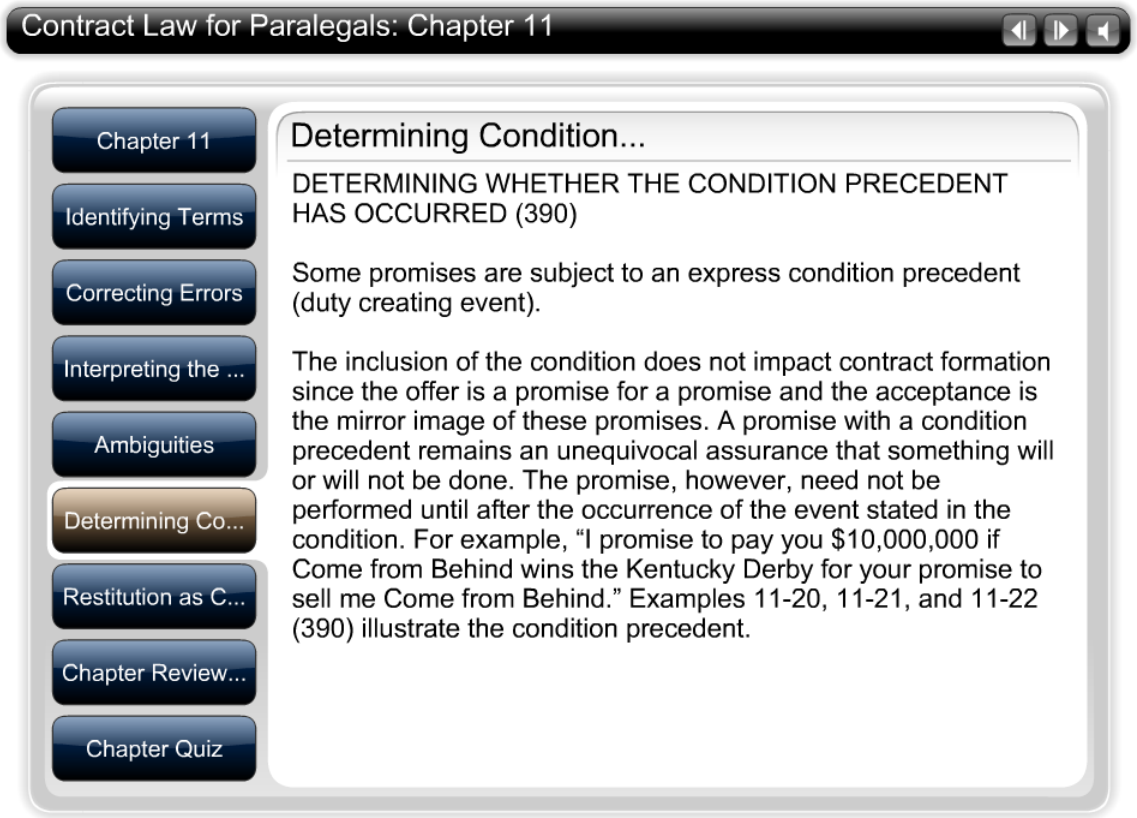
AMBIGUITIES (388)

A patent ambiguity is apparent when a reasonable person looks at the face of the writing. A latent ambiguity is not apparent from the contract's language but becomes apparent when the facts surrounding the transaction are known. The classic case of the two ships Peerless is Example 11-19 (388). The contract called for cotton delivered on the Peerless. The buyer met the Peerless that docked in Liverpool in October but no cotton was aboard. The buyer did not meet the Peerless that docked in Liverpool with the cotton in December. Courts at times get hung up on whether evidence should be admitted to demonstrate the ambiguity. Since the ambiguity is latent, the ambiguity does not come to light if the court does not permit the evidence to be admitted.

Determining Condition...



