Chapter 3: Making of Agreements

Mutual Assent: Ideal- offer, acceptance, (promise to sell, promise to buy)

Objective theory: outward manifestations of party’s assert sufficient to create reasonable reliance by the other party. *Embry v. Hargadine, McKittrick* (“Go ahead, you’re all right”)

**Objective Theory requires** 1) Reasonable person to believe 2) Honest belief of person that relied

**Objective Offer in Employee Handbooks Despite Disclaimer**

If employee is reasonable to rely on promises in handbook, (if handbook is intentional, objective manifestations of assent) then a contract was formed.

*Pine River State Bank v Mettile, Minn 1983*

- Contract created by handbook, if no disclaimer present
- Handbook language constitutes offer, offer is communicate in dissemination of handbook, employee retains employment is acceptance and consideration

*McDonald v Mobil Coal*

- Disclaimers must be conspicuous to be effective against employees and that conspicuousness is a matter of law.

*Woolley*- Clarity of disclaimer is essential, otherwise employee belief that certain promises have been made when the employer promises nothing

*Kari v. General Motors Corp, Mich Ap 1977- Disclaimer italicized and in red outline:*

- NO contract, Disclaimer Conspicuous, & handbook “Couched in disclaimers”
- Employee should realize that further negotiations are necessary to create a contract

Enforce promissory estoppel against employer?

Promissory estoppel:

1. promise be one likely to induce action, does induce
2. that such action be of a definite and substantial character
3. circumstances be such that injustice can be avoided only by the enforcement of the promise

**Advert is not an offer** → *Moulton v. Kershaw, 1884- Reasonable reliance? NO*

Soliciting of patronage/advertisement, no use of “sell”

1. Simply a notice general language possibility to sell salt at stated price
   a. Seller has a limited quality
   b. Does seller intend to give buyers that power to buy all that they want
   c. Reasonable to assume offer is within limit of amount available
2. Uncertainty of quantity that will be ordered cannot fix damages
3. IF it stated we will sell you salt you will order = BINDING CONTRACT to sell a reasonable amount II would have ordered

**Quotation of prices is not always an offer to sell, but language is more than a quotation of prices** → *Fairmount Glass Works, 1899*

Determine the Intent/Reasonableness of the parties- View correspondence as whole

- Language is more than a quotation of prices, “Please advise us of the lowest price you can make us on our order” = Make us an offer: could only be deemed as price it would sell for Objective standard.
For “immediate acceptance” = to sell at these prices if accepted by buyer

**Indefiniteness prevents** courts from determining what parties have assented to and calculate damages → Nader Hypo

- Restatement §33: **Terms of contract must be reasonably certain** → provide as basis for determining the existence of a breach and for measuring damages

  1. Failure to include term - Deli, Nader
  2. Failure to make included term definite - Fairmount Glass
  3. Ambiguity of meaning of term - Raffles-Peerless
  4. Vague term - what kind of chicken?

1. **Unspecified Type: Wilhelm Lubrication Co**
   - Offer sell oil but type is unspecified; Seller repudiated before orders entered, manifested assent; indefiniteness → NO Contract, “no meeting of the minds”-- subjective
     - Need definite as to **quantity** and **price**, particularly for measure of damages
     - To take average or arbitrary would be to remake the contract

2. **Unspecified Method Price Joseph Martin, Jr. Deli** - renewal clause on lease P “to be agreed upon”;
   - A mere agreement to agree, in which a **material term** is left for future negotiations is unenforceable → Price not there
     - Especially in sale or lease of real property AND in specific performance
     - Courts enforce promises; don’t impose own conception of what parties should or might have undertaken.
     - Parties have not agreed to a reasonable price or any other mechanism

3. **Latent Ambiguity: Mutual Misunderstanding** → **Raffles, Which Peerless?**
   - Subjective: No mutual assent → didn’t agree on same ship
   - Objective: Yes Mutual assent → But what ship?; no basis for enforcement

**Solutions to Indefiniteness**

1. **“least-level-of-benefit”** Minimum of certainty = damage is the least profit which the Π would have made on any of the yarns which Δ was entitled to specify under the K. **William Whitman & Co v. Namquit Worsted Co**, UCC 2-204(3)

2. **Course of Dealings - May Metro** v. May Oil Burner - Past interaction may be used to determine meaning of uncertainty, previous series of annual renewals - how they normally arrive at a quantity - criteria - mechanism used
   - Goods are fluid - transaction occur frequently
   - Real Property - stability of title is important

3. **Trade Usage/Customs - Flower City Painting - Which walls?**

4. If one party becomes aware of the ambiguity or different interpretation it has a **duty to inform** the other party of the ambiguity, **Dickey v Hurd, 1929**

**Section 2. Control over Contract Formation**

Offeror is the master of the offer - Terms, duration, means of specified acceptance

**Revocability of the Offer**

1. Offeror may revoke the offer at any time prior to offeree’s acceptance. **Dickinson**

2. **Indirect revocation** - offeree discovers reasonable reliable information
3. Reasonable length of Time- (Jury question- nature of K, business practice, other circumstance offeree knew or had reason to know) Textron v Froelich

4. Specified Time Limit
   a. Caldwell v Cline- Time Limit- Should Look at intent of offeror “8 days”
      i. Whether a time constraint of specified days on acceptance begins when letter is received or when it is written.
      ii. In law offers are allowed no existence until they reach the intelligence of the person to whom they are addressed????????
          o Offeror objective Intent 8 days from reasonable time delivery ordinarily took
          o **What is offeree reasonable perception** ➔ Mail take one or two days-(delay?)

5. Death, terminates power of acceptance/indirect, if it has not been executed or acted upon. Jordan
      1. Unilateral contract- Contract that is formed for a promise is exchanged for performance. One in which no promisor receives a promise as consideration for his promise. K formed only by performance- Revocable until full performance
         a. Offer of a reward; cannot accept by promising; only by performance
      2. Bilateral contract- one in which there are mutual promises between two parties to the contract. **Presumption when case of doubt**

*Davis*

- **Intent of offeror as revealed by facts and circumstances of each case.**
  o Mr. Whitehead was seeking promise for performance after his death
  o He begs and pleads ➔ desires a promise to give him confidence and needs assurance
  o Mr. W did not reject acceptance—but he wouldn’t reject promise in unilateral promise

Distinguish Unilateral & Bilateral ➔ walk across bridge. 1/2way thru A revokes

**Unilateral**- revocation enforced- Offer Revocable until full performance
  o **BUT:** Restate §45: Option Contract created when offer invites offeree to accept by performance; once performance is begun offer is not revocable.

**Bilateral**- immediately protects offeree; BUT
  1. Protection is not cost free ➔ offeree protected from revocation; but liable now for breach
     o **Presumption:** Typical Intent of offeror to invites promissory acceptance
  2. Even if there is a presumption it is still possible to make an offer for unilateral contract- offeree vulnerability remains Brackenbury

*Brackenbury v. Hodgkin, Equity, 1917, p385*

M to D to maintain and care for M during her life; dispute; D sues for home in Trust

- Moving and entering upon performance of specified acts creates a completed and valid contract.

Whether an equitable interest in Π is created by the letter?
Yes a letter or other memorandum is sufficient to establish a trust provided its terms and relations of the parties to it appear with reasonable certainty

WHY is TRUST GRANTED:
- Fitzpatrick v Michael says no specific performance for service contracts
- What else could be available

**Form of Acceptance - Offer is master**
Offeror has power to specify particular way acceptance must be made.
- Absent specification/ when in doubt mode of acceptance may be “construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.” UCC
- Performance is acceptable means unless it won’t come to offeror’s attention in the normal course –ie not reasonable-in-the-circum.

- explicitly stated irrevocable for set time period (or reasonable time)

**Mier v Hadden, SC MI, 1907**
An option contract for sale of land on behalf of buyer with $1 paid as consideration may not be revoked by seller before the stipulated date.
- Δ revocation after hearing oral notification of intent to exercise is not valid.
  - Restate §87: Offer is binding as an option K if it is in writing, recites a purported consideration for offer, and exchange is fair term and reasonable time.
  - UCC Firm Bids - “a signed writing by a merchant which by its terms gives assurance to hold open is not revocable” (<3months).

**General and Sub Contractors**

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<tr>
<th>D bid to P</th>
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<th>P gets K w/ O</th>
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**Offer Revocable by Reliance and use**

**Baird, Learned HAND- 1933**
YES, sub can revoke because there is no mutuality of obligation
- Gen could have revoked offer to Owner once sub revokes but still suffers loss
- Contractors did not suppose that they accepted the offer merely by putting in their bids.

**Promissory estoppel** due to a contractor’s reliance on its quoted prices to bid for a construction contract.

NO, D bids to P - Offer is not a promise until there has been assent to the exchange

**Drennan, Traynor, 1958**
1. Use of subcontractors figures is not acceptance. Offer is revocable at law. BUT
2. Enforceable [through promissory estoppel] due to a contractor’s reliance on its quoted prices to bid for a construction contract.
   - YES, Bid was likely to induce, action is definite and substantial in character & General is irrevocable bound, injustice can only be avoided by enforcement of the promise
   - Δ expect and wanted Π to rely on its bid; purpose of inducing reliance
Counteroffers and Deviant Acceptance

Livingstone v. Evans, SC of Alberta, 1925, p416

1. Rejection ends offeree power of acceptance
2. Counteroffer is a rejection of the original offer, Hyde v, Wrench
   - A response was more than a simple rejection, it was a renewal of the original offer
   - “Cannot reduce price” meaning the he was still standing by it and therefore still open to accept it.
     - LOOK at intent of seller;
     - B: “send lowest cash price. Will give $1600 cash.” S: “cannot reduce price”
     - Response must be considered as answering the question. Like in Fairmount Glass

Deviant Acceptance - any counteroffer rejects original offer; starting the bargaining process over again. Original offeror becomes offeree.

