REMEDIES FOR BREACH OF CONTRACT

I) The Goals of Contract Damages
   o Expectancy principle – give the nonbreaching party what he was promised so far as money damages can satisfy; compensation for nonbreaching party, not punishment for breaching party.
   o Restitution interest – interest of a party in recovering values conferred on the other party through efforts to perform a contract. To prevent unjust enrichment. Requires Δ to disgorge the money value of the benefit that the Δ received from partial performance of the contract. Not a k theory. Ordinarily no enforceable k exists at the time the suit is brought (either rescinded or never existed).
   o Reliance interest – party's interest in recovering losses suffered by virtue of reliance on the contract, whether or not there was a corresponding gain to the opposite party. If expectation damages can not be ascertained. Puts nonbreaching party back in the position they were in when the k was made. Making that party “whole” again.

   a Groves v. John Wunder—lease of land, land to be level upon return.
   o In a breach of contract by Δ, π is entitled to the cost of completing the work which the Δ failed to complete, even if the cost of completion exceeds the fair market value increase that the work would bring.
   o Dissent says there would be economic waste here. Award cost of completion when it's not disproportionate to value of the property or when changes are aesthetic in nature.

   b Peevyhouse v. Garland Coal
   o No person can recover greater amount of damages for breach of an obligation than he would have gained from the full performance.

   c Advanced, Inc. v. Wilks
   o If property is held for economic value, damages should not exceed change in fair market value.
   o If property is held for other reasons (some special significance) or if court is confident money will be used to complete the contract, cost of completion can be awarded even if it exceeds change in fair market value.

   d Acme Mills Elevator Co. v. Johnson—sale of grain, delivery of goods
   o In a breach of contract for the delivery of goods, the damages formula is market price of the property at the time and place of delivery minus the contract price, even when the breach occurs because the party contracts to a 3rd party at a higher price than the market value of the original contract. This formula may result in negative number, in which case the damages would be zero. Even if breaching party benefits.
   o Efficient breach – when the detriment to the nonbreaching party is smaller than the gains to the breaching party, then the breach is efficient. Breaching party can compensate and nobody loses.
   o Seller’s breach – market price at time and place of delivery – k price. If buyer covers, can recover cover price – k price under UCC.

   e Laurin v. DeCarlis—π bought land from Δ, prior to finishing construction, Δ took gravel; π sued for FMV of gravel.
   o With a willful breach π can collect from the benefit the breacher received. If value of taken property outweighs change in value to real property, cost of taken property is measure.

II) Limitations on Expectation Damages
   o There are times where the court will not award the expectancy damages that the π claims. Expectancy awards limited to reasonable (accounts for what nonbreaching party could have/should have), foreseeable (includes essential & special, but communicated), and measurable (excludes intangibles).

   a Rockingham County v. Luten Bridge
   o If Δ rescinds a construction contract but π continues the construction, the π is not entitled to damages incurred from the work done past the date of the breach; only entitled to compensation for damages that resulted up until the date of the breach.
   o Measure of damages – expenses plus profits on contract. Only expenses up to notification if breach and total profit expected from contract. Alternative measure is k price – expenses saved.
   o Doctrine of avoidable consequences – injured party may not recover losses he could have easily avoided; may recover loss that he could not reasonably have avoided. Burden of proof for mitigation of damages is on breacher to show how much of the loss could have been avoided.

   b Leingang v. City of Mandan Weed Board—k to cut weeds, weed board breaches. π wants damages for equipment. π can’t recover fixed expenses that would have been incurred even if no k.

   c Kearsarge v. Acme—computer service for year, Δ terminates, π wants expectancy but Δ says money made by π after breach from other jobs should be deducted. Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable, unless such gains could not have been made had there been no breach.

   d Parker v. Twentieth Century-Fox
   o In a breach of employment contract when alternative employment is different and inferior (not comparable and substantially similar) to that which π has been deprived, the doctrine of avoidable consequences cannot be applied to mitigate the π damages awarded when π rejects this alternative employment.
Claim for lost wages will be reduced by whatever wages the employee did earn or could reasonably have earned in another job. When employee doesn't obtain other employment, court must determine whether the employee could reasonably have found or should reasonable have accepted another position.

Only required to make reasonable efforts to mitigate damages.

e  **Billetter v. Posell**—π employed to work in retail store, Δ fires and reoffers job for lower salary. **Employee is not required to perform the same work for less pay in mitigation of damages in the same company.** If could get same job in another company, but for lower salary, should take and can get difference. If doesn’t, this would be deducted anyway. **Δ can't use unemployment compensation to mitigate damages.**

  - Collateral Source Rule — tort rule that denies to tortfeasor a reduction in damages for compensation received by the injured π from other sources (insurance, unemployment compensation). This is often applied in k cases.

f  **Missouri Furnace v. Cochran**—coke, Δ stops delivery

  - In a breach of delivery contract with delivery dates set in installments, when after the breach the π enters into a new forward k, the π is entitled to damages calculated by the formula (market price at dates of delivery) – (k price) NOT (new k) – (old k).
  - Future contracts to mitigate damages are entered into at the risk of the nonbreaching party.
  - UCC measure of damages is cover price – contract price
  - In mitigating damages, the nonbreaching party must act reasonably. But problem in determining reasonable because the π may think he’s acting reasonably (could have been the case in Luten). The nonbreaching party has to acting before it knows the consequences.

g  **Reliance v. Treat**—staves to be delivered in December, but Δ repudiates in August. Court says there is no need to mitigate damages until there are damages to mitigate, and this does not occur until delivery date.

  - Anticipatory breach — repudiation of a party’s contract duties before the time has come for performance.
  - UCC says can get cover after anticipatory breach, don’t have to wait for time of performance.

h  **Neri v. Retail Marine**

  - In a breach by the buyer of a contract for the sale of retail goods when the seller has an inexhaustible supply of the product and the product is sold at the same price to another buyer, the π must pay damages equaling (profit seller would have realized from the sale) + (incidental damages). This is because he would have had both the sales had the contract been fulfilled. This agrees with UCC.

i  **Hadley v Baxendale**—service k; established standards of foreseeability

  - In a breach of contract to transport goods, when the injured party does not communicated special circumstances regarding the contract, if the breacher’s actions result in unforeseeable, unnatural consequences, the breacher is not liable for damages that result from these consequences. Breacher does not have to pay for damages that could not have been reasonably foreseen, those not communicated; only responsible for those arising naturally because of the breach.

    1. General damages – those arising naturally out of the breach.
    2. Special or consequential damages – arising out of special circumstances – only recoverable if the special circumstances were known to the breaching party.

  - Tacit agreement test — extent of breaching party’s liability should be within contemplation. Would party have entered into agreement knowing about extent of liability expected/inferred by nonbreaching party? Did the party actually foresee the damages?

j  **Lamkins v. International Harvester**—lights for tractor so could farm at night

  - When damages arise from special circumstances and are so large as to be out of proportion to the consideration agreed to be paid for the services rendered under the k, it raises a doubt as to whether the party would have assented to such liability had it been called to his attention at the making of the contract unless the consideration to be paid was also raised so as to correspond in some respect to liability assumed. The damages may have been foreseeable, but that’s not enough because damages are way too out-of-proportion.

k  **Victoria Laundry v. Newman Industries**—Δ to deliver laundry boiler

  - In cases of breach of contract the aggrieved party is only entitled to such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as likely to result from the breach.
  - What is reasonably foreseeable depends on the knowledge possessed by the breaching party. Here, Δ would have known what boiler would have been used for.
  - Not everything has to be communicated, can just be reasonably foreseeable—there can be more than one foreseeable possibility.

l  **Prutch v. Ford Motors**—foreseeability today—defective equipment, damage to crops

  - Standard for foreseeability is not actually what is foreseen but what is foreseeable. (UCC—rejecting restrictive tacit agreement test).

m  **Restatement**

  - Unforeseeable not recoverable.
  - Foreseeable—probable result of breach:
(1) Ordinary course of events
(2) Result of special circumstances the party in breach had a reason to know
(3) Courts may limit damages for foreseeable loss by excluding recovery for loss of profits—only recover loss incurred in reliance or that are necessary to avoid disproportionate compensation.
   - Belief that there will be times when it is not good policy to require the Δ to pay for all of the foreseeable loss that is caused by the breach.
   - A more objective form of the tacit agreement test—what actor had reason to foresee.

n Valentine v. General American Credit, Inc.
   - In a breach of employment contract, discharged employee cannot recover mental distress damages resulting from the breach on the basis that the damages were foreseeable because an employment contract is not entered into primarily for job security.
   - Not ALL foreseeable damages are recoverable. Ordinarily mental distress damages are not recoverable because they are not foreseeable. Only really foreseeable in k with mortuary for funeral.
   - No punitive (exemplary) damages in contracts.

