How promises become enforceable

1. Mutual Assent: Agreements are enforced, but we must make sure that the parties have agreed to the same terms – generally manifested by an offer and acceptance.
   a. Objective Assent: Assent is judged by a reasonable understanding of the parties’ intent from the point of view of the offeree in the circumstances, which may or may not correspond w/ offeror’s subjective intent (Embry – “go on, you’re alright”).
      i. Subjective Assent: “meeting of the minds” – (Raffles and confusion over ship “Peerless” used subjective standard to say no mutual assent but same result w/ objective – most courts use objective standard).

2. Offer: Reasonable manifestation of assent to offer, as understood by recipient in the context, conferring power on recipient to create K by expressing assent.
   a. When has an offer been made?
      i. To determine whether an offer has been made, courts look to the intention of the off’or as manifested by their actions and words from the recipient’s point of view with regard to the circumstances. (Fairmount Glass – Seller’s quote “for immediate acceptance” was in response to buyer request for an offer so could reasonably interpreted as an offer).
      ii. An offer to sell whatever reasonable quantity the buyer wants to buy is not an offer - just an advertisement. An advertisement is not an offer b/c reasonable recipients understand it’s not an offer to sell but an invitation to negotiate (Moulton – “we are authorized to offer Michigan salt”).
   b. When is the offer effective and how long does it last?
      i. An offer doesn’t become effective until it is received – offer must come to knowledge of offeree before accorded legal existence (Caldwell v. Cline –“8 days to accept” offer sent by mail and clock began running when offer was received, not when it was sent).
         1. Note: this rule does not apply to acceptance. By the mailbox rule, acceptance is effective as soon as its sent.
         2. If P performs gratuitously, without knowledge of D’s offer, then no mutual assent for same reasons – can’t assent unless knows of existence of offer.
      ii. Offeror is “master of the offer and can specify duration of offer – how long offeree has to accept – and mode of response.
         1. But if no expiration date specified, power of acceptance terminates at the end of a reasonable time, considering nature of K, context, and circumstances (Textron Inc. note case).
   c. Terms of the offer: An offeror is “master of the offer” and has power to set the terms – we always look to the offeror’s intent, but it is still judged from the recipient’s perspective!
      i. Indefinite terms as to quantity, price, type of good: Okay to have some indefiniteness or to leave the particulars to be fixed by one of the parties, as long as:
         1. UCC: 1) The parties intended to make a K (by reasonable manifestations of intent), and 2) There is a reasonably certain basis for granting remedy.
         2. Restatement is same but requires 1) terms of K provide reasonable basis for determining existence of breach and for measuring damages. (prob better)
3. The important thing is to sort out indefiniteness rather than find easy way to calculate damages.

d. **Methods of terminating power of acceptance**: Offer can be revoked any time before offeree assents by:
   i. Direct revocation or indirect revocation (other sources lead offeree to reasonably understand offeror no longer assenting) at any time before offeree accepts, *even if* offer expressly extends past time of revocation (unless purported consideration for option K/promise not to revoke). (*Dickinson v. Dodd*).
   ii. Death of either party before mutual assent, even if other party ignorant of death. That’s just the rule.
   iii. Counteroffer by offeree
   iv. Lapse of time
   v. Nonoccurrence of any condition of acceptance under terms of offer

3. **Acceptance**:
   a. **Manner of acceptance (performance or promise)**: depends on if unilateral (acceptance by perf) or bilateral K (acceptance by promise). Courts decide if offer is one to enter unilateral or bilateral K by looking at offeror’s intent (offeror is master of offer) and facts / circumstances of each case.
      i. **When there is doubt as to form of acceptance**: offeror can always eliminate doubt by specifying mode of acceptance, but when he doesn’t:
         1. When an offer does not specify the form of acceptance, it is presumed the offeror intended to enter bilateral K b/c bilateral immediately and fully protects both parties b/c guarantees full performance. (*Davis v. Jacoby* – if you come down here you will inherit everything, wrote back they would, and then came and performed after uncle died).
         2. Even when clear offeror intends to create unilateral K/invite acceptance by performance, the offer cannot be revoked after offeree begins performance (*Brackenbury* – mother’s promise to will estate in exchange for daughter/son-in-law to move in care for life, they moved in, but mother revoked before end of life).
            a. Restatement II: where an offer invites acceptance by perf, once offeree begins part performance, an option K is created where offeree can finish performance and offer cannot be revoked.
            b. Note: even though offeror cannot revoke after perf has begun, this does not mean the offeree must continue perf – she can leave without it constituting a breach, because anything otherwise was not specific in the offer; she simply would not be able to recover the offer made for complete performance.
      ii. **Option K**: an offer extending over period of time with a promise not to revoke
         1. If option K is in writing, and there is even pretense of consideration (symbol prob in no way inducing promise not to revoke), offeror cannot revoke before option period is up. (*Mier v. Hadden* – contract for option to buy D’s land at given price on or before given day, “in consideration” for which P paid $1 – D refused to perform and P sued in equity)
            a. Restatement II: Also says offer is binding as option K if 1) in writing signed by offeror, and 2) recites purported consideration
            b. Probably makes more sense to just view option K as an offer, not a promise – offeror is master of offer and when he expressly
extends the offer over a period of time, he should be held to it. But courts have not taken this step – still require writing and seal or pretense of consideration.

c. UCC says offer to sell goods, if signed in writing, is not revocable (even if no consideration) for time stated or for reasonable time if none stated, not exceeding 3 mos.

b. Rejections and Counter-offers:

i. Rejections: When an offer has been rejected, it thereby terminates offeree’s power of acceptance – not because of lack of mutual assent but b/c once offeror receives rejection, he should be free to make offer elsewhere. (universal rule)

ii. Counter-offers: When an offeree makes a counter-offer, he thereby terminates his power of acceptance – also a universal rule though a little weaker b/c here offeree is still interested just no on terms proposed.

1. Mere inquiries are not counter-offers: an unqualified acceptance accompanied by a question, or a mere question that is not a condition of acceptance, are OK.

a. Mirror-Image Rule: Acceptance must be the mirror-image of the offer – if it changes any of the terms in the offer, it constitutes a counter-offer. (farm sale hypo with offer for payment due 1st of month and acceptance “I accept but I’ll pay on 5th of month).

b. Issue is one of interpretation: it is difficult to distinguish inquiries from conditions. An articulation of something already implicit in offer (but not expressly stated) still complies with mirror-image rule and is OK.

c. Standard form Ks: Boiler-plate offers and purchase orders: if both parties use standard forms for offer and acceptance, they usually don’t match and parties don’t usually read each other’s forms. But if parties proceed with transaction, their conduct amounts to assent and the last form sent amounts to terms of the K.

   i. Note: UCC discards mirror-image rule for sale of goods Ks – says acceptance is valid even if offeree states terms add’l to or diff than offer.

2. A response to an offer for a fixed price with a proposal for different fixed price constitutes a counter-offer and thereby terminates offeree’s power of acceptance. (Livingstone – “send lowest cash price. Will give $1600 cash.”)

   a. But if the offeror responds to a counter-offer with something like “Cannot reduce price,” this may constitute a renewal of the original offer even though offeror intends it to be simply a rejection of the counter-offer if the offeree reasonably understands it to be a renewal of the offer (Livingston – where offeree reasonably believed it to be a renewal of the offer b/c it was in response to offeree’s request to “send lowest cash price” – recall Fairmount Glass).

c. Acceptance by Silence or Inaction
i. Normal rule is silence is not acceptance – offeror cannot impose on offeree to act or be held to K (Chipmunk CD hypo – I’ll send you CD and expect $25, if I don’t hear from you I’ll take it as acceptance).

   1. But where there is reasonable understanding that silence / inaction operates as acceptance of an offer b/c of past dealings or in light of full context of transaction, silence may signify assent. (Hobbs – sale of eel skins w/past dealings that S sends to B and B pays later but one time B kept goods w/out paying).

ii. Restatement II: When offeror specifies silence as a mode of acceptance, silence operates as acceptance only where offeree intends it to be (can be a prob for offeror who doesn’t know by offeree’s silence whether assenting or not, but the prob is one of offeror’s own making!).

iii. Hill v. Gateway defied normal rule, saying when a standard form K provides that inaction=assent, and buyer has received K but not read it, the terms of the K become accepted by buyer’s inaction – a K need not be read to be effective. (Hill v. Gateway – computer purchase terms were agreed to over phone but written K sent with comp included arbitration agreement and provided if B did not return w/in days = acceptance).

   1. Court insists that offeror is “master of the offer” and can specify means of acceptance – including inaction. Problem is there’s no mutual assent – no reasonable understanding from offeree’s perspective of assent! (Embry and Fairmount).

d. Subcontractors, General Contractors, and Reliance (oh my): When a sub makes a bid to a gen, the sub is bound to the terms of the offer once the gen uses the terms to make its offer for the full contract. Though the gen cannot accept until after award of the prime K, the sub’s bid contains implied promise not revoke once gen uses bid. Reliance on the bid serves as consideration for the promise not to revoke. (Drennan v. Star Paving).

   i. Drennan rule that no consideration needed if reliance is prob majority rule but Baird (similar facts) says sub’s bid does not have promise not to revoke unless consideration for that promise – if no consideration, just an offer which can be revoked anytime before acceptance.

