Greenfield Contracts’ Outline – Fall 2003

Contracts = law of agreements; relationships between people

Expectancy position = put the non-breaching plaintiff in a position, as far as money can do it, that is literally the same position he would have been in had the contract not been breached (forward looking and from the P’s, not the D’s, point of view)

[Torts = restoration of value before the tort (looking backward); therefore tort rules should not apply to contracts.]
- Look to equivalent substitutes:
  - Replacement costs
    - Cost of completion -> when value of loss is inadequate as in construction of aesthetically important things (i.e. houses, ugly fountains – efficiency limited by personal desire) - Groves v. John Wunder
      - No one can get cost of completion if it is worth more than diminution of value – Peeyhouse v. Garland
      - Cost of completion if P is likely to use it to complete project – Advanced, Inc. v. Wilks
      - Cost of gravel removed from property, not FMV to remove it – Laurin v. DeCarlos Constr. Co. Inc.
  - Diminution in Value -> K value – FMV at time of delivery
  - Sale of goods -> FMV at time and place of delivery
    - Buyer’s breach = K price – FMV at time and place of delivery + incidentals (not including attorney’s fees)
      - When the above formula is not adequate to bring seller to it’s expectancy, then court awards profit (revenue net of variable costs – fixed costs) + incidentals (not including attorney’s fees) – Neri v. Retail Marine.
    - Seller’s Breach = FMV at time and place of delivery – K price + incidentals (not including attorney’s fees)
      - NOT FMV at time of sale to third party – Acme Mills v. Johnson.
    - Delivery in Installments = FMV at each of the originally K’d installments – the amount K’d to pay at each installment – Missouri Furnace Co. v. Cochran
  - Reliance = outlay of expenditures in preparation for the performance, losses occurred because of P’s reliance on completion of K; P can recover both replacement costs and reliance costs (referred to above as incidentals); if costs can’t be proven to a reasonable degree of certainty, reliance can be given
    - Reliance = Expenses – loss non-breaching party would have suffered had K been performed (proven by D) – Restatement 2d §349
- Remedy 1= Expenses incurred after signing of K and before breach of K as long as they were necessary in the furtherance of the performance – *Chicago Coliseum Club v. Dempsey*
- Remedy 2= Expenses incurred before breach not necessarily limited to those incurred after K was formed – *Anglia TV Ltd. V. Reed*

  - Restitution = 2 facets of restitution: 1) P conferred benefit on D, 2) Unjust for D to retain benefit without compensating P
    - If breach, P has a choice to sue for restitution or breach of K because Restitution is a separate area of law like Torts or Contracts
    - Can’t claim restitution if P completes K. In this case, P is limited to K.
    - Remedy 1 = Value of labor + equipment (quantum meruit) - $ already paid to non-breaching \(\rightarrow\) K price = evidence of value conferred but not necessarily limit of it - *U.S. v. Algernon Blair*
    - Remedy 2 = Salary – Costs of replacing farm worker who breaches K– *Britton v. Turner*
      - Fundamentally Flawed - Should be: Value of P’s work, but not more than pro-rated part of K price – Damages to D (Salary Price – Value of work)
      - Must be limited by K price b/c D has a B of K claim at the same time P has a Restitution claim

  - Specific Performance = Equity not strictly expectancy: Person with substantive complaint can always receive relief in law, not always in equity.
    - Test of equity:
      - No adequate remedy at law - Irreparable injury = irreparable by law
      - Value beyond market calculation b/c of uniqueness = physical + economic
      - No remedy at law b/c P stands to lose profit, but also reputation b/c D’s breach is going to stop P from fulfilling its own contractual obligations – *Curtice v. Catts* (tomatoes), *Manchester Dairy v. Hayward*
      - In the transfer of land, inadequacy of legal remedy ($) is presupposed – not so in lease of land (*Van Wagner Advertising Corp. v. S & M Enterprises*)
    - Equity is awarded at the court’s discretion – no right to equity. Will be refused if:
      - Hardship to D from enforced specific performance was disproportionately large to benefit to the P – *Van Wagner*
• Contra to Res Judicata - Specific performance is not final word on the matter, P comes back again and again to enforce specific performance and undermines court’s power of the final word:
  – No specific performance in maid’s personal service K – *Fitzpatrick v. Michael*
  – Court can’t make musician stay and perform music b/c musician will just perform poorly - *Pingley v. Brunson*

- Limits to Expectancy
  o Loss is not foreseeable. – *Hadley v. Baxendale*
    ▪ One cannot recover loss that is not foreseeable. Not one can recover loss that is foreseeable.
  o Reasonably foreseen - Lost profits should be the standard of damages for a breached contract when the P can prove that the lost profit resulted naturally from the breach or when lost profit could have been a reasonable result of a breach as contemplated by both parties at the time of K.
    ▪ Tacit Agreement test – loss was potentially foreseeable but if the breaching party knew that it would be held responsible for losses above price of actual losses breaching party would not have made the contract – *Lamkins v. International Harvester*
  o Loss was avoidable. – Doctrine of Avoidable Consequences = P injured by breach of contract can recover only from those losses that it could not reasonably have avoided = Party injured by breach cannot recover those losses that it could have reasonably avoided – NOT A DUTY- *Luten Bridge*
    ▪ Value of K to perform that’s breached before performance = party’s reasonable expenditures towards performance (reliance) + Profits (K price – (total amount spent to perform – fixed overhead)) – *Leingang v. City of Mandan Weed Board*
    ▪ 2 things that do not count as avoidable loss to be subtracted from K price: 1) savings to non-breaching party b/c of breach
      2) income from new business generated b/c of breach – *Kearsarge Computer Inc. v. Acme Staple Co.*
    ▪ Wrongfully discharged employee = Contract salary - $ employee has earned or with reasonable effort might have earned from other employment (in the case of might have earned, the employment must not be different in kind or inferior – *Parker v. 20th Century-Fox Film Corp.*
      ▪ Employee doesn’t have to do the same work they K’d for with breaching party for less $ and unemployment
does not count as avoidable loss to be subtracted from K price – Billetter v. Posell