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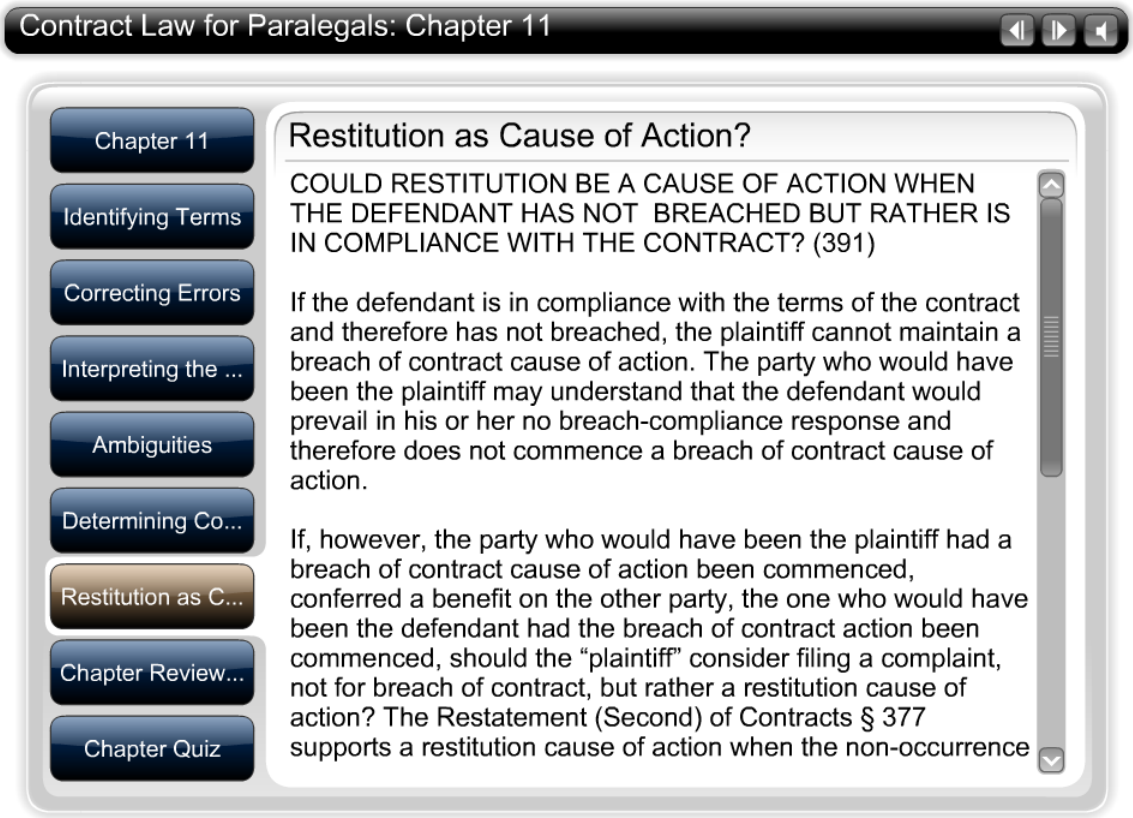
DETERMINING WHETHER THE CONDITION PRECEDENT HAS OCCURRED (390)

Some promises are subject to an express condition precedent (duty creating event).

The inclusion of the condition does not impact contract formation since the offer is a promise for a promise and the acceptance is the mirror image of these promises. A promise with a condition precedent remains an unequivocal assurance that something will or will not be done. The promise, however, need not be performed until after the occurrence of the event stated in the condition. For example, “I promise to pay you $10,000,000 if Come from Behind wins the Kentucky Derby for your promise to sell me Come from Behind.” Examples 11-20, 11-21, and 11-22 (390) illustrate the condition precedent.

Restitution as Cause of Action?