- Offeror is master, MIRROR IMAGE RULE, can’t change anything even a penny.
  - Except immaterial changes, but what are immaterial??????
1. Accept price, but “is the tractor included?” just an inquiry
2. Accept Price, but must have good clean title - implicit already
3. Accept Offer, how about close or lawyer’s office - mere suggestion
4. Accept Offer, and schedule closing offer at my lawyer, if nothing is stated they must close somewhere, ➔ offeree is changing terms Ardent - conditional
5. “grumbling acceptance” ➔ still acceptance

REALITY: Not so simple in complex, lengthy dealings, numerous terms, often dealt with at numerous times

- UCC §2-204- sale of goods in any manner sufficient to show agreement and declares unnecessary an actual id of the offeror, offeree, and moment of contract
  - Both parties just need to assent to the terms
- FORMS- Mirror image rule - complicated when both buyer and seller have form, with terms of boiler plate paragraphs, which form controls, FORMS don’t match, but both parties have performed

Battle of Forms: Common Law: whoever fired the last form controls.

UCC 2-207- Contracts for the Sale of Goods

- Definite express of acceptance makes contract even if acceptance express additional or different terms. (Mirror Image Rule gone)
  - If the additional terms are proposals for addition to the contract
  - If the parties are not merchants need additional assent
  - If the parties are MERCHANTS then become part, except
    - If materially altered - question of fact
  - IF writings of party do not form contract
    - Conduct of parties may tell use that there is a contract, even if writings don’t
      - Terms of the contract are then determined by
        - Terms that parties agreed to
        - Then go to gap filling of UCC Section 2, unless otherwise agreed....

Acceptance by SILENCE/ Duty to SPEAK

Hobbs v. Massasoit Whip, p448- Prior Dealings

- “Silence will not constitute acceptance of an offer in the absence of a duty to speak”
- Duty to speak when: Offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent.”

Reasonable understanding; Rest § 69

1. Prior dealings
2. Accepts Benefit w/ reasonable Time to reject and know Offeror expected compensation-
3. When ambiguous offer from offeror, assent is based offeree performing form of demanded assent and *offeree intends to assent*—Offeror is Stuck (Flag Hypo)

**Parol Evidence Rule- Rule of Contract, Enforceability of agreements**

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.

**To be Admissible parole evidence must:**
1. It must not contradict with express or implied provisions of the written contract
2. It must be one that parties would not ordinarily be expected to embody in the writing; can’t be so closely related that it would have been in contract

APPLICATION: *Mitchell v. Lath*, - Ice house removed?
1. It seems the contract was *Fully integrated*: embodied all obligations in detail
   a. Are they to do more? It seems unlikely #3:
      i. It seems most natural that obligation would be IN the contract
   b. Not even evidence of PI finding icehouse objectionable is enough

*Hatley v. Stafford* ➔ Credibility and Naturalness- K to farm land w/ buy back option

Nothing is contained in the K with respect to the duration of the buy out clause, so an added oral time limitation is “not inconsistent” with the terms of the K.

➢ “Inconsistent” is loosely defined; must *negate a term of the writing*
➢ Determine “naturally” consider surrounding circumstances and K as whole-
   o Business experience- Not a sophisticated transaction
   o Bargaining strength of parties
   o Apparent Completeness and detail/extensiveness of the writing
     ▪ Handwritten Document
     ▪ Without aid of Counsel
   o Although not conclusive, reasonableness of K without clause? Favor Reason over Absurdity
     ▪ Literal Reading would led to an unreasonable result ➔ sell land worth $400 acre for $70 acre *Hatley*
   o UCC 2-202- *Intent of Parties (not purely objective)*- Integrated agreements discharges inconsistent prior agreements, but may be supplemented or explained
     ▪ By course of dealings; trade usage, PE of consistent additional terms; unless court finds K is complete and exclusive

**PER Doesn’t Apply to**
1. **Proof of Fraud** and tort claims not prevented by PER,
   Distinguish *Mitchell*- Δ statement is a promise, Δ carsaleman is a statement of fact
      ➢ Fraud has nine elements: 1) representation of fact;
      ➢ Promissory Fraud: if in *Mitchell* Δ made promise with no intention to perform

2. **Subsequent Agreements**
3. **Evidence to Show Misunderstanding**
4. Agreements made for *Separate Consideration*
5. ***Disclaimer sale “all terms of agreement” integration/merger clause- boilerplate is not conclusive
6. Supplement or Explain Meaning of Words
   *Pacific Gas v. GW Thomas Drayage* (even when the words don’t appear ambiguous)
   a. A rationale interpretation requires at least a preliminary consideration of all credible evidence offered to prove the **intention of the parties**
      i. Place itself in the same situation as the parties/Context
         1. Understand trade usage
         2. Course of Dealing- common to these two parties
      ii. Parties understandings of the words
   b. The K was **reasonably susceptible** to that meaning
      i. Indemnify- could mean 3rd party
   c. The party challenging the literal meaning must present **objective evidence**, not just his say-so, that the K does not mean what it says, *Federal Dep Ins Corp v. WR Grace*

P502- *Bethlehem Steel v. Turner*- only where K is ambiguous on face may extrinsic evident prove intent of parties

Interpret parties meaning of language: “ex Peerless”, *Kline-* “8 days to accept”, *Livingstone* “can’t reduce price”, *Painter “paint wall”, *Van Wagner* “power to terminate lease in good faith sale of building”- can purchaser terminate?

*Course of Dealing*- Hobbs- “eel skins”, Deli- May Metro- “quota”,

**Standardized Forms and Assent**
Are the parties always responsible for what they sign?

➢ Whether or not party has read? Presumed assent
➢ Signature manifest assent ➞ Objective Theory of Assent
   o Without rule written contracts would be useless

**Elements to Consider:**
   2. Terminology used- “Plain English”- Ordinary person actually understands- (*Richards-*)
   3. Relative Bargaining Power-
      a. Freely negotiated-
   4. Actual Knowledgeable Assent of terms (*Broemmer-, Henningson-*)
      a. time to read, Prevents you from read/impedes
      b. Actually read, directed to read, put on Notice
   5. Misrepresentation- Other statements by party
      a. Way document is presented Nature or Essence of Form
      b. Dual nature
   6. Duress- (vs “take it or leave it” adhesion release (*Sharon-cheerleader*)) (*Gateway*)
   7. Unconscionable Result-

**Conspicuous:** *Mundy v Lumberman's Mut., p514-* Insurance Policy Silverware coverage
   1. Table of Contents: SOME POLICY CHANGES
2. One page summary of changes: separated and with bullet points
3. 12 page policy: “Special Limits of Liability” in text and readable English

Whether changed terms of the renewal policy are binding → Yes there was adequate notice.

**Henningsen v. Bloomfield Motors, Inc. SC NJ, 1960 p520**
Manufacture’s sale K that in fine print disclaims implied warranties and creates express warranty which limits manufacturer’s liability to replacement of defective parts is legally enforceable?

Cannot uphold the general rule of parties bond by K strictly

- **Bargain power is grossly unequal**, oligopoly
  - All manufacturers use warrant- no competition to stimulate good will
  - Buyer has no other means of fulfilling the specific need represented

- **No Knowledgeable Assent**: II was not **Specifically** called to attention of the warranty
  - Would not relinquish any personal liability claim

- Public Policy, Sales Act permits agreements between b&s qualifying the warranty
  - NOT grossly disproportionate bargaining power to **relieve liability of seller**

- Other cases- **Strict Construction**- don’t understand legal consequence
  - Common Carriers Parcel check, storage warehouse, garage tickets, L&T clause Baggage checks
    - Not enforceable unless fairly negotiated
    - Specifically called to patron’s attention- **Knowledgeable Assent**

**Richards v. Richards, SC Wis, 1994, p527**
Exculpatory contract Generally disliked because they tend to allow conduct below the acceptable standards of care applicable to the activity.

- **Balance freedom to contract with principle of tort law to compensate injured persons**
  1. The purpose was contrary to the name- **Unclear- strict construction?**
     a. Passenger Authorization does not conspicuously label the contract as an exculpatory clause to put the person signing it on notice
     b. Dual purpose of authorization and release of liability not clear
        i. Should have carefully id and separated the sections
  2. Extremely broad and all-inclusive
     a. Purports to include intentional, reckless, and negligence conduct **ONE-SIDEDNESS**
  3. Form contract- Employee hand book- **Notice- Knowledgeable consent**
     a. Offers little or no opportunity to negotiate- NO Bargaining power
        i. Significant when considering the **breath of the release**
     b. II was not advised or put on notice of legal consequences of K

Notice and Knowledgeable consent, Strict construction, Public Policy all together

- Covert tools are not reliable tools- deal with substantive tools
Strict construction - torture the language to construe the meaning - Richards - very first words say release - Release is way to broad - all/any,

**Hill v. Gateway 2000**, Order computer over phone; Arbitration clause arrive later with product
Rationale Very Stupid--
- SO there is NO acceptance until silence after 30 days???:(
- Fairmount Glass - look to reasonable understanding of parties?
Klocek v Gateway, 2000- II sues Δ for breach of its promise of tech support. Δ moved to dismiss—Disagree very strongly with Hill
In typical customer transactions, Seller it’s the offeree; the Buyer is the offeror?

Insurance company ➔ mode of acceptance - silence ➔ look to subjective intent of offeree - too bad for the offeror, he is bound, but doesn’t have power to force others into K.

**Hennington** - Challenge provision - contrary to public policy is reason for invalid
Here- there is a strong public policy favoring arbitration, but still unenforceable

**Broemmer v. Abortion Services - Arbitrate, K of Adhesion, Reasonable expectation?**
Courts look to two factors in Contracts of Adhesion
1. The reasonable expectation of the adhering party
   a. No clear waiver of a trial by jury, did not explain terms,
2. Whether the contract is unconscionable
   a. Henderson “a court will find less reason to regard the bargaining process as suspect if there are no terms unreasonably favorable to the stronger party”

- II was under **emotional stress**, only **high school** education, **not experienced** in commercial matters, and is STILL **not sure “what arbitration is”**.