- Non-breaching party does not have to enter into a new contract to mitigate losses until his losses would have actually occurred – in the case of delivery in installments, this is at the time and place of each installment – Missouri Furnace Co. v. Cochran
- UCC’s Cover rules for non-breaching Buyer - §§ 2-712 and 2-713
  - Cover costs – K price + (incidentals – expenses saved b/c of breach) OR
  - FMV – K price + (incidentals – expenses saved b/c of breach)
- Collateral source rule – Tort Law – denies tortfeasor a reduction in damages for compensation received by the injured plaintiff from other sources - punitive flavor
- Mitigation must be reasonable
  - No Emotional Distress in K – Valentine v. General American Credit, Inc.
  - Loss is not established to a reasonable degree of certainty. – Dempsey
- Go back up to Relevance

Statute of Frauds = Exception to enforceability of oral agreements, certain kinds of K require writing (even Statute of Frauds does not say the contract itself must be in writing – it only says written K or some memorandum or note thereof)
- Inspired by distrust of juries and parties – intended to reduce perjury about terms of a K
- 5 cases covered by S. of F.
  - Sale of an interest in land
  - Sale of goods for a price exceeding a specified amount
  - Promise “to answer for the debt, default or miscarriage of another”
  - K “NOT to be performed within one year” – K’s for life often do not need writing b/c life can expire within the course of 1 year
  - Marriage
- Applies to both law and equity; Equity has an exception to it:
  - When P partially performs that which it promises to do – no written K necessary. – Fitzpatrick v. Michael
- Even w/out writing thing is still a K, merely unenforceable by direct action for enforcement

Doctrine of Anticipatory Breach by Repudiation (clear repudiation of contract duty before time for performance of duty)
- Discharges any remaining duties of the other party – Non-breaching party does not have to stand ready to perform
Remedy should always be measured as of or close to the date of performance
Restitution – expenses go out of P’s pocket and into D’s pocket

P recovers for loss expectancy to the extent P can establish it to a reasonable degree of certainty – If it can prove profits and expenses, then it gets them. If it can’t prove profit, then it gets expenses it can prove to a reasonable degree of certainty (expenses = reliance and restitution).

- Distinction between law and equity:
  - Equity has greater flexibility in judgment (can render conditional judgments)
    - Specific performance on condition that P deposit into court full purchase price – D is assured return performance for its performance
  - Law issues judgment for damages that is unconditional and absolute.

Formality
- **Gratuitous Promise** = Oral promise to give gift upon death is not enforceable unless it’s sealed in writing – *Congregation Kadimah Toras-Mashe v. DeLeo*

- **The Seal** – symbol of consideration; purposes of:
  - Evidentiary = proof of existence and purport of K when in doubt.
  - Cautionary = check against inconsiderate action – makes both parties realize what they are getting into
  - Channeling = channel for legally effective expression of intention.
- Where there is a writing, no consideration is necessary in 15 states.

Bargain = Mutual Reciprocal Inducement = Quid quo pro (Something for something)

- **Consideration** = EITHER benefit to promisor OR detriment to promisee = Tool for determining enforceability – P’s burden of proof
  - **promisor** = person who makes the promise whose enforceability is in issue
  - **promisee** = person who receives the promise
  - Does the promisee give something up to validate the promise?
  - Maker’s deliberations must be adequate to convey seriousness of transaction
  - **Detriment** = restraint on future legal rights or freedom; doesn’t have to be factual – *Hamer v. Sidway* – the nephew’s detriment is that he can’t drink, smoke, or gamble
    - Promise to attend aunt’s funeral = consideration for aunt’s promise to pay $ upon attendance of her funeral – *Earle v. Angell*
    1. Promisee’s consideration is sought by the promisor in exchange for his promise.
    2. Consideration is given by the promisee in exchange for that promise.
    - Some guy signs a document with his mistress saying she will not call him at home in exchange for a stipend of money. B/c
he did not seek out her promise, document is unenforceable. – *Whitten v. Greeley-Shaw*

- **Meritorious “consideration”** = daughter’s love for her father is not bargained for nor is it consideration when dad gives daughter promise to pay off deed – *Fischer v. Union Trust Co.*
  - A fisherman’s performance of finding a contest fish, Diamond Jim, constitutes consideration forming a K with the company that pays fisherman. Money awarded is taxable. – *Simmons v. United States*
  - Moral considerations like love do **NOT** ground promises.

- **Courts will not inquire into the adequacy of consideration**
  - **Forbearance of an invalid claim** = No detriment to the promisee if the promissee is giving up something that is not valid = not consideration for promise to pay; unless *(Restatement §74)*
    - The forbearing party believes their claim is legitimate.
    - The claim is doubtful because of uncertainty as to the law or facts – Was the son terminated rightfully or wrongfully? School’s forbearance of lawsuit = consideration for dad’s promise to pay tuition – *Military College Co. v. Brooks*
  - **Duncan v. Black** says claim must have some legal foundation and be made in good faith. However, b/c suit is based on promised cotton allotment by someone with no power to grant cotton allotment, there is no foundation for forbearance of suit.

Promises Grounded in the Past – Past debt should be paid whether there was a K or a quasi-K

- Always have to pay for past debt in 3 circumstances b/c there is a quid pro quo:
  - Promise to pay an obligation on which the statutory period of limitations has run.
  - The bankrupt debtor’s promise to pay a discharged debt
  - Promise to pay contract obligation incurred while a minor.

