CONTRACTS OUTLINE

I. CHAPTER 1: REMEDIES FOR BREACH OF CONTRACT
A. The Goals of Contract Damages
   i. Expectancy Principle—so far as monetary damages will do it, put the non-breaching party in his expectancy position and give him economic benefits of full performance.
      a) Compensation will never exceed replacement cost because replacement costs give the opportunity for literal expectancy
      b) When a construction contract is defectively performed then the measure of damages is the cost of completion unless that would be grossly disproportionate to the diminution in value, in which case the diminution in value is the measure of damages.
      c) When a vendor of personal property who enters a sale contract with one buyer breaches by later selling the goods to a third party the proper measure of damages is the market value at the time and place of delivery minus any unpaid portion of the contract place.

B. Limitations on Expectation Damages
   i. A builder who enters a contract to build and then is told during the middle of the building by the consumer that the consumer will breach the contract is only entitled to damages in the amount of the costs up to the point of the breach plus his anticipated profit, even if the builder chooses to complete the building.
   ii. Doctrine of Avoidable Consequences: P can recover only those losses that he/she could not reasonably have avoided
   iii. Expectancy is: Value of what the plaintiff is to receive minus the value of what the plaintiff still has to perform
   iv. Doctrine of Avoidable Consequences applies in employment contracts. Liability will be reduced by the amount the employee could have earned by obtaining comparable employment. The burden is on the breaching party to show that a loss could have been avoided.
   v. The measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment.
   vi. Before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resort to in order to mitigate damages.
   vii. Courts will deduct any money made after breach that but for the breach she would not have made.
   viii. The proper measure of damages after a vendor's breach of a contract for the sale of personal property to be delivered in installments is the market price at the time and place where delivery(s) were supposed to occur minus the contract price.

ix. UCC Article 2—Cover
   a) Cover is substitute transaction in good faith without unreasonable delay.
   b) A buyer may cover, and if he does, then his damages are measured by cover price minus contract price so long as the substitute transaction is made in good faith and is reasonable.
   c) Subsection 3: If the buyer does not enter a substitute transaction that does not mean that he cannot recover damages, it just means that he has to recover under Section 2-713—market price minus contract price.

x. The Darker Side of Doctrine of Avoidable Consequences—Presents the non-breaching party with a dilemma. If they enter a new contract and it winds up more costly than the market price, they lose money. If they don't enter a new contract and the breaching party shows that they didn't take reasonable steps to avoid loss, they STILL lose money.

xi. Incidental Damages: UCC Section 2-708(1) provides that “the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710) but less expenses saved in consequence of the buyer's breach.

xii. Think of damages in terms of: Expectancy minus performance

xiii. A seller with an unlimited supply of standard priced goods should be allowed to recover damages in the full amount of contract profit if a customer breaches and does not purchase goods contracted for. The retail seller is entitled to its profit. The section of the code referring to “due credit for payments or proceeds of resale” does not apply because the situation is different with dealers having an unlimited supply of standard priced goods.

xiv. A retail seller is entitled to damages for incidental expenses arising from a breach of contract including storage, upkeep, finance charges, and insurance until he finds new buyer for his goods.

xv. In the case where a seller has a large surplus of goods the seller is entitled to lost profit plus any incidental costs and reasonable costs of overhead

xvi. Incidental damages do not include attorney's fees under common law or under the UCC

xvii. Hadley v. Baxendale 9 Exch.341 (pg 69) --REMEMBER THIS CASE NAME
a) The non-breaching party can only recover for the foreseeable consequences of the breach.
b) P's loss of profits brought on by the breach was not foreseeable. In this case P only told D that the shaft was used in his mill, not that the mill was at a standstill without it, so the special circumstances were not known by both parties. The judge should have told the jury that they ought not to take the loss of profits into account in awarding damages. The miller didn't tell the shipper about the need for speed at the time of contract.
c) The injured party may recover either
   - those damages as may be reasonably be considered arising naturally from the breach itself (general damages/direct damages—foreseeable thus recoverable)
   - may recover those damages as may reasonably be supposed to have been in contemplation of the parties, at the time they made the contract, as the probably result of the breach of it (special damages/consequential damages—recoverable if foreseeable)
d) McDonald's deep fat fryer hypo
   - McD – D K: $5000 (Oct 10)
   - D – GS K: $7500 (Oct 15)
   - It is foreseeable that that D will resell, but it’s not foreseeable that there is no market. If there IS a market, the damages are market price minus K price, but if there is no market, there being no market is not foreseeable and thus no damages.
e) the test is foreseeable, not foreseen
   - More than one consequence of a breach may be foreseeable
   - Foreseeability goes to the KIND of loss, not the amount of loss

xvii. An employee who is terminated when an employer breaches a contract including a job security position is not eligible for emotional distress damages under the personal interests exception to the market value measure of damages for contracts.
a) No damages for emotional distress, even though to put P in expectancy position would require that such damages be recoverable.
b) Rule of Hadley is not the affirmative rule that a person may recover for all foreseeable losses. Rather it is the negative rule that a person may NOT recover for damages that are NOT foreseeable
c) If what the party is losing cannot be measured by a market, the court may allow damages for emotional distress. If there is a market, however, emotional distress damages are not recoverable.

C. Alternative Interests: Reliance and Restitution
   i. Compensation for damages for a breach of contract must be established by evidence from which a court or jury are able to ascertain the extent of such damages by the usual rules of evidence and to a reasonable degree of certainty.
   ii. If P can show a stable history of profit, they can probably prove to a reasonable certainty what profit was lost, so in those cases P can recover.
   iii. If the court can't put the plaintiff in expectancy position, it can at least put P in the position he was in prior to the contract by awarding reliance damages.

   iv. Hypo:
      a) K was for $15,000
      b) Expected Profit $1,500
      c) Expenses $2,750
         - $1800 pre
         - $950 post
      d) Compensate for the lost expectancy in every way we can.

   v. Expense of mitigating IS recoverable
   vi. P has to be able to recover expenses AND profit, or else profit isn't really profit!!!!!
   vii. Compensate for the lost expectancy in every way we can. In Dempsey can't figure out profit, so that's out, but we should still award expenses, (both pre- and post) to get as close to expectancy as possible. Reliance is a component of expectancy. So yeah, Dempsey is wrong in this respect. The expenses before the contract are still incurred in performance of the contract.
   viii. Statute of Frauds—For certain types of contracts there must be a writing, and it must be signed by the party being charged. Originally five kinds involved:
      a) contracts for sale of interest in land
      b) Ks for sale of goods fro a price exceeding a certain amount ($500 in UCC)
      c) Promises to answer for the debt, default, or miscarriage of another (suretyship or guaranty)
      d) contracts not to be performed within one year
      e) contracts in consideration of marriage
   ix. One who justifiably ceases work under a contract because of the other party's breach may recover the value of labor and equipment already furnished pursuant to the contract irrespective of whether he would have been entitled to recover in a suit on the contract
   x. Hypothetical
      a) K price $750,000
b) D has paid $150,000  
c) D should have paid $187,000  
d) P's expenses are $200,000  
e) P's cost to complete $600,000  
f) Promisee can forgo suit on breach and can instead sue for restitution  

xi. Restitution—a system of civil obligation—  
a) separate from both contracts and torts  
b) Distinct elements (unjust enrichment)  
• Benefit to defendant  
• Retention without compensation is unjust  
c) Proper measure of recovery is the reasonable value of the services rendered, which is the amount for which such services could have been purchased from one in P's position at the time and place the services were rendered.  
d) The standard for measuring the reasonable value of the services rendered is the amount for which such services could have been purchased from one in P's position at the time and place the services were rendered.  
e) If breach occurs after full performance, however, only recover contract price.  

xii. Need to pursue restitution objectives, not contract objectives. Restitution objective is to prevent unjust enrichment. This is not the same as putting someone in their pre-contract position, because it’s possible that he/she did something that wasn’t of benefit to the other party, and such an expense would not be recoverable under restitution. It’s unjust for D to keep the benefit without paying for it, because there was a contract. So the contract is not “irrelevant” to restitution. The contract price may be evidence of the reasonable value of the services.  

xiii. P may choose whether he/she wants to pursue a contract claim or a restitution claim.  

xiv. When a contract is invalid and in fact not a contract at all, sometimes the court will play fast and lose with restitution  

xv. In a contract where P abandons performance prior to completion and there is no damage to D, P can recover for the amount of performance he has completed in restitution. The court says the rule of no recovery for the breaching party is unjust. D is enriched, so needs to pay P for that enrichment.  

a) P is the breaching party, so D has a claim against P for breach of contract. Therefore, if P is the breaching party, he cannot recover more than the contract price.  
b) Proper measure of damages SHOULD BE the value of the benefit minus the cost of replacement.  
c) Proper measure of recovery when an employee breaches an employment contract and sues in restitution is: Market value (but not more than the pro rata portion of the contract price) minus the excess cost of replacement.  