      1. But couldn’t we also say there is an implied promise not to revoke once gen uses bid, and consideration is that gen will use bid in general K bid (which sub wants in order to get the job so this is a bargain)?

      2. Note: there is no such implied promise in the reverse case – courts have uniformly rejected argument that listing of sub’s bid in a gen K bid constitutes acceptance or promise to accept sub’s offer, even if reliance.

I.) Consideration: Mutual Reciprocal Inducement (a bargain!)

   a.) Benefit to promisor (D) OR detriment to promisee (P). Detriment to promisee can include waiver of any legal freedom of action or restraint on future legal freedom of action, regardless of whether or not it also benefitted promise – i.e. waiver of legal right to drink/smoke. (Hamer v. Sidway).

      i.) It doesn’t matter if waiver of right is something P would have done anyway. (Earle v. Angell note case which enforced aunt’s promise to pay nephew if he promised to attend her funeral).

   b.) To constitute consideration, return promise, performance, forbearance, etc. must by sought by promisor (D); otherwise it’s just a gift. (the $1 in Fischer v. Union Trust).
i.) Ex: if one party thinks of both sides of exchange without the other’s input
(Whitten v. Greeley note case about extramarital affair).
c.) The promise does not have to induce the other of itself but must be at least part
of the inducement. (Hamer v. Sidway).
d.) Courts will not weigh the adequacy of consideration (even a penny!); they only
require that it is mutually induced. However, even if D goes to elaborate lengths
(lawyer, seal, etc) to make a promise binding, and afterwards “in consideration” P
gives a penny, the penny is not consideration – not b/c so small but b/c not sought by
D. (Schnell v. Nell).
e.) Promise or performance used as consideration may be given or received by
another person. (Restatement Second § 81: Consideration as Motive or Inducing
Cause – Remember, Restatement is not law!)
f.) Forbearance of a claim can be consideration for a settlement agreement when 1)
the claim being settled is made in good faith AND 2) the claim has some
reasonable basis. Though courts don’t weigh the adequacy of consideration, if claim
being settled is baseless, it is more like extortion under the veil of settlement. Side
Issue: If K is illegal, any agreement flowing from K (including claim) is
unenforceable! (Duncan v. Black).

i.) Unlike Duncan, Restatement says forbearance of claim is consideration if 1.) claim has some (even slight) basis OR 2) claim is made in good faith
(Restatement, Second: Settlement of Claims).

ii.) If D believes P’s claim is invalid but signs promissory note to buy time
so that P will forebear suit, P’s forbearance is consideration to enforce
note (regardless of fact D believed claim was invalid). (Military College
co. v. Brooks note case where father signed promissory note to buy time to
fight tuition bill which he believed was invalid).

II.) Gifts: One-way Promise (no bargain, no enforcement!)

a.) Gift of personalty is only enforceable by unconditional delivery of the thing;
what is not yet given cannot be enforced. (Fischer v. Union Trust).

b.) Gift of realty is only enforceable by execution and delivery of deed. You can’t
give away a third party’s interest in land (i.e. you can’t enforce a promise to pay a
mortgage!). (Fischer v. Union Trust).

c.) Even if a promise is performed for some time and then stopped, it is not
consideration without mutual inducement. (Pitts v. McGraw-Edison note case;
continued payment of commission after end of business relationship) … but it may be
enforced if it induced reliance …

III.) Reliance: Promises reasonably inducing action/forbearance in reliance

a.) Reliance is a sufficient reason by itself to enforce promise. We don’t have to try
to force consideration where it doesn’t exist. Justice is better served by enforcing
promises which induce promisee to rely to her detriment. (Why Kirksey v. Kirksey
was wrong. Poor lady moved across country! Don’t need consideration!).

b.) A promise made by promisor who can reasonably foresee that promise will
induce promisee’s reliance to her detriment is enforceable. This is true regardless
of absence of K or lack of consideration. Indeed, lack of K is when reliance is used.

5-part test to see if promise is enforceable. Promisee has burden to prove
each of these! (Logansport):

1) promise (an assurance or representation will suffice)
2) expectation that promisee will rely
3) promise does induce reliance
4) reliance is of definite and substantial nature, and
5) injustice can be avoided only by enforcement

c.) Courts previously tried to limit reliance to conduct or statements of fact (equitable estoppel), saying you can’t rely on a promise. (*Prescott v. Jones* note case where insurance co. offered to renew policy unless notified to contrary but repudiated and courts did not enforce saying no consideration and estoppel can’t be used for promises). BUT *Ricketts* and *Logansport* prove this wrong, extending estoppel to promises (promissory estoppel), and enforcing promises which induce reliance!

d.) *A promise made for gift of land, which induces reliance by promise to take possession and make improvements is enforceable.* This is true even when Statute of Frauds prevents enforcement on K otherwise. (*Seavey v. Drake*).

e.) **Promise of K adjustment which promisor reasonably foresees will induce promise to change his position can be enforced, even with no detriment to promise and even though new consideration usually required for K adjustment.** (*Fisher v. Fried* note case where D promised to release P from lease agreement and went back on it).

f.) **You can rely on a promise alone, without conduct or statement of fact.** (*Ricketts v. Scothorn*).

g.) **Remedy for promises inducing reliance:**
   i.) Still a Contract remedy, but courts may limit damages to only reliance expenses to prevent injustice. (*Logansport*).
   iii.) Courts are divided on whether to award expectancy or limit damages to reliance expenses, especially when expectancy would give lost profits.

h.) **Charitable Subscriptions:**
   i.) **Charitable subscription is enforceable even without proof of detrimental reliance (inducement can be implied).** (*I&I Holding Corp. v. Gainsburg* note case).
   ii.) **Charitable subscription is enforceable without proof of detrimental reliance as a policy argument.** (*Salsbury v. Northwestern Bell Tel. Co* note case). Other courts have rejected this but continue to enforce charitable subscriptions with barely any reliance.
   iii.) **Restatement says charitable subscriptions binding even without proof that promise induced action/forbearance.** (*Restatement, Second § 90: Promise Reasonably Inducing Action or Forbearance*).
   iv.) At least one court held that promise of money to a religious organization is not enforceable without consideration or reliance, saying mere hope or expectation is neither legal detriment nor reliance. (*Congregation Kadimah v. Deleo*).

IV.) Promises recognizing benefit received in past

   a.) A *promise made in recognition of past action that was not bargained for (a gift) is NOT enforceable when the promisor has received no material benefit.** (*Mills v. Wyman*).
   b.) A *promise made in recognition of past action that was bargained for is enforceable.** (*Mills v. Wyman*).
      i.) **Example of this is promises to pay obligations barred,** which can be enforced with no new consideration (unilateral action by debtor is enough)
a. Note that an action would be brought on the new promise rather than the old one, and any modifications made to the obligation would be enforced (e.g. a promise to pay when you sell your barn or promise to only pay half)

1) **Statute of Limitations**: new promise to pay, unequivocal acknowledgement of debt, or part payment of debt allows obligation to be reinstated and will start statute running all over again.

2) **Bankruptcy**: stricter than Statute of Lim. Only express new promise to pay will renew (not part payment or acknowledgement). Federal bankruptcy law requires court approval of reaffirmation and debtor power to rescind new promise.

3) **Debts of Minors**: After reaching adulthood, minors can choose to reaffirm barred obligation with new promise to pay.

c.) A promise made in recognition of past action that was not bargained for is enforceable when promisor has received material and substantial benefit (especially if benefit was to promisor’s person, and even more especially when promisee suffered detriment by reason of benefit conferred). (*Webb v. McGowin*).

i.) Some courts still trying to enforce only using consideration rule that promise made in recognition of past benefit to person of promisor is not enforceable because a voluntary humanitarian act is not consideration (*Harrington v. Taylor* note case where P saved D’s life and mangled hand in process).

d.) Restatement says that promise made in recognition of past benefit received by promisor is binding to extent necessary to prevent injustice UNLESS:

i.) If promise conferred benefit as gift or for other reason promisor was not unjustly enriched OR

ii.) If value of promise is disproportionate to benefit received (when value of benefit is fixed). When value of benefit received is uncertain (ex: saved someone’s life), promise made in recognition fixes value and may be enforced if not excessive. (*Restatement, Second § 86: Promise for Benefit Received*)

c.) Restatement also says that restitution cannot be recovered for services rendered as gift / services unasked for UNLESS:

i.) If there is evidence of intent to charge (for ex: services rendered by professional who normally charges for such services), restitution may be awarded even when services unasked for. (*Restatement, Second: Restitution for Benefit Conferred as Gift*).

2.) When are Limited / Indefinite Promises Enforced?