III) Alternative Interests: Reliance and Restitution
   - Because of the uncertainty of profits, cannot put π in expectancy position.
   - RELIANCE—put nonbreaching party back at start. = costs incurred by the nonbreaching party in partial performance of the contract.

a Chicago Coliseum v. Dempsey
   - In a breach of performance contract, the Δ is not liable for lost profits that are purely speculative and cannot be calculated to a reasonable degree of certainty.
   - Δ not liable for expenses incurred by π prior to the signing of the agreement.
   - Δ is not liable for damages incurred by π attempting to force Δ to comply with the contract.
   - Δ IS liable for damages incurred by π after the signing of the agreement but before the date of breach (reliance).

b Security Stove v. American Ry. Express
   - Reliance recovered when expenses in contemplation of breacher even though the expenses would have been incurred anyway. This was because π knew Δ would deliver.
   - Reliance losses can be recovered along with expectancy; reliance and profits cannot.

c Anglia v. Reed—actor repudiates, cannot find substitute, cannot produce play
   - Where lost profits cannot be proved, π is entitled to recover wasted expenditure and is not necessarily limited to that incurred after the contract was made.
   - Aggrieved party cannot recover both lost profits and wasted expenditures; must choose between them. Where the lost profits cannot be proved, π entitled to wasted expenditures and is not necessarily limited to those incurred after contract was made.

d Restatement—alternative to expectation interest—injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

RESTITUTION—reasonable value of performance; cannot be higher than the contract price if the breacher is the one entitled to money; a different suit than a suit on the contract; a theory of liability; NOT a category of damages; the prevent unjust enrichment.

a US v. Algernon Blair
   - A subcontractor who justifiably ceases work under a contract because of the prime contractor’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 k.
   - Where standard expectancy damages produce no recovery for the π, π can recover for benefit conferred on Δ.
   - He can collect the fair value of goods or services he has conferred even though such a recovery would put him in a better position than the expectation measure would have.

b Kearns v. Andree
   - π who cannot bring an action on the contract for some reason other than his own default is permitted a recovery for the reasonable value of his services without regard to whether those services have benefited the other party—these are situations where the law will imply an agreement to make reasonable compensation—principle applies where contract showed the expectation of the parties that compensation was to be made.

c Oliver v. Campbell
   - Where an employment contract is terminated by wrongful discharge before performance is completed, the contract does not operate as a limit on recovery. However, in this case, the k was substantially performed, so the avenue of restitution was not available according to Restatement §350.

d Britton v. Turner—worked on farm for 9 ½ months, then quit, wants restitution
   - A party who has breached a contract is entitled to recover the value of his performance even though he obviously couldn’t recover damages upon the contract itself.
   - Breaching party can collect in restitution for benefit conferred. Damages limited to k price and may be limited by replacement costs.
o Measure of damages: (k price) – (cost of having someone else complete). But this formula is fundamentally flawed—shouldn’t start with k price, because that is the employer’s expectancy. Formula should be (value of benefit conferred) – (injury to employer).

IV) Contractual Controls on the Damage Remedy

- Stipulated damages—contract clause fixing damages in the event of breach is enforceable only if it constitutes a reasonable forecast of the injury resulting from breach, and only then if the injury is difficult to measure. Courts won’t enforce punitive damages (penalties).

a City of Rye v. Public Service Mut. Ins. Co.—if not built by certain time, there’s a security bond; Δ didn’t finish in time, but there were other circumstances.

- Recovery of a contractually agreed upon sum is prohibited when it does not reflect a reasonable estimate of probable damages or damages actually incurred and damages would be difficult to ascertain.

- Difficult or incapable of being measured at:
  1. Time of formation, or
  2. In light of the actual damages that have occurred.

b Yockey v. Horn—business partners enter k not to litigate against each other; one party does, π could have been harmed.

- Enforcement of a liquidated damages clause if the amount estimated is reasonable at either the time of contracting or the time of injury—provided that the nonbreaching party has suffered some damage. Damage here is only a possibility, difficult to evaluate, so proper subject for contract clause; and they are what was anticipated.

c Muldoon v. Lynch—monument to be built for dead husband, delay, provision for payment if delay.

- Where it appears on the face of the contract that the parties intended a penalty, courts will not enforce the clause especially when the result would be a sum disproportionate to any actual damage. In this case, the parties used the word forfeiture which is equivalent to penalty.

d Stipulated damages - fixing damages that will be available in event of breach. Fixed at time agreement is made. When enforceable, will supersede whatever remedies might otherwise have been available to the innocent party. Stipulated damages cannot be a penalty – must only be compensatory. Measure of damages that appears to be punitive will not be enforced.

e Restatement §356 - damages may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. Sometimes also look at whether the figure is reasonable in relation to the actual harm that resulted.

f Equitable Lumber Corp v. IPA Land Development Co

- Relies on UCC—stipulated damages provision will be valid if either (1) the harm which the parties anticipate will result from the breach at the time of the contract or (2) the actual difference suffered by the nonbreaching party at the time of the breach; may be invalidated if so unreasonably large that it serves as a penalty rather than good faith attempt to preestimate damages; also could be invalidated if unconscionable.

g Fretwell v. Protection Alarm Co.—system installed, stipulated in k that agrees to indemnify and limits damages, lots stolen from house, π claim Δ didn’t follow procedure.

- A contract clause is enforceable when it strictly limits liability but makes no reasonable attempt to forecast just compensation for harm caused by the breach. A clearly stated indemnity clause may be enforced even though it seeks to indemnify a party from their own negligence.

- The test is whether it’s unconscionable or against public policy.

IV) Enforcement in Equity

- Inadequacy of legal remedy is key to door of court of equity. Specific performance routinely granted for a breach of sale of land.

b Van Wagner v. S&M—lease of billboard, changes owners, new owner wants to end lease

- Physical uniqueness is not used to grant specific performance if the court can determine with certainty the value of the damages.

- Equity will not be enforced when there is an adequate remedy at law. Damages inadequate when:
  1. Damages are too speculative
  2. Damages are not a substitute of performance (can’t attain substitute)
  3. Damages could not be collected from breaching party.

- Specific performance will not be enforced where it will disproportionately burden Δ in relation to benefit to the π. damages may be liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. Sometimes also look at whether the figure is reasonable in relation to the actual harm that resulted.

c Restatement §360— factors affecting adequacy of damages – to get equitable relief must be difficult to prove damages with reasonable certainty, difficult to procure substitute performance with money, damages are not likely to be collected.

- Interests in land – courts award specific performance.

- There is a difference between uniqueness and economic interchangeability.

