



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today we're talking about contract defenses, as part of our "Listen and Learn" series. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so that you'll be the best law student and lawyer you can be. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back! In today's podcast, we're going to discuss Contracts. More specifically, we're going to discuss contract defenses, including mistake, fraud, misrepresentation, and non-disclosure. Although some of these concepts might be unfamiliar, we'll explain all of the terminology and rules that you need to know. To review these rules and illustrate these concepts, we'll also go over two hypotheticals adapted from the California bar exam. So, we're going to do something different today and start with our first hypothetical, adapted from the [February 2018 California bar exam](#). To view the full hypothetical and question, you can check out the link in the resources page at the end of the transcript. Also, you can look in the show notes. Oh, and feel free to take notes as we dive in. Okay, onto the question:

Lee Burgess: "Austin recently sold a warehouse to Beverly. The warehouse roof is made of a synthetic material called Top-Tile. During negotiations, Beverly asked if the roof was in good condition, and Austin replied, 'I've never had a problem with it.'

Lee Burgess: In fact, the manufacturer of Top-Tile notified Austin last year that the warehouse roof would soon develop leaks.

Lee Burgess: The valid written contract to sell the warehouse specified that the property was being sold 'as is, with no warranties as to the condition of the structure.'

Lee Burgess: After Beverly bought the warehouse, the roof immediately started leaking. Beverly then sued Austin for rescission of the warehouse sale contract, on the bases of misrepresentation and non-disclosure.

Lee Burgess: Will Beverly be able to raise any defenses to contract formation and rescind the contract with Austin? Discuss."

Lee Burgess: To begin, I want to emphasize how we structure a Contracts essay and think through issue spotting. In a Contracts essay question, we always, always start with an analysis of the governing law. We have to decipher whether UCC Article 2 or the common law applies. The governing law matters because it dictates



some of the rules we must use. While Article 2 of the Uniform Commercial Code (the UCC for short) applies for all contracts for the sale of goods, the common law governs service contracts.

Lee Burgess: After we determine the governing law, we need to make sure a contract was formed – this requires us to go through an analysis of [offer, acceptance, and consideration](#). Note, though, that sometimes our essay question will tell us off the bat that a contract was formed! When that's the case, we don't need to do an offer, acceptance, and consideration analysis – we can simply quickly mention that we have a contract.

Lee Burgess: Now, that leads us to our third step in issue spotting a Contracts essay, and the focus of our podcast today – assessing defenses to contract formation. This practice question brings up several legally significant facts. In particular, we know that Austin fudged over what he knew about the roof, and that he didn't tell Beverly about the leaks. These facts raise the issues of misrepresentation and non-disclosure. So, let's take a look at our rules for each.

Lee Burgess: A fraudulent misrepresentation occurs when one party, one, knowingly; two, makes a false representation; three, of a fact; and four, the other party reasonably relies on the misrepresentation to their detriment. A contract induced by a fraudulent misrepresentation is voidable (may be rescinded) by the injured party.

Lee Burgess: The contract defense of non-disclosure, on the other hand, requires that the Plaintiff show that Defendant, one, did not disclose a material fact that; two, formed the basic assumption of the agreement; and that three, the Plaintiff reasonably relied on his statement.

Lee Burgess: Okay, with those rules behind us, let's dive into our question. As we mentioned at the outset, we want to follow a systematic approach to answering our Contracts questions. The first is always to identify the governing law. Here, the common law applies because we aren't dealing with a sale of goods (which would trigger the UCC), and have a real estate transaction.

Lee Burgess: Next, let's make sure we have a contract. In this instance, we're in one of our lucky situations where the question comes right out and tells us we have a valid written contract. Because of that, we don't have to go through our contract formation issues of offer, acceptance, and consideration. But I'd probably still write down that the question said there was a written contract, just so the grader knows that you recognized it.

Lee Burgess: So, let's move to our next step: Do we have any defenses to contract formation that Beverly can invoke? As we said, our facts trigger two primary defenses: misrepresentation and non-disclosure. During negotiations, Beverly specifically



asked if the roof was in good condition, and Austin responded with the fact that he had never had a problem with it. He made this statement knowing that Top-Tile had notified him a year earlier that the roof would soon develop leaks.

Lee Burgess: This brings us to our last element that we must prove in our misrepresentation claim – whether Beverly reasonably relied on the misrepresentation. Austin will argue that Beverly did not rely on his misrepresentation, and that Beverly did not make it clear in her comments to Austin that the condition of the roof was a material fact of the contract. He'll also point to the clause that the property is sold "as is" to show that she didn't rely on his statement.

Lee Burgess: On the other hand, Beverly will contend that Austin's misrepresentation as to the condition of the roof certainly formed the basis of the bargain – a leaky roof on a giant warehouse structure would be very expensive to fix, and if she had known, she may not have purchased the property.

Lee Burgess: An astute examinee should argue both sides of this issue, but still come to a conclusion. Because the facts don't indicate that Beverly relied on the statement when purchasing the product, a court will likely reject Beverly's fraudulent misrepresentation defense to contract formation, unless other facts showing her reliance arise.

Lee Burgess: Next, let's look at Beverly's possible non-disclosure claim. Remember that with non-disclosure we're focused on what Austin should have said. Here, while Austin misstated the roof's condition, he also failed to disclose the true condition of the roof.

Lee Burgess: However, we run into a similar problem that we did with our misrepresentation claim: Beverly must successfully argue that the roof's condition was a material fact that formed the basis of the agreement. Austin will argue that Beverly didn't make it known – either through her conduct or her words – that the roof was critical to her entering the contract. In addition, he'll point into the "as is" clause in the contract. Thus, a court will likely find for Austin on the issue of non-disclosure as well, unless other facts arise.