I.) **Bilateral Contracts: Promise and Return Promise (Enforceable!)**

a.) A promise alone is consideration. The detriment is the restraint on future freedom of action.

b.) In bilateral Ks for employment or sale of goods, both promises are enforceable before either party has performed or relied because the promise to sell/employ and return promise to buy/work are induced by each other and restrain future conduct. (Seller breach in *Acme Mills*, Buyer breach in *Ellis/Greenfield car sale hypo*, and employer breach in *Parker*).

c.) A promise which gives one party an unlimited right to decide nature and extent of the promise is **NOT** enforceable b/c no restraint on future conduct → promise is merely illusory. (*Davis v. General Foods Corp* note case where D said if P agreed
to give recipe only to him, D reserved right to use [or not use] and determine compensation [if any]).

d.) A promise that is conditional on future event which both parties are free to avoid is not enforceable until both parties complete event. (Nat Nal Service Stations v. Wolf note case where D promised discount for gas P bought but did not promise to sell, and P did not promise to buy → Promise is illusory until gas is bought and sold)

e.) K Termination Clauses are enforceable UNLESS they are unrestricted / one party can cancel at any time with no restriction, in which case the K is illusory. (Ipod Hypo).

II.) Mutuality of Obligation: Must exist at inception to enforce (Consideration!)

a.) Remember, mutuality of obligation is NOT equality of obligation! Courts don’t weight the adequacy of consideration! Also a policy argument that if parties have structured agreement to give one party flexibility, why not let them enforce it, as long as some future conduct is restricted?

b.) The fact that a rule of law renders a promise voidable (misrepresentation, statute of frauds, minors/insane persons) does not prevent it from being consideration. For ex: you can’t make a promise to an insane person in exchange for the insane person’s promise and then breach and claim no consideration. (Comment on Mutuality and Promises barred by Law).

c.) A K contingent upon one party completing a future event is enforceable if the party promises to restrain his conduct once the event is completed. (Obering v. Swain-Roach Lumber Co). This court said that the K was not enforceable on its face but was once the future event was completed. This is wrong! Contract was enforceable on its face, even though D could choose not to complete event and avoid K entirely, because D restricted right to sell to someone else once future event completed – some restriction of future conduct!

i.) Even if breach occurs before future event completed, K is enforceable. (why Paul v. Rosen note case was wrong!) Here, court said K was not enforceable – Wrong! There was mutuality of obligation on the K face, regardless of future event being completed or not, b/c P restricted right to buy liquor business from anyone else once but D once he got the lease!). Plus, by breaching before P secured lease, D eliminated obligation of P to secure lease – Anticipatory breach eliminates condition obligating completion of future event.

d.) In any K, if one party may terminate at any time with no condition, there is no mutuality of obligation, therefore no enforcement. Even if seller partly performs, buyer can repudiate. Either can repudiate anytime because no mutuality of ob at INCEPTION! Unless both parties perform, no enforcement. (Ipod Hypos).

e.) If one party cannot terminate but reserves right to request certain payment type, he is restraining future conduct, so yes mutuality of ob and yes enforcement. (Ipod Hypos).

f.) Requirements Ks: If buyer promises to buy all of a good he needs for a certain time from seller, and seller promises to sell all buyer orders, there is mutuality of ob and enforcement. Both parties have restrained future conduct even though buyer may not need any good at all (b/c if he does he can’t buy from anyone else!).

g.) Output Ks: If seller agrees to sell everything produced and buyer agrees to buy all seller sells, same deal, mutuality of ob and enforcement.

h.) In any K, if one party can terminate any time after a certain date, there is still some restraint on future conduct so mutuality of ob and enforcement. This is
true even if one party can terminate just two days after K begins b/c he’s restricting future conduct for those two days and courts don’t weigh adequacy of consideration! (Baskin Robbins and WU Hypo).

i.) **Implied Promises: Where Mutuality of Ob can be Implied (and enforced!)**

   i.) In agreement where P gives D exclusive agency in exchange for part profits, courts will imply a promise that D will make reasonable efforts to do his job. (Wood v. Lucy, Lady Duff-Gordon). Courts reason that unless this is a fraud (agent trying to block party from competition), the parties must have anticipated that agent would make efforts, because otherwise P would get nothing and the K would be useless!

   a. If K is based solely on one party completing future event, K has implied promise that the party will make reasonable efforts to complete event, because otherwise K would be useless! (Implied Promise Hypo where seller promises to sell a house to a buyer who promises to buy as long as he gets loan).

   i. *Paul v. Rosen* note case: Here too, there is an implied promise that buyer would make efforts to secure lease. It is reasonable to suppose parties anticipated that buyer would try to get lease, otherwise, the K was useless.

The Effects of Adopting a Writing

1. **Parol evidence rule (PE):** If the parties have put their agreement in a writing that they intend as the final, complete, and exclusive expression of their agreement, a prior or contemporaneous agreement may not add to, vary, or contradict the terms of the writing.

   a. PE Rule only applies to prior agreements! PE does not preclude extrinsic evidence offered to prove:

   i. false statements of fact (this is fraud – hypo w/ car seller statement 25 mi/gal but K said nothing about mileage and had merger clause - car gets only 10 mi/gal)

   ii. subsequent modification of detailed written Ks (car sale hypo w/ subsequent agreement S will install license plate holders)

   iii. meaning/interpretation of written language (car sale hypo w/ K writing “deluxe soundsystem” and prior oral agreement that B wanted tape deck).

b. Different meanings intended by parties:

   i. When an ambiguous term in contract is misinterpreted by both parties, and using the objective approach there is no rational basis to choose b/t conflicting understandings, no mutual assent. (Raffles). But we must ask:

      1. Is it a material fact over which there is disagreement? If it is immaterial, no agreement needed (whether $100 should be paid in 20s or 50s).

      2. Does one party know or have reason to know the meaning of the other? If so, the meaning of the ignorant may be enforced (Restatement II and Dickey note case)

      3. Proof of a trade usage is not enough to establish meaning - a party is bound by usage only if he knows or has reason to know of its existence and nature. (*Flower City* note case – “painting walls” and custom for interior/exterior walls but P was new to industry).

   ii. When parties disagree over meaning of a term in written K, a court must give effect to parties’ intention and all evidence relating to intent should be admissible – b/c words do not have fixed meaning. (*Pacific Gas* – D “indemnifies P against
all loss, dmg, and liability” P says applies to dmg to own prop but D offers meaning that indemnity applied only to 3rd parties – ct allowed evidence).

1. **Trade Usage or Course of Dealing:** Finding of ambiguity is not necessary for admission of extrinsic evidence of trade usage of parties’ course of dealing – test of admissibility is not whether K appears complete in detail but whether proffered evidence of course of dealing and trade usage can reasonably be construed as consistent w/ writing (*Columbia Nitrogen* note case and *UCC* has same rule for sale of goods).

2. Extrinsic evidence may always be heard as long as purpose is to elucidate intention of parties by explaining context (*Robert Industry* and *Federal Dep Ins Corp* note cases).

   iii. **Plain Meaning rule (wrong!):** When parties disagree over meaning of term in a written K, a court will first look to written K itself- if language has plain meaning, will not consider extrinsic evidence offered to prove one party’s meaning. (*WWW Associates* – “if litigation not concluded, either party has rt to cancel” but P says rt to cancel was for P’s benefit and could be waived – ct rejected b/c lang was clear).

   1. **Note:** “Plain meaning” rule is wrong! *Always* look to parties’ intent!- mutual assent. (*Pacific Gas* and *Greenfield*).

   c. **Integration/Merger clauses (“writing is full and complete integration”):** If agreed to, merger clause may be effective, *but must be subjectively assented to by both parties* – [important especially for such clauses on pre-printed Ks which are usually not read. Integration clause cannot be taken at face value all the time!] (*Restatement II Commenti*).

d. To determine if a prior agreement which modifies a written agreement is enforceable, the court must **first determine the parties intent and if it was for writing to be final, complete, and exclusive agreement.** To determine intent, first look to *writing itself* to see if it appears to be complete on its face. If not use the following three-part test:

   i. **Prior agreement is collateral in form,**

   ii. Must not contradict express or implied provisions of written K, and

   iii. Must not be so closely connected with writing as to be part and parcel of it (otherwise, parties would have included it in writing). (*Mitchill v. Lath* – oral agreement to remove ice house prior to written K for purchase of land).

   1. **Note:** Dissent says assuming parties agreed to ice house before, did they intend the writing to drop it out – decide this using the 3-part test and you will see that ice house is not so closely related to written agreement about land purchase next door to be part and parcel of it.

   2. **Note also:** seems like a case of fraud but usually fraud only applies to statements of fact, not promises, unless at time of making promise, promisor intends not to perf (promissory fraud) – difficult to prove.

e. **PE Rule does not apply to partial integration (where parties did not intend for writing to include all terms).**

   i. **Restatement I:** An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration … if the agreement is not inconsistent with the integrated contract, and

   1. is made for separate consideration, or

   2. is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written K.
ii. Prior agreements may be used to establish that the parties did not intend for the writing to be complete integration, provided that the prior agreement is not inconsistent with an express (not implied) provision of the writing, and is such an agreement as might naturally be made separate by parties situated as those to written K.