- Sales are entitled to specific performance, but lease are not necessarily.
d Curtice Bros. v. Catts—sued for specific performance of k where Δ was to sell whole crop of tomatos, Δ breaches, leaves factory helpless.
   o Inability to attain substitute would cause serious harm, so specific performance in the form of an injunction will be enforced.

e Manchester Dairy System v. Hayward - Δ entered k to sell to association all its dairy products.
   o Specific performance is appropriate in case where there was even a stipulated damages clause if the stipulated damages won’t adequately compensate. In this case, strict performance was essential for survival of the association.

f Fitzpatrick v. Michael—nurse cares for Δ wife, supposed to care for him, he kicks her out, she wants specific performance.
   o Specific performance will not be granted in a contract for personal services even when there is no other remedy at law.
   o Negative Covenant – in the absence of affirmative specific performance, courts will sometimes enjoin breaching party from replacing injured party.

g Pingley v. Brunson—Brunson organ player, others in town of comparable ability.
   o When others can substitute, specific performance is not available.

h Northern Delaware v. EW Bliss—k in which Δ agreed to furnish labor and materials, didn’t go as fast as agreed upon, π wants Δ to use more employers
   o If a court determines that specific performance would be impractical for the court to enforce, the court may choose not to grant it even without another remedy at law.
   o Relief in equity is discretionary with the court.

i City Stores Co v. Ammerman--Δ promised to put π department in store building, later refused to lease to π
   o Sometimes specific performance will be awarded even if it were possible to measure damages for breach of contract where future damages would be incalculable.

j Threshold test for what qualifies for equity – if you can mitigate, you probably don’t have a case in equity because mitigation assumes you could find a market substitute.

k Failure to perform an order of equity is contempt.

GROUNDS FOR ENFORCING PROMISES

I) Formality
   a Congregation Kadimah Toras-Moshe v. DeLeo
      o Oral contract cannot be enforced when the court determines that there is neither reliance nor consideration.
      o Consideration – benefit to promisor OR detriment to promisee.

II) Exchange Through Bargain
   o Consideration – must be mutually reciprocally induced.

a Hamer v. Sidway—uncle would give nephew $5000
   o A contract in which the promisee gives up some legal right or freedom (legal detriment) on return for money, but the promisor has not benefited from the promise, is with consideration and therefore the promisee is entitled to what the contract stipulates.
   o Detriment is forbearance of legal right, doing something not legally required to do.

b Earle v. Angell—aunt would give nephew $500 for attending her funeral
   o Consideration when promised to pay in exchange for promise to do something is an enforceable contract—promise for a promise is recoverable.

c Whitten v. Greeley Shaw—people having an affair
   o Clause was neither bargained for or given in exchange for promises and therefore cannot constitute consideration necessary to bind π to contract.

d Restatement §71
   o To constitute consideration, must be bargained for.
   o Bargained for if sought by the promisor in exchange for his promise and is given by promisee in exchange for that promise.
   o Performance may consist of:
      (1) An act other than a promise, or
      (2) A forbearance, or
      (3) The creation, modification, or destruction of legal relation.
   o Performance or return promise may be given to the promisor or some other person.

e Restatement §81—consideration as motivation or inducing cause
   o Fact that what is bargained for doesn’t of itself induce the making of a promise doesn’t prevent it from being consideration for the promise.
   o Fact that promise doesn’t induce a performance or return promise doesn’t prevent the performance or a return promise from being consideration.

f Fischer v. Union Trust Co.—land given to handicapped daughter without inducement
Promises Grounded in the Past

III) Promises Grounded in the Past

- Past consideration is generally not accepted. But a past debt, still existing and enforceable, is a sufficient basis for the enforcement of a new promise by the debtor to pay it.
  - **Mills v. Wyman**—nursed son away from home, promise by father to pay expenses.
  - **Moral obligation is not consideration to enforce a promise made after services were rendered but not requested.** No mutual reciprocal inducement.

b Promises binding without consideration:

- Debts barred by statute of limitations.
- Debts incurred by minors, debts of bankrupts.
  - No mutual reciprocal inducement at the time, but bargain was in the past.

b **Webb v. McGowin**—fell with log instead of dropping it, saved employer's life, employer paid him until he died, executor stopped payment. **EXCEPTION TO PROMISES GROUNDED IN THE PAST ACTIONS**
  - A promise made in recognition of benefit already received and subsequently acted upon by promisor can be enforced.
  - When a substantial material benefit is conferred upon a party without being requested, but the party promises something in exchange for it after the fact, the contract is enforceable. It is implied that he would have made the promise beforehand.

- Restatement §86—promise for benefit received—binding to the extent necessary to prevent injustice—promise not binding if promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; to the extent that its value is disproportionate to the benefit.

- **Edson v. Poppe**—drilled well, Δ refused to pay because no agreement
  - Where performance is induced by a reasonable expectation of payment, and Δ benefits from performance, there is an enforceable contract.

IV) Reliance on a Promise

a **Kirksey v. Kirksey**—bro-in-law says move down here
  - This was the former reliance rule where reliance was irrelevant. The rule was that a donative promise was unenforceable even if it was relied upon.

b **Rockets v. Scothorn**—grandpa says she doesn't have to work
  - Promise without bargain enforceable where it would be grossly inequitable not to enforce. Enforced on equitable estoppel.

- **Prescott v. Jones**—would renew insurance policy unless otherwise notified, π didn't reply, Δ didn't renew, but π relied on renewal
  - Letter to renew insurance policy unless notified to the contrary is only intention or purpose; without acceptance there is no contract; π cannot rely on letter, intentions were subject to change.

- **Seavey v. Drake**—parol agreement for land, π made improvements on the land, dad died, didn't get deed.
  - Specific performance can be awarded to the promisee when the only proof of consideration of the oral promise is part performance induced by the donor's promise.

- **Reliance on a promise is a substitute for consideration** if a party relies on the promise reasonably and to its detriment.
  - Statute of Frauds—no action shall be maintained upon a k for the sale of land, unless the agreement upon which it is brought is in writing and signed. But part-performance doctrine can displace this. Entry into possession by promise is critical. Will grant specific performance if to not grant would cause great injustice. Consideration and mutual reciprocal inducement not necessary.

- **East Providence v. Geremia**—π didn't renew insurance, but said they would, car accident, Δ relied on the promise; Δ took out loan from π because couldn't pay premium.
Promissory estoppel can be applied to enforce a promise when the injury results from promisee’s reliance on the promisor’s fulfillment of promise.

Three elements of reliance (Restatement agrees)
1) Promise one which the promisor should reasonably expect to induce action or forbearance on the part of the promisee?
2) Did promise actually induce such action/forbearance?
3) Can injustice only be prevented by enforcement of the promise?

Forrer v. Sears
1) In an employment contract, consideration other than services rendered is needed to enforce the promise made by the employer.
2) Permanent employment is terminable at will without additional consideration on the part of the employee.
3) Without mutuality of obligation (both parties must be bound), reliance is not enforceable (since reliance is a substitute for consideration). Employee was not bound to keep working and employer and employer was not bound to keep him employed.

V) Promises of Limited Commitment
a) Davis v. General Foods Corp.—π had idea for new recipe, Δ said she could send it but they could use it in their discretion and without compensation.
   1) Where promisor retains unlimited right to decide later the nature or extent of performance, it is an illusory promise and is too indefinite to enforce.
b) Nat Nal Service Stations v. Wolf—promise to sell if buyer wants to buy, but no requirement to buy.
   1) A promise of limited commitment does not fulfill the mutuality of obligation requirement.
   2) Neither party was obligated to deal with the other until offer is placed and accepted.
c) General Principles
   1) A promise is consideration if the performance promised, either act or forbearance, would be consideration if they alone were bargained for.
   2) Mutuality of contract is determined at the time of the contract—look to the substance of what is being promised rather than the fact that it is being promised to determine consideration.
   3) Requirements contract – buyer promises to purchase all he needs.
   4) Output contract – seller promises to sell to buyer all he produces.
   5) ★ For output and requirements contracts there is no problem with enforceability. No problem with lack of mutuality because of restriction limiting buying/selling to anyone else.