- **Moral Obligation** = Not sufficient to enforce a promise by father to pay stranger for care given to deceased adult son as the son lay dying – *Mills v. Wyman*

- **Moral Obligation + Material Benefit** = consideration
  - When promisor receives material benefit to his person and promises to pay for the benefit, moral obligation to fulfill promise is enforceable.
  - Man’s promise to pay man who, on the job, saves his life and in the process injures himself severely a stipend for the rest of his life is enforceable because the material benefit from his life being saved is consideration – *Webb v. McGowin*
    - However, man’s promise to pay woman who saves his life by stopping an axe with her hand is not enforceable b/c a humanitarian act like the woman’s is not consideration, nor is the benefit the man receives. – *Harrington v. Taylor*
- Restatement of Restitution = no restitution when action motivated by humanitarian concerns
- No reward for kindness where there is a special relationship between the people (family or neighbor). But if it is a stranger, a business relationship is assumed and K is made. – *Hertzog v. Hertzog*
- When promisee performed with the expectation of being paid, not doing it for free, then there is consideration for payment in Restitution. – *Edson v. Poppe; Muir v. Kane*

Reliance on a Promise

- Promise to provide home for sister-in-law and her kids is gratuitous and not enforceable even though she left her house and traveled some distance in reliance on the promise. Brother-in-law did not bargain for her actions. – *Kirksey v. Kirksey*
  - Promise of grandfather to pay granddaughter not to work = enforceable b/c granddaughter gives up a legal right – *Ricketts v. Scothorn*
  - Insurance agency’s promise to renew home insurance unless notified otherwise is not enforceable b/c there is no consideration and no acceptance of the offer. Equitable estoppel does not apply b/c there is no statement of fact to estop. – *Prescott v. Jones*

- **Promissory Estoppel** = 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 can be avoided only by enforcement of the promise.
  - Substitute for consideration.
  - 3 questions that must be answered in the affirmative to constitute promissory estoppel:
    - 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?
    - Did the promise induce such action or forbearance?
    - Can injustice be avoided only by enforcement of the promise?
  - **Gratuitous promise associated with agency relationship** - Mortgagee’s promise to renew insurance on a mortgaged vehicle unless notified otherwise is enforceable because promisee relies on promise by using vehicle, because the promisor should have reasonably expected the promise to induce the specific reliance and because injustice can be avoided only by enforcing the promise. – *East Providence Credit Union v. Geremia*
    - **Charitable subscriptions** - Promise of money “to aid and assist” Hospital in its humanitarian work is enforceable b/c invitation or request for Hospital’s performance of services is implied. – *I & I Holding Corp. v. Gainsburg.*
- **Oral promise of land followed by entry and improvements** – Father’s oral promise to convey deed to son is enforceable in equity because son lives on the land and makes improvement. S of F does not apply because part-performance makes the K valid in equity. Son’s reliance on the deed as evidenced by his improvements makes deed enforceable in equity. – *Seavey v. Drake*
- **“Waiver” or “Abandonment” cases** – K has been established, and performance has begun. One party promises to modify or eliminate term of the K – but there is no consideration. Sometimes courts will grant this case.
- **Employment** - Promissory estoppel can not enforce a promise that has already been kept (promise for permanent employment that terminates)
  - Permanent employment = terminable at will. **Permanent employment = forever only when employer directly benefits from detriment of employee.** P selling his farm so that he can work for D doesn’t make permanent employment last permanently b/c P’s detriment doesn’t directly benefit D. – *Forrer v. Sears, Roebuck & Co.*
    - Promissory estoppel awards 2 months lost wages when woman quits job for another job that never starts. – *Hunter v. Hayes.*
  - **Retaliatory discharge** = when it is contrary to public policy (violates clear mandate of public policy) – Tort of wrongful discharge, check on terminable at will employment Ks
    - Statute requires Sheets to influence his employer to comply with the law – if he doesn’t do that, he faces criminal liability
    - When does it violate public policy for employer to fire at will employee?
      - When public policy requires employee to act in a certain way or go to jail, he acts that way and then is fired for acting that way. – *Sheets v. Teddy’s Frosted Foods*

**Limited Commitment – Promise for a promise**
- By making a promise, promisee’s making a commitment with respect to his future, reducing his range of possibilities = the detriment to the promisee – induced by promisor’s promise; Restraint on future conduct is detriment
- A promise is consideration if performance promised would be consideration
- **Illusory Promises** = Don’t commit anybody to anything
  - When a promisor promises to retain unlimited rights to decide later the nature and extent of its performance there is NO K.
    - Promise to decide if/when to use recipe and what compensation will follow from use = Illusory – *Davis v. General Foods Corp.*
  - No K where neither party is obligated to do anything at anytime.
- Seller doesn’t agree to sell any gas at any time. Buyer doesn’t agree to buy any gas at any time. Promises still set up a framework for future Ks, but are not Ks in themselves. – Nat Nal Service Station v. Wolf
  - Cancellation Clauses = invalidate K only if its exercise is unrestricted
  - Doesn’t matter if there’s reliance or not – b/c there was no mutuality of obligation at the outset.

