Chapter 1 – Remedies for Breach of Contract

I. **Expectancy** = court’s objective in awarding remedies for breach of contract
   A. Expectancy = law aims to give the disappointed promisee, so far as money will do it, what he was promised (Groves)
      1. To determine damages, look to substitutes, such as replacement cost
      2. Creates efficient incentives not to breach:
         a. Expectancy forces the breaching party to pay in damages the value of the promised performance
   B. No punitive damages
      1. A K means you will pay damages if you don’t keep the K, nothing more
      2. Some courts seemed to be influenced by the character of the breaching party’s character in breach in choosing measure of damages (Groves and Korolis)
   C. Value to the nonbreaching party
      1. Replacement cost/Cost of Completion (upper limit)
      2. May be less than replacement cost (Peeveyhouse and Groves)
         a. Peeveyhouse – no person can recover a greater amount in damages from breach then they would have received by full performance
      3. In selecting between C/C or D-in-V:
         a. Courts looks to the likelihood the nonbreaching party will use the remedy to fulfill the contract (Advanced Corp. v. Wilks)
         b. Chose not to favor the faithless contractor (Groves)
         c. Go w/ C/C unless undue economic waste
      4. Gains made by the nonbreaching party on other transactions after breach are never deducted from damages awarded unless such gains could not have been made w/o breach (Kearsarge Computer v. Acme Staple Co)
      5. Collateral Source Rule = do not reduce damages by the amount of gov’t benefits or insurance; not universal rule (Parker v. 20th Cent Fox)
   D. Awarding expectancy creates “efficient breach” b/c the breaching party must internalize the external costs of his breach
      1. A party should only breach if there is higher economic efficiency of doing something else

II. **Limitations** on ability to get expectancy
   A. Causation
      1. If you cause loss, you cannot collect damages
      2. No damages at law for breaching party
   B. Foreseeability (Hadley v. Baxendale)
      1. Hadley v. Baxendale Rule: A person may not recover from breach of contract, losses that are not reasonably foreseeable at the time of the contract.
      2. Loss must be foreseeable at time of formation of K (Hadley)
      3. Loss not to be disproportional (Lamkins) – Art 2 of UCC rejects this limitation
      4. Tacit Agreement Test – promisor liability is limited that he would have likely/reasonably assented to if it had been presented (Lamkins)
5. Can only recover mental distress damages for breach when one of the purposes of the contract is emotional tranquility (Valentine v. General American Credit)
   a. Emotional distress damages = unrecoverable in normal breach of K

C. Avoidability – Doctrine of Avoidable Consequences
   1. A party can only recover from breach damages that it could not reasonably avoided
   2. No duty to mitigate
   3. Policy goals
      a. Avoid waste (Rockingham Cty. v. Luten)
      b. Encourage productivity (Parker v. 20th Cent. Fox)
   4. Damages
      a. = expense incurred up till breach + profits (Rockingham), OR
      b. = K – expenses saved (Note cases to Rockingham)
      c. Expenses of mitigation can be recovered by nonbreaching party
   5. Doc. of Avoidable Conseq. is an affirmative def., must be raised by def. (Dempsey)

D. Certainty – damages must be ascertained to a reasonable degree of certainty (Dempsey)
   1. Higher standard than anything else the pl. must establish, all else to preponderance
   2. Emotional distress is inherently not provable to a reasonable degree of certainty

III. Application to particular kinds of contracts
A. Construction contracts
   1. Breach by builder
      a. Cost of completion
      b. Diminution in value if economic waste
      c. Choose btw based on likelihood remedy will be used to complete contract
   2. Breach by owner
      a. After completion: Damages = K price
      b. Before completion:
         i. Damages = expense incurred + profit
         ii. Damages = K – expenses saved

B. Sales of goods
   1. Breach by seller
      a. = Spot MKT price @ T and P of D – K + incidental costs (Missouri Furnace & UCC § 2-713)
      b. Don’t replicate the contract, just get periodic expectancy
      c. Doctrine of Avoidable consequences is built in
      d. Buyer may “cover” to get commercially usable reasonable substitutes; must be done in good faith and reasonable manner (UCC § 2-712)
   2. Breach by buyer
      a. K – MKT price @ T and P or D
b. IF breach causes loss of transaction, then:
   i. Damages = lost profits + incidental expenses (Neri v. Retail Marine)