D. Enforcement in Equity  
i. A litigant is not entitled via a right to equitable relief—its up to the court's  
ii. The courts view land as unique, so despite how illogical it is, they will say there is no adequate remedy at law and order specific performance  
iii. Where there is substantial, reliable information as to the monetary value of the subject matter of a breached contract and where specific performance would create harm to the defendant disproportionate to its aid to the P, specific performance is not available.  
iv. P who is employed for personal services that do not require special skill is not entitled to a remedy at equity. Equity will not enforce a contract for personal services for four reasons:  

a) danger involved in forcing parties to continue to interact on a personal level—But this is BS because she wants a receiver appointed so that she can have her room and board and $8/wk, and if he doesn't want to take advantage of her services he doesn't have to do so  
b) court has no means to enforce such a decree—but this is a BS reason because if D fails to do what the court has ordered them to do then they can be held in contempt  
c) Peonage—but it’s not the employee who breached!  

v. The statute of frauds DOES apply in equity as well as law. Courts of equity, however, recognize an exception where P has partially performed.  

vi. Equity will not enforce negatively a contract which it could not enforce affirmatively, nor will it enjoin the breach of a negative covenant, express or implied, unless the breach will cause a loss to the promisee independent of the loss caused by the mere failure of the promisor to keep and perform his affirmative covenants  

a) i.e. An employee breaches a contract with one employer and then goes to work for that employer's rival  
b) A negative covenant is a promise not to do something  
c) Enforcement of a negative covenant has been used to force completion of a positive covenant  

vii. Court is unwilling to sacrifice its dignity via a contempt charge unless they are damn sure the party will perform. Courts of equity will not issue decrees of specific performance where such orders would require extension supervision by the court.  

II. CHAPTER 2: GROUNDS FOR ENFORCING PROMISES  
A. Formality—An oral promise to donate money is unenforceable.
B. Exchange Through Bargain
   i. An individual can sell their rights to a payment to someone else
   ii. For a promise to be enforceable, it requires consideration. Consideration is either
      a) a benefit to the promisor (of the promise who's enforceability is at issue) OR
      b) a detriment to the promisee (of the promise who's enforceability is at issue)
   iii. Forbearance from a lawful act at the request of another is sufficient consideration for a contract.
   iv. Mere love and affection do not constitute sufficient consideration to compel performance of an entirely
       executory contract.
   v. Courts do not address the question of whether or not consideration is adequate because doing so would limit
      our ability to bargain for what we want.
   vi. To constitute consideration a promise must be bargained for (mutual reciprocal inducement)
      a) By Bargain, we mean sought by the promisor in exchange for the promise AND
      b) is given by the promisee in exchange for the promise
      c) Does not have to be the ONLY reason
   vii. As a general proposition, we want to enforce the agreements that parties come to settle disputes. However,
       there are limits to this generality.
       a) Extortion (i.e. promise of paying $100 for promise not to sue although nothing to sue over)
       b) We won't enforce agreements based on illegal agreements.
       c) If the claim that the plaintiff surrendered was not valid then there is no consideration.
          • There is mutual reciprocal inducement—there IS a bargain
          • But if the claim is not valid there is no detriment in surrendering it, so its not consideration.
          • But how do we know if the claim is valid or not? By going to the court. But the parties entered the
            settlement purely to avoid going to court over that question. This removes the incentive to resolve disputes
            out of court. Therefore, that's not the test
   d) The test laid down by the court requires that
      • 1) Person surrendering the claim has to be in good faith
      • 2) The claim has to have some basis (there has to at least be a mole hill)
   e) Court will still be second guessing parties on whether there is a reasonable basis for the claim under this rule.

C. Promises Grounded in the Past
   i. If there is no bargain then the promise is not enforceable.
   ii. A moral obligation is insufficient as consideration for a promise. (majority rule)
   iii. A moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor
       has received a material benefit. (minority rule)

D. Reliance on a Promise
   i. To be legally enforceable an executory promise must be supported by sufficient bargained for consideration.
      If a promise is a mere gratuity (gratuitous promise) then the promisor is not induced to make his promise by any
      consideration, so the promise is not enforceable.
   ii. Promissory estoppel for reliance on a promise
      a) is extended from reliance on statement of fact.
      b) Courts that reject promissory estoppel argue:
         • A promise is a statement of intention
         • Everybody knows that people change their minds and intention, so it is not reasonable to rely on promise to
           do something in the future because a promise is nothing more than a statement of present intention, which
           says nothing about your intention tomorrow.
         • Rejects promissory estoppel and requires a statement of fact
      c) A promise which the promisor should reasonably expect to induce action or forbearance of a definite and
         substantial character on the part of the promisee and which does induce such action or forbearance is
         binding if injustice cab be avoided only by enforcement of the promise.
   iii. There is partial performance in equity then there is an exception to the statute of frauds.
   iv. If a creditor fails to fulfill a promise to insure the borrower's property and that property is subsequently destroyed, is
      that promise enforceable? Yes, because of promissory estoppel. The promise to insure induced the promisee not to
      act to insure. It would be unjust for the promisor to induce this reliance and then not perform.
   v. Elements of promissory estoppel
      a) Was there a promise, which the promisor should reasonably expect to induce action or forbearance of a
         definite and substantial character on the part of the promisee?
      b) Did the promise induce such action or forbearance?
      c) Can injustice be avoided only by enforcement of the promise?
   vi. Because of the difficulty of proving a negative we relax are requirements of proof to cut D some slack
   vii. Overview
      a) Old cases didn't require consideration—they were down with any sealed instrument.
      b) “moral obligation” is consideration (Webb)--BOLOGNA!
      c) Seavy expenditures in reliance = consideration = BOLOGNA
d) Articulating these results in terms of consideration destroys the utility as a consideration.
e) Courts wouldn't do this if they could just admit that consideration is A REASON to enforce a promise, but NOT the ONLY reason to enforce a promise.
f) We don't need to put things in terms of estoppel because reliance alone is a reason to enforce a promise and estoppel adds that extra unnecessary step. Having the judge say to D, “Because P relied on your promise you are not allowed to claim there was no consideration,” is inefficient—just admit that reliance is grounds for enforcement, dammit! So remember this when using study guides :)

viii. A contract of “permanent employment” is terminable at will by either party unless additional compensation in the form of an economic benefit is rendered by the employee to the employer. Why not say that employer is committing to lifetime employment, but employee is not? (POLICY)
a) Some courts have claimed that if we looked at it this way then there would be no mutuality of obligation. There is a flaw with that theory, though. Employee is at least making a commitment that she will show up at the agreed upon time for that first day of work. Any time after the commencement of the work, but that initial obligation means that there is a mutuality of obligation. But the courts have not taken this step.
b) An employer is not likely to take an employee's promise to work forever very seriously, but an employee is likely to take employers promise of “permanent” employment very seriously, so this makes the courts uncomfortable.
c) They say that if the employee can quit at any time, then they are terminable at-will. However, if the employee gives some additional consideration to the employer, then the employee is not terminable at will.