   1) In a contract contingent on a future event controlled by the promise, mutuality exists at inception, therefore making the k enforceable.
   2) Limiting future performance is detriment to promisor. The moment the contingent event occurred, the k became binding. Flaw in this decision because they’re looking to the time the contingent event occurs.
   3) Mutuality of obligation – look to time of the agreement. If one party can terminate at any time, the other’s promise is not enforceable.
e) Paul v. Rosen—to sell liquor business, conditioned upon π getting new lease. Before new lease, Δ refused to do inventory. Since the k made the securing of a lease a condition to its effectiveness but placed no duty on π to secure it, the entire k was void for want of mutuality and Δ owed no duty to perform.
   1) Where one party reserves an absolute right to cancel or terminate at any time, mutuality is absent.
f) Restatement §77—illusory and alternative promises – promise or apparent promise is not consideration unless:
   1) Each of the alternative performances would have been consideration if it alone had been bargained for.
   2) One of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

g) Wood v. Lucy
   1) When a contract does not specify a binding agreement and cannot be enforced without an implied promise, a promise can be implied from the whole of the agreement. The implication of a promise, if it assigns some duty, is enforceable. In determining the intention of the parties, the promise does have value.

h) Sheets v. Teddy’s Frosted Foods—firing guy for complaining about improper canning
   1) Contracts terminable at will have some limitations, such as public policy issues.
   2) Here, employer’s implied promise is that he will not terminate without just cause.
   3) Most states have adopted the public policy exception to the at-will doctrine.

THE MAKING OF AGREEMENTS
I) Mutual Assent
   a) Emby v. Hargadine—oral promise for one-year extension on employment k – Embry thought there was promise for renewal, Δ says that’s not what was intended.
o For determination of whether a contract has mutual assent, the court looks to what a reasonable person would believe the intention of the parties to be. (Objective standard) If a reasonable person would have believed that a contract was made, then the contract is binding. Party’s secret intents are irrelevant. Objective manifestations of what person’s intent was. Even if reasons for contract were brought into evidence, a reasonable person’s view of intent is the deciding factor. Limited when both parties clearly know the other’s intent.

o Subjective test – looks for “meeting of the minds” – point where parties subjectively agree – “actual intent”

b McDonald v. Mobil Coal Producing, Inc.—employee handbook about procedures, says in small print it isn’t a contract.

o To determine if an employee handbook with no conspicuous disclaimer can modify an at will employment agreement, it is necessary to examine the outward manifestation of a party’s actions that lead to a reasonable reliance by the other party. Here, employer’s statements led him to believe that the employer would follow the handbook.

c Kari v. General Motors—offer must contain a promise communicated in such a way that the promisee may justly expect performance and may reasonably rely on it. Here, the handbook clearly said that the provisions didn’t create a contractual relationship, so no offer.

d Pine River State Bank v. Mettille—if the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the employee’s remaining in that job constitutes acceptance. An at-will employment contract may be modified or replaced by a subsequent unilateral contract.

e Moulton v. Kershaw—salt dealer sends letter containing price they could sell at

o A party is bound by an offer to sell personal property where the amount is left to be fixed by the person to whom the offer is made when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. Here, no such offer—this was an advertisement.

o Advertisement or general price lest is not an offer where it does not specify an offeree. A reasonable person in this case would not perceive this as an offer.

o Courts use objective manifestation of assent not (whether reasonable person would perceive assent.

f Fairmount Glass Works v. Cruden-Martín Woodenware—mason jars, used “quote” and “immediate acceptance” in the letter.

o Reasonable interpretation is used to determine whether a statement is an offer or a quote—use of those words is not dispositive.

o The agreement does not fail to reach the status of a contract merely because it leaves certain particulars of performance to be filled in by one of the parties. (UCC)

g Wilhelm Lubrication Co. v. Battrud—A agreed to buy oil, but repudiated before he placed any orders

o The subject matter of a contract must be definite as to quantity and price, particularly in order to prove a basis for measuring damages.

o Courts used to require this specificity but now moving more toward allowing some indefiniteness—UCC and Restatement encourage this trend. But must know there’s a breach.

h Joseph Martin, Jr. Deli v. Schumacher—lease for 5 years, clause for renewal at rentals to be agreed upon, renewal at much higher rent

o In a renewal clause of a lease of real estate, if a material term is left out of the agreement, with no available method for any interpretation of the possible intentions of the parties, the clause is not enforceable.

o A contract must contain all material terms at the time of formation.

o When there are not previous agreements between the parties, court has no past experience to look at. If there were any formula, or hint of how rent could be calculated, then clause would be enforced.

i Restatement §33—certainty:

(1) Even though manifestation of intention is intended to be understood as an offer, it can’t be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) Terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

(3) Fact that one or more terms are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as acceptance.

j Southwest Eng’g Co. v. Martin Tractor—failure to agree on terms of payment for sale of goods would not defeat an otherwise valid agreement reached by the parts.

o Under the UCC now, as long as the party intended to make a binding contract, the agreement will be enforced. Now, courts will apply a reasonable term in place of the missing material term (i.e. FMV).

k Raffles v. Wichelhaus—Peerless ships – each party is thinking about different ship

o Where an ambiguous term is misinterpreted by both parties in good faith, it will be considered that neither party meant to agree to the agreement and it will be void due to a lack of mutual assent. Doesn’t pass either subjective or objective test.

o Indefiniteness: failure to include a term, failure to make a term definite enough, irresolvable ambiguity, vagueness.

l Dickey v. Hurd—Δ meant for acceptance to mean payment in cash, knew it thought promise to pay was enough

o When one party learns how the other is interpreting language, they have a responsibility to correct them at the time, rather than inform them at the time of payment.

m Restatement §20—effect of misunderstanding
II) Control Over Contract Formation

a  Caldwell v. Cline—sale of land, communicate by mail
   - When an offer is made by mail, with a stipulation that it must be accepted in a certain time period, the period begins when offeree receives offer. Acceptance is made legal when it is given to reasonable courier.
   - Problems could have been avoided had the seller included a date.
   - Offeror is master of the offer—he exercises power to set duration for acceptance—look to offeror’s intentions. Can also set mode of acceptance.
   - After revocation of the offer, there can be no mutual assent.
   - Mailbox rule — if there is no specified time for acceptance then acceptance is good when it is sent.
   - Acceptance is good upon arrival only when there is a specific time allotted for the acceptance.

b  Textron, Inc v. Froelich—seller offered broker steel during phone conversation, said interested but wanted to check with customers, nothing said about time limit.
   - If no time for expiration of power of acceptance is specified in the offer, the power terminates at the end of a reasonable time. This determination depends on surrounding circumstances.

c  Davis v. Jacoby—niece and husband to come take care of aunt in exchange for everything, went, but nothing left to them at death.
   - Unilateral contract — formed by exchange of promise for performance—method of accepting offer is performing. Offeror can revoke before performance.
   - Bilateral contract — promise for a promise—contracts are assumed to be bilateral unless the terms of the contract state that it is unilateral. This presumption because bilateral contract protect both parties. Can’t revoke promises.
   - Death of offeror serves as revocation of unilateral contract before it is performed. (applied in Jordan v. Dobbins)

d  Restatement §32—in case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering performance, as the offeree chooses.

e  Restatement §36—methods of termination of the power of acceptance
   - (1) Offeree’s power of acceptance terminated by
      - Rejection or counter-offer by offeree, or
      - Lapse of time, or
      - Revocation by the offeror, or
      - Death or incapacity of the offeror or offeree.
   - (2) Also terminated by the nonoccurrence of any condition of acceptance under the terms of the offer.

f  Restatement §45—option contract created by part performance or tender
   - (1) Where an offer invites offeree to accept by rendering performance, option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
   - (2) Offeror’s duty of performance is condition on completion or tender of the invited performance.

  - Option contract — contract made to keep the offer open for a specified period so that the offeror cannot revoke the offer during that period. There is no consideration for keeping offer open—no bargain, no mutuality of obligation, but offer is made with intention and desire of inducing reliance.

g  Brackenbury v. Hodgkin—mom wants daughter and husband to take care of her until she dies, offer to give land for that, moved, didn’t work out, delivered deed to son
   - In a unilateral offer, the offer cannot be revoked after the offeree has partially performed. It is not fair if offeror can continue to revoke after performance begins, even though acceptance is not given until complete performance. But offeree can still quit performance.
     - Remedy — since π hadn’t completed performance, not entitled to land—order to reconvey land to mother to hold in trust for π if they complete performance—compels π to perform. But court shouldn’t have forced this relationship.