1. Also to determine if it might naturally be made separate, court is not limited to writing on its face but can consider surrounding circumstances, including: business experience of the parties, counsel representation, bargaining strength of the parties, and apparent completeness of the writing. (Hatley v. Stafford – handwritten K w/ unsophisticated parties and gave D right to buy out P at $70/acre. Farm was worth $400/acre. P said prior agreement was buy-out provision would only last 60 days)

2. This rule is like the Restatement I but limiting to express provisions – this contradicts Mitchell and Hayden note case [similar facts to Hatley where time fixed in prior agreement but court excluded b/c said contradicted implied provision that where written K is silent on time, implies reasonable time]).

f. Two Views to determining whether written agreement is complete or partial integration: Williston vs. Corbin – focus on the writing vs. focus on intent

i. Williston’s "reasonable person" approach: The writing is the focus of attention – a judge assuming the function of a reasonable person looks to the writing on its face and determines whether it is the complete integration, and if so, its meaning to a reasonable person situated as were the parties to the writing. An integrated writing clear in meaning to the reasonable person = contract, and no jury needed.

ii. Corbin’s “intention of the parties” approach: A writing is integrated when the parties intend it to be and it means what they intend it to mean, so integration may be lacking even if the additional terms naturally would have been included in the writing and could have a meaning different than that which a reasonable person would attach by viewing the writing alone.

iii. Note: Greenfield’s hypo about the one-line house sale written K is kind of a combination but more about intent – first look to the writing itself and b/c only one line does not appear parties intended to be complete integration. Then look to the prior agreement regarding payment method and though it is closely related to writing that might naturally have been part and parcel of it, it’s OK b/c writing on its face shows no intent for complete integration.

g. PE Summed Up: Writing speaks for itself only when:

i. Writing is integrated

ii. Integration is complete

iii. Prior agreement is inconsistent with writing

iv. Prior agreement is within scope of writing

v. Prior agreement does not bear on writing’s interpretation

vi. Prior agreement would not naturally be omitted from writing

Statute of Frauds (applies in both law and equity, though equity has exceptions*): Certain oral Ks need evidence in writing signed by party to be charged (D). On all of these, though, if one party performs fully, the K is taken out of Statute and is enforceable.

1. K for sale of interest in land: does not apply to Ks for real estate broker services or transfer of Ks with mortgage lenders. Does apply to gifts of land, unless P can prove promise induced reliance.
2. K for sale of goods over $500; does not apply to sale of services/other intangibles.
3. K incapable of being performed within one year; if at all possible K could be performed in full w/in one year, no writing is needed. ONLY if terms of K expressly extend it to more than one yr, statute applies.

*Equity exception: in oral Ks to sell (not give) land, partial performance by promisee (P) may lead court to give relief in equity even though no remedy at law b/c of Statute of Frauds [see Equity Remedies below]. Partial performance (possession + payment or improvement to land) gives evidence of oral agreement (which replaces written evidence) and proves there is injury to P beyond compensation by money (which could be given in Restitution).

**Changed Circumstances and Policing the Bargain:** when a court determines a K to be rescindable on any ground (mistake, duress, fraud, impossibility), it cannot step in and impose new K terms w/out free assent of both parties, but it can make the K voidable or allow damages.

4. **Mutual Mistake**
   a. If both parties are mistaken as to a material fact (the substance of the thing bargained for / going to the whole of the K, not some incidental quality), then the K is rescindable.  
      (Sherwood v. Walker – barren cow)
      i. **Note:** If both parties are not mistaken – if B in Sherwood did not believe cow was barren – then the K is enforceable.
      ii. Where risk is inherent in the transaction and both parties take chance and one is right/one is wrong, courts will let K stand however parties allocated the risk.
         1. But in an inherently risky transaction, such as antique shopping, if both parties go to great lengths to determine the value of something and both are mistaken, K is rescindable (b/c both believed risk had become negligible).  
         2. *Or even if they just both believe* and both are wrong, rescindable  
            (diamond/topaz hypo where both believe topaz and it’s a diamond).

5. **Implied Warranty**
   a. Conveyance of land carries an implied warranty of suitability – this warranty relates to the quality of the land, not the value.  
      (Hinson- bought land for residential use but both parties unaware of probs with septic tank).
      i. In Hinson, court reluctant to use mutual mistake b/c did not want to upset stability of completed land Ks (land is special case) so used implied warranty.
      ii. Besides, only relief in mutual mistake is discharge from K, so in sale of land K if B already possesses land, wouldn’t want to allege mistake – would want damages so need implied warranty or tort (fraud/misrepresentation).

6. **Intentional Misrepresentation: Fraud (tort)**
   a. If one has full information and discloses only part of the information, but leads the one with whom he contracts to believe he has made full disclosure and does this with the intent to deceive, he is guilty of fraud if the other relies on the misrepresentation.  
      (Cushman – in sale of home, wife said water was “a little hard”, husband was silent – both knew water had sulfur and buyers relied on wife’s statements).
   b. When facts are accessible only to one party and not the other through observation and careful judgment, the first is bound to disclose these facts and make them known to the other – Silence / failure to correct a known misrepresentation constitutes fraud when the silent party has superior knowledge than the innocent person.  
      (Cushman).
      i. A seller’s duty to disclose is especially prominent regarding material defects (in the sale of a home, for ex), and the seller cannot preclude the buyer from rescinding on the basis that there was no mutual mistake or no intentional
misrepresentation. (textbook passage regarding seller of termite infested home – court held that seller was liable in tort).

7. **Impossibility, Impracticality, or Frustration of Purpose:**

   a. In a K which the perf depends on the continued existence of a given thing or person, and that thing ceases to exist or turns out to be nonexistent, performance of both parties is excused because performance has become impossible. (*Taylor v. Caldwell* where music hall burned down so perf was excused).

   i. Impossibility can mean “absolutely impossible” (destruction of a thing) or “impracticable” (unreasonably expensive or burdensome).

   ii. **Instead of thinking about impossibility, think about it as allocation of the risk of this type of loss – who should bear the risk?** In *Taylor*, burning of the music hall excuses both parties – but if the gardens were still available/ only part of the performance was impossible, should both parties be completely excused?

      1. If instead of impossibility, we allocate the risk of a certain type of loss and excuse only the party who does not bear the risk, we ensure that when the excused party is still willing to perform and at least some of the terms of the K have not been rendered impossible, the other party who bore the risk is still obligated to perform to the extent he can.

   b. While impossibility is a defense, it has been applied narrowly and should only excuse perf *extreme* circumstances – when destruction of the subject matter or means of perf make perf *objectively impossible* by events which could not have been foreseen or guarded against in K. (*Kel Kim* – insurance industry crisis caused P to lose insurance coverage and violate term of K but ct said inability to procure ins was foreseeable).

   c. Not only does impossibility excuse both parties’ performance but also frustration of purpose if event preventing performance was such that reasonably could not be in contemplation of both parties at time of K – if *both parties contracted with a shared purpose and that purpose has been frustrated* (*Krell* – room for rent for king’s coronation but king got sick).

      i. Note: even if a K has been made totally useless for one party, if it is not impossible and the other party’s purpose is not frustrated (he is indifferent to the other’s purpose), performance is not excused (*cab for derby hypo* in *Krell*).

8. **Duress and Coercive Renegotiation:**

   a. A K is voidable on ground of duress when 1) party making the claim was forced to agree to it by means of wrongful threat, precluding exercise of his free will, 2) threatened party could not obtain goods from another source, and 3) ordinary remedy of action for breach would be inadequate. (*Austin Instrument* – gen compelled to modify K terms under threat of breach by sub b/c gen could not obtain another sub to complete govt contract in time)

      i. **Preexisting Duty Rule** - promise to do something one has already contracted to do is not consideration. This rule is defective – prevents enforcement of modifications even when they are appropriate and easily avoidable by parties modifying one more term to give both parties “extra consideration” for the agreement. UCC abolished pre-existing duty rule for sale of goods – saying Ks may be modified without additional consideration.

   b. When there is a bona fide dispute over an amount due, the cashing of a “paid in full” check makes further suits unenforceable (and altering the words / crossing them out does not change this). Courts give precedence to the settlement over the pre-existing duty rule so even if *both parties agree the “paid in full” amount was a pre-existing duty of D*, the check is consideration for a settlement agreement. (*Marton Remodeling* – P cashed check but wrote “not payment in full” underneath – didn’t matter b/c “payment in full” check is
universally accepted as convenient means for resolving debt disagreements and if the creditor cashes it, he may not disregard any conditions attached)

9. **Violation of Public Policy**
   a. Forcing an employee to choose between violating a statute / acting illegally and the prospect of losing his job is a violation of public policy, and the employee may have a wrongful discharge claim in tort despite employment K being terminable at-will. *(Sheets v. Teddy’s Frosted Foods – quality control manager discharged for refusing to violate food safety statute).*

**Standardized Terms and Unconscionable Inequality**: No “duty to read” but usually you are bound by what you sign if you have reasonable opportunity to read the terms, so your signature is objective assent. No one can defend against enforcement of standardized times *solely* on the ground that he signed it without reading it *(Allied Van Lines).*

1. **Exceptions to “bound by what you signed” doctrine**:
   a. D misrepresents the nature of the document
   b. D prevents P from reading doc (sometimes enough if D discourages P from reading)
   c. Doctrine of notice and knowledgeable assent: term is hidden or inconspicuous
   d. Doctrines of strict construction: language of term is difficult to understand – if terms are not obvious to the ordinary person, any ambiguity is construed against party who constructed K.
      i. *Note*: Llewellyn is critical of the last two (doctrines of notice/knowledgeable assent and strict construction) b/c they don’t really address the problem – D can just try again to make the terms more conspicuous or clear. He says signature on boiler-plate clauses (partially hidden terms over which buyer has no choice) = a blanket assent to 1) any not unreasonable or unfair terms which 2) do not alter or impair the fear meaning of bargained-for terms when read alone.
   e. Violation of public policy