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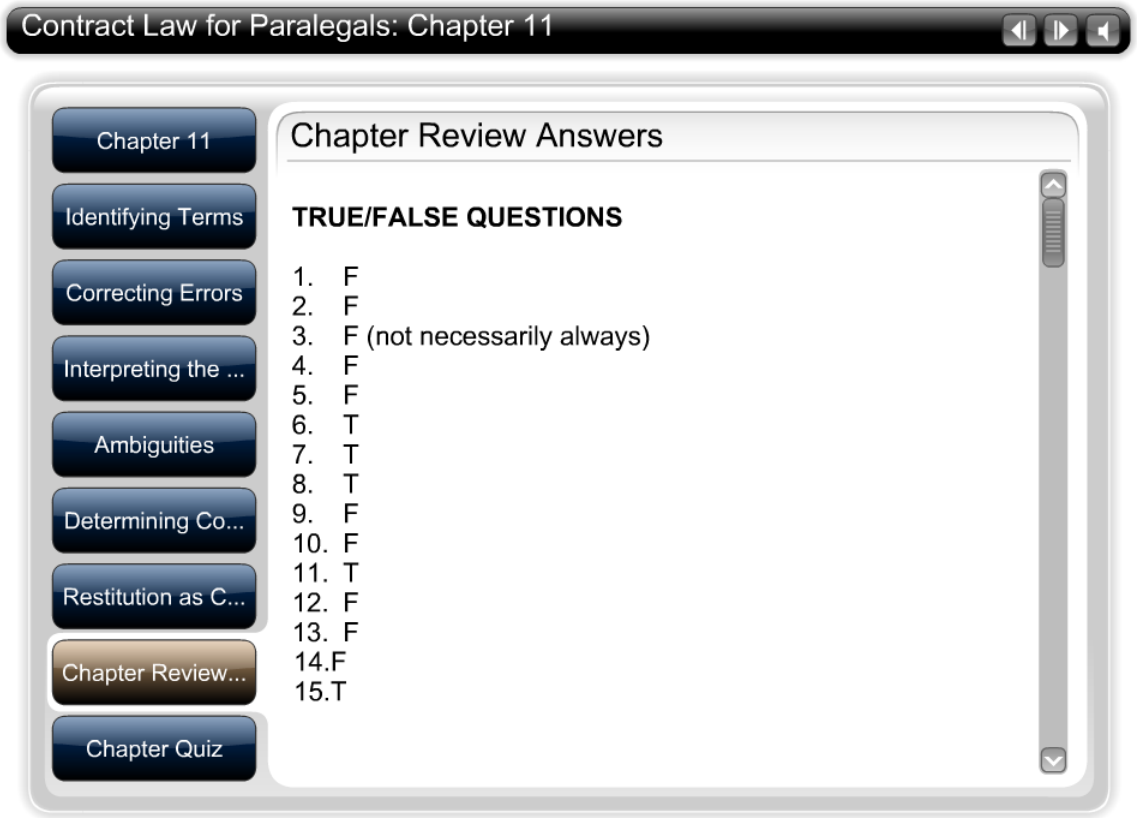
COULD RESTITUTION BE A CAUSE OF ACTION WHEN THE DEFENDANT HAS NOT BREACHED BUT RATHER IS IN COMPLIANCE WITH THE CONTRACT? (391)

If the defendant is in compliance with the terms of the contract and therefore has not breached, the plaintiff cannot maintain a breach of contract cause of action. The party who would have been the plaintiff may understand that the defendant would prevail in his or her no breach-compliance response and therefore does not commence a breach of contract cause of action.

If, however, the party who would have been the plaintiff had a breach of contract cause of action been commenced, conferred a benefit on the other party, the one who would have been the defendant had the breach of contract action been commenced, should the “plaintiff” consider filing a complaint, not for breach of contract, but rather a restitution cause of action? The Restatement (Second) of Contracts § 377 supports a restitution cause of action when the non-occurrence of a condition resulted in an effective no breach-compliance response.

In PARALEGAL EXERCISE 11.5 (391), the buyer's promise to buy is subject to a condition precedent-finding a mortgage of a certain dollar figure and at an interest rate below a certain percentage. The contract also called for the buyer to give the seller a deposit. The contract did not specify what would happen to the deposit if the buyer were unable to find an appropriate mortgage. As it turns out, the buyer could not find an appropriate mortgage and the seller refused to return the deposit. The buyer was complying with the terms of the contract by not going forward. The deposit was the benefit the buyer conferred on the seller. Under the Restatement (Second) of Contracts § 377, the buyer could successfully maintain a restitution cause of action for the reasonable value of what he had conferred on the seller (i.e., the deposit).