- Mutuality of Obligation = both parties must be bound or neither party is bound
  - Determined at time promise is made.
  - Contingent Promises = if promise does restrain flexibility of future conduct of promisee – there is a detriment = do not need to look at any point after K was made
    - Obering v. Swain-Roach Lumber Co. - Range of conduct for Lumber Co. is restricted by Obering’s promise to buy the land
      - Buy Obering’s land
        - Sale to X - Restricted
        - Sale to Y - Restricted
        - Keep - Restricted
        - Theme park - Restricted
        - Sale to D – if it buys, it can only do this
      - Not buy Obering’s Land
    - P under no obligation to complete the lease, no mutuality of obligation. K is unenforceable. It doesn’t matter that there was no partial performance b/c here there is anticipatory repudiation which makes the non-performance of the condition irrelevant – excuses fact that condition did not occur – Paul v. Rosen
  - Implied Obligation = If promise of performance is implicit or else they would receive nothing from the agreement then mutuality of obligation and promise = enforceable
    - Wood’s promise to try to market Lucy’s name is implied by the fact that he gets nothing out of the agreement unless he does try to sell. With the implied obligation there is mutuality of obligation. – Wood v. Lucy, Lady Duff-Gordon

Requirements Contract
Buyer: “All the gas I need for calendar 2004 for 1.25/gal.”
Seller: “All the gas you need for the calendar 2004 year for 1.25/gal.”

- What if buyer doesn’t need gas? Buyer can repudiate at anytime – only if he chooses to go out of business.
  - Buyer says if I need gas, I will buy it from you, not anyone else, and I will pay 1.25 – restraint on future conduct (detriment)
  - ENFORCEABLE

Output Contract
S thinks there is oil under his farmland, but is not sure.
B: “I will purchase from you all of the oil that comes out of your land for $.”
S: “I will sell you all of the oil that comes out of my land.”
B repudiates.
- Similar restraint on Seller’s conduct.
- Requirements of output K – one party has flexibility
  - ENFORCEABLE

S will give 1 carload/day 2003
B will pay $10,000/carload
S may terminate at any time after Nov. 1, 2003 (or June 1, or Jan 2)
B repudiates on Oct. 3, 2002
- No detriment to the promisee, if promisor is free to terminate at any time.
  Here, there is detriment to the promisee until Nov. 1, 2003. Determined at point and time of exchange of the promise.
- ENFORCEABLE – Seller has restricted future conduct – detriment to promisee = consideration
- Parties look at entire package and each make the determination that it’s worth it – Bargain

Mutual assent = offer + acceptance; both parties must agree to the same thing in the same sense
- Court looks to objective manifestation of intent of both parties even if one party does not subjectively intend for a K to be made.
- Objective manifestation of intent judged by what a reasonable (normally constituted) person would interpret manifestation to be.
- Is language an offer? How must offeror manifest consent? Offer = promise not just intention to deal
  - Language should be precise and circumstances must lead to conclusion that there was an offer:
    - Upon being told by employee that employee’s K expired 8 days earlier, employer says “Go ahead, get your men out. Don’t let that bother you.” = manifestation of intent to renew K. *Embry v. Hargadine, McKittrick Dry Goods Co.*
    - Disclaimer of handbook being a K must be conspicuous to be automatically binding.
    - Response to request for offer is a quote not specifying how much of a product offered but ending in “for immediate acceptance” = Intent to form K. – *Fairmont Glass Co.*
    - Distributing handbook, which contains Fair treatment policy constitutes offer of the policy. Accepting handbook and continuing to work = Assent to offer. *McDonald v. Mobil Coal*
  - Terms should be reasonably certain:
    - Reasonably certain = provide a basis for determining the existence of a breach and for giving an appropriate remedy
More terms left open, less likely parties intended to be bound – *Southwest Eng’g Co. v. Martin Tractor Co.*

Failure to make term definite enough - Renewal agreement to agree to pay later, in which a material term (like price) is left for future negotiation = unenforceable. If methodology for determining the future rent was in the lease then enforceable. – *Joseph Martin Jr. Delicatessen v. Schumacher*

- Courts tolerate indefiniteness in renewals b/c of the past relationship of parties.

Ambiguity of Term is impenetrable= 2 boats named “Peerless” – both sides applied different meaning to the term, therefore no K. - *Raffles v. Wichelhaus*

- No meeting of the minds = no sensible basis for choosing between conflicting understandings.
- Intersubjectivity is not the test.
- Both parties are equally at fault for not understanding the term.
- Term appears to be unequivocal, but isn’t.

Time limits = Time of acceptance runs from date of offer not date of delivery. Offer is not made until it is perceived by the senses of the one to whom the offer is made. – *Caldwell v. Cline*

- Unless deadline is a date (i.e. respond by Feb. 15) or offer specifies time limit runs from time letter was written

- Advertisement = not offer to sell a specific amount of the product, just makes a general offer for trade; if interpreted as offer then there is unlimited liability – No K – *Moulton v. Kershaw*
  - “We are authorized to offer” a product at a certain price “shall be pleased to receive your order.” = Advertisement not K.

Offeror is the master of the offer:

- Determines time of acceptance
- Determines way in which acceptance must be made:
  - **Unilateral K** = formed by exchange of promise for performance
  - **Option K** = formed once offeree begins performance; offeror’s duty is conditional on complete performance or part performance; irrevocable if:
    - In writing and signed by offeror
    - Recites a purported consideration for the making of the offer.