**Grounds for Enforcing Promises**
1. **Consideration Hamer v. Sidway** *Don’t drink until you’re 21, $5,000)*
   a. Legal benefit to the promisor, OR
   b. Legal Detriment to the promisse
      i. Forgo a legal right/Limit future conduct
   c. OR reasonably reliance by promisee to his detriment

- We need not speculate on ACTUAL EFFORT to keep promise, *Earle v. Angell* (nephew to funeral)
- Hope or expectation is not reliance *Congregation KTM v. DeLoe*

**Fischer v. Union Trust Co., SC Michigan, 1904, Equity case**
Even if the gift has been started, the promise is only enforceable by delivery
Gift of house, promise to pay mortgages before:
- Consideration for deed is completed by signing and delivery.
- A promise to make a gift of personality can be consummated only by an unconditional delivery of the thing.
2. **Bargain: A MUTUAL Reciprocal Inducement**

- Sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise,
  - unlike in *Whitten v. Greenley-Shaw* (g/f promise not to call)
  - unlike *Fischer* dollar/baseball after the fact ➔ not inducing factor
- Promise doesn’t have to be the primary inducement, *Simmons*, fisherman
- Ordinarily “**Mere inadequacy of consideration will not void a contract**” *Batsakis v. Demotsis*, p218
  - Then why no consideration in *Schnell v Nell* and *Blackacre*?
    - Clearly unequal values for 1 cent for $600 or the land for $1
    - (things of fixed, not indeterminate value.)
    - **Not dollar is inadequate consideration, but not inducing factor**
    - **Bargain is a sham**, unconscious contract
- If court second guess our agreements then that limits economic transactions
  *Buckner v. McIlroy*,

*Duncan v. Black*, CtA Mo, 1959, Farmer and crop allotments

Forebearance of claim or defense is **consideration**, even when doubtful as long as:
1. **good faith**, honestly believed enforceable
2. **some foundation**, But in *Duncan* allotments are for 1yr only so no way could promise more- No consideration beyond 1 yr
   a. A claim based on a contract which is against public policy or illegal,
      cannot for the basis of consideration for a valid compromise settlement.

Restatement: Section 74. Settlement of Claims, p222
1. Forbearance to assert or surrender of a claim or defense which proves to be Invalid is not consideration unless
   a. The claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
   b. The forbearing or surrendering party **believes** that the claim or defense may be fairly determined to be valid
2. The execution of a **written instrument** is enforceable if bargained for.

**Promise grounded in the past or Moral Obligations**

**Promise to Pay Barred Obligation**:

Moral obligation is commonly invoked as consideration for a voluntary revival of a promise to pay an obligation on which:
1. The statutory period of limitations has run
2. The Bankrupt debtor’s promise to pay a discharged debt
3. Promise to pay a contract obligation that incurred while a person was a minor/infant

- **In all these cases there is a previous mutual reciprocal inducement an antecedent consideration.**
- Voidable contracts include (affirmed or rejected at option of one of the parties)
  - Those made as a infant/ Fraud, duress, mental incompetence/simple mistake

*Mills v. Wyman*, Supreme Judicial Court Mass, 1825

II nursed sick son, father promises to pay expense, reneges
there is no mutual reciprocal inducement, there was never any inducement for PI services, 3rd party promise
Law of society has left most moral obligations to the parties conscience.

**Webb v. McGowin, CtA Alabama, 1935**
II working fell with the pine blocks to avoid hitting McGowin, II was badly crippled for life, promise to pay rest of II life, Δ dies payment stops

- If benefit be material and substantial, and was to the person (not estate), it is within the class of material benefits which promisor has privilege of recognizing and compensating either by payment or promise to pay
  - Exceptional/Emergence Situation- **don’t need MRI**
  - Emphasized when compensation is not only for benefits but injuries to the promisee

**Harrington v Taylor, 1945, II stopped ax from hitting Δ, Δ promises to pay damages**

- Humanitarian act, voluntarily performed is not consideration for sub promise
- **Always need mutual reciprocal inducement**

**Presumption for Restitution**
1. Self-interested/professional if you do work for stranger. *Edson, Muir*
2. Kindness/Gratuity if you help your friend, family member- gift and gratuitous. *Schoenerman.*

**Promissory Estoppel- Reliance as Consideration**

**Kirksey v. Kirksey, SC of Alabama 1845**
Δ, brother-in-law give land for widow, widow moves, takes away later
This promise was mere gratuity, and expenses of moving not detriment

- Δ promise was not motivated by II actions; NO mutual reciprocal inducement
- In *Hamer*- benefit or inducement is satisfaction that the nephew is living a healthy life
  - Uncle is intentionally influencing or restricting nephew legal rights
- Partial performance does not make gratuitous promise binding. *Fisher* didn’t pay off mortgages, *Harrington* axe case

**Rickettes v Scothorn, 1898, p245 CREATED PROMISORY ESTOPPEL**
Grandfather gives II promissory note so II would have to work

- He gave the note in gratuity and looked for nothing in return,
- She did not have to stop working, NO consideration
- BUT: He intentionally influenced the plaintiff to alter her position for the worse, stop her income flow on the faith of the note being paid
- **Reliance on promise**- expenditure of money or assumption of liability by the donee and Δ can be estopped from denying payment and denying consideration

**Prescott v Jones, 1898- EQUITABLE ESTOPPEL**
Δ, insurer, wrote II that policy would be renewed “unless notified to the contrary. II never responded, never paid premium, Δ cancelled policy, II building destroyed by fire.

- Statement of Fact about the past or present- Δ must act can enforce estoppel
- Statement of Intention- “we intend to renew policy” b/c of contingencies NO estoppel

**East Providence Credit Union v. Geremia, SC RI, 1968, p259**
Promissory estoppel: the acts of reliance by the promisee to his detriment provide a substitute for consideration.

- Promissory estoppel: the acts of reliance by the promisee to his detriment provide a substitute for consideration.
  - Did Δ rely on the promise and would otherwise would have paid?

**Emphasis on Injustice.**

- May be other reasons for enforcement of promise without consideration
- Unfortunate that courts use estoppel. Circuitous, around the issue, shut-up can’t deny you made promise,

Evolution of Promissory Estoppel

*Kirsey* 1845 (bro-inlaw)- unwilling to enforce on reliance

*Seavy (son gets land)* - 1882- court in equity will give effect to reliance

*Prescott/Rickittes* 1898- law court struggle no/yes

*Sears* 1967- reliance is now accept as enforcement, but not in this case

**Standard situation where promissory estoppel is used based on reliance**

1. charitable subscriptions
   a. *I&I Holding v. Gainsburg, NY* 1938
      i. Evidence of reliance not needed when pledging to charity; enough that a request or invitation to the promise to go on with its work can be implied.

2. Oral promises of land followed by entry and improvement **Expenditures in reliance**
   a. *Seavy (son) v. Drake (dad’s executor), SC NH, 1882, 264*
      i. Π’s father gift a portion of land, never gives deed, but Π make expenditures on land
         1. Entry into possession by promise, with promisor’s acquiescence, is CRITICAL element. Sometimes payment too. Most states hold possession + permanent improvement will suffice.
            - Statute of Frauds- in part performance cases would allow fraud of vendor
            - Usually in sale of land not gift of land
            - Specific performance: “Reliance must be something more beyond injury adequately compensable in money.”
            - If restitution will make Π whole then no need for equity
            - Statute of Frauds doesn’t block restitution

**Reliance** must detrimental loss or **substantially change his position** by entering into that business upon the faith of promisor’s promise

**Remedy** is only what justice requires, direct loss suffered as a result of reliance- *Hunter*

- Full enforcement or reliance loss (what does “as justice requires” deem)
- 1975-85: one-sixth 16% limit relief to reliance damages

**NO mention of estoppel**
**Section 90:** Promise Reasonably Inducing Action or Forbearance
1. Promisor should reasonably expect to induce action or forbearance of a **definite and substantial character** on the part of the promise.
2. Promise **DID** induce such action or forbearance
3. circumstances be such that injustice can be avoided only by the enforcement of the promise

**4. Section 139:** To determine whether injustice can be avoided only by enforcement the following circumstances are significant:
1. availability and adequacy of other remedies, particularly cancellation and restitution
2. definite and substantial character of the action or forbearance in relation to remedy
3. extent to which action or forbear corroborates evidence of the making of a promise or otherwise making and terms are clear and convincing
4. reasonableness of the action or forbearance
5. the extent to which the action of forbearance was foreseeable by the promisor

**Employment Contracts**

*Forrer v. Sears, Roebuck & Co., SC of Wis, 1967, p271*
Π worked, came back, sold farm at loss, fired 4 months later
Π trying to Tort of deceit and avoid any notions of contract, p283 Fried v Fisher
➢ Really trying to enforce promise, p273

Promissory estoppel is not applicable in this case, employer, Δ, fulfilled his promise
➢ There is no fixed term of employment so assumed it is terminable at will by either party
  o Employees don’t intend to bind to employer for life
  o If we don’t know exact duration, how can we fix damages

If employee furnished “additional consideration” in exchange for the Δ promise of permanent employment, other than services rendered,

**Section 5. Promises of Limited Commitment**

Hypo: R hires E for 3 years, $75,000/yr,
After 1 yr R fires E, Employees promise to work is consideration for the promise.
Before E starts R fires E, Shirely- employees promise to work is consideration

Ellis sell car to G for 35k- consideration if performance promised would be consideration if IT ALONE were bargained for.- Substance alone were bargained for
What if ellis doesn’t desire for promise, just wants G to show up at time w/ cash $35k
Galleria G is not induced by J showing up at Galleria, no consideration
Seller breach
Acme Mills- enforceable
Curtis- before any performance enforceable
G, buyer breach
Neri v Retail- buyer breach

**3. Mutuality of obligation**
1. **99% of the Time:** Promise is consideration if the performance promised, either act or forbearance, or both, would be consideration if it alone were bargained for.
2. **Mutuality of obligation**- there must be obligation on both sides, a restraint on future conduct, affirmatively or negatively
3. mutuality of obligation must **exist at inception of agreement,** terminate and any time not enforceable, terminate after some date is enforceable

*Nat. Nal Service Stations v Wolf, p292*
Δ,Seller promised Π, buyer would receive a discount if Π requested gas from Δ and Δ accepted
Neither party was bound to do anything at any time, 
Only upon accepting II, buyer’s request of gas did there come into existence a legal 
obligation, the obligation of the ∆ to pay the agreed discount 

Consideration emphasis on detriment abandons some legal right in present or limits 
legal freedom of action in the future.