III) Precontractual Obligation

a  Mier v. Hadden—option contract with Δ to be exercised before certain date, consideration of $1 paid, π said wanted to exercise contract
   - Offeror cannot terminate offer before an option period expires when there is consideration given in return for the option period. There was mutual inducement for the period of acceptance here.
   - Restatement §87—if offer is in writing and recites purported consideration and proposes exchange in reasonable time, offer is irrevocable.
   - UCC makes offer to sell goods irrevocable.
b  James Baird Co. v. Gimbel Brothers—Δ sub made bid to generals about linoleum, made mistake so underbid, π general used it in its bid, then Δ learned of mistake, then sent withdrawal, bid was accepted, π accepted contract
  o  When a contractor relies on an offer which has not yet been formally accepted, subcontractor is not bound to the offer merely because it was relied upon. Unless there is consideration, an option is not given and the offeror can still revoke.
  o  Promissory estoppel doesn't apply because there must be a promise first. Here, no promise because no acceptance.

c  Drennan v. Star Paving—same situation as above, but decided differently
  o  When a subcontractor makes a bid to a contractor, the sub is bound to the terms of the offer once the contractor uses the terms to make its offer for the complete contract.
  o  This is the majority opinion now. Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding.
  o  Court held that implicit in the sub's bid was a subsidiary promise to keep his bid open for a reasonable time after award of the prime contract to give general an opportunity to accept the offer on which he relied in computing the prime bid.
  o  Courts have uniformly rejected the argument that listing in the general's bid constitutes acceptance of the sub's offer.

d  Restatement §87—option contract—offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

IV) Conduct Concluding a Bargain

a  Livingstone v. Evans—Δ offered to sell land for certain price, π responds would buy for different price, Δ wouldn't reduce, π said would buy, Δ wouldn't sell
  o  When an offer has been answered with a counteroffer, the counteroffer serves as a rejection of the original offer, freeing the offeror from its terms. Do this so offeror can find other buyer.
  o  Renewal – does not reject offer
  o  Counteroffer – rejects offer
  o  Courts look to language to determine whether it was a renewal or rejection.

b  UCC gets rid of mirror image rule for sale of goods.
  o  Mirror image rule – at common law, an acceptance had to be a “mirror image” of the offer—if a purported acceptance deviated from the offer in any way, even immaterially, it was deemed a qualified or conditional acceptance and did not form a contract—had legal effect of a counteroffer.
  o  UCC §207 (additional terms in acceptance or confirmation) has changed this—Really designed to deal with form contracts.
    (1)  Definite and seasonable, sent within reasonable time, operates as acceptance even with additional or different terms, unless acceptance is made conditional on assent to these terms.
    (2)  Additional terms to be construed as proposals for addition to the contract. Between merchants, such terms become part of k unless:
      (a)  Offer expressly limits acceptance to the terms of the offer
      (b)  They materially alter it
      (c)  Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
    (3)  Conduct by parties which recognizes the existence of a k is sufficient to establish a k for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular k consist if those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this act.

c  Restatement §69—acceptance by silence or exercise of dominion
  (1)  Where offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
    (a)  Where offeree takes benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with the expectation of compensation.
    (b)  Where offeror has stated or given offeree reason to understand that assent may be manifested by silence or inaction.
    (c)  Where because of previous dealings it is reasonable that the offeree should notify the offeror if he does not intend to accept.
  (2)  Offeree who doesn't act inconsistent with offeror's ownership of property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if act is wrongful as against the offeror it is an acceptance only if ratified by him.

d  Hobbs v. Massasoit Whip Co.—sale of eel skins when they were not requested, court enforced k
  o  When 2 parties are not strangers to each other (i.e. prior business dealings), one party's retention of goods for an unreasonable time received from a standing offer coupled with silence as to acceptance amounts to acceptance on that party's behalf.
  o  Exceptions to rule that silence does not equal acceptance:
    (1)  Prior business relationship
The Effects of Adopting a Writing

V) Parol evidence rule—(Greenfield’s definition) if the parties have put their agreement in a writing 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. Applies to both written and oral agreements.

- Restatement §240—an oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration...if the agreement is not inconsistent with the contract, and
  - Is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.
  - Exceptions:
    - (1) If it is of the sort that would naturally be put into a separate agreement (not within its scope) rather than included in the writing (and it is not inconsistent with the written contract).
    - (2) Evidence as to whether the agreement was intended to be an integrated contract.
    - (3) Evidence as to whether there was a contract at all (fraud, duress, mistake)
    - (4) If there are ambiguous terms
    - (5) Later agreements.

a) Mitchell v. Lath—wanted to buy farm, but didn't like ice house across the street, not on land to be sold, \( \Delta \) said would remove the ice house, \( \pi \) bought, \( \Delta \) didn't remove ice house.

  - Oral promise is not accepted as evidence when it is one that would have been expected to be embodied in the writing, the omission leading to the belief that it was left out intentionally.
  - Oral agreements must meet all 3 conditions before it can alter the written contract:
    - (1) Agreement must be collateral (supplementary)
    - (2) Must not contradict express or implied provisions of the contract
    - (3) Must be one that the parties would not normally be expected to embody in the writing—an inspection in light of surrounding circumstances must not indicate that the writing appears to be complete
  - Integration—did the parties intend to incorporate prior negotiation into their agreement—if so, then parol agreement should not be looked at, but if there was no intent to integrate, then they may be looked at.

b) Hatley v. Stafford—lease of land, owner takes possession just before harvest season

  - Evidence allowed to clear ambiguous terms. When prior agreement is consistent with integrated agreement, evidence was allowed.
  - Court looked at surrounding circumstances to determine whether it was full or partial agreement.
  - Parol evidence rule applies only to those aspects of a bargain that the parties intend to memorialize in the writing.

c) Hayden v. Hoadley—parties agreed to exchange properties, \( \Delta \) to make repairs, didn't do it, said different agreement

  - Contract is complete even though silent as to time of performance, so parol evidence rule cannot be applied.

Restatement § 209—integrated agreements

- Final expression of one or more terms of an agreement
- Determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule
- Where the parties reduce an agreement to writing which appears to be complete agreement, it is taken to be an integrated agreement unless it is established that it did not constitute a final expression.

Restatement § 213—effect of integrated agreement on prior agreements (parol evidence rule)

- Binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them
- Binding integrated agreement discharges prior agreements to the extent that they are within its scope
- One that is not binding or voidable and avoided doesn't discharge a prior agreement. But even if it’s not binding it may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

Restatement § 214—evidence of prior or contemporaneous agreements and negotiations

- Admissible in evidence to establish
  - (1) That the writing is or is not an integrated agreement
  - (2) That the integrated agreement, if any, is completely or partially integrated
  - (3) The meaning of the writing
  - (4) Illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause
  - (5) Ground for granting or denying rescission, reformation, specific performance, or other remedy.

Restatement § 216—consistent additional terms
Standardized Forms: Assent and Public Policy

- **(1)** Evidence of consistent additional terms admissible to supplement an integrated agreement unless court finds the agreement was completely integrated.
- **(2)** Agreement not completely integrated if the writing omits consistent additional agreed term which is:
  - (a) Agreed to for separate consideration, or
  - (b) Such a term as in the circumstances might naturally be omitted from the writing.

- **(h)** Merger clause – clause stating that there are no other representations, promises, or agreements between the parties except those found in the writing—if such a clause is agreed to, it’s likely to conclude the issue of whether or not the agreement is completely integrated—but not always (e.g. under UCC, not always upheld because consumers aren’t experienced in these transactions—want to protect consumers from merchant fraud).

- **(i)** Interform v. Mitchell—prevailing view—imparts to the writing no unique or compelling force; a writing is integrated when the parties intend it to be and it means what they intend it to mean. UCC view.