2. When a standardized K attempts to disclaim away liability for personal injury resulting from defects in complex/dangerous machinery put into hands of consumers, the disclaimer is void as contrary to public policy – in this case, the Uniform Sales Act (now UCC’s) implied warranty of merchantability – and though UCC allows disclaimers of this implied warranty, *legislative intent* was to allow disclaimer only by assent of parties of equal bargaining strength. *(Henningsen – car warranty disclaimed implied warranty of merchantability but ct held it could not be used to absolve liability when defect caused personal injury).*

3. An exculpatory K that is overly broad and unreasonably favorable to D will be strictly construed against drafter and can be void as contrary to public policy. *(Richards v. Richards – “passenger authorization” K for truck drivers where drafter went too far).*
   a. Court used strict construction and notice/knowledgeable assent, but this was a stretch b/c it was a short K w/ relatively clear language and even if the terms had been brought to P’s attention and she had opportunity to bargain, it wouldn’t change anything b/c D prob wouldn’t bargain – court was just looking for way to invalidate unreasonable provision.

4. Contracts of adhesion (standardized Ks offered on take-it-or-leave-it basis) are only enforceable 1) when within the reasonable expectations of the adhering party, and 2) are not unconscionable. Arbitration agreements, though favored by public policy, are held to the same standards if presented as part of an adhesion K. *(Broemmmer – abortion clinic agreement not to arbitrate where pregnant girl didn’t even know what arbitration was so not w/in her reasonable expectations to waive jury trial).*
   a. *Broemmmer* tells us that besides public policy (used in *Henningsen* and *Richards*), can use mutual assent arg to address failures of assumption of free bargaining of K.
5. **Restatement II: Standardized Agreements**: where other party has reason to believe party manifesting assent would not do so if knew writing contained particular term, the term is not enforceable.

a. Such a belief may be shown by prior negotiations or inferred from circumstances (term is bizarre/oppressive, eviscerates agreed-to terms, or eliminates dominant purpose of transaction). Inference is reinforced if P never had opportunity to read term or term is illegible or hidden. Rule is closely related to policy against unconscionable terms.

b. Parties who make regular use of standardized forms do not expect customers to read or understand terms, and customers ordinarily do not – tacit representation that like terms are being accepted by others similarly situated and understanding that they are assenting to these terms subject to any limitations law may impose.

6. **Unconscionability**

a. A court (of law or equity) may refuse to enforce a K it finds to be unconscionable at time made. A K is unconscionable if there is: 1) Absence of meaningful choice on part of one party, and 2) terms unreasonably favorable to the other party. (*Williams v. Walker-Thomas Furniture* – cross-collateralization clause allowing repo of all old furniture)

i. To determine if there is absence of meaningful choice, look to the inequality of bargaining power and details of the K formation process – can look to education of parties, size of print and whether clearly communicated (recall notice/knowledgeable assent and strict construction), sales tactics, etc. Also if it’s a K of adhesion (can’t negotiate terms) and all merchants using the same term (can’t get diff terms anywhere else), there is prob absence of meaningful choice.

ii. To determine if unreasonably favorable, look to the commercial setting but remember that the whole commercial setting could be unreasonable. In *Williams*, though it is reasonable that creditor needs extra security interest to cover debt when there is no down payment, cross-collateralization clauses have been prohibited in most states b/c they inflict much more injury to B than benefit to S (used more as a threat than actually recovering money).

b. **Remedies for unconscionability**

i. UCC gives options for sale of goods Ks, similar to overly broad covenants not to compete:
   1. Refuse to enforce K
   2. Enforce remainder of K w/out unconscionable clause
   3. Limit application of unconscionable clause to avoid unconscionable results (like blue-penciling non-compete covs to make reasonable)

**Consequences of One Party’s Failure to Perform – Does it Justify Other Party’s Nonperformance? (Promises vs. Conditions):** P’s promise (if made for consideration) is always the obligation of P to perform, and if he does not perform, he is liable for damages to D, but D is not relieved of his own obligation to perform. But sometimes P’s promise is also a condition of D’s obligation to perform, and P’s nonperformance makes him liable for damages as well as relieves D of his obligation to perform.

1. **Condition**: some operative fact subsequent to acceptance and prior to discharge, upon which the rights and duties of the parties depend. Conditions are created only by agreement of the parties or by construction of the law (“constructive conditions”). (*Corbin*).

2. **How do we determine if a promise is also a condition?**

a. **Express Conditions**: parties created condition (usually insurance Ks but also construction Ks with “satisfaction of perf” / certificate of approval conditions, and others)

i. To determine whether a promise is also a condition, courts look to the intent of the parties as manifested by:
1. the language they used – remember that “the inclusion of one thing is the exclusion of the other” (if some terms are explicitly labeled “conditions precedent” and others are not, the unlabeled terms were reasonably not intended to be conditions)
2. and also manifested by the circumstances – trade usage, prior dealings, context.
3. *If the language is unclear, presume promise:* there is a presumption of promise over condition unless language clearly indicates otherwise [“condition precedent” or “provided”] (*Restatement II: Interpretation of Doubtful Words asPromise or Condition*). Why?
   a. Because of general policy against forfeiture (forfeiture of the K’s consideration - in insurance Ks the payment of premiums)
   b. Also to interpret language against the party who drafted the K. (*Howard v. Fed Crop Ins Corp* – D insured P’s tobacco crop which was ruined. P notified on time, but cut down stalks before inspection. Court held preservation of the stalks was not a condition of D’s ob to pay claim).
   ii. When looking to reasonable intent of parties – ask yourself, did parties by using this language allocate the risk that nonperformance of the promise would excuse the other’s perf completely – and keep in mind the policy against forfeitures (hypo “S promise to repay L with interest as soon as he sells his house and receive money from sale” – parties prob intended “selling the house” as a convenient time for payment and prob did not allocate the risk that L would not get paid at all – plus the policy against forfeitures gives presumption of no condition).
   iii. In insurance cases, provisions like “claims must be filed w/in 12 months” or “written notice shall be provided w/in __ time” are the standard language of conditions. More general provisions like “insured shall immediately forward claim” are a closer case, but courts generally still treat these as conditions. (*Aetna* – “policyholder must immediately forward” – court treated as condition [but still excused b/c K of adhesion / harshness of forfeiture, etc]).
   iv. In construction Ks, provisions like “work shall be performed to satisfaction of [third party expert or D]” or “payment made upon certificate of approval by [third party expert – i.e. architect]” are standard language of conditions – can assume that both parties intended certificate of approval to be condition b/c both parties benefited by use of third party expert (owner by advice of expert and builder by impartial opinion of expert). (*Second Nat’l* – standard for rivets and cert of approval by architect).

b. **Constructive Conditions:** In the interest of justice and to avoid forfeiture when P has fallen just short of perfect performance, a court may interpret an express or an implied condition to be fulfilled by **substantial performance**.

3. **Order of Performance**
   a. *Restatement II:* when all or part of perf can be perf simultaneously, they should be held to be due so unless language or circumstances indicate contrary.
   i. Simultaneous perf is possible when: the same time is fixed for both perf, time fixed for one and not other, no time fixed for either, or same range of time fixed for both, but not when different range fixed for both.
   ii. If perf is due simultaneously, each party’s render or tender (offer to perf with manifest present ability to do so) is a condition of the other’s ob to perf.
b. As in most construction Ks, where the contract provides for a series of installment payments, performance of one part is a condition precedent to payment, which in turn becomes the condition precedent to the next performance installment, until full performance is the condition for the final payment. (Plante).

c. Where the time for perf of one party does or may come before the time for performance by another, the latter promise is an independent obligation, and nonperformance merely raises a cause of action in the promisee but does not excuse his performance (Price – where both parties knew P might not be able to give deed to D on time).

4. **If a Promise is a Condition**

a. In order to recover for D’s breach of K, P must render or tender performance, with two exceptions:

   i. Impossibility: If it is impossible for D to perform, P’s formal tender is not required in order for him to sue for breach (because tender would be useless if D can’t perf anyway). (Ziehen – but here ct determined that D’s transfer of good title was not impossible because D could have cleared up encumbrances, so by not tendering perf P lost relief even though D did not perform).

   1. Because of the variety of circumstances that can arise during the executory period of a real estate K, purchasers of land are not entitled to rescind prior to closing solely on ground that seller did not have good title when K made – must give seller an opportunity and reasonable time to explain or give assurances (Neves note case)

   ii. Anticipatory Repudiation: If D repudiates K, P is not required to tender perf - he can terminate the K and sue at once.