- **If consideration for the offer is given, it becomes an irrevocable promise.** – *Mier v. Hadden*
- Or is Irrevocable by statute – UCC §2-205 (Sale of goods)
- **Bilateral K** = formed by exchange of promise for promise
- Courts assume this over unilateral only in ambiguous cases
- Courts look to intent of offeror and surrounding circumstances to determine whether unilateral or bi.
  - “Let me hear from you” and offeror could rely on promise of close family member so court assumed all he wanted was promise - *Davis*
  - Implied promise not to revoke bilateral K
    - Enforceable under promissory estoppel.
      - Desire to induce reliance, and likelihood of reliance gives rise to implied promise not to revoke. Implied promise is enforceable because of consideration. Subcontractor wants the general to use the bid. Use of the bid is consideration for promise not to revoke. – *Drennan v. Star Paving Co.*
  - No Implied promise not to revoke – *Baird v. Gimbel Bros.*
    - Promissory estoppel is evoked where there is a gift.
    - Offer is not a promise until there is acceptance – offer of exchange does not become a promise until there is assent to the exchange
    - Mode of acceptance = usual (i.e. tell us your accepting) did not require action as acceptance
  - Distinction between suggested mode of acceptance and required mode of acceptance – mere mention does not limit mode of acceptance.
- **Revocation** of offer
  - **Indirect Revocation** = offeree should reasonably understand that offeror no longer intends to offer:
    - Death of offeror before acceptance
    - Sale of item before offeree can accept
    - Lapse of time
  - Offeror can’t revoke promise once performance has begun b/c part performance = promise of full performance- *Brackenbury v. Hodgkin*
- Offeror can still revoke even if he promises that the offer will remain valid for a given time period (unless consideration for the promise is paid) – *Dickinson v. Dodds*
- Firm Offer - When offer states it is irrevocable, but does not specify a time frame, reasonable time is assumed.

**Acceptance**
- When offeror indicates mode of acceptance and acceptance is made in accordance, then the acceptance is binding – *Davis v. Jacoby*
- Deviant Acceptance Rule = introduction of new or variant terms constitutes rejection of offer unless those terms are immaterial
  - Offeree must retain power to explore other avenues.
  - If acceptance is clearly independent of conditional language, then there is acceptance despite the conditional language – *Ardente v. Horan*
- **Mirror Image rule** = acceptance must be mirror image of the offer. Can’t express new terms. Can’t make conditional terms. Can state implicit terms. Can make requests. Form Ks:
  - UCC §2-207
    - Subsect. 1 = answers question does writings of the parties form a contract? – out with the mirror image rule = a definite expression of acceptance operates as acceptance even if it states additional terms, unless acceptance is expressly made conditional on assent to the additional terms or different terms.
    - Subsect. 2 = if the writings form a contract, what are the terms of the K? – additional terms = proposals for additions to the K. If parties are merchants, then all terms are in the K unless:
      - Offer expressly limits acceptance to terms of offer
      - New terms materially alter original offer.
    - Subsect. 3 = what if writings do not form a K? – there may still be a K and the terms are those on which the writings agree and terms supplied by other sections of article 2 of the UCC.
    - Applies to transactions of goods exclusively – Drafters of Restatement 2d assert this rule to all Ks = Bad.
  - Counter-offer = rejection of offeree’s offer. However, responding to counter-offer with “cannot reduce price” accounts for a renewal of original offer that can be accepted by offeror. – *Livingstone v. Evans*
  - Silence = acceptance; If parties have an existing relationship, a pattern of conduct in which one makes a proposal and the other accepts
without speaking, it’s reasonable to think parties will continue to operate in that fashion – *Hobbs v. Massosoit Whip Co.*

- Restatement – Silence = acceptance
  - Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

- **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 (not subsequent) agreement may not add to, vary, or contradict the terms of the writing. A **writing is the last word** unless:
  - Parties do NOT intend writing to be the final agreement
  - OR parties intend writing to be part of the overall agreement.
  - *Mitchill v. Lath* - Conditions necessary to change written agreement with parol evidence
    - Oral agreement must be collateral to written agreement
    - Must not contradict expressed or implied provisions of written agreement
    - Must ordinarily have been embodied in the writing, must not be so closely connected to writing as to be a part of it.
  - The problem is whether the parties are presumed to have intended to render the parol agreement legally ineffective and non-existent by failure to embody it in the writing.
  - Partial **integration** version of the parol evidence rule = if the parties reduce part of their agreement to writing that they intend to be part of the agreement, then prior written agreements can be enforced only if they are outside the scope of the writing – *Hatley v. Safford*
    - Allow parol evidence if - It is such an agreement that might be naturally made by parties in a similar situation. Factors to consider here are:
      - Parties with business experience are more likely to reduce their entire agreement to writing than parties without such experience.
      - Relative bargaining strength of the parties.
      - Apparent completeness and detail of writing.
  - Restatement – parol evidence is allowed if inconsistent with expressed or implied term of writing provided term was not provided by rule of law to fill gaps
  - No parol evidence, does not stop suit in Torts for fraud.
    - Promissory Fraud = At the time that promise is made, promisor intended not to perform
- Intention of parties to have writing integrated v. integration practices of reasonable person. - Interform v. Mitchell

- Parties should be allowed to present evidence that there is an ambiguous term – parol evidence rule does not interfere with process of interpretation - Pacific Gas
  - 2 grounds to decide case:
    - Trial court was wrong, the words were ambiguous
    - Trial court used wrong approach – plain on its face approach is wrong, courts should consider extrinsic evidence in interpretation

- Before applying parol evidence rule, we must interpret what the writing says. – Bethlehem

- Merger clause does NOT make the writing complete – only intent of parties does this.

- **Bound by what one signs** = people are bound by what they sign regardless of whether it applies to them or whether they read it, as long as they have a reasonable opportunity to read – Allied Van Lines v. Bratton

  - Signature = objective manifestation of assent.
  - Exception = K of Adhesion = take it or leave it: signer did not have time to plan and think about effect of signing agreement the way writer did:
    - Doctrine of **Strict Construction** = If person who prepares document misrepresents essential nature, person who signs is not bound.
      - If important term is buried in maze of **fine print** and otherwise **inconspicuous**.
      - If important term is drafted in **confusing language** not intended to be understood. – Henningsen v. Bloomfield Motors
    - Doctrine of **notice and knowledgeable assent** = signer did not know what she was signing

- Claim Checks are NOT Ks - Agricultural Ins. Co. v. Constantine

- If seller prevents buyer from reading document, document is not binding – short of absolute prevention, document is usually binding.