Restatement Section 78
“The fact that a rule of law renders a promise voidable or unenforceable does not prevent it 
from being consideration.”

Requirements Contracts
Consideration because B promises to buy asphalt only from S, restricted his legal right to buy from 
anyone. If B breach, S entitled to damages 

- Lima Locomotive v. National Steel Castings, 6th Cir 1907- Seller “Furnishing all your 
requirements in steel castings for the remainder of the present year…
  o This means buyer was obligated to take from the seller all castings which [its] 
business should require 
  o Seller was obligated to deliver all buyers requirements requested 
  o Different from all that one “may desire” or all that one “may order”

Output Contracts Buyer agrees with S to buy all oil that S produces, 
Consideration, b/c S can’t sell oil to anyone else, S has restricted his future conduct

Obering v Swain-Roach - gave up right to acquire land and do with it what it wished 
- Parties set up Framework for future promise—In the event seller bought seller restricted his 
  future conduct by agreeing to sell to buyer which is consideration 
- AND buyer has obligated to buy land 
- A contract that is contingent upon a future act of the seller, that the seller is under no 
obligation to perform, is valid.

Paul v Rosen, gave up right to obtain lease and operate store of his choice, court is WRONG: 
enforceable at inception but conditional 
  o Once one party breaches other has no obligation to perform 
  o even if B never goes to Cali

Broader view- if parties engaged in a bargain, mutual reciprocal inducement, as long as the II 
has detriment, future restriction, so why isn’t the promise consideration enough 
- In requirements contract- extreme promise could be nothing 
- It is okay for one party to have flexibility and not the other 
- Obering/Rosen- troubled by flexibility of II believe agreement doesn’t restrict future 
  action enough 
  o But Is this any different than inquiring into adequacy of consideration 
  HOW MUCH FLEXIBILITY is permissible?

Illusory and Alternative Promises
Alternative- promise to deliver either lawnmower or bike 
Illusory- not promising to deliver either, but one subject to some out cause⇒Seller right to 
terminate at any time

Wood v. Lucy, Lady Duff-Gordon, “exclusive right/privilege” dealing contract 
An agreement between parties that gives one party “exclusive rights” to place the others 
goods/endorsements creates mutuality of obligation.

- II Obligation is fairly to be implied is to use reasonable efforts to place indorsements and 
bring profits and revenues into existence because he had exclusive rights
Lucy would get nothing if Π did not perform

Commitment to future conduct

➢ In determining the intention of the parties, Π had exclusive rights to market employers designs and indorsements there is mutuality of obligation.

Hypo:
Oct 1 K: $150,000 closing on Dec 1, on condition of buyer getting loan by Nov 1,
➢ Seller repudiates on Oct 20- buyer is under an implied obligation to try to get the loan/ Enforceable--buyer has **Exclusive right to House**

➢ Lack Mutuality of obligations concerns- When is it appropriate to assume an implied obligation? Reach of notion of implied obligation
  ▪ Look to whether performance is conditional or not

**Exceptions to the doctrine of at-will termination of employees**
1. General principle→ refuse to intervene with employer’s discretion to fire at will (Sears)
2. Certain situations **public policy** imposes limits on unbridled discretion to terminate the employment, when discharge in retaliation for exercise of employee’s right to
   a. File a worker compensation claim, directly say can’t fire
   b. Engage in union activity, Federal Labor Law Statutes
   c. Refuse to commit perjury- no statute
   d. Duty to perform jury duty- no statute
   e. Comply with the requirements of a statute, **Sheets v. Teddy’s Frosted Foods,** Uniform Food, Drug and Cosmetic Act
      1. Tort claim most successful when a discharge violates some “mandate of public policy” like in (a) and (b)
   f. Discharge of employee for filing a health insurance claim under a policy which he is a beneficiary does not violate a clearly mandated public policy, **Price v Carmack Datsum**

**Policing the Bargain- Chapter Four**
Offshoots of Mutual Assent and Consideration or are they?
**Economic Duress:** One party forced to agree to it by means of a **wrongful** threat precluding the exercise of his free will

**Austin Instrument, Inc v. Loral Corp, 1971,** gvt K to build radar setsΔ subKed with Π for, subK demands more money
1. **Immediate** possession of needful goods is threatened/risk of loss (wartime Gvt K)
2. Threatened party could not obtain goods from another source (how hard to try 10)
3. Ordinary remedy of an action for breach of K would not be Adequate- (rep/3rd party K) *(Smithwick- could have sued in equity for SP for sale of land)*

**Preexisting duty rule.** A promise to agree to do what one has already promised to do is not consideration. After duress and performance victim doesn’t have to pay duress

➢ Limitations
  o Only comes in on executory promises- promises not yet performed
  o Limits valid claims- modification for unexpected bad conditions
  o Sophisticated overreaching party will change terms on both sides=consideration
  o §2-209(1)—Removes need for consideration for modification
  o Forbearance is consideration as long as it has some reasonable basis.
    ▪ Conflicts with policy of court to encourage settlement.

**Marton Remodeling v. Jensen**-Dispute over $- O send “full payment”; Builder marks check “not full payment” cashes
1. **Objective Assent** Contracts frequently do not require actual meeting of the minds → Action louder than words, appears to be a settlement
   a. Just because Π owed at least $5,000 doesn’t negate objective Settlement view
   b. **Jeopardize a convenient and valuable means of achieving informal settlements**
      - *School Lines v Barcomb*, 1985- If there is no *“bona fide dispute”*. Debt was liquated to and acceptance of lesser amount “discharges the debt pro tanto only”.
      - *Kilander v Blickle*, 1977- Creditor may still have the right to collect “final” payment, under protest with some explicit reservation of his right to the remaining claim, UNLESS debtor has, expressly demanded a waiver of that option.

**Rescission for Mutual Mistake of material facts**
*Sherwood v. Walker, 1887*— replevin for a cow; Π & Δ- SC reverses and remanded for both parties thought to be barren
   - **IF Mutual** mistake is to the SUBSTANCE/Material, root, very fundamental FACTS
     - Mistake as to the very nature of the thing—present and ultimate use
     - **Mutual** mistake of substantial (change the nature of K)
       - More than some quality or accident even though may have been actuating motive

*Beachcomber Coins v. Boskett*- thought the coin was worth $$, counterfeit; HELD: Void
   - Where parties know of existence of uncertainty then assumption of risk is part of the bargain--- isn’t there always the risk of counterfeit?!- not enough
     - BUT here both mistakenly believed coin was genuine
   - If seller was uncertain, and took buyers believe → Different
   - If buyer negligent still does not preclude rescission

*Hinson v. Jefferson*— Δ sold Π land as **only residential purposes**, subsoil unfit for house
   1. BUT Mutual mistake is difficult to determine—
      a. **Hard to prove so don’t use in context of Real Estate**
   2. BUT- mutual mistake is not only reason—Implied warranty of use sold for.

**HYPOS:**
1. S gem merchant, B owner of store, S shows B stones, B looking at clear stone, neither say anything about what the stone is, agree on $1000, Both believe stone is a diamond
   a. Stone is a diamond, but has flaw makes it worth $100, B rescind?
      i. Under Sherwood, mistake is about value not substance (clear stone that was suppose to be a diamond) WHAT is substance, is value an essential/fundamental nature of object—Not under Sherwood
         1. **Duty to disclose latent defects?**
   2. S and B look at stone, think it is a TOPAZ, $100
      a. Stone turns out to be a diamond- worth $1000, can S rescind?
         i. D
      b. Stone turns out to be a diamond with flaw worth $100, can B rescind?
         i. Important to be able to rescind? Bought stone for $100 can sell for $100
   3. S thinks stone is a TOPAZ, B looks at it and thinks it is a Diamond, buys for $100
      a. B discovers it is really a Topaz, can B rescind?
         i. Not a mutual mistake, unilateral → S should point out obvious
   4. Kid goes to buy baseball card label 1200, clerk sells for $12, kid gets $1,200, can S rescind?