E. Promises of Limited Commitment
i. Hypothetical: Linda promises Mike her cabin, canoe, and windsurfer, and Mike promises in return to give her his mountain top chalet. The exchange is to occur on a set date. The adequacy of the consideration is irrelevant. There is a mutuality of obligation. What if Linda reserves the right to keep the canoe (she still conveys the cabin and the windsurfer)

ii. Hypothetical: In September 2004 a K is formed. Seller agrees to deliver a carload of coal each day in 2005 for $10,000/car. The contract says S may terminate after July 1, 2005. On October 3, 2005 B repudiates. Buyer has to pay $10,000/car for the coal he received. The promise is thus enforceable. The parties put together the deal that they want. The seller's right to terminate is a part of the bargain, even if they haven't said a word about specific allocation in dollars for that right. Would the seller have terminated before the end of the year? You have to establish your damages to a reasonable degree of certainty, so the seller has to prove he wouldn't have repudiated in order to get the entire year's worth of damages. So what if he shows market price has not gone up—in deed it has gone down? That could show that he wouldn't have repudiated, so he should get damages for the whole year. If seller promises to sell 500 i-pods but has the right to repudiate at any time, the contract is invalid because there is no mutuality since the seller is never required to do anything.

iii. The fact that a contract has a condition precedent to its formation does not make the contract to indefinite to be enforceable.
iv. Must be mutuality at the time the contract is formed
v. Hypos:
a) Compare to woman who agrees to sell all of the oil she produces to the Oil Company. If she doesn't produce any oil, well, there we go. But she gives up her right to sell any oil that she DOES produce to anyone else.
b) If you promise to stay at the Red Roof on your next visit to San Franc = enforceable = If you promise to stay at the Red Roof on your next visit to San Fran I promise to give you $50 tomorrow = enforceable
c) Range of Conduct for Lumber Co pre-contract
   • buy--develop theme park, donate land to city, build condos, Sell to A, Sell to B....etc., Sell to Obering, Etc
   • not buy

d) Range of Conduct for Lumber Co after contract
   • Buy--Sell to Obering
   • Not buy
e) Therefore, there is mutuality at the time of agreement!

vi. Mutuality exists because if guy leases space he doesn't have a right to start a bookstore anymore—now he HAS to open the liquor store if he gets the lease. So MUTUALITY EXISTS

vii. There is no need for you to fulfill your promise if the other party has informed you that he/she will not be performing

viii. Mutuality of obligation does NOT mean equality of obligation—its okay for one to have an escape hatch and the other not have an escape hatch

ix. Implied promises can suffice for mutuality of agreement at the time of the formation of the agreement.
HYPO: Oct 1 K for house for $150k. Closing on December 1. Contingent on borrower obtaining a loan of $120k at no more than 7% interest by November 1. On October 20, seller finds someone who's willing to spend $160k on the house and thus repudiates. Buyer sues. There is an implied obligation on the part of the buyer to TRY to get the loan. --> Each party is obligated to do something, so there is a mutuality of obligation.

x. If there are no restrictions on ability to terminate, then not enforceable, but there may be some implied
III. CHAPTER 3: THE MAKING OF AGREEMENTS
A. Mutual Assent
i. For a contract to be formed there must be Mutual Assent which requires offer and acceptance. Can't get to literal about this—don't need the exact words “offer” or “acceptance” or “promise”
   a) Hypo: Lets say you own some stock in a company that is not publicly traded. You ask greenfield if he wants to buy the stock, and he offers you $10 a share. You are shocked and say you'll accept no more than $250/share. Greenfield laughs like a fool and says “yeah, sure, right.” Is there a contract? Of course not.
   b) Its the jury's job to determine the facts of what exactly was said, but its a question of law for the court to decided whether or not it was a manifestation of assent—This is the traditional view. Today the courts are more likely to let the jury decide all these issues, however
   c) Two theories of assent
      • Subjected looks for some point in time at which there is a meeting of the minds--DO NOT USE THE EXPRESSION MEETING OF THE MINDS UNLESS YOU MEAN TO TALK ABOUT THE SUBJECTIVE THEORY
      • Objective looks to the manifestations of assent
   d) The secret feelings, intentions or beliefs of a party will not affect the formation of a contract in which their words and acts indicate that they intend to enter into a binding agreement.
   iii. McDonald v. Mobil Coal Producing, Inc.—employee handbook case
      a) Is the disclaimer in an employee handbook that says that it does not modify contract effective?
         • It has to be conspicuous (says this is a question for the court—the UCC says that conspicuous is a question for the court to decide, so the court steals that idea even though the UCC has nothing to do with this case)
      b) Does the employee handbook containing an inconspicuous disclaimer combined with the employers actions modify the terms of a contract for at-will employment?
      c) From the employers perspective the handbook is not a contract. The disclaimer proves that. But that disclaimer might not be enough. In fact, the court says that the disclaimer must be conspicuous, but they do not say that is enough. (May be very likely that it would be enough, but they do not hold that here)
      d) An employer in an otherwise at-will employment may be bound by policies set forth in an employee manual.
   iv. Moulton v. Kershaw
      a) In car example, making an offer to numerous people runs the risk of getting more competences that you can supply and thus leading you to be over-committed.
      b) So is the Moulton letter an assent to exchange? No. Didn't say “well sell you as much salt as you want” and the reasonable recipient will know that the seller has limited stocks, so they know its not an offer of unlimited salt.
      c) A general letter informing others that a merchant has a product for sale may not constitute an offer that binds the merchant upon acceptance.
      a) Whether the quotation of prices for a certain quantity to be determined in response to a request for an offer constitutes an offer without having the quantity specified? Yes.
      b) Court looks to the intention of the parties when construing a contract or determining whether a contract has been formed.
      c) The only way for the seller to avoid becoming over-committed is to be in the position of receiving and accepting offers, not in making offers
      d) “for immediate acceptance” could then mean “tell us what you want, and we'll let you know immediately whether or not we can provide it”
      e) But this is in response to buyer's request for an offer. So seller's supposed “quotation of prices” must be deemed as intended to be an offer, even if seller only meant to quote prices.
      f) Court says we have to look at all of the correspondence.
      g) If an offer is requested, the response will be considered an offer unless the party specifically states that it is not an offer.
      h) How should the court measure the damages if there is a contract? UCC says although one or more terms are left open a contract for sale of goods does not fail for indefiniteness if 1) the parties have intended to make a contract and 2) there is a reasonably certain basis for giving an appropriate remedy.
   vi. Nader-GM Hypothetical--GM says they will give Nader cars if he never rights another book about auto safety. Is there a contract?
      a) There are no specifications regarding how many cars, what kind of cars, or when they will be delivered. So if there is no way to figure out whether or not the contract is breached, then its not a contract.
      b) Wilhelm Lubrication Co. says that we don't know exactly what was supposed to happen and the damages would
be different in every case, so the agreement is not definite enough to enforce.


viii. Shift from UCC view of “did the parties intend a contract” to the restatement view of “can we tell whether there's been a breach?”— Restatement view is better (page 350)

   a) A renewal clause in a lease providing for future agreement on the rent to be paid during the renewal term is not enforceable by specific performance at a court-determined reasonable rent even if it is established that the parties' intent was not to terminate in the event of a failure to agree.
   b) A promise must have assented to the obligation in question. A promise must be sufficiently certain and specific so that what was promised can be ascertained. A mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. This is especially true of the amount to be paid for the sale or lease of real property, especially in cases where specific performance is sought. The contract doesn’t even hint at a commitment to be bound by the “fair market rental value” in determining the renewal rate. Some courts would enforce the renewal because they want to protect tenant who has relied upon keeping this place so he can continue his business.
   c) A real estate lease provision calling for the renewal of the lease at a rental to be agreed upon is unenforceable due to its omission of a material term.