- **(j)** UCC §2-202—integration issue is matter of intention—writing finalizes only what the parties intend it to finalize. Can’t be contradicted by evidence of any prior agreement or contemporaneous oral agreement but may be explained or supplemented:
  - (a) By course of dealing or usage of trade
  - (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

- **(k)** Parol evidence rule and Statute or Frauds
  - Statute requires only a writing in the sense that the lack of writing is a defense to enforcement of a contract.
  - Parol evidence rule does not require a writing at all, except in the sense that it can only apply where there is a written document adopted by the parties as the integration of their agreement.
  - Statute can be satisfied by writings that were never effective, or intended to be, as an integration of the agreement.
  - Statute requires that a memorandum be signed by the party to be charged but the parol evidence rule can operate on a document signed by either party.

- **(l)** Pacific Gas & Electric v. GW Thomas Drayage & Rigging Co.—insurance policy, was its intent only to protect 3rd parties and not the π’s property?
  - Parol evidence can be admitted to explain ambiguous terms. The test of admissibility of evidence to explain the meaning of a written agreement is whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.
  - Plain meaning rule – look at language of contract or statute first, then if it doesn’t have a plain meaning to court, will consider other material. But what the court sees as the plain meaning may not be what the parties intended. So, rule shouldn’t apply.
  - Always look at outside evidence to see parties’ intention.

- **(m)** Restatement §212—interpretation of integrated agreement
  - Question of interpretation agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.

**VI) Standardized Forms: Assent and Public Policy**

- Generally, person is bound by what he signs whether or not he reads it. However, if contents of document are misrepresented, then not bound (Allied—shipper was misled and signed). Also, if against public policy not bound (Constantine—claim check with liability limitations). Other exceptions include where seller induces or prevents buyer from reading the document and situations where seller doesn’t expect/want/intend consumer to read.

- **(a)** Mundy v. Lumberman’s Mut. Cas.
  - When a casual reading of an insurance policy will give notice of a change of coverage, the excuse of not reading the policy will not suffice for ignorance to the change.

- **(b)** Henningsen v. Bloomfield Motors—steering wheel case, auto company claims no liability
  - The court will not enforce adhesion contracts where the nature of the policy is against public policy by the waving/abridging of legal rights of the agreeing party.
  - Exceptions to rule that your signature is binding
    - (1) Misrepresentation by one party of the nature of the contract
    - (2) One of the parties prevented from reading the contract
    - (3) Other inconspicuous terms
  - Dealer didn’t call attention to this and buyer may not have understood even if he had read – problem with assent if buyer wouldn’t understand.
  - Courts struggle with this—seller will make letters bigger, etc so still won’t pay damages—that’s why courts use public policy.

- **(c)** Richards v. Richards—wife in truck, passenger authorization form, she was injured, but exculpatory clause in form
  - This was actually a waiver of legal rights and was against public policy. Won’t be upheld.
  - Reasons unenforceable
    - (1) The contract’s purposes were not clearly identified or distinguished.
    - (2) Release is extremely broad and all-inclusive—unreasonably favorable to the company.
    - (3) Standardized agreement that offers little or no opportunity for negotiation or free and voluntary bargaining.
  - Form contracts often associated with unequal bargaining power.

If given reasonable time and methods (clarity) to discover all aspects of a contract, you will be held liable for the agreement (adhesion contract enforced).

Broemmer v. Abortion Services of Phoenix—agreement to arbitrate with abortionist, π tries to block arbitration, π wins

An adhesion contract cannot be upheld if the terms of the contract are beyond the reasonable expectations of the π or the contract is unconscionable.

Adhesion contract=standardized form; gross disparity in bargaining power.

Adhesion contract's terms can be avoided if

- Reasonable expectations were thwarted—π didn’t understand terms or
- Terms are unconscionable

Restatement §211—standardized forms

- If signs, bound (subject to certain exceptions)
- Writing is interpreted as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- Where other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement. Parties are not bound by unknown terms which are beyond the range of reasonable expectation.

There’s a movement toward legislative requirement that consumer contracts be in plain language.

POLICING THE BARGAIN

II) Revisions of Contractual Duty

Austin Instrument, Inc. v. Loral Corp—k for parts, subcontractor held out on one contract unless awarded 2nd contract, Loral had contract with Navy, couldn’t find substitute goods, had no other choice than to award the 2nd contract

Contract is voidable on the grounds of economic duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will.

Economic duress

- Withheld needful goods
- Cannot get them from somewhere else (reasonable effort)
- No adequate remedy at law or equity (no practical remedy)

Smithwick v. Whitley—π contracted to buy land for certain price, went into possession, began clearing, 3 years later Δ said deal is off, Δ said he could buy it for more, π bought it

Duress only exists where the unlawful act of another has deprived one of free will. π could have sued in equity for specific performance when Δ demanded a higher price.

Wolf v. Marlton Corp.—π was supposed to buy land, didn’t work out, wanted part of deposit, if didn’t get it would buy and then resell to undesirable purchaser.

Economic duress

- Duress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim.

Preexisting duty rule—promise to do what is already contracted to do is not consideration. Very haphazard in application.

Marton Remodeling v. Jenson—dispute as to amount owed to remodeler, π sent check with “payment in full” to contractor, contractor crossed it out and cashed it, π won.

In a bona fide dispute over price, when a check is tendered in full payment of an unliquidated claim, creditor cannot cause check and disregard the terms of the attached condition, thereby retained rights to collect the difference in balance; his retention of the check constitutes accord and satisfaction.

Can’t disregard condition placed on a tendered check for full payment in disputed claim. Rules:

- Must be a good faith dispute over terms
- Single agreement – to settle you must pay more than you think you owe
- Payer is the master of his offer, and offeree cannot change the terms (cashing=acceptance of the terms)

III) Mistake, Misrepresentation, and Nondisclosure

Sherwood v. Walker—mistake of barren cow

If there is a difference or misapprehension as to the substance of the thing bargained for, or if the thing actually delivered or received is different in substance from the thing bargained for, then there is no contract.

Mutual mistake

- Mistake must be to the “nature of the thing” – mistake as to material fact
  - Heart of the contract
  - Both parties make the same mistake
  - Once mistake is made, either party can rescind
- Mistake of value does NOT count
- Uncertainty known to both parties is NOT a mistake

Beachcomber Coins, Inc. v. Boskett—coin dealer, both think it’s a certain kind of coin, but it’s not.

Rescission for mutual mistake—where parties can be restored to status quo, negligent failure to discover such a mistake does not preclude rescission.
V) Unconscionable Inequality

a Wollums v. Horsley—old guy in mountains, sold mining rights, was told would not be bothered by it, later old man didn’t want to convey—court says old man didn’t have experience or knowledge like the other party, other party used this to its benefit

○ When a contract is considered to be an unconscionable bargain and is inequitable, a court of equity can refuse to decree specific performance while not declaring the contract invalid. Unconscionability or undue hardship good enough reason to deny specific performance.

○ Equitable relief matter of discretion with the court.

○ Rules of law governing mistake as related to specific performance differ from those governing rescission for mistake.

○ Courts of equity have often decreed specific performance where the consideration was inadequate and it may be said in general that mere inadequacy of consideration is not enough to withhold specific performance unless it is so gross as to render the contract unconscionable.

b Williams v. Walker-Thomas—didn’t own until ALL products paid off, takes all previous purchases in case of default

○ In a contract where consumer has little choice as to terms of the contract, a court of law can nullify the contract based on its unconscionability or unfairness, even if there was no fraud or duress involved.

○ Unconscionability (question of law for the judge)

1. Gross inadequacy in bargaining power
2. Terms unreasonably favor one party (can look to commercial setting)
3. Absence of meaningful choice by other party

★ Consider the inherent contradiction in this. If all merchants in this line of business use same terms, they are consistent—but there would be an absence of meaningful choice.

○ Cross collateral clause deemed unconscionable.

○ Remedy

1. Refuse to enforce whole contract
2. Refuse to enforce offending clause
3. Reformation of terms

○ This case different because court of law, not of equity, saying unconscionability is a basis to not enforce a contract.