- Court will refuse to enforce provisions beyond reasonable expectations of signing party or provisions that are unconscionable

- **Public Policy** = courts will not enforce Ks against public policy:
  - **Exculpatory clause** = unenforceable when it is too broad and all encompassing; public policy to
retain right to sue is strong especially when someone is injured. – *Richards v. Richards*

- **Disclaimer of Warranty of Merchantability** = unenforceable when it disclaims right to sue for personal injuries suffered. Not if only property is damaged. - *Henningsen v. Bloomfield Motors*

- **Arbitration clauses** = Undermines constitutional right to trial. Can be waived, but must be done knowingly. Systemic bias = arbitrator is often hired by the party writing the K. – *Broemmer v. Abortion Services of Phoenix*
  - Enforceable even when it arrives in packaging with computer – *Hill v. Gateway*

Even where there is consideration and mutual assent, K can still be unenforceable when:

- **Abuse in Bargaining Power** = Deprivation of **Free Will**
  - **Coercion** = promisor is forced by promisee to make a promise
    - **Duress** = If you don’t do sign this K, I’m going to withhold property of yours (or your person)
      - **Economic Duress** = Refusal to perform unless other party submits to new demand to which other party has no alternative
        - Promisor must NOT be able to obtain goods from another source
      - Only when promisor is forced to agree with K that deprives him of free will b/c of **illegal act** - *Smithwick v. Whitley*
      - Measured by state of mind produced in victim, not by nature of the threats – *Wolf v. Marlton Corp.*
  - **Pre-existing Duty Rule** = A promise to do what one is already contractually obligated to do is NOT consideration
    - Ousted by UCC – not in effect for sale of goods
  - Policy encouraging settlement outweighs policy discouraging coercion sometimes.
    - **Accord and Satisfaction** = writing on check, “cashing this check acknowledges full payment”
      - Requires **unliquidated claim** (not a fixed amount) or **bona fide dispute** over the amount due like dispute between contractor and owner about hours billed – *Marton Remodeling v. Jensen*
      - Not withholding money b/c one is unhappy with costs it has to incur while waiting for buses – *School Lines Inc. v. Barcomb Motor Sales*
Must be in **Good Faith**
- Encourages compromise discouraging lawsuits
- Offer cannot unilaterally change terms of offer – writing “partial payment” on back of check doesn’t count

**Unconscionability** = absence of meaningful choice on part of 1 party AND terms unreasonably favorable to the other party.

- **Procedural** = Absence of meaningful choice
  - Unequal Bargaining Power – characteristics of the parties
    - Old, uneducated man and slick businessman
    - Poor, welfare mom and electronics co.
    - Rarely uphold unconscionability claim by one company against another – *Gianni Sport Ltd. v. Gantos, Inc.* = exception
  - Reasonable opportunity to understand based on education, presentation of writing and deceptive sales practices - Strict Construction and Knowledgeable assent?

- **Substantive** = Unreasonably favorable terms
  - Commercial setting = practices of the industry
  - Terms = so extreme as to be unconscionable
    - $900 for a $300 refrigerator
    - Sales subject to security interests = improper to repossess and sell more than the interest in the security
    - No cross-collateral clauses b/c repossession as a threat against creditor more than a benefit to lender
    - Cancellation clause = unreasonable
  - Different ways of dealing with unfair terms in a K:
    - Statute or Admin. Regulations force terms into K to favor weaker party.
    - Statute or Admin. Regulations prohibiting specific terms in Ks
    - Statutes that don’t focus on terms but on transaction types – establishing standard of conduct for consumer transactions

- **Defect in Substance of Bargain**
  - **Mutual Mistake** of a Material Fact = both parties have a misapprehension as to the substance of the thing bargained for:
    - Value of the thing is irrelevant in determining its substance
    - Both parties believe a cow to be barren, when cow gets pregnant, seller is allowed to file suit for replevin of the cow – *Sherwood v. Walker*
3 alternative remedies for mutual mistake:
- **Replevin** = give the thing back to the seller, give $ back to buyer – everyone is where they were before the K.
- Allocate the loss to the party better able to bear it.
- Leave the K as is. Enforce it anyway.

Indifference about the material fact by buyer doesn’t matter as long a there was a mutual mistake – *Aluminum Co. of America v. Essex Group*

**Restatement – Doubtful Fact** = When parties know there is doubt about a certain matter and contract on that assumption, K is enforceable b/c risk of existence of doubtful fact is an element of the bargain.

**Restatement of Restitution §12** - Restitution for actual value of thing sold where B is aware of mistake by S and benefits from that mistake.
- No restitution for S if S knows about the mistake also.
  
  **Duty to Disclose** = when S knows a material fact about thing being sold that B doesn’t know, S has to tell B that material fact. When:
  - Disclosure is necessary to prevent previous assertion from being misrepresentation or fraud.
  - Disclosure would correct a mistake of other party as to a basic assumption on which that party is making the contract and nondisclosure is bad faith.
  - Disclosure would correct mistake as to contents or effect of writing.
  - Other person is entitled to know the facts b/c of a relationship of trust and confidence between them.
  - If B should have known by the low price that the thing was not genuine, then no duty to disclose. Selling artificially aged paintings for $50 amounts to a disclosure b/c genuinely old paintings would never sell for so little.
  - Homeowners have a duty to disclose defects unless they are clearly visible to a reasonable person.
    - Economic Efficiency argument = When seller withholds information, value of aggregate resources goes down b/c purchasing is discouraged.
    - **Concealment of fact** = openly claiming fact does not exist.
  - Buyers do NOT generally have a duty to disclose.
    - Policy = we want to encourage buyers to obtain and use special knowledge through skill, but balk at special knowledge obtained from personal relationships b/c that knowledge is not available to seller.
  