C. Employment
1. Breach by employer
   a. Damages = K salary – earnings from comparable work (Parker v. 20th Cent. Fox)
      i. Tension btw expectancy and encouraging efficiency
   b. Courts differ on whether governmental benefits should be deducted
2. Breach by employee
   a. Damages = Replacement cost – K salary

IV. When expectancy is not available
A. Reliance losses
1. = losses suffered by virtue of reliance on contract
2. Post/pre-formation
   a. Dempsey one view – can’t rely on K before it exists
   b. Anglia opposite view – can rely on K before it exists, if person being offered K could turn it down and the K could still be competed
3. Limited if losing K (Armstrong Rubber) – expectancy cap
4. If common-law duty to accept K, then reliance can exist before K (Security Stove)
5. Reliance stops once K is breached (Dempsey)
6. Damages for breach of sales contract: (Armstrong Rubber)
   a. = Preparation expenses – amount breaching party can show the nonbreaching party would have lost if the contract had been performed
   b. Breaching party has the opportunity to show(affirmative defense) that the contract was a losing proposition and the expenses occurred should be revised down by that loss.
   c. Very difficult defense to use b/c since this is reliance, the profits are not determinable to a reasonable degree of certainty, therefore, how could the def. prove the pl.’s loss?
7. Expectancy (on the K) is upper limit of damages for reliance

B. Equitable
1. Remedy at law must be inadequate/unavailable
   a. Land K – remedy at law is presumed to be inadequate for historical reasons
   b. Sale of goods – presumption does not exist, but if pl. can establish, then equitable relief may be available, or if circumstances are unique (no market)
2. Can’t est. damages to a reasonable degree of certainty (Restatement 2d)
   a. No substitute goods, no market, no market price (Curtis Bros v. Catts)
a. Compare benefit to pl. from relief with harm to def. of relief, make sure not disproportionate (Van Wagner)
b. Give negative specific performance, not affirmative, usually
c. Employment K – special contract where courts will rarely give equity (Fitzpatrick v. Michael)
   i. strained relations
   ii. involuntary servitude
   iii. difficult supervision
   iv. But, injunctive relief may be available in certain circumstances
d. Construction K – specific performance is rarely available
   i. difficulty supervising
   ii. don’t want to encourage parties to come to court to settle problems
   iii. Shouldn’t be available unless [1] there are special circumstances and [2] the public interest is directly involved (N. Del. Indus. Dev. Corp. v. E.W. Bliss)

4. Specific performance should be withheld when: (Van Wagner Advert.)
a. Monetary damages are adequate to compensate nonbreaching party, AND
b. Equitable relief would impose disproportionate burden to breaching party

V. Restitution – compensates pl. for benefit conferred when retention of benefit without pmt would be unjust, prevent unjust enrichment, only available from court of equity
A. Basis entirely independent of Contract Law
   1. Goal = prevention of unjust enrichment
   2. Available only when there is no remedy at law, examples b/c:
      a. Losing K (Algernon Blair)
      b. K is too indefinite to be enforceable (Kearns v. Andre)
      c. Breaching party can’t recover anything at law
      d. Damages not determinable to a reasonable degree of certainty
B. Damages – which party can get what
   1. Nonbreaching party – choice btw remedy at law (expect. or reli.) OR at restitution
      a. Measure of Damages = limited by K (Noyes v. Pugin)
      b. Measure of Damages = not limited by K (US v. Algernon Blair)
      c. Damages = reasonable value of work done or of benefit conferred - $ already paid (Algernon Blair)
   2. Breaching party – material breach
      a. Cannot get remedy at law, because they are breaching (Britton v. Turner)
      b. But, can recover at restitution
      c. Measure of Damages = not to exceed K price (Britton v. Turner)
      d. Damages = value of breaching parties work @ ≤ K rate – damages suffered by nonbreaching party (Britton v. Turner)
C. Unavailable to a person who has fully performed, must sue on K (Oliver v. Campbell)