○ UCC §2-302—doctrine of unconscionability – court doesn’t have to enforce contracts which it finds unconscionable. Exclusion of liability for personal injuries is prima facie unconscionability.
c  Frostfresh Corp. v. Reynoso—refrigerator, buyers paid too high a price, contract wasn’t explained to them, they didn’t speak English
  o  Unconscionable – remedy is to change price to reasonable amount. So π can still recover even though contract is unconscionable.
d  Restatement §205—duty of good faith and fair dealing—every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
e  Gianni Sport Ltd. v. Gantos, Inc.—women’s clothing, k gave buyer right to terminate k at any time
  o  Clause allowing one merchant to terminate at any time is unconscionable when clause is one-sided, even though equal bargaining power.
  o  Typically unconscionability is only used with consumer. This case demonstrated the exception. Was there mutuality of obligation?? Mutuality of obligation part of unconscionability.

THE MATURING AND BREACH OF CONTRACT DUTIES
I)  The Effects of Express Conditions
a  Howard v. Federal Crop Ins. Corp.—crop insurance, crops damaged, farmer cut them down before investigation of claim
  o  Determination of whether promise or condition:
    (1)  Primary criterion is intention of the parties (Glaholm v. Hays) – ascertain intention by looking at language of the entire agreement. Remember ancient maxim of expression of one thing is the exclusion of another. If can't determine intention from language, look at circumstances surrounding the transaction (trade custom, course of performance, etc.)
    (2)  If still not confident with conclusion, presumption for promises over conditions because courts don’t like forfeitures. (agrees with Restatement) Construing writing against party that wrote it.
  o  Condition precedent – needs to be fulfilled for an agreement to be enforced
  o  Promise – needs to be performed as part of the agreement
  o  If condition becomes impossible to perform, promise becomes unconditional.
b  Merritt Hill Vineyards, Inc. v. Windy Heights Vineyard—sale of land, π refused to buy when learned Δ didn’t secure mortgage confirmation and insurance policy.
  o  A condition is an event not certain to occur which must occur unless its nonoccurrence is excused before performance under a contract becomes due. While failure to fulfill condition excuses the other from performance by the other party whose performance is so conditions, it is not, without an independent promise to perform the condition, a breach of contract subjecting the nonfulfilling party to liability for damages.
  o  Need a high degree of clarity to override law’s presumption against conditions.
c  Semmes v. Hartford Insurance Co.—12 month limit for bringing suit after damages occur, Civil War prevented commencement of action within 12 months.
  o  Where fulfillment of the condition is impossible within the stated time period, condition must be fulfilled within the reasonable time fixed by statute of limitations.
d  Gilbert Globe v. Rutgers Fire Ins. Co.—waited a year to make an insurance claim, was led to believe the Δ would still enforce it
  o  Where an insurer informs insured that payment will be made, but changes its mind after limitation for suit runs out, the time limitation begins when estoppel is lifted—the insured does not waive their right to the time limitation.
  o  π reliance on Δ assurance is only justified as long as Δ takes that position; once he stops, time limit commences.
  o  Equitable estoppel – a party will be estopped from claiming the other failed to fulfill a condition precedent where the parties actions reasonably induced the other to believe he would not have to fulfill the condition or had already fulfilled the condition.
  o  Waiver – intentional relinquishment of known right.
  o  So, nonoccurrence of condition may be excused due to conduct of the other party.
e  Aetna Casualty v. Murphy—dentist fails to tell insurance company he was being sued
  o  Condition can be excused where it doesn’t prejudice the other party, and the first party stands to suffer a disproportionate loss.

II)  Conditions of Satisfaction
a  2nd National Bank v. Pan American Bridge Co.—8 rivets v. 10 rivets, architect to give certification
  o  When a condition precedent for payment is the certificate of satisfaction of one of the parties, the test for whether the certificate was withheld improperly is bad faith of the actor, not unreasonableness.
b Loyal Erectors—clause that withholds payment until performance is deemed satisfactory is permissible because it induces the contractor to perform quality work.

c Maurer (school district, liquidated damages) and Fay (whim of owner)—refusal to grant certificate for reasons other than unsatisfactory work are refusals in bad faith and are not permitted.

d Hartford—refusal by architect to inspect the work waives the condition precedent needed to receive payment.

e Fursmidt v. Hotel Abbey Holding Corp.—hotel unhappy with valet service
  - Where the nature of the contract is “one involving fancy, taste, sensibility, or judgment” then the party hiring the service can quit the contract if “honestly dissatisfied.”
  - 2 rules for determining whether satisfactory condition was reasonable:
    1) objective – in contracts relating to operative fitness, utility, or marketability the provision is construed as matter of law as imposing only the requisite of satisfying a reasonable man (i.e. installation of machinery).
    2) Subjective – literal construction is made where the agreements provide for fancy, taste, sensibility, or judgment of the party for whose benefit it was made (i.e. making of a garment, painting).

f Haymore v. Levinson—house not completed, list of things to be completed before full payment, not satisfied so don’t pay, builder collects
  - Building contracts generally fall into a class where fancy or taste or sensibility is not of predominant importance; therefore condition of satisfaction involves an objective standard on such matters as operative fitness, mechanical utility, or structural completion.
  - This is true when party giving approval has incentive not to because then they don’t have to pay.

Breslow v. Gotham Securities Corp.—attorney fully performed objectives of agreement, Δ says not done to his standards
  - This case falls into operative fitness as matter of law. Lack of satisfaction cannot, in the face of conceded full performance, raise an issue of fact for trial.

h Restatement §228—if it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition that the obligor be satisfied with the obligee’s performance occurs is such a reasonable person in the position of the obligor would be satisfied.

III) Constructive Conditions: The Order of Performance

- Constructive conditions – conditions which are not agreed on by the parties, but which are supplied by the court for fairness.
- 3 types of covenants
  - independent — no relation between promises; either party may recover damages from the other, for the injury he may have received by a breach of covenants in his favor, and where it is no excuse for Δ to allege breach of covenants on part of π.
  - dependent condition — one-way, a condition before the obligation; performance of one depends on prior performance of another and therefore, until this prior condition is performed, the other party is not liable for action on this covenant.
  - mutual conditions — to be performed at the same time, concurrent; if one party was ready, and offered to perform his, and the other neglected or refused to perform his, he who was ready has fulfilled his engagement and may maintain an action for the default of the other; though it is not certain that either is obliged to do the act first.

b Nichols v. Raynbred—Δ promised 50 shillings for cow
  - Old rule was that promisee could sue promisor even though he has not shown that he can perform. Parties can each win if they haven't performed.

c Kingston v. Preston—give up business, π had to get security, Δ didn't approve
  - Covenants in this agreement are mutually dependent, such that one will not be enforced without performance of the other. There are some types of contracts where it is inherent that the promises are mutually dependent on each other.

d Restatement §234—order of performances
  1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless language or circumstances indicate the contrary.
  2) Possible in several situations
    - (a) Where same time fixed for performance of each party
    - (b) Where time is fixed for the performance of one party but not the other
    - (c) Where no time fixed for either party
    - (d) Where same period is fixed within which each party is to perform

e Restatement §238—effect on other party’s duties of a failure to offer performance
  - Where all or part of the performances are due simultaneously, 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 RULE—in order to collect damages you must attempt to tender performance. Exception is where in advance of an exchange, a party knows the other will not perform, he will have no obligation to render or tender performance to maintain an action for breach.
  1) Render — to be able to perform
(ii) **Tender** – to offer to perform

- Where due simultaneously, are concurrently conditional.

f **Price v. Van Lint**—deed delayed from Holland while being signed

- When it is in contemplation of both parties that a promised act may be impossible to perform before the date specified for the other party’s performance, then the promises are viewed as independent.
- Courts don’t favor independent promises.
- Dual nature of promises – promise can be obligation of promisor and condition of Δ obligation to perform. How do you determine whether promise should also be a condition?? Intent, risk of parties, and ineffectiveness of remedy if not viewed as condition.

h **Ziehen v. Smith**—π to buy land, learns of action to foreclose existing mortgage, fails to tender because of other party’s possibility of nonperformance (other mortgage)

- When it is impossible for one party to perform on the date of execution, the other party does not need to render or tender performance in order to sue.
- In this case, π lost because it would not have been impossible for Δ to perform.
- π needs to be aware that Δ cannot perform in order to be excused from render/tender rule.
- Normal rule for executory contracts is that the injured party may recover if he demanded performance from the breaching party, or if he tendered performance himself.
- IT IS ALWAYS BEST TO TENDER PERFORMANCE—VERY RISKY NOT TO.