   1. But, although repudiation voids need for P’s tender, when evidence calls into question the assumption that P would have been ready and able to perform, a court may look at this evidence and deny recovery to P. (Corporale note case where D repudiated but P could not have performed b/c didn’t own land).

   iii. Courts of equity are more flexible and may relax requirement for tender provided P fulfill some other condition (“P may recover so long as he does __”). Courts of law are not flexible and always require tender unless impossible or repudiation – if no tender, P cannot recover any contract damages, even reliance losses (some but not all courts will allow restitution if P paid deposit). Moral of the story -the safest route for P always is to tender/render perf and demand D’s perf.

5. **Express Conditions: When non-occurrence is excused so D’s performance still due**

a. **Condition is Time-limit / Deadline to submit claim (mostly insurance Ks):** Impossibility, repudiation, waiver, estoppel (temp)

   i. If a condition has become impossible it is void, and the promise remains obligation of the promisor but not a condition. (Semmer where Civil War made condition of filing ins claim w/in 12 months impossible so was void, and hypo to repay L as soon as sell house where if we assumed sale of house was condition of repayment and house burned down before sale, condition was void and still have to repay).

   ii. If the occurrence of the condition is in control of one of the parties, and that party prevents the condition from occurring, he can’t then hide behind it so he has essentially waived the condition, making it void (hypo to repay L as soon as S sells house where S did not even put house on market so condition was void and S still had to repay).
iii. If the occurrence of the condition is in control of one of the parties, and the other party prevents occurrence by his statements or actions which induce the party in control’s reliance so that he forbears the condition, the condition is temporarily excused by estoppel until notification of repudiation of the statement/action by the other party makes reliance no longer reasonable and re-instates the condition. Note: court said that at repudiation, condition time-limit would begin all over again, whereas some authorities say cond is just postponement so begins where left off. (Gilbert - insured beach house against fire, condition was to bring suit w/in 12 mos. D kept saying would pay no need to file - until 12 mos had passed, then repudiated – but P waited 3 yrs after repud to file).

   1. Difference b/t waiver and estoppel: Reliance is the essential difference. Waiver is a voluntary relinquishment of a known right, which is irrevocable and voids the condition for all time. Estoppel is preclusion of one party to contradict self when his statement induced reliance – since reliance is the reason the condition is not fulfilled, once the reliance ends, the condition is reinstated (the condition is postponed until notification that the statement has been retracted).

iv. Especially in an insurance K, even if D ins. co. has nothing to do with the nonoccurrence of the condition, non-occurrence may still be excused if 1) the K is a K of adhesion (the insured had little choice as to terms and time-limit provision was not brought to his notice), 2) enforcement = serious forfeiture (harsh forfeiture of P’s premiums w/ no coverage from D), and 3) legitimate purpose of the provision can be protected w/out strict enforcement (P’s delay did not materially prejudice/harm ins co).

b. Where Condition is Satisfaction of Performance / Certificates of Approval: (construction Ks and personal service Ks): bad faith or reasonableness

   i. In construction Ks, where the condition for the owner’s ob to pay is issuance of third party expert’s certificate of approval, non-occurrence of the condition can only be excused if certificate was withheld in bad faith – it is not enough to say that the certificate was withheld unreasonably. (Second Nat’l – construction K w/ certificate of approval condition required “standard connections” and architect refused to issue cert believing standard to be 10 rivets, while builder believed 8 rivets – even if 8 rivets was the standard so that architect acted unreasonably and builder fulfilled obligations under K, cond is not excused as long as architect acted honestly / in good faith).

   1. Bad faith requirement is similar to Duncan v. Black (where courts enforce settlements even if claim has little legal basis as long as made in good faith) – pt is courts defer to the decision of the person(s) the parties have agreed ahead of time will settle any disputes, whether this is arbitrator or, in case of construction Ks, a third party expert, even if a reasonable jury might have decided otherwise.

   2. Examples of certificates / approval of perf being withheld in bad faith:
      a. Dishonestly failing to certify (Second Nat’l remand to det this)
      b. Withholding cert at behest of owner rather than expert’s own impartial judgment (Fay note case)
      c. Withholding for reasons unrelated to completion of work / outside area of responsibility (Maurer note case)
      d. Withholding after failing to properly inspect work (Hartford note case).
ii. Where the K subject matter is *functional* rather than aesthetic (such as construction), and the condition is satisfaction of P’s performance but satisfaction depends on *one of the parties* (rather than a third party expert), if satisfaction was withheld *unreasonably*, the condition is considered met and D’s performance (payment) is due. (*Haymore* note case - D unreasonably kept saying he was dissatisfied with the way P built house).

1. The standard for excusing nonoccurrence of the condition is diff when satisfaction depends on *one of the parties (in construction Ks – the owner)* rather than an expert b/c of the increased risk of proclivity for D to say he is unsatisfied (so he won’t have to pay). When the subject matter is *functional* rather than aesthetic, condition is met if jury finds reasonable performance).

iii. Where the K subject matter is *aesthetic* in nature so that satisfaction is subjective, and the condition is satisfaction of *one of the parties*, non-occurrence of the condition will *only* be excused if D expressed dissatisfaction in *bad faith*. (*Fursmidt* - hotel laundry service K where cond was satisfaction of hotel – court focused on the guest service nature of K rather than the utilitarian aspect of cleaning clothes and said the K perf was matter of “fancy, taste, and sensibility”).

1. Determining what is a functional or aesthetic services K (so which test applies – reasonableness or bad faith) is tricky but if the K is for a specific job (painting a barn) may be functional, whereas if it is a K for personal services as a personal attendant (personal attendant who paints barn as one of many duties) may be aesthetic / up to fancy of employer.

6. **Constructive Conditions: When can a party who has not completely performed seek to enforce the promise of the other?**

   a. **Perfect Tender Rule:** UCC for sale of goods K — seller must perform perfectly in every respect to trigger buyer’s ob to accept and pay for goods (subst perf not good enough – prob b/c seller still retains god and can sell to someone else). *Note:* perfect tender rule allows buyer to reject goods for even minor nonconformities, but other sections of UCC mitigate some of the harshness / make it more flexible to balance the interests of buyer and seller.

   i. In sale of goods K, if parties specify a date of delivery, even if they have not manifested intent that delivery by *exact* date is a condition of payment, courts have traditionally interpreted that time is of the essence (and a condition of payment) because of the demands of commerce. (*Ohinsky* – “deliver to you at :Nov 15” and ct interpreted that even a day late delivery relieved purchaser of ob to accept and pay for foods [rule continued in UCC but w/ some limitations]).

   ii. In sale of goods K, delivery of *exact* quantity of goods specified is a condition of buyer’s ob to accept and pay for goods. (*Prescott* - seller couldn’t load all the crates on ship b/c some room taken up by govt but delivered majority – still buyer refused to accept. When seller sued for breach, court refused recovery b/c no perfect tender.)

      1. Problem with following perfect tender rule too strictly is that buyer can express dissatisfaction w/ any minor deficiency of perf when he is really motivated by other reasons (decrease in market price, cash flow prob), and buyer is still excused from performance.

   b. **Substantial Performance (usually construction or employment Ks):** While perfect performance is required to discharge P’s obligation to perform, substantial performance (just short of perfect) may be enough to invoke D’s obligation to perform – so that if P
has substantially performed, D must still perform and can sue separately for damages for any minor defects in P’s performance. **Substantial perf is a constructive condition** – created by courts to avoid forfeiture when P has fallen just short of perfect performance.

i. In a construction K, the test of substantial performance is whether P’s performance falls just short of perfect perf / meets the essential purpose of the K – if the specific details are not made the essence of the K, then substantial performance can be found even though not every detail is in strict compliance, and D will still be held to his obligation to perform. *(Plante v. Jacobs*– builder had series of minor defects and one bigger one / a misplaced wall – **Note:** this is prob the outer edge of what would be considered substantial perf).

ii. In a construction K, substantial performance can be found if the shortfall is trivial and innocent (not willful) omissions which can be fixed with damages to D rather than forfeiture; but the shortfall cannot be so great as to frustrate the purpose of K – this is a question of degree and ct must weigh factors: purpose of promise, desire to be gratified, excuse for deviation, and cruelty of enforcing forfeiture. *(Jacobs & Young v. Kent* - P completed house for D, and after a year of living in house D found out it wasn’t the exact brand of pipe they wanted).

1. If P has subst perf, and D does not perform, P may recover on K but recovery will be reduced by damages owed D for defects in performance:
   a. Measure of damages = Unpaid K price (b/c P met condition) – [either c/c of defects or dim in FMV if c/c would result in econ waste or would be grossly disprop] (b/c P did not meet his own obligation). (recall *Groves and Peevyhouse*).

2. **Note:** if P had not substantially performed, might be able to recover in Restitution (recall *Britton* where 9 ½ mo of 12 mo employment K was not subst perf but P could recover in restitution: FMV of services (up to K price) – D’s dmgs).
   a. If P has subst perf, can recover in K (w/ measure of dmgs listed above), but not in restitution b/c once perf complete or nearly complete, lose chance to sue in restitution *(Oliver v. Campbell)*.