x. Raffles v. Wichelhaus
   a) P and D agreed that P would sell D cotton. P made the cotton available, but D refused to accept delivery or pay P. D believed the cotton would be shipped by a ship named Peerless in October, but P shipped the cotton on a ship of the same name in December.
   b) If the meaning of an ambiguous term in a contract is later disagreed on by both parties is the agreement is not enforceable
   c) Reasoning: The latent ambiguity of the terms combined with evidence that P meant one Peerless and D meant another shows that there was no consensus and therefore no binding contract. If there's no meeting of the minds, there is no contract. (subjective approach)
   d) If used objective approach look at manifestation of assent. There would still be such ambiguity that we don't know what the parties agreed to. Who breached? Who knows?
   e) What if both had known there were two ships? Look to Ralph Nader hypothetical.
   f) Where neither party knows or has reason to know of the ambiguity or where both know or have reason to know, the ambiguity is given the meaning that each party intended it to have.

xi. Restatement (Second) Section 20: Effect of Misunderstanding
   a) (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
      • (a) neither party knows or has reason to know the meaning attached by the other, or
      • (b) each party knows or each party has reason to know the meaning attached by the other.
   b) (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
      • (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
      • (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

xii. Red Sox Bobble-Head Doll Hypothetical
   a) Seller has 10,000 dolls. Offers to sell them to buyer in an e-mail. Seller means to type $4.30/ea price, but there's a typo so the e-mail says $4.20/ea. Is there a contract?
   b) What if the keyboard malfunctions and the email gives the price at $0.30/ea. Is there a contract?
   c) If for some reason the buyer should know that the seller erred in stating the price then there is no contract because the buyer should know that the seller is not assenting to this exchange, so there is no mutual assent.

xiii. Caldwell v. Cline
   a) If the offeror makes an offer via post and states that he “will give [the offeree] [an amount of time] in which to accept or reject the offer, the time period will start running from the time the offer is received.
   b) Reasoning 2: Letters, which perform the office of words, must come to the knowledge of the party to whom they are addressed before they are accorded legal existence, just as in person an offer isn't made until the person being offered something hears the offer. There must be mutual assent and where the proposal to sell stipulates a limited time for acceptance, it is essential, to constitute a valid contract, that the acceptance be communicated to the proposer within the time limited.
   c) The offeror is the master of the offer. Among the offeror's powers in determining the terms is the power to determine how long the offeree has to accept the offer.
   d) We have to look at the offeree's knowledge of the offeror's intention (i.e. if offeree looks at the postmark and saw that the letter was postmarked 2 months ago. Should this be an issue for a jury?

xiv. Mailbox Rule: There is a contract as soon as the offeree drops his/her acceptance in the mailbox. It doesn't
matter if the acceptance is never received or if the offeree changes his/her mind.

xv. Hypo:
   a) A sends B a letter offering to sell his house to B for $80,000. A year later B writes, “I accept.” Is there a contract? A year is unreasonable, so no contract.
   b) A sends B the letter described above. Three days later A sends another letter, “I have changed my mind, the deal is off.” B receives this letter. The next day B writes, “I accept.” Is there a contract? No. There is a revocation, so at the time B assents, A is not assenting.
   c) A sends B the letter offering to sell his house. Three days later D tells B, “A told me to tell you that he sold his house to C and he revokes the offer to you. Be writes A, “I accept.” Is there a contract? No, revocation has occurred.
   d) A sends B the letter. Two days later B sees in the local newspaper that A's house has been sold to C. B immediately sends a letter, “I accept.” Is there a contract? No. When B sees the ad, B reasonably believes that A no longer assents to the deal. This may be called indirect revocation.
   e) A sends the letter. Two days later B reads in the paper that A has died. B writes the administrator of A's estate, “I accept.” Is there a contract? No. B would reasonably realize that A's dead, so A sure as hell isn't assenting. A isn't capable of assent when he's dead.
   f) A sends the letter. Two days later B drives by the house and sees A showing the house to C. B knows that C is looking for a house to buy. B returns home and writes A, “I accept.” Is there a contract? See page 390.
   g) A sends the letter. Two days later B reads in the paper that A has died. B writes the administrator of A's estate, “I accept.” Is there a contract? No. B would reasonably realize that A's dead, so A sure as hell isn't assenting. A isn't capable of assent when he's dead.
   h) A sends the letter. Two days later A dies. Ignorant of A's death, B writes, “I accept.” Is there a contract? So far as B knows, A is still assenting. But, the courts still say there is no contract. Even though the courts normally apply the objective standard, if the offeror dies, then he cannot assent, even if B is ignorant of A's death.

B. Control Over Contract Formation
   i. It is said that a unilateral contract is a contract that is the exchange of a promise for a performance. However, it is sounder to view as an offer that is accepted by rendering the requested performance. It is an exercise of the offeror's power.
   ii. If you know that the offeror dies before you render performance on a unilateral contract, then the offeror no longer assents so you're out of luck.
   iii. What criteria determines whether an offer is for a bilateral or a unilateral contract?
      a) Is the offeror asking for a promise? This tells us about the intention of the offeror.
      b) What is the relationship between the parties?
      c) Is there a rejection of the promise and a demand for performance as acceptance? (Not a lot of weight on this one)
   iv. The restatement tells us there is a presumption in favor of bilateral contracts when in doubt because they protect both offeror and offeree.
      a) A offers B $100 if B will walk across the Brooklyn Bridge. This is an obvious unilateral contract. Only way to accept it is to walk across the bridge. B gets half way across, A catches up to him, and says, “I revoke.” B finishes walking across the bridge. Did B accept the offer?
      b) The presumption under the restatement protects B from A's power to revoke.
      c) This protection comes at a cost because the offeror cannot change his/her mind.
      d) But most people are looking for a promise in an exchange. This means that the usual intention is for a bilateral contract.
      e) Keep in mind, this is only in case of doubt. Its still possible to propose an offer under which performance is the only method of acceptance. In these cases, the offeree is still vulnerable.
   v. The offeror loses the power to revoke once the offeree starts performance. This does not mean that the offeree has to complete performance. Justification for this principle is reliance.
   vi. In case of doubt it is presumed that an offer invites the formation of a bilateral rather than a unilateral contract.
   vii. A contractual offer may be accepted by performance if a unilateral contract is involved.

C. Pre-contractual Obligation
   i. The doctrine of promissory estoppel shall not be applied in cases where there is an offer for exchange as the offer is not intended to become a promise until a consideration is received.
   ii. Reasonable reliance on a promise binds an offeror even if there is no other consideration.

D. Conduct Concluding a Bargain
   i. A counter-offer is a rejection of the original offer and terminates it.
   ii. A contract may be implied based on the conduct of the parties to compensate a party on a “time basis” when no proof of an express contract is presented.
   iii. Mirror image rule: The acceptance must be the mirror image of the offer. Nothing can be changed.
   iv. HYPO: I offer to sell my farm for $1800, on credit, with interest at 10% per year, payment do on the 1st.
      a) Bob accepts, and wants to confirm that I mean U.S. Dollars. There is mutual assent and he's just making explicit something that is implicit.
b) What if Bob says he accepts and will schedule closing at his lawyer's office. The acceptance is good, even if the lawyer's office is in Florida. The offer is accepted, but the location of the closing is negotiable.

v. Question is whether the change is just a request/suggestion, or whether it is a qualification to the acceptance, thus violating the mirror image rule.

vi. What do we do when buyer and seller have different forms for contract?
   a) Answer the Courts Came up with: This is known as “the battle of the forms.” Whoever sent the last form is making a counteroffer. The person who responds to this by performing is accepting that form. So the last form sent is the one that prevails. The mirror image rule still lives in anything not covered by UCC Section 2, but
   b) UCC: Realized that this is a pretty weak answer, because neither party is reading the boilerplate on the other's form. The UCC answers in Section2-207(1)
   - Subsection 1: Definite expression of acceptance operates as acceptance even if there are changed terms. Mirror image rule down the drain.
   - Subsection 2: If the writings of the parties form a contract under subsection 1, then the additional terms are proposals for additions to the contracts. If both parties are merchants they automatically become part of the contract unless one of 3 conditions are met.
   - If not both merchants, then they aren't automatically incorporated under UCC so look to common law and see that there is assent
   - Subsection 3: says if the writings do not form a contract there may still be a contract. The terms are the forms on which the parties agree plus gap fillers (provisions supplied by article 2)
   - UCC Section 2 was revised in 2003, but no state has adopted it yet
   c) Restatement Second contains a provision very similar to UCC 2-207 that would apply the rule to all contracts, not just those for sale of goods. But courts haven't adopted the Restatement.

vii. I offer to sell you my jaguar for $8,000. If I don't hear from you by Wednesday, I'll drop it off on Friday. You remain silent. No contract.

viii. Hobbs v. Massasoit Whip Co.--Seller sends some eel skins to buyer with whom he had a previous relationship. This is an offer. "Buyer" manifested assent because he held the eel skins for an unreasonable time without rejecting them which would allow Seller to reasonably think that Buyer was accepting the skins just as he had many times before.