**Duty to Disclose-** *Cushman v. Kirby, p640*- sulfur water…”oh just hard water”
Duty to speak when one has “superior knowledge and means of knowledge” and knows facts are not within the reach of the diligent attention of other party. (Cheever v. Albro)

1. No implied warranty that mall will be built Warranty relates to the subject matter of the contract.
2. In sales of existing homes, there is no implied warranty of habitability. But is there a duty to disclose.
   a. Seller of house, fails to disclose basement floods, can buyer rescind?
      i. Failure to disclose permits buyer to rescind
   b. What if seller doesn’t know of flood ➔ no duty to disclose, no habitability
3. Duty to Disclose when, Hill v. Jones
   a. Duty to prevent a previous assertion from being a misrepresentation or fraud or negligence of material fact
   b. Correct a mistake of basic assumption
   c. Look to good faith and reasonable standards of fair dealings
   d. Correct a mistake as to the content or effect of a writing
   e. Entitled to know b/c of relation of trust and confidence

Implied warranty- (Henson v Jefferson)- Remedy is rescission -OR-
   i. Seller is delivering less than promised-
      1. May rescind or Enforce Kpaid – MKTactual
Mutual Mistake- (Sherwood)- K void and improvement costs are all lost, remedy is to rescind
Tort Liability- Fraud Misrepresentation- allows for damage recovery

Unilateral Mistake:
1. No duty on vendor to inform of obvious, Eytan v. Bach- antique painting?
2. A party who knew of and said nothing of anothers mistake cannot claim benefit.
   a. Even if party had no reason to know of mistake rescission is granted where enforcing K would result in, Elsinore, Donovan v RRL Corp (2001):
      1. “unfair, one-sided” contract and
      2. “overly harsh results”
      3. “an unconscionable contract”
         a. Donovan- would have lost $12,000 on a car

Changed Circumstances Justifying Nonperformance-
DOCTRINE OF IMPOSSIBILITY Change in a Fundamental assumption of the K
Taylor v. Caldwell, Kings Bench 1863- Building is destroyed be4 concert
Implication is made as to the continued existence of a thing
   ➢ Personal performance contracts where party dies, excuses performance
   ➢ Destruction of chattel before it is delivered/title transferred to the vendor excuses performance, Rugg v Minett. (But if title has passed then buyer must pay)

Look to fulfill the intention of the both parties- Is there some other basis?
Is the purpose of K prevented?
   ➢ Parties based K on continued existence of the Hall—BOTH parties excused.
      o If hall unimportant to Π, K is not excused
Impossibility?
   ➢ Objective Impracticability ➔ Actually, physically impossible-
   ➢ Subjective impossibility/impracticability ➔ Very difficult or expensive-
      o Even the extent of losing money on the contract does not justify the excuse
         ▪ Mineral v. Howard- requirements K, but gravel would cost 10-12x normal
Cost must be GREAT→“excessive and unreasonable cost”
  o Beyond assumptions of parties—like MM
Except in exceptional cases, Unexpected financial burdens caused by a shift in market conditions is unlikely to excuse performance. *Maple Farms Inc. v City School Dist*
  o *Utilities v. Westinghouse Electric*—Uranium skyrocketed- $8-10 to $40+, Δ faces loss of over $2bil, should Δ be able to rescind. Trial court HELD—NO

HYPO: A and B contract to build garage. A would build a garage for $15,000. Almost near completion fire burns down garage. A refuses to rebuild. B hires another contractor for more and B sues A for the cost of cover.
  ➢ How big is this loss that A must incur to call it impossibility?

*Roberts v Lynn Ice, 1905*—Landlord and Tenant house building burns down
If lease, T had exclusive possession for term of lease and is still liable to L.
If license, T had agreed to use of premises and fire destroys ability to use.
  ➢ Intention of Parties→ What terms of Contract State as allocation of risk.

*Kel Kim Corp v. Central Markets, Inc.* CtA NY, 1987- Roller rink insurance required
  ➢ Impossibility excuses a party’s performance only when destruction of the subject matter of the contract or means of performance makes performance objectively impossible.
  ➢ Impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.
    o Could have foreseen difficulty in getting insurance-Purpose to protect L.

**Availability of the Excuse of Frustration**

*Krell v. Henry, Ct App, 1903*—K to view Royal procession and the procession was cancelled
Not only impossibility but frustration of the Mutual purposes of the contract.
  1. In regard to all the circumstances, what was the foundation of the contract?
  2. Was the performance of the contract prevented?
  3. Was the event contemplated by the parties at the date of the contract and guarded against in K.

HYPO: Cabbie hired to take P to Race. If race is cancelled is P excused from paying.
  ➢ No, this cab had no special qualifications—Krell wasn’t so special either
  ➢ Is the race the mutual purpose of the race?
    a. NO, cabbie’s purpose is all about taking people where they want to go
    b. In Krell, the buyer and seller both have the same purpose of renting out the room, (room offer was only for day)

**Govt Interference** excuses performance if makes performance impractical/impossible
  ➢ *Isle of Mull*—S is forced to sell ship to the govt, K is frustrated and parties take gains and losses independently of other party.—English Rule
  ➢ *RR v Crowe*—When govt renders performance of lawful K unlawful- party already received benefit should pay other party. (RR right of way for free rides for life)
  ➢ Govt approval required for performance is foreseeable—party assumes risk of denial

HYPO: *Kim Kel*—What if the city had outlawed skating rinks because of danger?
  ➢ Is leasee excused? (If lease stated for skating rink only?--->yes)
    o Leasee purpose is frustrated may still operate other business
    o But Landlord’s purpose is not

**Unconscionable Inequality**

*Woollums v. Horsley 1892*—elderly, uneducated K w/ Buz man sale of land SP unenforceable
A hard or unconscionable bargain will not be specifically enforced
  ➢ Price (consideration) was grossly inadequate (adequacy of consideration?)
Disparity in Knowledge, seller moved in a small circle

Is this consistent with hypo mall where S doesn’t know but B does, and S is not entitled to rescind?

**SP is a matter of discretion** of the court, if enforcement will create injustice

- K unenforceable in equity when contract is founded in
  - Fraud, Imposition, Mistake (mutual), Undue advantage, Gross misapprehension

**Cleanup Principle:** Both as damages are given in lieu equitable relief OR as an add-on to equitable relief to complete damages. (Limited to sold to innocent 3rd party; property destroyed)

**Williams v. Walker-Thomas Furniture,** cross-collateral security **unconscionable**

**Law courts** have power to refuse enforcement of an unconscionable contract (UCC §2-302)

**Unconscionability Test**

1) *Absence of meaningful choice ***AND***
   - Gross inequality of bargaining power
   - Formation process
     - **terms of the contract** (maze of fine print?) *Obscure terms
     - manner in which K made/education of parties*Home Sales (high pressure)

2) Terms unreasonably favor other party
   - Unfair result; doesn’t actually accomplish Security for Merchant—(Threaten)

In light of general commercial background and the commercial needs of the particular trade or case. (Inherent contradiction- if all actors use same policy—No big sharks get slammed??)

**Meaningful Choice**

1. If walking away from a deal is always an option? Then there is never an **absence of meaningful choice.** Choice mean MUST.
2. On other hand if buyer says I objected to a term and Seller refused to take it out. Then all standard form K today are unreasonable.

**Duty of Good Faith and Fair Dealings**

**Doctrine of Good Faith Performance, Tymshare**

- As in Lucy- Implied Obligation “instinct with an obligation, imperfectly expressed”
  - Today- more directly rely on “morality” and “public policy”
  - **Law will impose restriction if it is implicit or wholly lacking**
    - Just as it will eliminate unlawful clauses and provisions
  - BUT apply GFP doctrine is not concept of not enforcing K for illegality

Good Faith→ faithfulness to an agreed common purpose and expectation of other party

  - Community standards of decency, fairness, or reasonableness

Bad faith → evasion of spirit of bargain, lack of diligence, willful rendering of imperfect performance, abuse of a power, interference w/ other parties performance

**Gianni v. Gantos-** Buyer may terminate at any time before shipment by S: **Unconscionable**

Rule: Unconscionability

- In light of general commercial background and commercial needs of the particular trade the clause is so one-sidedness at time of making of K it is unconscionable

Prevent unfair surprise **not** disturbance of allocation of risk due to superior bargaining power

**In applying provision consider:**

1. Relative Bargaining power
2. Is the term challenged substantively reasonable?
If clause appears to be reasonable, disparity in bargaining power between the parties will not make the clause unenforceable

BUT this clause was NOT reasonable→Cancel at any time

Review Questions:

1. Why does not the court consider mutuality of obligation?
   a. b/c Seller would be off the hook—both must be bound or neither will be

2. Why doesn’t the court invoke the preexisting duty rule?
   a. Within B contractual right to cancel forbearance of it option is consideration

3. Why doesn’t the court invoke duress?
   a. Immediate need of goods? No, attempt to sell to others? No, adequate remedy at law?

Chapter 5- Maturing and Breach of Contract Duties
Section 1- The Effects of Express Conditions

Express term is either a:

1. Covenant/Promise
   OR

2. Condition- only if some subsequent event occurs

Corbin: Condition means some operative fact subsequent to acceptance and prior to discharge on which the rights and duties of the parties depend.

Non-occurrence of a condition will

- Prevent the existence of a duty in the other party
- BUT WILL NOT create any duty to pay damages at all unless someone has promised that it shall occur
  - Subject to qualification/limits discussed all semester

Howard v. Federal Crop Ins, Preservation of stocks is a promise
If a condition→Δ does not have to perform its promise to pay for crop loss
If a promise→the Δ will still be obligated to perform its promise, but II has breached its promise and may be liable for damages

Factors to Determine Whether Express Terms are promise or conditions

1. Intent of Parties→Language of Terms (not always conclusive)
   a. Expressio unius est excluso alterius- (expression of one thing is the exclusion of another)

2. Circumstances- subject matter- context- trade usage-
   a. Effect of construing the clause→if plowing makes Δ assessment impossible then no damages are possible→legitimate reason Howard
      i. Repay loan when sell my house→Normal parties don’t intend to allocate risk of not selling to lender (unless evidence-ie- i = 40%)

   b. Effect of Enforcing the Condition—Even if Condition isn’t met a party may still recover if the other party is materially harm/prejudiced by failure
      i. Aetna v. Murphy, dentist sued; belatedly files insurance claim; insurer may not have been materially prejudiced by delay
         1. Burden of establishing proof on the issue of prejudice in on the insured.
         2. (Most cases hold burden is on the insurer)p764
      ii. Breach by one party that causes little damages to the other does not justify the other in cancelling K. Turner v. Chester (material breach only)

3. Presumption for Promise/against condition
   a. Policy against forfeiture
4. Contra proferentem—construe document against drafter of document; lay the loss on the party that created the ambiguous terms

Impossibility makes condition disappear, but Promise Remains

1. Home owners house burns down, repay loan when house is sold becomes unconditional!!
2. Semmes v. Hartford 1871, Civil War prevents filing of fire insurance claim
   - HELD: If war excuses compliance with provision, makes it impossible then condition disappears but promise remains!!!!
   - The time limit is not tolled by the war, and revived after it—nothing in K that does it but still subject to reasonable time—Statute of limitations

Occurrence of the condition that is in control of one party.