7. **Material Breach:** At what point does the nonperformance of one party give the other party a right to cancel the K (and terminate performance)?
   a. A breach by one party which causes little damage to the other does not justify the other’s termination of performance. The other party may terminate performance and cancel K **only** when there has been a material breach. *(Turner* – gen paid sub all of K price except a few thousand over which there was a dispute and ct held gen’s failure to pay a few thousand precisely on time was not a material breach so sub was not justified in abandoning K).
   i. If there has not been a material breach, P may not cancel but may suspend perf, giving D a reasonable time and proper notice to perf – if delay is too long or D never performs, P may cancel K or continue to perform and sue for dmgs now or later. *(Turner)*.
   ii. To determine if there has been a material breach, ask: has the “essential purpose” of the parties been defeated, considering the following factors
      1. Cause of breach (unforeseen event or outright refusal)
      2. Extent of breach (if payment is late, how late?)
      3. Needs/expectations of parties (what is the K about? How does breach fit into parties’ needs?)
4. Likelihood nonperformance will continue (does the breacher seem willing to make it right? Or does it seem likely breach will continue?)
   a. Difficulty is nonbreaching party doesn’t know whether will be justified in terminating or not so the safest thing to do is to remain “suspended” but ready to perf, which is inefficient and unfair b/c prob means P cannot take on new projects.

8. **Breach by Anticipatory Repudiation**
   a. **First question:** Did D’s words and actions constitute a Repudiation: an overt communication of intent not to perform:
      i. D made express statements / acts that he would not perform (*Rockingham*),
      ii. D refused to do something essential to performance of K (*Paul v. Rosen* where D did not expressly refuse to sell his store but he refused to conduct inventory to determine the sale price, which fairly indicated that he intended not to perform)
      iii. D insisted on new conditions not in original K and suggests he will not perform unless new conditions are met (amounts to an overt communication of intent not to perform)
         1. Where D believes he has completed his obligations and so refuses to perform further, but a court determines this belief to be incorrect and D’s performance to still be due, perhaps D’s refusal to perform is not a repudiation and a court ruling will prompt him to continue performance. (*Greguhn* – insurance co’s incorrect belief that P was no longer covered probably factored into the majority’s ruling that ins co’s failure to pay was not an anticipatory breach – court probably assumed that once D knew it was still obligated to P, D would do so and if didn’t P could sue).
   b. **Anticipatory Breach = Total Breach:** Where D repudiates before perf and before P’s perf, repudiation = total breach and discharges P’s duty to perform / may excuse nonoccurrence of condition. Upon anticipatory repudiation, P can terminate K and sue immediately or wait until time for D’s perf and sue if D does not in fact perf.
   c. Anticipatory repudiation constitutes a material breach and justifies cancellation of the K and termination of performance only if 1) it is a bilateral K, and 2) P has not completed performance. (*Greguhn* – ins K where P totally disabled but D stopped making payments, insisting it had completed its obligations).
      i. If P has already completed performance, usually there is no need to discharge him from his duties, and he can simply sue for breach. This is only a problem in insurance Ks when P has been totally disabled so done perf/paying premiums and awaiting perf from D (installment insurance payments), and D repudiates his remaining obligation to perform. In these cases, a court may preclude P from suing for future benefits (lost expectancy) until the time has passed for D’s perf so that P would have to keep suing for missed payments or wait until he is dead to sue for all missed payments. This is why the dissent in *Greguhn* probably had the better reasoned arg - concluded that even Ps who have completed performance deserve protection of anticipatory repudiation as material breach, and should be able to sue for all future perf to avoid multiplicity of suits. *But*, the majority probably assumed that after its ruling, D would continue payments without need for another suit.
      ii. **Note:** the main escape route for dealing with the prob of anticipatory breach in unilateral Ks or Ks where P has completed performance is if there is an express or implied condition of insurance payment that P continues to be disabled – this turns the insurance K into a bilateral K and P has not completed performance b/c
must submit to tests/etc to prove still disabled, so anticipatory breach applies and upon repudiation, P can terminate performance and sue for all future expectancy.

iii. *Alternative Remedy - Restitution:* when expectancy is denied b/c P performed fully, P could sue for restitution of all premiums paid on policy.

**Remedies**

1.) *Law Remedies*

1.) **Contract:** Forward-looking; restore what was promised

A.) **Expectancy:**

i.) Put non-breaching party, so far as money will do it, in place he would have been in had K been performed. Compensatory, not punitive!

a.) Usually market price at t/p delivery (if replaceable) – Unpaid K price (+ incidental damages caused by breach – expenses saved by breach).

b.) If breach caused lost profits: Lost profits + Reliance Expenses (-expenses saved by breach).

c.) Non-breaching party must prove lost profits and expenses with reasonable certainty.

1.) **Limitations:**

i.) Only award lost profits when can be proved with reasonable certainty. *(Dempsey).*

a.) When lost profits uncertain, at least give reliance expenses alone. *(Dempsey).*

b.) Reliance expenses are made to third party, but sometimes courts will include payments made to breacher (Restitution) when awarding expenses alone. *(Dempsey).* But normally, to recover payments made to breacher, sue in Restitution.

ii.) Deduct losses which were reasonably unforeseeable. Non-breaching party must prove D knew or had reason to know that losses could happen. *(Hadley).*

iii.) Deduct for losses *breacher proves were reasonably avoidable harm.* Goal is to avoid waste in construction *(Rockingham County)* and encourage productivity in employment *(Parker).*

a.) Deduct for money earned or expenses saved that *breacher proves could not have been made but for breach.* *(Kearsarge Computer Services).*

b.) Some courts deduct from collateral sources (i.e. unemployment / social security) in order not to overcompensate P / punish D. *(United Protective Workers v. Ford Motor Co.)*. But some don’t b/c policy arg that the purpose of unemployment etc is to alleviate P, not lessen damages D must *(Billetter v. Posnell).*

iv.) Courts may consider nature of breach to decide which measure of damages. *(Groves and Laurin v. DeCarolis).*

v.) Rarely ever do courts count emotional distress damages. *(Valentine v. General American Credit).*

vi.) If K is for sale of land, or if there is no adequate remedy at law, can sue in Equity instead.

2.) **Formulas:**

i.) **Construction Ks**

a.) When builder breaches: C/C – unpaid K price. C/C is upper limit, and is sometimes given even when > than diminution in value, such as when breach
is willful (*Groves v. John Wunder*), K object is unique (ugly fountain) and/or repair is likely - best determined by jury (*Advanced v. Wilks*).

- **If c/c is grossly disproportionate to Diminution in Market Value:**
  - FMV as promised – FMV as delivered as long as less than c/c and repair is unlikely. (*Peevyhouse*)

b.) **When owner breaches before builder completes:** Lost profit + Reliance Expenses (including pro rata fixed costs and expenses before K made) OR K price – expenses saved (including pro rata variable costs) → same thing!.

Builder must prove lost profits and expenses incurred. Owner must prove expenses saved. (*Rockingham County v. Luten Bridge*).

- Deduct expenses seller proves buyer could have reasonably avoided (Doctrine of Avoidable Consequences).

- If builder completed: unpaid K price.

ii.) **Sale of Goods and Sale of Land Ks**

a.) **When seller breaches by failing to deliver:** Market price at t/p of delivery – unpaid K price. If market price lower than K, no damages. This measure encompasses Doctrine of Avoidable Consequences! (*Acme Mills v. Johnson*).

- Buyer cannot sue for seller’s enrichment for selling to another unless seller’s enrichment robbed buyer of profit she was entitled to make. (*Lauren v. DeCarolis* note case where D took P’s sand and gravel without permission).

- To determine market price, look to market which non-breacher would go to replace (manufacturer to retailer; retailer to consumer). (*Illinois Central Railroad v. Crail*).

- When seller breaches product guarantee: Pro rata market price for number of years lost – unpaid K price. (*Roofco Hypo*).

- **In Sale of Goods K ONLY, If buyer chooses to cover (not required!):** Cost of cover – unpaid K price (UCC). Doesn’t matter if cover more expensive as long as in good faith / reasonable time. Doesn’t apply to K for intangibles, like service.
  
  - Any other K: market price at t/p delivery – unpaid K price, even if buyer covers and even if cover is more or less expensive than market price.

- **Buyer may recover any damages which seller had reason to know at K and which could not be reasonably avoided** – i.e. replacement cost instead of market price if K is for unique good, or lost profits if seller has reason to know buyer has already made resale Ks. (*Doctrine of Consequential Damages* – combines foreseeability and avoidability!).

  - **Buyer may only recover for damages which are foreseeable.**
   - If special circumstances exist (no market for replacement, buyer will lose profits from resale Ks, buyer’s business will stop b/c machinery defect etc.), these must be communicated to seller or seller must have reason to know at time of K. (*Hadley v. Baxendale*).

  - **Buyer need not show harm was actually foreseen, only that seller had reason to know at time of K** (*Prutch v. Ford Motor Co.*).
o Rule is the negative. Unforeseeable damages not recoverable. Doesn’t mean foreseeable damages are always recoverable. Ex: mental distress dmgs are foreseeable for wrongfully discharged employee, but not recoverable b/c would be punitive/tort issue (Valentine v. General American Credit).

o Buyer need not show harm suffered was most foreseeable of possible harms, only that it was not so remote as to make it unforeseeable to reasonable person at K (Hector Martinez v. Southern Pacific).

b.) When buyer breaches by non-acceptance/repudiation: Unpaid K price – market price @ delivery because seller can still sell to someone else (+ incidental expenses such as cost of delivering somewhere else). (UCC).


c.) If either party makes anticipatory breach (before performance): Non-breaching party may terminate contract and sue immediately or obtain substitute and still sue later.

iii.) Employment Ks

a.) When employer breaches: Unpaid K price – amount employer proves employee could have reasonably avoided through comparable employment/not diff or inferior (Parker v. Twentieth Century Fox).