Silence may constitute acceptance in appropriate cases.

ix. Hypo: Insurance broker sends a letter to H saying I will renew your insurance if you don't respond within X time. So H didn't respond, b/c he wanted the insurance. Broker doesn't renew the insurance, and H's house burns down. Was there a contract? What if H hadn't wanted to renew the insurance? H's silence is ambiguous—it could mean consent or no consent. Restatement resolves by inquiring as to H's subjective intent. The ambiguity is offeror's fault, so he has to deal with the mess. In a sense the offeror is misleading the offeree by saying the offeree may accept by remaining silent. So in the restatement's view there is a contract.

E. Effects of Adopting a Writing

i. Parol Evidence Rule: If the parties have put their agreement in a writing that they intend as the final, complete, and exclusive expression of their agreement, evidence of a prior or contemporaneous agreement may not add to, vary, or contradict the terms of the writing.
   a) Why have the Parol Evidence Rule?
      - To prevent fraud
      - The distrust of the willingness of jurors to prefer written memorials over the later recollections of the parties.
      - Deals with the party who does not accurately remember what the deal was.
   b) Problem with Parol Evidence Rule: Maybe something was part of the agreement, but the parties just failed to put it in the written agreement.
   c) Really isn't a rule of evidence—its a substantive rule of contract. The evidence is irrelevant because the agreement is not enforceable.

ii. Mitchell v. Lath
   a) Does the parol evidence rule preclude an oral promise not contained in the written agreement that is appears on its face to be complete?
   b) Before an oral agreement is received to vary the written contract at least 3 conditions must exist.
      - (1) The agreement must in form be a collateral one
      - (2) It must not contradict express or implied provisions of the written contract
      - (3) It must be one that parties would not ordinarily be expected to embody in the writing—on inspection of the written contract, read in the light of surrounding circumstances must not indicated that the writing appears "to contain the engagement of the parties, and to define the object and measure the extend of such engagement." Would the parties have agreed separately when the adopted THIS writing?
   c) Hypo: Sue & Bob agree that Sue will sell her house at 110 Main to Bob for $150,000, closing in 30 days. They make and oral agreement that he'll pay $10,000 cash and then a promissory note to pay over time. Bob goes to deliver the $10k and promissory note and Sue is like, "Screw you, where's my money.” What result?
   d) Restatement (First) § 420: 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:
• is made for separate consideration, or
• is such an agreement as might naturally be made as a separate agreement by parties situated as were the
  parties to the written contract.

e) An oral agreement is permitted to vary from a written contract only if it is collateral in form, does not
  contradict express or implied conditions of the written contract, and consists of terms which the parties could
  not reasonably have been expected to include in the written contract.

iii. Hatley v. Stafford—For an oral term to be inconsistent with a writing, thereby barring its admission as evidence
  under the parol evidence rule, it must be contradictory to an express provision contained in the writing.

F. Assent to Standardized Forms

i. Mundy—An insured is bound by the terms of a renewal insurance policy as long as he receives the policy.

ii. Henningsen—Where there is a gross disparity of bargaining power, a disclaimer of an implied warranty of
  merchantability and of te obligations arising therefrom is invalid as contrary to public policy.

iii. An exculpatory contract will be deemed void when the public policy of imposing liability on person whose
  conduct creates an unreasonable risk of harm outweighs the public policy of freedom of contract.

iv. An adhesion contract will be enforced unless it is unconscionable or beyond the reasonable expectations of the
  parties.

v. Court frowns on vendor trying to limit its liability when it is really the best party to be subject to the cost of its
  dangerous products.

vi. Strict construction as a method of dealing with adverse terms often results in a tortured construction of the
  document.

vii. Additional terms that are tacked on after the forming of an initial contract are only enforceable if they are reasonably
    expected by the party not adding the terms.  (so a warranty with your toaster might be ok, but an arbitration
    computer with a computer might not be ok).

viii. 1920s congress passed the Federal Arbitration act to reverse anti-arbitration stance of the courts.  It makes
      arbitration agreements enforceable, but they are subject to the rules of contracts at equity & law.

ix. Starting in the 1990s there was a sweeping trend to incorporate mandatory arbitration clauses into employment and
    consumer transaction contracts.  The enforcement of those provisions have been challenged on a variety of grounds

x. IN contracts of adhesion, if the provisions are beyond the expectations of the signing party then they are not
    enforceable.

xi. All the rules of mutual assent developed with equal bargaining power, but often that's not the case anymore.  The
    predominant transaction today uses standard form documents.  How does the court deal with this?  Three ways.

a) Develop new assent rules

b) Develop new rules of substance of contract

c) no change at all.

G. Arbitration and Agreements to Arbitrate in Fine Print Boilerplate—Greenfield's Rant

i. One party is unaware of the arbitration clause, and if she knows its there, she doesn't know what it means.

ii. Benefits to the party who creates the clause (the employer or manufacturer)

   a) eliminate the risk of the jury

   b) eliminate class action lawsuits

iii. Problems with these types of arbitration agreements

   a) US Constitution gives right to trial by jury.  Its possible to waive this right, but for other constitutional rights the
       standard of whether there is a waiver of the right is that it has to be knowing, intelligent, and voluntary.  These
       clauses don't uphold that standard—the courts are just sticking to the “you're bound by what you sign” approach

   b) Arbitration has a problem as a process

      • lack of written opinions-->arbitrators don't have to back up their decisions and with arbitration we don't get
        any history or evolution of the law—everything is frozen.

      • The arbitrator doesn't have to look to the law to resolve the dispute unless the agreement specifically says
        so.

      • Only judicial review of arbitrator's decisions in VERY narrow circumstances.

      • It is also likely to be the case that there is systemic bias in the whole process b/c one party is a repeat
        player.  There are 3 huge nationally operating entities that provide arbitration in the US, and they are
        competing for the major corporations business.  So they make the arbitration friendly to the merchant.

      • Often the agreements provide that certain remedies that would regularly be available are not available (like
        saying the arbitrator cannot award punitive damages)

      • Consumer protection statutes say that if the merchant loses he has to pay the customer's attorney's fees, but
        arbitration clauses prevent this.