  **Misrepresentation** = Where one has full information and represents that he has, if he discloses a part of the information only, but his words leads the one with whom he contracts to believe that he has
made a full disclosure and does this with the intent to deceive he is guilty of fraud. – Cushman v. Kirby

- Still Tort liability even in the absence of misrepresentation - Fraud.
  - When tort remedy more adequately compensates B for misrepresentation, then K remedy will not be used – Cook v. Salishan Properties

  o **Implied warranty of fitness** = the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction. Buyer may **recede** on K.
    - Does NOT apply to defects that were or should have been **visible** to reasonable person – Hinson v. Jefferson
    - No more caveat emptor.

  o **Impossibility** = K is unenforceable if one of the terms becomes impossible to perform after the K is formed
    - Physically – the thing doesn’t exist anymore
    - Economically – prohibitively expensive to perform now

- **Duty of Good Faith and Fair Dealing** = implied obligation of no bad faith:
  - **Bad Faith** = evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance
    - Violation of community standards of decency, fairness or reasonableness.

Chapter 5 – Maturing and Breach of Contract Duties

- What happens when something that the parties said would happen or must happen does not happen? Things the party expressly said would happen v. things they assumed would happen (mutual mistake).

- **Express Condition** = one party will only perform if some event occurs.
  - **Interpretation** = process of understanding meaning of language
    - Pacific Gas & Electric = meaning of the word indemnify
  - **Construction** = process of determining legal effect of the language.
    - Caldwell v. Cline = legal effect of saying “will give you 8 days to reply”

- **Condition** = some operative fact subsequent to acceptance and prior to discharge, a fact upon which the rights and duties of the parties depend.
  - Intention of parties = number one determinant of whether given statement is promise or condition. – Howard v. Federal Crop Ins. Co.
    - Language
      - **Expressio unius est exclusio alterius** = expression of one thing is the exclusion of another – calling one thing a condition precedent and then not calling another thing a condition precedent makes the other thing not a condition precedent
Subject Matter/ Circumstances
  - Trade customs
  - Policy against forfeiture – insured forfeits premiums if it’s a condition precedent
    - Presumption of Promise
    - **Contra Preferentem** – construe language against party who drafts the language
      - Precedent – almost all conditions b/c point of reference is duty to render immediate performance and the condition is precedent to that point.
      - Subsequent – Something to be done after one party performs
        - B promises to pay S $50,000 for house “on the condition that the ice house has been removed” (not a promise)
          - Possible that S has promised to remove ice house, but S did not necessarily promise to remove ice house. If S did not promise, then no breach and B can’t recover for the loss.
          - If there was a separate promise by S to remove ice house, removal would have been a condition and a promise.
          - The non-occurrence of a condition will prevent the existence of a duty in the other party.

S has house to sell. House is in bad shape. S borrows $10,000 from L. “Repay the $10,000 + interest as soon as I sell my house and receive the proceeds.” S fixes the house, puts it on the market. No one purchases house. L demands repayment. S refuses. L sues.

- Is language an allocation of risk of not selling house from S to L?
  o Maybe if the interest rate is extremely high - condition
  o If interest rate is consistent with market, language has to be construed as term.

- If condition, S has no obligation to pay.
- If term expressing time for repayment, S has obligation to pay.
  o Waiver = a voluntary relinquishment of a known right which except for waiver would be enjoyed
    - Once party waivrs a right (by accepting late payment for example), party cannot reclaim it (must continue to accept late payment).
    - Irrevocable
  o Estoppel = one party makes a misleading representation to another party and the other has reasonably relied to his detriment on that representation.
    - Estoppel can be lifted upon party giving proper notice.
    - Holding insurance company to saying that it would give farm owner time to settle ensuing claim with third party before payment of insurance will be suspended. However, insurance company is allowed to revoke an estoppel by later refusing to
pay (time limit to file suit against insurance co. starts from the point of refusal to pay)
- Policy against disproportionate forfeiture of insurance payments – *Aetna Cas. & Sur. Co. v. Murphy* (dentist trashes his place before leaving – insurance doesn’t have to pay b/c he filed his claim too late)
- Conditions of Satisfaction
  - Condition of architect’s approval (objective 3rd party) = test of good faith not reasonableness - *2nd Nat’l Bank v. Pan-American Bridge Co*
    - Bad faith = fraud, severe mistake, dishonesty, etc.
      - Architect’s bad faith =
        - Architect refuses certificate for reason he didn’t have authority to employ.
        - Architect must use impartial judgment and not just work at the whim of the owner.
        - Architect did not inspect the work himself.
  - Condition of one of the party’s approval (generally not objective) – problem of mutual obligation
    - Scale of bad action – mistaken (low end), unreasonable, bad faith, malicious (high end)
    - Utilitarian K = reasonableness test
      - Home buyer’s approval of house - *Haymore v. Levinson*
    - Aesthetic K = bad faith test b/c reasonableness does not operate.
      - Valet and laundry services = aesthetic - *Fursmidt v. Hotel Abbey Holding*
- Order of Performance
  - Dual nature of promises:
    - Obligation of promisor – always
      - Measure of fulfillment of promise: Complete performance is necessary
    - Condition to obligation of promisee – sometimes
      - Measure of fulfillment of condition: Substantial performance suffices
      - Look to manifestation of intent (evident sense and meaning) of parties and intent of transaction: - *Kingston v. Preston*
        - Not concerned with actual intention of parties, but constructed intention of parties
      - Intent of transaction =
        - Efficiency
        - Standard Practice, Trade Usage
        - Past transactions between these parties
        - Fairness between parties
        - Effectiveness or ineffectiveness of the remedy if we don’t view the promise as a condition
Purpose of K