- No duty to mitigate! Employee can sit on butt and do nothing. Employer has burden to prove losses could have been avoided. (Doctrine of Avoidable Consequences).

- Employees are not required to take same work at less pay (this would be inferior anyway). (Billetter v. Posnell note case).

- But if employee does take work, even diff/infer., and could not have done so but for breach, deduction will be made! (as in personal services K) (Expectancy).

- If employee had business that was able to take multiple jobs and could have done so with or without breach, no deduction (Kearsarge Computer Inc. v. Acme Staple Co).

- Some court may also deduct for unemployment/social security benefits employer proves employee received (Collateral Source Rule).

  o Ones that do say we don’t want to overcompensate P b/c want to give expectancy not punitive damages (United Protective Workers v. Ford Motor Co.)

  o Ones that don’t give policy arg that it is better to let employee recover double than employer pay nothing (Billetter v. Posnell).

b.) When employee breaches: Replacement cost of substitute (New K pro rated for length of time replacement needed – unpaid K price).

- If employee can’t prove employer could have reasonably gotten substitute: Lost profits + Reliance Expenses. (Anglia Hypo with BBC).

- Reliance expenses can include expenses incurred before K when there is reason to believe performance is certain (i.e. common carrier
has duty to take all business and not free to back out as in personal services K). *(Security Stove).*

- **Reliance expenses do NOT usually include expenses incurred after breach, which P takes at his own risk.** *(Dempsey).*

- **Employer can recover lost profits only when they can be proved with reasonable certainty.** Burden of proof is on employer to measure lost profits and expenses incurred. *(Chicago Coliseum Club v. Dempsey).*

- **When profits are uncertain, at least give reliance expenses alone.** *(Dempsey).*

**II.) Restitution:** Backward-looking; restore to former value.

- **Available only when there is benefit conferred on one party at the expense of the other, and retention of benefit would be unjust.**

- Doesn’t matter if there is K or not. If benefit conferred to D at expense of P, P can sue in Restitution for FMV of his services at t/p rendered.

- **Some courts may say it also doesn’t matter if D did not retain the benefit. If P’s work was done in reliance on statements of compensation by D or at the request of D, but suing in reliance on K is unavailable (b/c Statute of Frauds or indefinite K, etc), P may recover in restitution.** Think of this as a benefit to the breaching party of getting the non-breaching party to do something it would not have otherwise done. However, deduction must be made for any benefit accrued to P as a result. *(Kearns v. Andree* note case where K was unenforceable b/c indefinite but P acted to his detriment by making lots of changes to construction and *Farash v. Sykes* note case where P did work in reliance but Statute of Frauds made K unenforceable).

  1.) **But the plaintiff cannot recover for damages which the defendant did not request.** It all depends on a determination of what it was that the party in breach “requested” and agreed to pay for. *(Curtis v. Smith* note case P quarried stone to build D wing walls but could not recover restitution b/c D did not ask for labor but completed walls – P was working for himself when quarrying).

- **But if there is a contract:**

  i.) **When non-breaching party has partially performed before breach,** non-breaching party has two choices:

  a.) **Stop performing and sue in K or Restitution, whichever gives more.** May choose restitution when K unavailable (b/c of Statute of Frauds, for ex.) or when K damages (Lost Profits + Reliance expenses) inadequate.

  b.) **Complete performance and sue only in K. Lose chance to sue in Restitution!** *(Oliver v. Campbell).*

    o **When non-breacher sues in Restitution: FMV of P’s services at t/p rendered, without regard to K price, - any money already paid** *(United States v. Algernon Blair).*

      - If market value of P’s services is not given, look at P’s expenses incurred prior to breach and add a little to give P profit.

  ii.) **When breaching party has partially performed and then breaches:**

    a.) **Breaching party can only sue in Restitution, never in K.**
When breacher sues in Restitution: FMV of services at t/p rendered up to K price (K price is upper limit) – D’s expectancy damages (replacement cost for substitute if employment K). *(Briton v. Turner)*

- K price serves as upper limit on recovery b/c in competing claims of K and Restitution, K claim prevails.
- In employment K, must deduct D’s replacement costs to give him expectancy.
- Usually it doesn’t matter if breach was willful or not.
- **When builder breaches construction K:** builder may not be able to recover in restitution if buyer can prove he was not benefitted by builder’s work. Unlike in personal services K where employer automatically receives benefit from P’s services, buyer in construction K merely retains possession of land and may or may not be benefitted. *(Kelly v. Hance)*.
- **Breacher cannot recover down payment.** This would defeat purpose of down payment, encourage breach, and promote litigation. *(Thatch v. Durham* note case where breacher tried to recover down payment).

2.) **Equity Remedies:** Separate from court of law; relief in form of specific performance, injunction, appt of receiver, reconveyance of land, or declaration of trust. Literal expectancy, rather than money damages.

- **Available only when there is not adequate remedy at law or in seller breach of sale of land Ks,** and even then may not be granted (w/in discretion of court).
- **Parties cannot include provision for equitable relief in a K clause,** if they do it will be invalid – only courts can decide to give equitable relief. *(Manchester Dairy)*.
- **Possibilities for no adequate remedy at law:** difficulty in proving lost profits with reasonable certainty, difficulty in procuring substitute, or likely that damages could not be collected. *(Restatement, Second §360: Factors Affecting Adequacy of Damages).*

  i.) **Sale of Land Ks:** Adequacy test doesn’t apply

  a.) **When seller breaches sale of land K,** buyer may automatically recover for equity regardless of possible remedies at law.

  b.) **But in lease K (not sale),** when lessee has made resale K, lessee may not recover in equity because value of land is no longer uncertain when can be measured by price set in resale K. *(Van Wagner Advertising Corp. v. S&M Enterprises).*

  o **Lessee may also not recover in equity when harm to D is disproportionate to benefit to P.** For ex, when seller would lose great profits if forced to provide specific performance and buyer would only gain small benefit. *(Van Wagner).*

  o **When lessee is planning to use land (not resell),** lessee may recover in equity. *(Van Wagner Hypo).*

  ii.) **Inadequacy of damages Ks**

  a.) **When seller breaches sale of goods K,** buyer may not recover in equity *(b/c lost profits provides adequate remedy at law) UNLESS loss to P is cannot be proved with reasonable certainty.* For ex, if P depends on sellers to run business, and breach by one seller would give precedent for breach by all sellers, such breach would ruin P’s entire business. *(Curtice Bros and Manchester Dairy).*
When seller breaches K for sale of unique goods for which it is reasonably foreseeable that there is no market. (*Autographed baseball sale hypo*).

When seller breaches K for sale of uncertain quantity of goods, buyer may recover in equity. For ex, if sale was for all crops grown by D in one yr, P would not be able to prove lost profits – no adequate remedy. (*Eastern Rolling Mill v. Michlovitz* note case with K to buy all steel scrap produced by D).

Where specific performance seems impractical or unduly harsh, the court may declare an injunction enjoining the breaching party from pursuing alternatives made available by their breach, thus attempting to compel performance. (*Manchester Dairy*).

iii.) Personal Services Ks

a.) When employer breaches personal services K, employee may NOT recover in equity because of mischief that arises from forcing two people to work together. Plus, it’s too difficult to enforce. (*Fitzpatrick v. Michael*).

b.) When employee breaches personal services K, employer may NOT recover in equity because of problems with involuntary servitude. (*Fitzpatrick*).

- When employee breaches, specific performance will not be ordered UNLESS the employer cannot find substitute, because employee possesses such unique and exceptional skill. (*Pingley v. Brunson*).

- Also, injunction will not be ordered UNLESS K contains express non-compete clause. (*Pingley*).
  - Courts view non-compete clauses with strict scrutiny, only granting when necessary and not unreasonable.
  - If unreasonable non-compete clause was made in good faith, courts may alter to render it enforceable. For ex: by reducing # of years or limiting territory that employee cannot work for competitor. (*Data Management, Inc. v. Greene* note case which had 5-yr noncompete clause covering all of Alaska).

iv.) Generally courts will nor order specific performance when would require unduly burdensome court supervision. This is usually true in construction Ks b/c of large labor element, but some exceptions:

a.) In *City Stores Co. v. Ammerman* note case construction K, importance of enforcement to P was great because monetary damages would be difficult to calculate (P would have lost immeasurable business growth from expanding to suburbs) and since construction was part of bigger shopping center project for D, could use other leases to fashion order.

v.) Courts will generally defer to arbitrators’ decisions when parties have undergone arbitration, even when goes against what courts would usually do.

vi.) Also no equity when bargain is hard or unconscionable. Though courts will not look to adequacy of consideration, decision to grant equitable relief is within sound discretion of court. (*Woollums v. Horsley* where uneducated, untraveled landowner sold mineral rights for much less then they were worth).