      • It isn't always faster, and it isn't always cheaper.  Have to pay a fee to the entity who is conducting the
        arbitration that depends on the size of the P's claim (can be thousands of dollars when filing a lawsuit is
        $80-$150), you have to pay the arbitrator ($2000/day—and you would never pay a judge), plus you still
        have to pay attorney's fees

   c) Enforceability of agreements to arbitrate threatens the rights of consumers/ employees/patients that courts have
      protected from the power of corporations/etc
IV. CHAPTER 4: POLICING THE BARGAIN

A. Revisions of Contractual Duty

i. Duress

a) What if the promisor is coerced into making a promise—“I'll give you $100 for your watch or I'll shoot you in the head.” Of course not enforceable. But that's obvious and trivial.

b) Duress of the Person—(first recognition of duress) I'm not going to let you out of this room until you agree to sell me your farm for $5,000. Promise not enforceable

c) Duress of Goods--(started in 18th century)--wrongful withholding of a person's goods until he/she makes a promise. Bob gives pawn broker i-pod; he gives her $80, under the understanding that she will give him $110 for the i-pod a week later. She takes the $110 a week later, and pawn broker says, “No, I want $150.” Pawn broker is engaging in wrongful conduct (tort of conversion) so this is not enforceable.

d) Austin Instrument, Inc. v. Loral Corp—

• Court defines duress as: wrongful threat that precludes the exercise of free will

• Modern trend toward more liberal view of duress—conduct doesn't have to be tortious—it can just be simple refusal to perform unless a demand is met, and there is no practicable alternative

• A contract modification is voidable on the ground of duress when the party claiming duress establishes that its agreement to the modification was obtained by means of a wrongful threat from the other party which precluded the first party's exercise of free will.

ii. Pre-existing Duty Rule: A promise to do what one is already obligated to do is not consideration.

a) Hypo: Developer agrees to pay P and 20 other construction workers $18,000 to work in Ontario. Workers get up there and then say “screw you, we want $27,000.” D can't get any workers up there in time to replace, so he goes with their demands. P and the other workers get back to the states and D will only pay them $18,000. Can P recover the additional $9,000. No, because of the Pre-existing Duty Rule: A promise to do what one is already obligated to do is not consideration.

b) This rule means that there is no consideration for the additional $9,000 and thus the promise is not enforceable. This is one of the solutions that came up before duress was available as an option.

c) The problem with the pre-existing duty rule is that it makes modification impossible when it is actually a good idea and is a desirable outcome. Like if there was an unexpected deadly insect infestation and that's why they wanted the extra money. HOWEVER, if the insects made it so that the work couldn't possibly be completed in time, there is a different story that we'll get to later.

d) The pre-existing duty rule does not mean the contract can't be changed—it just means that you have to make more than one change. So $27,000 in exchange for waiting an extra two weeks to get paid is all good.

e) Article 2 of the UCC, plus a few states in other areas, have thrown out the pre-existing duty rule.

f) There can be a contradiction between this rule and the policy encouraging settlements. The court has come down on the side of encouraging settlements rather than enforcing the pre-existing duty rule.

iii. Accord and Satisfaction

a) Marton Remodeling v. Jensen—MAJORITY VIEW

• Facts: Jensen hired Marton under a “time and materials” contract to remodel his house. Marton charged Jensen $6,538.12, but Jensen claimed the number of hours Marton claimed was excessive and offered to pay $5,000. Marton refused the offer, but Jensen sent Marton a check that said, “Endorsement hereof constitutes full and final satisfaction of any and all claims...(see book)” Marton wrote to Jensen refusing to accept the check in full payment. When Jensen made no further payment, Marton filed a mechanics lien on Jensen's property and cashed the check after writing “not full payment” below the condition.

• Issue: When a bona fide dispute arises and a check is tendered in full payment of an unliquidated claim may the creditor disregard a condition attached to that check in order to recover the undisputed portion of the claim? NO

• Some courts would disagree with this and say that D only paid the $5000 he thought was due, and thus there is no consideration for Marton taking this amount. Too easy to get around this rule—write a check for $5001.00. Can't say I like the money but not the condition, so I'll take one and not the other.

• A creditor cannot escape the discharging effect of a draft sent in satisfaction of a debt by adding words of non-acceptance.

B. Mistake and Misrepresentation

i. Mutual Mistake

a) Facts. P agreed to purchase a cow from D that both P and D believed to be sterile. D then discovered that the cow was with calf and refused to tender the cow for the agreed upon price.

b) Issue: If in a contract for sale both the seller and the purchaser are mistaken as to the nature of the thing to be sold, and the seller later discovers that his assent to the contract was based on a mistake, may he refuse to execute the contract? Yes.

c) Today the question is whether or not the contract is enforceable—title stuff is no longer important under the UCC

d) Replevin is an action at law seeking property (not money!) The court only got involved if the defendant wanted to go to court—otherwise the sheriff just snatched the property. This has changed, now, and there are more
procedural steps.

e) **Mistake makes the contract unenforceable if it goes to the fundamental subject matter of the contract and the mistake is mutual.**

  
f) *When there is a mutual mistake going to the very substance of what is being sold, no contract exists.*

ii. When one Party knows a factor about a party that the other party does not know about:

a) Could the ignorant or mistaken party have known?

b) If the knowing party conceals the problem from the unknowing party, then the court will find against the knowing party because it is a misrepresentation.

c) Law applicable to bobble-head dolls: If the general contractor should know that the subcontractor is not really assenting (because the price mistake is WAY off) then he can't snap up and enforce the mistaken deal. Re-read the end of the *Dreaden* opinion

d) Read and take notes on pgs 622-624 Comment on Unilateral mistake

e) Remedy in tort for misrepresentation or half truth

iii. Misrepresentation can give rise to an express warranty or fraud (tort or contracts)

iv. Buyer of land builds seaside cottage, then finds out about the erosion problem. He sues for breach of implied warranty, negligence, and misrepresentation. The court denies all relief. Why didn't he sue for mutual mistake? Mutual mistake is a basis for saying there is something wrong with the assent process, so all it does is let them rescind. They don't want to walk away from the contract, because then they'd be walking away from the land and the house. They want damages for their failure to get what they thought they'd be getting.

v. In tort put party where they would have been had the misrepresentation been true.

vi. Hooters guy told waitresses he would put the waitresses who sold the most beer each month in a drawing for a Toyota. Beer sales went up. He gathered all the waitresses together, pulled the name of the winner, blindfolded her, and then gave her a toy Yoda. She sues for value of truck. What result?

vii. *When a home seller disclosed only a portion of the information he has but leads the buyer to believe he has made a full disclosure, he will be liable if the buyer acts in reliance on that partial disclosure.*

C. **Changed Circumstances Justifying Non-Performance**

i. **Impossibility**

a) *Taylor v. Caldwell:* Concert hall burns down through no fault of either party. Guy who had rented the concert hall sues.

  - The parties had no intention that the building would be destroyed. But from the beginning of the contract, IF they had thought about “what if the building is destroyed” then they would have said “no contract” under those circumstances: presumed intentions of the parties.

  - In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

  - In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

b) The courts have not used “mutual mistake” to apply to future affairs, but it would be neat, wouldn't it? It fits pretty well.

c) Types of Impossibility:

  - Objective impossibility: Performance is absolutely impossible

  - Subjective impossibility or Impracticability: performance that is very difficult or expensive (like if the hall had burned down 6 months prior to concerts and could be rebuilt)

d) Objective impossibility is required for the impossibility claim.

e) So what kind of impossibility should be required to provide the excuse, and should impossibility be the test at all?

f) Hypo: F is a freight company, M is a merchant. M has goods that are worth $180,000 in NY and $300,000 in HI. Hires F to transport the goods to HI for $20,000. M delivers the goods to F and pays the $20,000. F sails down the eastern coast of the US and as he's approaching the Panama canal he learns that rebels have shut down the canal so he returns to NY and gives M his goods and money back. M sues F for the $100,000 loss he faces b/c goods don't get to HI. Can he recover?

ii. **Frustration of Purpose**

a) Non performance is ok if something happens that frustrates both parties' purpose in forming the contract in the first place.

b) Hypo: On 1/1, M a mining company in Canada forms a contract with L, an electric utility in Kansas for uranium to be delivered to Edmonton on 4/1. On 3/1 the US bans the import of uranium. M does not deliver. The purpose of the contract is frustrated because L can't bring in the uranium and use it. The foundation of the agreement for both parties.

c) Hypo: Same as above, except instead of US baning imports, Canada requires uranium exporters to have a license. M is denied the license so he doesn't deliver. L sues M. What result?

iii. These excuses (impossibility and frustration of purpose) are NOT readily available.
a) HYPO: S is a singer. S agrees to sing at N’s nightclub on November 1st. The show is a sell-out. S performs, then goes back to her dressing room and dies. N doesn’t pay. S’s estate sues N for the compensation. What result? Can’t pay S because she’s dead. But that’s ridiculous. This changes the way we look at impossibility.

b) Harrison v. Conlan—very narrow exception for personal services

c) S is a seller who contracts to sell her car to B on December 20. On December 15th S dies. B shows up on December 20 and tries to complete the transaction with S’s husband, but the husband refused. B sues. S has made a commitment, and that commitment carries over to her estate. Her continued existence was not fundamental to the contract. Assume B failed to show up. S’s husband sues B. Same result.