- Purpose of requiring security is to protect seller in case buyer defaults on promise to make monthly payments – if court awards buyer who does not provide security it defeats the purpose of requiring security
  - *Price v. Van Lint* said providing security is independent from loaning money.
  - P’s promise to give deed was only an obligation b/c both parties knew that P might not be able to provide deed before the loan was to be made.
- **We presume that promises are conditional unless there is a reason not to.**
  - Protects the defendant. Plaintiff always sues for performance of a promise, but in most cases it’s not clear that defendant will get what he wants.
  - Don’t put defendant in position to perform if defendant has no assurance that plaintiff will perform.

- Kingston’s 3 categories of promises:
  - Mutual and Independent = either party can receive damages for loss and no grounds to claim other side breached
  - Conditions and Dependent = performance of 1 depends on performance of the other – other party is not liable until the condition is performed.
  - Mutual Conditions = both promises are to be performed at same time if 1 party is ready to perform he can hold the other party liable.
  - Restatement - if performance can be rendered simultaneously then it should unless language or circumstances indicate otherwise
    - **Render or Tender** = if promises are concurrent, P must render performance or tender offer to perform with manifested present ability to do so, unless:
      - **Anticipatory Breach by Repudiation** - Vendor refuses in advance to comply with the terms of the contract OR
        - The more doubt there is about P’s performance without D’s repudiation, the less likely court will enforce D’s promise without P’s tender – *Caporale v. Rubine*
      - Vendor places himself in a position in which performance is impossible – not the case in *Ziehen v. Smith* b/c seller
could perform under the K even if he didn’t have good title

- If court disagrees with impossibility to render then buyer is screwed, best advice is to always render or tender – *Neves v. Wright*

- **Perfect tender rule** = sellers are required to deliver goods that complied exactly with the sales agreement. Person who does not tender perfect performance cannot enforce other person’s promise. – *Oshinsky v. Lorraine Mfg.*
  - UCC 2 - If goods or tender fail in any respect to conform to K, buyer may reject all the goods. - *Ramirez v. Autosport*
  - UCC 2 – other segments soften the rule
  - Time is of the essence
    - Parties are free to make timely performance condition of performance
    - Does this phrase create express condition? Not always.
      - Depends on intent of parties even if it is an express condition (i.e. payment of interest on Nov. 15 – *Sahadi v. Continental Illinois Nat’l Bank* and *Beck & Pauli v. Colorado Milling*  
      - What if parties say nothing about time? – Should it be viewed as a constructive condition? – *Yes in sale of goods*  
        - Some goods are perishable  
        - Market price fluctuates much more in respect to goods  
          - Likelihood for immediate delivery of goods.
  - Quantity is of the essence
    - Exact quantity is a constructive condition, B doesn’t have to take less than quantity contracted for.

- **Substantial Performance** = P has largely, but not completely performed according to the K. P can recover balance of contract price b/c he has substantially performed even if he hadn’t completely performed. P will still be held liable by D for what’s left to be done.
  - If performance meets essential purpose of K, then there is substantial performance – closer to perfection than to no performance at all (not mathematical)
    - Substantial performance in constructing a house does not amount to strict compliance to every detail of the specifications and plans unless all details are made the essence of the K.
    - Just because homeowners are not happy doesn’t mean K was not substantially performed. – *Plante v. Jacobs*
    - Non-performance of features of great personal importance can restrict finding of substantial performance
- Even if no substantial performance, P can sue in restitution for FMV of work rendered.
- Delivering 4.756 acres in a K for 7 acres more or less is substantial performance of the K making specific performance of sale possible - *Reigart v. Fisher*
  - Missing ¼ acre does not equate to substantial performance. - *Keating v. Price*

- **Material Breach** = non-breaching party can end the relationship and recover expectancy = relieves/discharges other party’s obligations – If non-breaching party wants to end relationship b/c of a short fall in proceedings, then we ask does the short fall constitute a material breach?
  - Test: Does breach go to the essence of K?
    - Defeats essential purposes of the parties:
      - **Cause** – result of intentional decision or some unforeseen event?
      - **Extent** – how late is performance?
      - **Needs and expectations** – full context of contractual setting
      - **Likelihood of continuation** – temporary problem or something that will continue?
  - Courts want to encourage parties to hang with the K and not end relationship – breach by one party that causes little injury to the other (D has substantially performed) does not allow other party to end relationship - *Turner v. Chester*
  - Non-breaching party has a right to rescind the K? – No, b/c **rescission** has 2 meanings:
    - The joint action of both parties to a K to end relationship.
    - One party ends the relationship and seeks to recover what was performed (go back to pre-contract position) – rescission and restitution
  - Non-breaching party has a right to **cancel**.
    - Court is dealing with a failed relationship and is attempting to assign fault for the failure.
  - **Non-material breach** = other party may hold performance until breaching party complies and even sue for restitution

- **Anticipatory Repudiation** = Material Breach ONLY IF – *Gregun v. Mutual of Omaha*
  - 1) K is bilateral AND
  - 2) Plaintiff has not completed performance
  - **Repudiation** = overt communication of intention not to perform
    - In K for payment in installments breach of 1 installment is not a breach of the whole K.
    - Repudiation, if party insists on condition of performance some other performance that he is not entitled to.
    - Reliance Cooperage v. ... = if one party repudiates, other party may wait for performance or treat repudiation as breach and
sue at once, repudiation may be seen as a total breach and suit can be brought for expectation of whole K