1. Hypo- Home owner had control of condition to sell refusal removes condition
2. Gilbert v. Globe- Insurer induced II not to contest claim until after K time limit
   - Gilbert- promisee has control over condition, but promisor induces the promisee to make the condition not occur
     - Promisor is estopped from asserting condition, because promisee has reasonably relied on promisor’s statements
       - Once promisor notifies promisee then there can no longer be any reasonable reliance by promisee

Waiver— a INTENTIONAL voluntary relinquishment of a known right

- Provision cannot be revived without agreement of both parties

Estoppel— a preclusion which in law prevents a party from alleging or denying a fact in consequence of his own previous act. ALWAYS the case that RELIANCE is NECESSARY.

Test:
1. Purpose to be served by condition
2. Excuse for deviation from K
3. Desire to be gratified
4. Cruelty of enforced adherence to the literal terms of K

Factors in Insurance Cases:
1. Contract of adhesion,
2. Enforcement will cause forfeiture of dutiful payment of premiums,
3. Insurer legitimate purpose of insuring timely notice of claims and suit can be protected without forfeiture

Satisfactory Performance
Second Nat’l Bank— Standard 8 or 12 rivets? Architect refuses certification of approval, a condition of payment/ “unreasonably and unfairly” not enough

Purpose of this satisfaction provision by 3rd Party— Loyal Erectors

- Builder doesn’t want to be at mercy of unknowledgeable owner
- Owner doesn’t want to be bound by only what builder says
- So parties agree to abide by expert decision maker unless he is in “bad faith”
  - If builder can sue anytime he disagrees then they turn over the issue to a jury (nonexpert) undermine agreement
- Martin Modeling v Jenson; Duncan v Black— attention between preventing coercion and encouraging settlement- don’t want to undermine agreement as long as settlers believe settlement has some reasonable basis

Bad Faith
- Maurer— beyond is authority
- *Fay*- refused to exercise judgment
- *Hartford Elec*- refused to inspect duty
- *Second Nat'l*- II conduct and materials conformed to the plans approval by architect

Restitution? - still must determine who was in breach to determine to what extent the retention of benefit conferred is unjust

If refusal is done by party to K, then standard to dismiss the satisfaction provision is Reasonableness
- *Haymore v. Levinson*- Construction Contracts- *Homebuyer* must have some reasonable justification to deny condition builder’s payment.
  - Temptation to express dissatisfaction is great/ Risk of overreaching

*Fursmidt v. Abbey Hotel*- valet and laundry services- literal construction

Performance to the Satisfaction of a Party: Condition to Pay only upon satisfaction

1. **Operative Fitness**, utility, or marketability, → Satisfy a reasonable person
   a. Construction Contracts- normally *Haymore*- need reasonable justification

2. **Literal construction** Fancy, Taste, Sensibility, Aesthetic judgment
   a. Teaching course, Services of an orchestra, Painting portrait
   - K allowed Δ to control many aspects of Π operations
   - Sought to ensure Π did not upset the good will of the guest
   - Protect and enhance good will- critical to a hotel

While may entitle Δ to termination, damages issue must be remanded.

Mutuality of Obligation? Hotel could cancel K anytime so is valet liable for nonperformance? Employment contract

**Order of Performance: Constructive Conditions**

*Nichols v. Raynbred, KB, 1615* - Π claims he sold cow to Δ, and Δ didn’t pay 50 shillings

One party may sue for performance when it has not performed.
- Π need not assert delivery b/c promise for promise is consideration; “the dependency of mutual promises”?? really?

Which party is at fault in suspending or ceasing performance???

*Kingston v. Preston, KB 1773* - Δ silk buz to Π, but at or before must procure security

1. Meaning of the parties language-INTENT of Transaction
   a. **Essence of the Agreement** was to protect Δ from risk of Π default → Π performance is a condition of Δ’s obligation to perform
      i. But if Π defaults Δ can sue?
   b. Π is worthless in terms of net wealth and assets

2. Trade Practices, course of dealings, justice?, nature of K

**Promises**- Temporal Relationship Between Parties

1. **Mutual and Independent**: where either party may recover damages from the other without first performing their promise, and its nonperformance is not excuse for other parties nonperformance

2. **Conditions and Dependent**: performance of one party depends on prior performance of the other

3. **Mutual Conditions to be performed at the Same Time**: where party who is ready and willing may bring suit against party not ready or unwilling to perform

Read 811- Patterson
Bobble Head-S K to sell goods to B on Dec 1. Neither shows up. Stalemate?
Neither party shows up, both sue, Kingston court decide?

**Price v. Van Lint**- Π promised to give mortgage deed for Δ loan; both knew Π may not have deed from oversees by date of Δ duty to perform—Δ is not excused
- Δ is still obligated to perform even though he has not received the security he bargained for, when both parties know that the time of performance by Δ might arrive before Π was able to perform his promise.

**Nichols**- Performance are independent

**Kingston**- neutral base examine to determine whether conditional or not

**Price**- General rule is that promises are concurrently conditional
Put nonbreaching party in expectancy. Δ should not be put in position where he will perform and other will not. Secure the expectations of parties

**Constructive Conditions**

**Ziehen v. Smith**- Κ to sell land; land has lien, no excuse for buyers nonperformance
APPLICATION: No, proof Δ was unable to perform b/c of some lien or encumbrance which it is in the power of the seller to remove. Π not entitled to downpayment back
- But if Π performed; then Δ could not perform and give good title called for in Κ
- But Π didn’t know about mortgage; so he didn’t perform for some other reason??
  - If Π is wrong then Π may be in breach, if Δ could still perform

**Render or Tender RULE**
- In order to entitle a party to recover damages for breach of an executory contract of land Π must show performance or tender of performance on his part.
  a. **Unless** seller of real property is unable to perform at the time specified by K then a formal tender or demand by buyer is not necessary
  b. **Unless Anticipatory Breach**-other party has refused in advance
    - Sue immediately-Even before Π has not tendered performance
    - Wait for time of performance- then sue

**Caporale v Rubine**- Must show able and ready to perform Π part of K if Δ had not breached to sue for damages or equity against anticipatory breacher.

**Neves v. Wright, 1981**—“Party who desires to use legal process must put the other party in default”– Safest course of action—formal tender or demand to perform
- Must give seller opportunity and reasonable time to explain or give assurances

**Bell v. Elder**- Π promise to get water permit; Δ promises to supply water; no time is specified for either promise→ Implied concurrent performance—neither party may claim breach until tender of performance on their part. NO Restitution for downpayment

**Willener v. Sweeting**- Court denies damages but allows “rescission” an “equitable remedy” to return parties to their precontract positions

**Williston**
- **Equity** decree may be conditional; May ensure performance. Relax requirements of tender. Δ SP on the condition that Π perform; order of SP for both
- **Law** judgment is not conditional; order damages final; only one party may claim damages for total breach

**Protecting the Exchange on Breach**
Is the nonperformance sufficient enough to justify the other side’s response (a breach)?

**Perfect Tender Rule**
**Oshinsky v. Lorraine Mfg. 1911- sale of goods is a day late, buyer refuses**

A buyer is not bound to accept and pay for goods, unless they are delivered or tendered on the day specified in the contract.

- Nichols- II doesn’t have to perform
- Oshinsky- Can’t allow Seller to change terms of K- time, place, quantity, quality?

**Sale of Goods Transactions**

- **Oshinsky-1911 Perfect Tender Rule**- seller were required to deliver **goods** that complied exactly with the sales agreement- (amount, time, quality, origin)
  - Rapid interchange of commodity, price, p747-748
- **UCC-** Perfect Tender Rule, but B and S must act in “good faith”
- **Ramirez v. Autosport-** ‘perfect tender rule’ so entrenched in law there is no room from Substantial Performance- less than perfect.
- **Prescot v. JB Powles- Act of Govt** does not afford seller excuse when buyer refuses lesser quantity; seller cannot sue for damages; (govt act may be a defense if seller is sued)
  - B refuses b/c prices have gone down- opportunistic refusal
- **Beck & Pauli v. Colorado Milling-** K for business letterhead, cards; delivery is late; buyer refuses. HELD: Goods K time is of essence b/c of the rapid interchange of commerce. BUT here goods are not saleable to any other buyer- no show of damage. Buyer refusal to accept delivery was not justified by this trifling delay.

**Substantial Performance Doctrine**

**Plante v. Jacobs-** Substantial Performance to compel others performance (meets the essential purpose) II builds house, livingroom wall, crack patio, owner refuses to pay

<table>
<thead>
<tr>
<th>Dual Nature of Promise</th>
<th>→Obligation of II→ discharged with full performance</th>
</tr>
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<tbody>
<tr>
<td>Condition of Δ to pay→ arising w/ substantial performance</td>
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- Plante- when II stops performing before completion may sue in K or Rest. Δ substantial performance doesn’t mean no a breach: just means Δ must perform.

Performance meets the Essential Purpose of K: Depends on the Nature and magnitude of the defect

**Britton v Turner-** 9.5 out of 12 worked- still not enough for Substantial

**Method to Determine Expectancy**

1. **Cost of Completion Rule:** Cost to rectify defect and conform to K.
   - if repair would Not cause substantial destruction of the work and create unreasonable economic waste (disproportionate to the probable loss in value)
2. **Diminished Value Rule:** Value of House specified by K- Value of House with defects
   - If cost of completion in accordance with K would involve unreasonable economic waste

June 1997- Mike Tyson v Hollyfield- Promoter refused to pay Tyson; Tyson sues- has Tyson substantially performed. (10th round, 3rd round?)

**Substantial Performance Doctrine Examples**

- In appropriate circumstances, despite a party’s own default, he may still be entitled to relief from the Perfect Tender Rule that would otherwise amount to a “disproportionate forfeiture” when Δ has received the work. *Aetna*
  - In Construction K: Builder deviates from K specification, even if conscious and intentional, will not defeat his right to recover in an action against the owner on the K.
In sale of land: A stated date for performance does not necessarily make time of the essence. A defaulting purchaser still may reclaim earlier payments.