D. Unconscionable Inequality
i. Unconscionable contract is not worthy of equitable relief.

ii. A court of law can nullify a contract based on unconscionability.

iii. UCC Article 2: If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

iv. What Makes a Contract Unconscionable:
   a) Absence of Meaningful Choice (Deception or coercion can lead to an absence of meaningful choice)
      • gross inequality of bargaining power
      • manner in which the contract was formed
   b) Terms that unreasonably favor the other party (look at the commercial setting, purpose, and effect)
      • So ah ha, when this favorable term is price, then the court IS looking at the adequacy of consideration!

v. But if every merchant employees a particular term, then the consumer has no choice, but it is consistent with commercial practice.

vi. Unconscionability is a question for the COURT, not for the jury

vii. unconscionability can undercut the theory of “you’re responsible for what you sign.”

viii. Courts will not enforce penalty provisions in contracts

ix. Courts are using unconscionability frequently in binding arbitration agreements in consumer transactions

x. Alternative to unconscionability—Legislature or administrative agency can prohibit certain contract clauses

xi. Gianni Sport Ltd. v. Gantos—A clause permitting a buyer to unilaterally cancel an order is invalid if unreasonable and the buyer is in a substantially superior bargaining position.

V. Chapter 5: The Maturing and Breach of Contract Duties
A. The Effects of Express Conditions

i. Contract expressly states that one or both parties are only required to perform if some event occurs. We will look at two things:
   a) interpretation—determining the meaning of the contract
   b) construction—determining the legal effect of language in the contract

ii. Condition means some operative fact subsequent to acceptance and prior to discharge, a fact upon which the rights and duties of the parties depend.

iii. Hypo: S promises to convey her house to B on May 1 for $160,000 and B promises to pay $160,000 for it on May 1, on the condition that the ice house across the road is removed.

iv. The non-occurrence of a condition will prevent the existence of a duty in the other party; but it may not create any duty to pay damages at all, and it will not unless someone has promised that it shall occur.

   a) Is preservation of the stalks a condition of insurance company paying or an obligation of the insured. If its a condition then the insurance company is not liable since the stalks were destroyed. If it an obligation of the plaintiffs, the P is in breach and liable for any loss it may cause, but it does not necessarily mean that the insurance company does not have to pay.

b) What Court will look at to determine if it is a condition or a promise:
   • Principle criterion for determining the answer to this question is intent. Expression of one thing is the exclusion of another
   • If language is not enough to tell us the intent of the parties, we look to the circumstances surrounding the formation of the contract, including trade usage.
   • Then look to interpretation of doubtful words as promise or condition. Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise; but the same words may sometimes mean that one party promises a performance and that the other party’s promise is conditional on that performance.
   • General legal policy opposed to forfeitures. (in this case forfeiture of premiums)

c) There is a presumption of promise rather than condition.

d) Hypo: “I promise to repay $10,000 plus 8% interest as soon as I sell my house and receive the money from the sale.”
   • Is it a condition/obligation/or convenient time for payment
• Not obligation—look at words—I disagree, but greenfield says no
• Need to focus on both loaner and loanee's intent. At 8% interest, how likely is it that the parties are allocating the risk of non-payment to the loaner?

c) When the party who is only required to perform under a condition prevents a condition from happening, the condition falls out.

f) Where it is doubtful whether words create a promise or an express condition, they are usually interpreted as creating a promise, thereby avoiding a forfeiture.

a) The non-occurrence of a condition may be excused by certain conduct of the defendant. Because of conduct of the defendant

b) An insurer’s acts or conduct inducing the insured not to bring suit estops the insurer from asserting a contractual condition relating to a time limitation for filing suit thereunder. The limitation becomes effective again, having been suspended, at such time the insurer gives notice to the insured that the reason for withholding suit is no longer effective.

B. Conditions of Satisfaction

i. Second Nat'l Bank v. Pan-American Bridge Co  
a) If the condition precedent of an architect's certificate of approval is not met, can that condition be excused if the architect's failure to issue a certificate was “unreasonable and unfair,” can the builder recover? No, the architect's failure to issue a certificate must be shown to be in bad faith.

b) This creates tension, because if the architect is WRONG, then the contractor is sort of getting screwed, because he did everything he was supposed to do under the contract. But holding otherwise would have undermined the purpose of having the architect in the first place. So long as the parties are in good faith and there is some basis for the architect's refusal, the architect's decision is final.

c) So what is bad faith? Look to the note cases, which come up with three different examples of bad faith on the part of an architect. This case comes up with a 4th.

d) Haymore v. Levinson says unreasonableness is enough to excuse the non-occurrence of the condition. But in this case the satisfaction was to a party of the contract, rather than to a disinterested third party. So there is a temptation to never be satisfied.

ii. Fursmidt v. Hotel Abbey Holding Corp.  
a) Facts: P and D entered into a contract under which P would provide valet and laundry services for D. The contract state that “the services to be rendered by [P] shall meet with the approval of [D], who shall be the sole judge of the sufficiency and propriety of the services. After 7 months D informed P he was to discontinue services, and D found someone else to provide the services. P now sues claiming D had no right to terminate the contract.

b) Issue: If a contract contains a provision calling for performance to the satisfaction of one of the parties and that party terminates the contract on the grounds that performance is not satisfactory, must that dissatisfaction be found to be reasonable?

c) Holding: No. The jury should only find whether the dissatisfaction was bona fide or feigned.

d) Reasoning: This is a satisfaction provision providing for performance involving 'fancy, taste, sensibility, or judgment' of the party it benefits. Agreement said D was to exercise strict control and direction of P's operation. D's objective was to ensure its guests proper/reasonable valet and laundry services. No objective standards of reasonableness can be set up by which the effectiveness of P's performance in achieving the effect sought can be measured.

e) If the performance is aesthetic in nature, then you can't use a reasonableness standard (since everyone has different tastes) so you have to use the bad faith standard. On the other hand, if performance is of a mechanical nature, an objective standard of reasonableness can be used to determine whether a condition can be excused.

f) What if the valet walked off the job, and for two weeks the hotel had to send its laundry out to a commercial laundry at their own expense. Hotel sues valet. Could valet defend by saying no mutuality of obligation
(hotel's promise is illusory)?

g) Hypo: P is a painter painting farmer F's barn to F's satisfaction. F pays half in advance, half upon completion. Upon completion, F says “I'm not satisfied.” P sues.

h) Does not mean that bad faith standard always applies in a personal services contract.

i) S contracts to sell bobble heads to B for $5000, delivery Dec 1. On Dec 1 they both sit at home waiting for each other. On Dec 2 they both go down to the court house and sue each other.

j) When “satisfaction” contracts involve taste, fancy, etc., a jury may only inquire as to whether the party is honestly dissatisfied, not as to whether the dissatisfaction is reasonable.