Chapter Review Answers



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TRUE/FALSE QUESTIONS

1. F
2. F
3. F (not necessarily always)
4. F
5. F
6. T
7. T
8. T
9. F
10. F
11. T
12. F
13. F
14. F
15. T

FILL-IN-THE-BLANK QUESTIONS

1. No breach-compliance
2. Patent ambiguity
3. Patent ambiguity
4. Latent ambiguity
5. Latent ambiguity
6. Gap fillers
7. Contra perferentem
8. Plain meaning rule

MULTIPLE CHOICE QUESTION

1. a, b, c, d, & e

SHORT ANSWER QUESTIONS

1. A condition precedent is a duty creating event. The occurrence of the condition creates the duty.
"I promise to pay if you have a fire."
A condition subsequent is a duty terminating event. The occurrence of the condition ends
the duty. "I promise to pay unless the property is destroyed by fire."
Concurrent conditions arise simultaneously. Often promises raise concurrent duties. "I
promise to trade you my horse for your promise to trade me your bull."
2. The parol evidence rule is a substantive rule of contract law and not a procedural rule. The parol
evidence rule raises the issue "What terms are in the contract." Is the contract the writing or the
writing plus a parol (either oral or written) term? The parol evidence rule only applies when the
parties have a final writing (also known as an integration). The rule applies to terms that were alleged
to have been made either prior to or simultaneous with the final writing. If these parol
terms are inconsistent with the terms in the final writing, they cannot be added to the terms in
the final writing. If the parol terms contradict the terms in the final writing, they will not be included
as a term of the contract. Parol evidence, however, may be used to explain a term in the

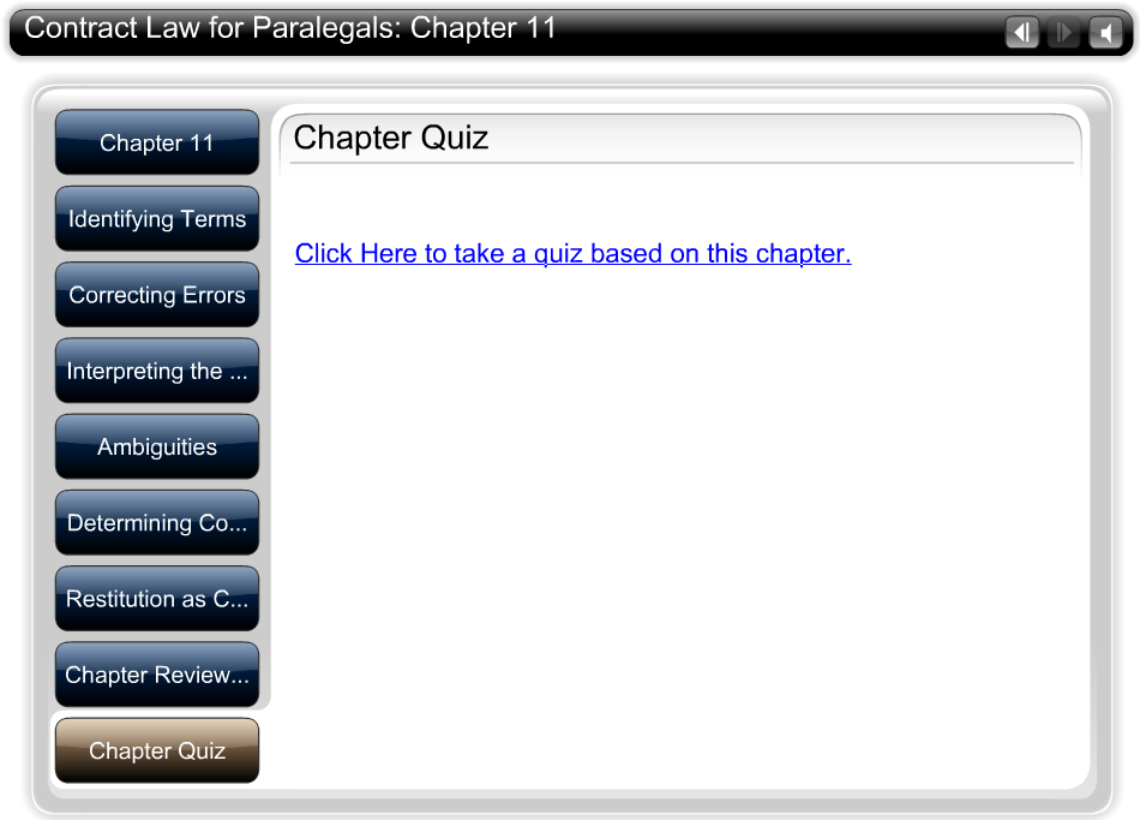
final writing, but this is simply the use of parol evidence and not the application of parol evidence
rule.