Delivery of Goods: A seller need not pay the liquidated damages to buyer if he can prove Buyer has not suffered any damages.

Reynolds v Armstead- brickwork not same color: Even though express conditions not met and no recovery under K theory, may still recover under restitution (luten bridge- Algernon blair)

Thach v. Durham- Restitution of Down payment not granted to a defaulting sheep buyer—deny seller security it bargained for in K.

Kelley v. Hance- Restitution for hole dug for sidewalk denied. Willful breach, accept of benefit not implied by retention of land. Not Substantial Performance

Turner v. Chester, 1921- Con K- builder abandons after partial payment

Material Breach→Defeats the essential purpose of K

Essence of K- excuses other parties Performance

Essence of K: Promise to perform is condition upon Promise to Pay, but

1. Builder is not entitled to rescind and abandon the K unless there has been some wrongful act or default on the part of the owner. Turner v. Chester
   - Only after Reasonable Time and Proper Notice→may abandon
   - Unless O insolvent unable to pay or Anticipatory Breach- Says won’t pay
2. Builder must act reasonably→ give owner reasonable time to comply with the demands before the contract work is abandoned→Encourage Negotiations
   - Magnitude of response is out of proportion w/ disputed breach

Defeat the essential purpose of K

1. Cause of default
2. Extent/Magnitude of default
3. Needs and Expectations of Party
4. Likelihood of Correction by Breaching party

Mike Tyson hypo-is there material breach, p836- Com Ed

Tichnor Bros v. Evans- S sells B goods; with promise not to sell to others. B refuses to pay b/c S breached promise. HELD: Promise is not essence of K only part of consideration; B only has cause for damages and can’t withhold all performance.

Riess v. Murchinson- S → B farm, with promise to split farm profits with S until payment of $50k or 10years. B nonperformance is essence of K. S bargained for nothing else than B’s performance and farm profits

Breach by anticipatory Repudiation- Reliance cooper, oxford—chapter one

1. Will not- an overt communication not to perform
   - (Paul v Rosen?) S Won’t conduct inventory = anti repud
   - S demands for different terms (p856)
2. Cannot perform

Principal Effect: Nonbreaching party is free of its obligations of future performance.

Remedies: Seek Damages Immediately or Wait until actual breach (Luten Bridge)

Constructive Conditions—All relates to Chapter 1.

Anticipatory Repudiation= Material Breach
1. Bilateral K (not unilateral)
2. \(\Pi\) has not completed performance
   - *Webb v. McGowin* - only sued for past payments

**Greguhn v. Mutual of Omaha** \(\Pi\) permanent disable
   - Under insurance K, \(\Delta\) claims not obligated to pay, calls \(\Pi\) abled
     - Wrongly interpreted K; \(\Delta\) are liable and shouldn’t get \(\Delta\) second chance
     - Refusal to Pay it is tantamount to repudiation - Material Breach
     - *Algernon Blair* - G doesn’t pay crane cost—Material Breach
   - \(\Pi\) may sue, must wait for delinquent installments and then resue—(Dumb)

**Reigart v. Fisher** - Equity may relax substantial Performance test - but same test
Sale of Land stated about 7 acres actually 4.75\(\rightarrow\)2/3 of K

**Seller sue for SP**; granted with abatement for value of Kland-Actual value of land
1. **Substantial defect** (with no notice) \(\rightarrow\) Seller cannot force Buyer to perform; SP not granted
2. **Immaterial Defect** \(\rightarrow\) Seller can enforce, but Buyer entitled to an abatement in K price
3. Buyer, however, in either case, may enforce Seller to perform to the extent possible with an adjustment of the K price to take defect into account.

**Substantial/Material Defect:**
1. Intent of Parties/Purpose of K (not just %)
   a. Convey 7 acres or convey this parcel of land
   b. Home or farm land?
2. If true facts were known the K would not have been made
3. Fairness or Hardship of enforcing K
   a. Hardship to Buyer v. Benefit to Seller

Brian Beck

**EXPECTANCY PRINCIPLE:**
To put the promisee in as good as a position as he would have occupied had the defendant performed his promise.”

When breach happens courts look to the non breaching party’s Expectancy

**GROVES v JOHN WUNDER CO.** 205 Minn. 1939, p1supp.
“\(\Delta\) took the best sand, but did not level the land.”

- Proper measure of damages is the Cost of Completion: MKT Price – unpaid K
- But what about when MKT Price is greater than the original contract price?
- Even though the cost of completion is grossly greater than value added by completing the work?
  - *Peevyhouse v Garland, construction* - Primary purpose of contract is economic. Can’t recover in damages for breach more than would have if \(\Delta\) performed his promise.
  - *Advanced, Inc v. Wilks* - \(\Pi\) can recover costs even when repairs exceed the damages under the value formula IF it may be probable that he will complete or there is esthetic value
- Restatement 348 say:
  - Entitle to diminution in the market price of property, or
  - Cost of Completion, if not clearly disproportionate to the probable loss in value

**ACME MILLS & ELEVATOR CO v. JOHNSON**, Kentucky, 1911 p23
- In event that MKT < K when seller breaches, buyer recovers nothing,

**Expectancy:**

**Buyer** Gets:

MKT (at time and place of delivery) Top is expectancy of the nonbreaching party

- K

How much more the buyer will have to pay to get to his Expectancy
Seller Gets:
- \( K \) Top is expectancy of the nonbreaching party
- MKT (at time and place of delivery)

How much more the seller would have been paid if contract was honored.
- This represents Literal Expectancy in terms of money. So if no harm, no foul.
- Efficient Breach: Breach can sometimes be more efficient - maximizing overall utility for society. If overall benefit to the breaching party is greater than damages to nonbreaching party
  a. Fails to determine idiosyncratic values/nonmarket based values

LAURIN v. DECAROLIS CONSTR. Co, INC, MASS 1977, P26
- \( \Delta \) sells house but then removes chattel from property before possession switches, property is still worth the same:
- “Diminution in value of the premises may sometimes be seriously inadequate.”
- \( \text{Damages} = \text{value of chattel} - \text{removal expenses (value added)} \)
- Deprive \( \Delta \) of wrongfully made profit? NO giving \( \Pi \) money he could have made.

BREACH OF CONTRACT AND PUNITIVE DAMAGES?
- Only when misconduct is outrageous, wanton, malicious/ usually when independent tort. A Breach is not independently unlawful

RELIANCE INTEREST: Return of sums paid on contract plus reimbursement for such expenditures as the cost of investigating title.
- “Good Faith” = Flueau v. Thornhill (English case)
  a. *return nonbreacher to position before contract

LIMITATIONS ON EXPECTATION DAMAGES
ROCKINGHAM COUNTY v LUTEN BRIDGE Co., P41, construction

After nonbreaching party receives notice of the breach, the nonbreaching party is not entitled to compensation if it continues to perform.
- **DOCTRINE OF AVIODABLE CONSEQUENCE** - A person may only recover damages that could NOT have been reasonably avoided.

All expenses after notice could have been avoided. So builder only gets:
- \( D = K \text{ PRICE} - \text{EXPENSES SAVED (OR} \text{ OR}) (\text{Preformation Expenses}) + \text{EXPENSES INCURRED} + \text{PROFIT} \)

LEINGANG v. CITY OF MANDAN WEED BOARD (ND 1991) P44
- **WRONG!** - Fixed overhead costs must be included in Compensation
- KEARSARGE COMPUTER INC v. ACME STAPLE CO (NH 1976) P45
  - Businesses are expandable - gains made from other transactions after breach don’t mitigate \( \Pi \) damages. It would have been more total business. Unless gains couldn’t have been made (resources tied up) without breach. Same as NERI

Employment Contracts and Doctrine of Avoidable Consequences

PARKER v. TWENTIETH CENTURY-FOX FILM CORP. SC OF CALI, 1970
- “Shirley said no but still got the dough!”
  - When an employer breaches, the measure of recovery
  - \( K - \text{money made or reasonable could have made} = \text{Damages} \)

**DOCTRINE OF AVOIDABLE DAMAGES SAYS**

<table>
<thead>
<tr>
<th>1. HAS EARNED</th>
<th>2. MIGHT HAVE EARNED</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Comparable</td>
<td>a. Comparable</td>
</tr>
<tr>
<td>b. Different (doesn’t count?)</td>
<td>b. Different (doesn’t count)</td>
</tr>
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However, the employer affirmatively must show:

a. Employee could have found work if she looked
b. “comparable, or substantially similar”, to work the employee has been deprived"

What does “substantially similar” mean?

Collateral Source Rule

- **BILLETTER v. POSSELL**, Cali, 1949, (P53)-Floor lady and designer at $75, demote to $60. Contract for fixed term
  1. State unemployment funds are not applicable to mitigation of damages. They alleviate distress.
  2. Employee is not required to perform same work for less to mitigate damages
- **United Protective Wkrs**. Tort “Collateral source” rule denies reduction in damages by amount PI received from other sources, if not applicable, mitigation allowed
- **Hall v Miller**: Better the injured party recover twice than the breaching party escape liability
- **Corl v Huron Casting**: Mitigation from unemployment benefits allowed

- Contracts remedy is to make P whole

1 yr- $48,000 ($4,000/mo) employee (seller of services) quits after 4 months

Employee breach

Employer can recover MKT(new employee) – K= Damages

Unless employee can prove that employer could hired someone for less. Could have avoided ALL LOSS. Doctrine of Avoidable Consequences

**MISSOURI FURNACE CO. v COCHRAN**, US CRT CT, WD PENN, 1881, 8 f. 463

Δ broke contract and refused to sell anymore coke. After breach, PI made a substantially similar contract with Hutchinson for 29,587 tons of coke at $4 per ton.