C. Constructive Conditions: The Order of Performance

i. Nichols v. Reynbred—Where there is a bilateral contract, suit may be brought by a party without his pleading that he performed his side of the bargain.

ii. Kingston v. Preston

a) Back in the day you didn't have to allege that you yourself have performed in order to enforce the other party's promise.

b) Promise by plaintiff is always an obligation of the plaintiff, but it may or may not be a condition of defendant's obligation to perform.

c) To determine if a constructive condition is a condition precedent we look to:
   • evident sense and meaning of the parties
   • order of time in which the intent of the transaction requires their performance

d) We can look at essential fairness and the unavailability of a practicable remedy. Also, look to their prior dealings if they have worked together in the past. You can also look to industry custom, what the best way to maximize efficiency are.

e) Three categories of promises
   • independent—no temporal relationship between the parties—they both have to be performed regardless of whether the other is
   • Dependant or conditional—one must be performed before the other
   • mutually dependent or concurrently conditional—each has to be performed simultaneously and neither has to be performed before the other

f) Breach of a covenant by one party to a contract relieves the other party's obligation to perform another covenant which is dependent thereon, the performance of the first covenant being an implied condition precedent to the duty to perform the second covenant.

iii. Price v. Van Lint

a) Promises have a duel nature. A promise is always an obligation of the promisor. It may also be a condition. Kingston said that getting security was a condition of the land being tendered. Price says no, that D's performance is not conditional on P's rendering security.

b) The general rule is that promises are concurrently conditional (dependent upon one another). This assures that the D isn't required to perform without being assured that the P will perform.

c) Performance of both parties is normally due simultaneously. Each is a condition of the other. If there is doubt whether a condition is a promise or an express condition, Howard tells us to view it as a promise. But this case (and the restatement) tell us that a constructive condition is presumed rather than a promise.

d) Bobble Head doll Hypo: S shows up at B's door with the collection of dolls and demands the $5,000. B says “I changed my mind.” S sues B. B defends by saying that our promises are concurrently conditional, and you didn't give me the dolls, so I don't have to perform. But saying that S has to leave the dolls there would be saying that S has to perform first.

e) It is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange. (Render or Tender his own performance)

f) Where a contract contains mutual promises to pay (or perform some other act), one of which may or is to be performed before the other, the latter promise is an independent obligation the nonperformance of which merely gives rise to a cause of action and does not defeat the right of the party making it to recover for a breach of the other promise.

iv. Ziehen v. Smith

a) ISSUE: May a vendee recover for breach of contract if he has not rendered or tendered performance or demanded that the vendor perform and on the day of performance there is some lien or encumbrance to the sale that is within the vendor's power to remove if the vendor and the vendee do not know of the encumbrance? No.

b) D was to convey good and sufficient deed to a country hotel and some land to P. P was to pay $500 down at the execution of the contract, $300 more on September 15. There are no dates on when D was supposed to turn over the deed, so the court presumes that everything happens on the 15th. There was a mortgage on the property that P and D didn't know about. Because of this mortgage, P did not perform on the 15th and did not demand that D perform. P now sues to recover the down payment and expenses for the examination of the title.

c) There is an exception to the general rule when the performance by D is not possible. If its impossible for D to perform then the requirement that P render or tender is excused. Tender would be pointless because D cannot
perform, so the purpose of tender isn't met even if performance is tendered.
d) If P found out about the encumbrance he still wouldn't be excused because he has a good faith obligation to tell
the seller and give the seller a reasonable time to address the problem.
e) There are two exceptions to the requirement for render or tender
   • performance by D is impossible, or
   • D has repudiated the contract (but if the D had not repudiated, would P have perform. Usually the court
     presumes that P would, but if there are facts that show otherwise the courts will take that into
     consideration).
f) If the vendor of real estate is unable to perform his part of an executory contract when such performance is
due, a formal tender or demand by the vendee is not required for maintenance of an action by him to recover
the money paid on the contract or damages.
v. The safest route is to always go through the formality of tender. After all, what if you are wrong about the
impossibility of D's performance.
vi. There is a difference between law and equity. The courts of equity have more flexibility. They may grant
conditional relief, i.e. Buyer gets specific performance if he renders purchase price to the court. So they aren't as
rigorous about the requirements for render/tender. Courts of law can't do this, however.

D. Protecting the Exchange on Breach
i. Oshinsky v. Lorraine Mfg. Co.-- P was to deliver goods “at” Nov. 15. P delivered on Nov. 16th. P now sues for
breach because D refused goods. D says refusal is justified because the goods were late. Trial court found for P, this
court reverses.
a) Does the phrase “deliver at November 15” mean that if the seller does not deliver on November 15th that the
seller has breached and is wholly responsible for the breach? Yes.
b) Is the seller's delivery on November 15th a condition buyer's obligation to perform? Yes.
c) Why does the failure of the seller to deliver precisely on time automatically prevent the seller from
recovering? The court would tell us it is because time is of the essence. Parties are free to make time of the
essence. Also, in contracts for the sale of goods, time is of the essence even if the parties don't make this
explicitly clear.
d) This creates the “perfect tender rule”
e) A party is not bound to honor a contract after the specified date of performance.
ii. UCC says if the good or the tender fail in any respect to conform to the contract the buyer may reject. However,
other sections of the UCC take the teeth out of the perfect tender rule.
iii. Plante v. Jacobs
   a) There is a presumption in favor of viewing promises as dependent, but this isn't possible in a building contract
because the consumer can't be paying as every nail is driven.
b) If the buyer is paying in installments, then the building up to the first installment is a condition of the payment,
of the first installment. The payment of that installment payment is a condition of the builder doing the second
portion of the work, which is then a condition of the second installment, and so on and so on.
c) In this case, the builder's performance failed in a number of respects to be what the consumer wanted. Under
Oshinsky the builder couldn't recover. However, the court holds that the builder can recover in this case
because he has substantially performed.
d) Plaintiff's obligation is complete performance, but the condition of defendant's obligation occurs if the
plaintiff substantially performs.
e) Substantial performance is less than perfect performance, but its not just any amount of performance.
f) Consider this: If D breaches before P stops performing, P can sue in contract or in restitution. If D has
not breached before P has stopped performing, but D refuses to perform because he believes P has not
completed performance then if P's performance amounts to substantial performance the P has a claim in
contract, but probably not in restitution. If it does not amount to substantial performance then P does
not have a claim in contract, but does have a claim in restitution (not all courts agree on this last part—
see note on 118-119 and 123—it's because of willfulness of breach by P)
g) There can be no recovery on a contract as distinguished from equity unless there is substantial performance
which is defined as where the performance meets the essential purpose of the contract.
iv. Turner v. Chester Construction
   a) Once one party fails to perform the other party may be justified in canceling the contract, ending the
relationship, and suing for loss in expectancy.
b) Recision has two connotations
   • mutual agreement by both parties to end the contract
   • unilateral decision to end contract and restore parties to pre-contract position

c) This isn't a case about recision, its a case about cancellation. A breach by one party that causes little damage to
the other doesn't justify cancellation of the contract. This encourages the parties to hang in there through the
rough spots and not cancel over some trivial fault. On the other hand, if one party does nothing, the other party
can cancel the contract and recover expectancy on the whole contract. How do we determine if the parties have
reached the point where they can cancel? The courts deal with this with the concept of material breach. If
there is a material breach, the contract may be canceled and the party may recover. If the breach is not material the party will continue with performance, but he can sue either immediately or after his performance is complete.

d) If one party wants to cancel the contract because the other party has failed to perform we want to know if the shortfall in performance amounts to a material breach. Conceptually it is not possible to have substantial performance by the plaintiff and material breach by the plaintiff. So material breach is the other side of the substantial performance coin.

e) The test for whether something is a material breach is whether it goes to the “essence of the contract.” To determine this we look to
   - Cause of default
   - Extent of breach
   - Needs & Expectations of the parties
   - Likelihood of correction

f) Sometimes material breach is referred to as “total breach.”

v. Greguhn v. Mutual of Omaha
   a) Anticipatory repudiation amounts to a material breach, and as a material breach, it discharges the other party's obligation to perform.
   b) The failure to perform an installment of a contract does not necessarily amount to a material breach. But a repudiation of all the remaining performance does amount to a material breach.
   c) Doctrine of anticipatory breach is really just an application of the principles of conditions and material breach.
   d) Apparently chapter 1 and chapter 5 are very related...figure that out.
   e) Anticipatory repudiation amounts to a material breach only if:
      - the K is bilateral AND
      - P has not completed performance (because if P doesn't have to perform anything else, then P does not suffer from having to remain ready to perform.)
   f) Common definition of repudiation is overt communication of intent not to perform
   g) The rule is the same in equity and law that the P must at least substantially perform.
   h) In a unilateral contract for the payment in installments after default of one or more, no repudiation can amount to an anticipatory breach of the rest of the installments but yet due.

vi. Reigart v. Fisher—Where there is substantial defect with respect to the nature, character, or situation and in regard of which he is not put on inquiry, specific performance will not be decreed against him.