John sold his Jaguar to Alice for $25,000. The final writing did not state that John had orally
promised to pay for registering the vehicle if Alice purchased it. Note the parties had a final writing
and the promise to pay for registering was a parol term made prior to the final writing. The
question under the parol evidence rule is whether the promise to pay for registering adds to
the integration so it contradicts the terms in the final writing.

3. Both the parol evidence rule and a mistake in integration involve a final writing. The parol evidence
rule deals with whether the contract consists of only those terms in the final writing or
whether the contract includes the parol term in issue. This is not a question of the accuracy of
the final writing since the parties had no intention of including the parol term in the final writing.
A mistake in integration is concerned with a final writing that does not accurately reflect the
terms of the contract. A mistake in integration issue seeks to have the final writing reformed to
correct the error in transcription. The parol evidence rule does not seek to have the final writing
reformed but rather seeks to have the contract be considered as having two parts, the final
writing and the parol term.
4. Under the common law last-shot doctrine, the acceptance must mirror the terms in the offer,
otherwise it is a rejection and, if the requirements of offer are met, a counteroffer. In this question,
Seller's price list may or may not be an offer. If an offer, it is rejected by Buyer's purchase
order (which now becomes a counteroffer). Seller's acknowledgment form rejects Buyer's offer or
counteroffer and is itself a counteroffer. When Buyer accepts and pays, Buyer's performance implies
the promise to pay and is the mirror image of Seller's offer (counteroffer). Therefore, the
terms of the contract are those in the Seller's offer since the seller is the master of his or her
offer. Seller disclaimed all warranties so Seller prevails on the warranty issue.

5. Under UCC § 2-207(1), Seller's acknowledgment form is the acceptance and a contract is formed.
Since Buyer wants the warranties and Seller does not, the warranty and disclaimer conflict and
are different terms. UCC § 2-207 does not expressly deal with different terms.
The courts have proposed three solutions. One is to use 2-207(2) and check if both parties
are merchants. If not, the second term is treated as an additional term and drops from the contract
leaving Buyer's warranty term. If both parties are merchants, an analysis of the second
sentence of subsection 2 is required. One issue will be whether Seller's term materially alters the
contract. This may require inquiry into the trade use of warranties.
A second solution drops both the warranty and disclaimer from the contract and the parties
look to gap fillers to complete the contract's terms. UCC §§ 2-314(1) and (2)(c) would add an implied
warranty of merchantability to the contract.
A third solution drops the second term, thus leaving the first. The first term was Buyer's
warranty so the contract includes warranties.
6. If the parties are members of a trade and the trade has a trade meaning for whatever is in issue,
then the trade meaning applies unless one party is new to the trade and either he or she does not
know the trade meaning or the meaning is not so well known as to assume that the new trade
member is held to know.
Farmers in a certain county in the panhandle of Texas grow a certain type of sorghum.
These farmers always sell their sorghum crop to the local grain elevator. When either the local
grain elevator or a farmer uses the term sorghum, the reference is to the type of sorghum grown
in that county. Thus, if the farmer delivered a different type of sorghum to the elevator, the
farmer would be in breach, even though the contract only stated sorghum.

Chapter Quiz



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