**Anticipatory breach** – repudiation in advance of time of performance—relieves nonbreacher from any remaining duties, no longer need to remain ready to perform.

IV) **Protecting the Exchange on the Breach** (determining whether performance has occurred)

a **Oshinsky v. Lorraine Mfg Co.**—goods delivered a day late, specific performance not ordered

- The language in the contract specified a time of delivery which allowed Δ to reject delivery when it was one day late.
- **Perfect tender rule** – a buyer may reject the entire contract if it is not perfect in every manner (quality, quantity, time and place of delivery)

b **Ramirez v. Autosport**

- UCC retains perfect tender rule, but mitigates the harshness of the rule and balances the interests of buyer and seller. This is because buyers in declining market could reject goods for minor nonconformities and force the loss on the seller. UCC allows seller to cure nonconforming tender within reasonable time.

c **Beck & Paul Lithographing v. CO Miling & Elevator**—rejection of goods due to late delivery, but specific performance awarded

- Stipulations as to the time of performance are not necessarily of the essence, unless express provisions of the contract or the nature of the subject matter indicates that the parties intended performance on time to be a condition precedent.
- Note: in a contract for the sale of goods, time is of the essence because of the volatility of the price and the likelihood that the buyer has an immediate need; if can change this term, what would stop him from changing other terms. Modern courts are more lenient than Oshinsky. Where the flaw was minor and did not significantly detract from the use of the purchaser. The goods were specialized for the company and could not be used elsewhere.

d **Plante v. Jacobs**—house, work substantially performed, some things not done right, Δ wouldn’t pay, π walked off, π won.

- The qualification for substantial performance is whether the performance meets the essential purpose of the construction contract.
- Substantial performance — not perfect performance. The contractor is liable for damages but...
  1. Dual nature of promise—in construction contracts, the obligation of the builder is complete performance (if not, then pay damages); the condition for the owner is that if the contract is substantially performed, then must pay.
  2. If the cost to fix a number of defects is determinable the damages are cost of replacement. If it is impossible or too confusing to separate cost of defects, then the rule is diminished value. Depends on the nature and magnitude of the defect.
- Difference from Oshinsky—here Δ have benefit of the services.

e **Jacob & Youngs v. Kent**—says substantial performance is reached despite inconsequential and trivial mistakes that would present a major economic burden to replace. Cardozo points out that a “willfull transgressor” might be treated differently.

f **Reynolds v. Armstead**—new brick, doesn’t match existing brick, but was supposed to

- Failure to substantially perform deprived π of the right to recover under the theory of express contract, but π is entitled to the judgment on the theory of restitution.

g **Hadden v. Consolidated Edison Co**—whether π pension could be revoked after employee’s retirement when employer found out he did stiff when employed that would have been grounds for discharge

- π performance was substantial—value Δ received during years π was employed is not substantially impaired by his disloyalty in some of those later years.

★ Owner’s obligation to pay is based on constructive condition of substantial performance. If there is no substantial performance, then there is a material breach.
Measure of fulfillment of performance as obligation is full performance; measure of fulfillment of promise as condition is substantial performance.

**Turner v. Chester**—builder abandons project because he is not paid

- In a construction contract, a subcontractor does not have the right to abandon performance when the contractor does not pay part of monthly installment because of good faith. Party may only cancel if there is a material breach.
- Could suspend performance until reasonable time passes for payments to be made and then cancel contract.
- Note: don’t use rescission – rescission is mutual agreement of parties to end contractual relationship. Or decision by one party to end the relationship AND go back to precontract position. Here it’s cancellation because wants to end relationship and get expectancy.
- **Material breach**—goes to essential purpose of contract.

**Material breach v. substantial performance:**

1. Has essence (purpose) of contract been met?
2. Adequacy of compensation for loss? Can damages be calculated?
3. Greater the part (%) of the performance, the more likely it is substantial
4. Likelihood of breaching party to correct breach
5. Willfulness of breach – good faith v. bad faith

- Safe course of performance is to suspend performance and demand payment. But this puts nonbreaching party in position of having to remain ready to perform.
- A good faith dispute over performance will usually be regarded as substantial performance.

**Anticipatory Repudiation**

- Repudiation – an overt communication of an intention to not perform. How do you know when party has decided not to perform?
  1. **Paul v. Rosen** – if a party insists on a condition not within the original agreement, then that is a repudiation.
  2. **Algernon Blair** – a material breach amounts to a repudiation.
  3. **Doctrine of anticipatory breach** – only applicable in a bilateral contract where the other party (plaintiff) has not completed performance.

- Injured party can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relations between the parties, or he can treat the repudiation as an empty threat, wait until the time of performance, and exercise his remedies for actual breach if a breach does in fact occur.

- If one party has reasonable grounds for insecurity of performance by other party, they may demand assurance that performance is forthcoming. Failure to give assurance after reasonable time allows other party to cancel.

- Buyer cannot suspend payments for goods already delivered.

**Greguhn v. Mutual of Omaha Ins. Co.**—permanent disability that originated in earlier ailment

- In an insurance contract in which the insurer is to make installment payments (unilateral or bilateral but one party finished obligation) the default of one or more payments is not a repudiation of the rest of the contract therefore there is only anticipatory breach if the breacher says they will make no further payments.

- If in a unilateral contract a party is required to perform in periodic installments and the party fails to perform for one period, the other party is not allowed to demand a lump sum for future payments.

- Anticipatory breach = material breach only if (1) k is bilateral AND (2) π has not completed performance. If unilateral, π has no future obligation, if bilateral and π has completely performed there is no future obligation – doesn’t have to remain ready to perform.

**ANTICIPATORY BREACH OF UNILATERAL OBLIGATIONS**

- **Alternatives to a Damage Remedy** – there are other remedial possibilities other than damages when insured sues under health or disability policy.
  1. Restitution – number of decisions have held that restitution of premiums can be awarded where the repudiation by insurer is clear, even though expectancy damages might be denied. Main question in such cases is whether there should be a deduction of the value of the insurance protection received by the insured prior to repudiation.
  2. Declaratory Judgment – binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement.
  3. Judgments Payable in Installments – different in all jurisdictions but can only last so long as the disability remains.
  4. Relief in Equity

- **Anticipatory Breach of Unilateral Obligations**
  1. Not normally extended to unilateral contracts or bilateral contracts where one party has performed so fully that all executory duties are those of the repudiator.
  2. Can avoid this by including an “acceleration clause” – money debt shall fully and automatically (or at creditor’s option) become due in the event of the obligor’s default.
  3. Remains law today although push for reconsideration.
k. **Reigart v. Fisher**—land conveyed was 1/3 less than in contract, \pi refused to buy, Fishers sued for specific performance
   - In executory real estate contract, if the discovered change has little to do with the essence of the contract, then specific performance is granted to the vendor with an abatement in price for the buyer.
   - \pi must be able to substantially perform—not a mathematical inquiry.

l. **Keating v. Price**—variance of ¼ acre not so immaterial that he’s getting substantially what he intended—that ¼ acre was key to why he wanted the property, so buyer not ordered to specifically perform.

m. **Bartlett v. Department of Trans.**—vendor realizes that more land was conveyed that he thought, wanted to rescind, but it’s immaterial because he still would have conveyed the land—just gets compensation of the extra land.
   - If it appears that the discrepancy would not have prevented party from entering into a contract, then the mistake is immaterial and the proper remedy is an adjustment in the purchase price. Intention of the parties and not the size of the purchase price is what controls.