Lee Burgess: Okay, great work with this question. Now, to practice these concepts again, let's take a look at another hypothetical. The next hypothetical is adapted from the [October 2020 bar exam](#):

Lee Burgess: "Daniel's house is for sale. In his living room are two valuable original paintings by Artist – one of the California coastline, and the other of a field of Golden State wildflowers. Daniel recently refused an offer from Museum to purchase the paintings for \$10,000 each.



- Lee Burgess: Pam went to Daniel’s house hoping to buy it before she left on a business trip. As Pam, Daniel, and his real estate broker, Bill, inspected the house, Pam noticed the paintings in the living room, commenting that they were beautiful and seemed designed to fit the house.
- Lee Burgess: Pam then offered \$400,000 for the house and another \$50,000 if the sale included the two paintings. Daniel agreed and asked Bill to draft a contract for the sale of the house and the two paintings for \$450,000. Bill promised to have the contract ready before Pam left town the next day.
- Lee Burgess: Bill drafted a written contract, which Daniel signed, even though he noticed that Bill had mistakenly omitted from the sale the painting of the California coastline. Daniel met Pam at the train station, as her train was about to depart. Daniel gave the contract to Pam, telling her, ‘This is what we agreed to and I’ve already signed it.’ Pam’s train started to move, so she quickly signed the contract without reading it and jumped onboard the train.
- Lee Burgess: When Pam returned from her trip, she was horrified to find that the California coastline painting was not in the house. She immediately telephoned Daniel to ask about the painting, but he told her, ‘That’s what the contract we signed provides’, and hung up.
- Lee Burgess: Six months after Pam moved into the house, she noticed a local newspaper advertisement that Daniel was offering to sell the Artist painting of the California coastline to the highest bidder at an auction two weeks later.
- Lee Burgess: What defenses to contract formation can Pam raise? Discuss.”
- Lee Burgess: To answer this question, let’s go over a few additional rules and terms. We need to take a look at the defense of mistake. There are two types of mistake: mutual mistake and unilateral mistake.
- Lee Burgess: Mutual mistake is what it sounds like – a mistake made by both parties. Mutual mistake occurs when we have three elements present: one, both parties are mistaken as to a basic assumption on which the contract is made; two, the mistake is material to the contract; and three, the person asserting the mistake did not bear the risk of the mistake. Bearing the risk for the mistake could occur by agreement or by a party treating their limited knowledge as sufficient.
- Lee Burgess: With a unilateral mistake, there are four critical elements to keep in mind. A unilateral mistake is, one, a mistake made by one party; two, that is unknown to the other party; three, concerning a basic assumption; four, that has a material effect. To be material, the mistake must be about an issue that would impact whether the parties would agree to enter into the contract in the first instance.



- Lee Burgess: Importantly, a unilateral mistake is generally not a valid defense to formation. But if, one, one party knew or had a reason to believe that the other party was mistaken; or two, the mistake would make enforcement of the contract unconscionable, then the contract is voided by the mistaken party.
- Lee Burgess: Okay, with those rules in our rearview mirror, let's tackle our question. First, as we mentioned before, we always have to identify the governing law before jumping into a question. Here, like in the previous question, we have a real estate contract that will be governed by the common law. Because the prompt doesn't specifically tell us that we have a valid contract, you could earn extra points here by quickly addressing offer, acceptance, and consideration. As we're focused on contract defenses here though, we won't go into detail on that here.
- Lee Burgess: So let's check out the possible defenses that Pam can raise. In particular, let's see if Pam could successfully raise a claim for unilateral mistake. Here, Pam definitely made a mistake – she thought that the contract included the unique California paintings, but the contract, in fact, did not.
- Lee Burgess: The mistake, moreover, was material – Pam made clear that she thought the paintings were beautiful and were a perfect fit for the design of the home. She even offered additional money – a whopping \$50,000 – for the sale of the home to include the paintings. When she found out that they wouldn't be included, she was "horrified". The mistake, therefore, was material to the contract.
- Lee Burgess: Next, for Pam to be able to void the contract, she has to show that Daniel knew or had reason to believe that she was mistaken. Here, Daniel knew that the paintings were important and part of the bargain, and that it was meant to be reflected in the contract. Instead, he noticed the drafting mistake and still presented to Pam that everything was correct in the contract. This got her to quickly sign the contract. Because Daniel took advantage of Pam's unilateral mistake, knowing that she was mistaken, Pam can successfully assert the defense of unilateral mistake.
- Lee Burgess: Let's take a look at mutual mistake briefly next. Here, we know that mutual mistake requires both parties to be mistaken. Because only Pam, and not Dan, was mistaken, there is no defense of mutual mistake.
- Lee Burgess: Finally, let's see if Pam can successfully raise the defense of misrepresentation. Here, while the California coastline painting being omitted from the contract was originally accidental, Daniel later discovered that fact. Knowing that the painting had been omitted from the contract, Daniel knowingly and falsely represented that nothing had changed in the contract. Pam, relying on that representation, signed the contract. As a result, Pam can likely maintain a successful contract defense for misrepresentation.



Lee Burgess:

And with that, we're out of time! If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via our website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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[California Bar Examination – Essay Questions and Selected Answers, February 2018](#)

[California Bar Examination – Essay Questions and Selected Answers, October 2020](#)

[Bar Exam Toolbox Podcast Episode 161: Listen and Learn – Contract Formation](#)