1. PI no duty to go into the market and provide himself with a fixed forward contract
2. PI entered into forward contract at his own risk
3. Cannot claim damages be assessed on the basis of that new contract

- **UCC S 2-712**: Now states buyer may recover cost of cover in good faith, despite in hindsight may prove the method of cover used was not the cheapest or most effective Mkt – K + incidental/consequence damages – expenses saved
- Reliance Cooperage Corp. v. Treat
  - Doctrine of anticipatory breach by repudiation should aid injured party, not repudiator.
  - Cannot subtract damages that should have been mitigated until damages exist to mitigate – measure damages at time of breach, not in anticipation.

NERI v. RETAIL MARINE CORP, CtA NY, 1972, p64

1) If the seller is a “lost-volume” seller, like a retailer then it can be assumed that the buyer breach is a unrecoverable lost sale + incidental damages,

- UCC Rule lost-volume rule overrides normal MKT-K

**Doctrine of Foreseeability**

**HADLEY v BAXENDALE**, Equity, 1854 Contract for delivery of goods

Breaching party not liable for loss that was not foreseeable at the time the Contract was formed.

- Absent specific notice, the shaft was not an indispensable element of the mill

FORESEEABLE consequences ONLY:
a. Reasonable, in a majority of cases
   b. Special Circumstances known to both parties (well really breaching party)
   • Terms of contract might have been different if special circumstances were known
   • Contract was made with assumption of Liability only for foreseeable damages

Other Restrictions on Foreseeability
McDonald’s Exercise Foreseeable, Not necessarily will happen, Not foresee amount of lost profit,
Not foresee amount of resale, Not whether \( \Delta \) actually thought about it
 ’BUT it was foreseeable, if \( \Delta \) had thought about it.
• Lamkins v. International Harvester Co.
   o Damages arising from special circumstances out of proportion to breach are not
     recoverable, even if \( \Delta \) is informed of possible consequences of breach. Mere notice to
     seller of interest/probable action is not sufficient.
   o Normal damages for Seller breach: Mkt-K=, BUT no other alternate light, Seller would
     not have consented to such a tacit consent
• Martinez v Southern Pacific Trans- \( \Pi \) wants rental MKT of late equipment
   o Obvious the good had use value/ Hadley not obvious
   o “not most foreseeable of possible harm” but not remote and unforeseeable
• Prutch v Ford Motor Co.- defective farming equipment
   o foreseeability is not actually what is foreseen/known, but what is foreseeable
• VALENTINE
   o Even though mental and emotional distress damages are foreseeable, NO RECOVERY,
     except very rare exceptions, punitive

If expectancy is insufficient/incalculable, courts turn to other remedies…reliance.
Losses incurred in reliance on the contract can be recovered.
❖ Chicago Coliseum Club v. Dempsey
   • Profits must be proved with a REASONABLE DEGREE OF CERTAINTY (Usual
     Standard: More likely than not = Preponderance of Evidence-a contract, a breach)
   • Reliance Expense incurred that were necessary in furtherance of the undertaking. \( \Delta \) could
     are recoverable. Foresee those damages.
   • \( \Pi \) costs in procuring equity relief \( \rightarrow \) taken own financial risk, these aren’t expresses incurred
     on reliance of the contract or foreseeable
     o Usually- expenses occurred in attempts to mitigation are recoverable (if successful)

SECURITY STOVE v. AMERICAN RY. EXPRESS (MO.App 1932)
Oil and Gas burner delivery, part missing, \( \Pi \) couldn’t demo at convention.
   • \( \Pi \) knew common carrier would accept contract. Damages for reliance allowed even if there
     would have been no profit with full performance. \( \Delta \) actions rendered \( \Pi \) costs/efforts
     valueless.
   • (Did Chicago know Dempsey would sign/Dempsey wouldn’t sign before other boxer ready)

ANGLIA TV v. REED (All ER, 1971) England
TV company contracted actor,\( \Delta \), to play part, actor repudiates, \( \Pi \) can’t find replacement and had to
abandon the project
   • Reliance is not limited to that incurred after the contract was made.”
   • If pre-contract expenses are not recoverable—then Expectancy Principle is not achieved,
     just like overhead costs
• EXPECTANCY INCLUDES RELIANCE EXPENDITURES
  o (Luten Bridge Exp+Profit= Recoverable Damages)

**ALBERT & SON v. ARMSTRONG RUBBER Co (1949)**
Reliance damages are mitigated by the breaching party’s showing that there would have been lost profits had there been full performance. Burden is on the breaching party.

**Restitution- focus on Δ unjust gain,**

- off-contract remedy
- Sue for (reasonable) MKT value of work
- Can’t receive restitution if performance complete
  1. remedial interest in K
  2. System of civil obligation- (eg tort, contract,) Π conferred benefit on Δ and ought not be able to kept that benefit without paying Π for it
    a. Two Elements
      i. Π conferred BENEFIT on Π
      ii. Retention w/out compensation is unjust

- Nonbreaching party may recover reasonable value of services and equipment rendered, under restitution.
  - May look to K but Recovery is not limited by K, when nonbreaching party sues under Restitution

**WHEN BREACH Π has two options:**
1) Enforce Contract and claim damages based on Expectancy Principle
2) Claim Restitution and claim damages based on reasonable value of his performance
Nonbreaching Party gets: MKT at t&p (expenses + profits) – amount Δ has already paid
- Why: Objective of restitution is to compensate Π for Δ unjust benefit
- BUT: A Contract allocates risk among parties. Should the Δ breach serve to shift that risk away from the Π and to the Δ? Blair says YES.

**RATIONALE:**
  1. Restitution Interest: A combination of unjust impoverishment with unjust gain, creates the strongest case for relief
  2. court should focus on the unjust gain of Δ

**Kearns v. Andree, CONN, 1928**
Δ agrees to buy Π house after changes, expenses for cover changes, and K-mkt
- K unenforceable b/c mortgage terms
- BUT: Reliance interest under Restitution: Work done in good faith, and in honest belief that the agreement was sufficiently definite to be enforced. Can recover reasonable value of his services without regard to whether those services benefited the Δ.

Restitution For The Breaching Party- Can’t sue for services on contract

**BRITTON v. TURNER, SC NH, 1834**
A breaching party, who voluntarily fails to complete performance,
- Breaching party is entitled to the
  1. **Reasonable value of the benefit conferred at time and place, but not more than the pro rata of the contract price, MINUS damages to cover breach.** (Amazon Hypothetical)
    a. Π→Δ Restitution Claim
    b. Π←Δ Contract Claim Must Respect Contract Claim
2. K-cost of cover = Fundamentally Wrong! **K is not the starting point in a restitution claim, it is the cap**

*THACH v DURHAM, COLO, 1949, 119*

- No restitution for breaching party, can’t force a willing party to establish amount of damages, which is uncertain, only when
- Relief in Equity is interstitial
- Equitable relief is at discretion of the court, under what standards?
- **THRESHOLD QUESTION:** Only when remedy of law is not adequate
  - Irreparable harm- meaning under law

**Statute of Frauds**

1. **Sale of land**- some memorandum signed by the party being charged
2. **Sale of goods** – written contract required for any **value over $500**. Writing sufficient to indicate that a contract for sale has been made between parties and signed by party trying to enforce.
3. **Contracts “not to be performed in one year”** – contract must be incapable of being performed in 1 year

**Remedy at Equity**

1. At discretion of court
2. Only when legal remedies are inadequate
   a. **Van Wagner → ADEQUACY(-of-legal-remedies-)TEST**
      i. A billboard lease has determinable economic value;
         1. unlike **real property** → uniqueness in the sense of physical difference reflect aesthetic value, **irreparable by legal remedies**
   b. **Eastern Rolling Mill v Michlovitz → Requirements for a year**
      i. Uniqueness is uncertainty in valuing it, not magic door,
      ii. Any attempt to measure damages would be speculative and conjectural
   c. **Curtis Bros v. Catts, p155- Tomatoes**
      i. the business is extraordinary **no market**
      ii. **Third party contracts, business reputation, protect industry**
   d. **UCC:** “where goods are unique or in other proper circumstances”

**Discretion:** Courts would enforce specific Performance of K when

1. **Negative injunction more likely** than affirmative injunction
2. **Impossible.** Dealer can’t deliver b/c mfg. shortage **Paloukos v. Intermountain Chevrolet**
3. **Person Services** unless the performer possesses “unique and exceptional skill or ability in his area of expertise”
   a. **Fitzpatrick- Nurse/maid → life estate-** Can’t enforce SP even after part performance of employment. II may claim restitution for MKV of services
   b. **Pingley,** piano player, plenty of other piano players
   c. **Dallas Cowboys v. Harris- Negative injunction** not to perform more likely to be enforced; unique is not narrow as “sole, one, only” RB
   d. **Fullerton Lumber- Noncompete clause** that is unreasonable and not necessary to protect employer’s interest is unlawful. *(time and area)*
   e. **City Stores Co v. Ammerman**
i. K agreement to provide Π with “rental and terms at least equal to other department store tenant” in development
ii. Π can have SP. Almost in calculable advantages that new store will create.

4. NORTHERN DELAWARE
   a. Equity decrees are enforced through contempt.
   b. Reluctant to reward equity relief unless they believe it can be delivered
   c. Reluctant to get involved in an ongoing basis through equitable relief
      i. Refusal to obey equitable decree is affront to the court
      ii. Refusal to pay legal remedy ➔ clear cut remedies.

5. Defer to Arbitration agreement, favor private autonomy, encourage mediation

Equity Enforcement of Realty
   ➢ In land contracts the presumption of inability to value land is, most of the time conclusive
   ➢ WHAT IF, the buyer wants to resale the land? Still no economic interest/ legal remedy- but here the uniqueness might be gone.
      a. Hazelton v. Miller- Resale denies specific performance- MINORITY VIEW

Three Remedial Interests
There is a Breach- Flow Chart
   1. Expectancy (profits)
      a. Equity?- Specific Performance
   2. Reliance Expenditures
   3. Restitution
      ➢ Misleading Expectancy interest really includes Reliance expenditures
      ➢ Restitution is also in expectancy b/c Π paid someone else rather than Δ