VI. Arbitration
A. Advantages
   1. Relieve congestion in courts
   2. Fewer rules than judicial procedure
   3. Arbitrator should be more familiar with situation and industry than judge
   4. Arbitrators are free to disregard est. rules of law to apply their own sense of fairness
B. Disadvantages
   1. No precedent
   2. Don’t report decision; can’t use past decisions to argue
C. Greenfield
   1. Adamantly opposed to mandatory arbitration in consumer transactions and contracts; generally against arbitration

Chapter 2 – Grounds for Enforcing Promises
I. Formality
   A. In a K with two promises being exchanged, the party breaching the K is the promisor
   B. Formality to make sure parties knew they were making a contract – in the past
      1. Served a channeling function – tell people how to make enforceable Ks
   C. Now, we only look to see if there is consideration – consideration now takes the place of formality

II. Consideration
   A. Main function of consideration is to distinguish a bargain from a gift and decide when a contract should be enforced
   B. Consideration is EITHER: (Hamer v. Sidway)
      1. Benefit to promisor, OR
      2. Detriment to promisee
         a. forbearance of a legal right
         b. restraint of future conduct
   C. Bargain is required – the exchange of promises must be bargained for
      1. Reciprocal mutual inducement (Restatement 2d §71, p. 208; Fischer v. Union Trust)
      2. Just receipt of something that makes you happy and then induces you to give something, the is no consideration (Whitten v. Greeley-Shaw, Fischer v. Union Tst)
      3. Can’t be a gift for a gift
      4. Promise for promise is ok
   D. Either there IS or there IS NOT consideration, no modifiers
   E. Courts will not inquire into the adequacy of consideration (Fischer v. Union Trust)
   F. Forbearance of a right that you don’t have is not consideration, for forbearance of right to sue must meet one of the following two tests:
      1. Duncan v. Black test: surrender of suit = consideration if:
a. Basis for suit must be made in good faith, AND
b. There is some reasonable basis for asserting the claim

2. Restatement, 2d: surrender of suit = consideration if:
a. Claim is asserted in good faith, OR
b. There is some reasonable basis for asserting the claim

NB: These are issues of fact, so you should point to factors that the finder of fact will use to determine the issues of fact
a. For good faith test: look to immediacy of asserting of claim
b. For reasonable basis test: look to what was actually promised

NB: To determine which is better, look at the policy goals behind each rule:
a. Parties should solve their own disputes
b. The law should discourage extortion

G. Determine whether consideration exists AT INCEPTION of contract
1. Conditions don’t matter, either there is consideration or at the formation of the K or not (Obering v. Swain-Roach Lumber)

H. A promise is consideration if the performance promises, either act or forbearance, would be consideration if it alone were bargained for

III. Special exceptions to bargain test of consideration
A. Moral obligation is sufficient consideration to support enforcement of a promise
   IF there was a pre-existing obligation, which has become inoperable by positive law:
   1. Promise to pay for debt of infant/minor
   2. Debt beyond the statute of limitations
   3. Debt after bankruptcy
B. A new promise made because “moral obligation” to fulfill these three types of exceptions is enforceable without new bargain b/c old, good consideration suffices
C. Distinction btw moral obligation with material benefit and moral obligation without material benefit:
   1. Mills v. Wyman – no consideration for payment of debts incurred on son’s behalf
   2. Webb v. McGowan – consideration for material benefit for saving a person’s life
   3. Harrington v. Taylor – humanitarian act, voluntarily performed, is not consideration
D. Mutual reciprocal inducement – i.e. bargain – is required for consideration
E. An unrestricted cancellation clause will invalidate a contract

IV. Reliance
A. Progression in consideration
   1. Started out with requirement of sealed instrument, but no consideration
   2. Then, courts started to look for consideration in all promises and still used a sealed instrument for evidence of consideration
   3. Then, courts started to use constructive consideration in other ways that a sealed instrument – started to destroy the point of consideration
   4. Courts should use consideration as the main requirement, but a promise without consideration is not automatically unenforceable
B. Progression in reliance
1. Courts started out unwilling to use reliance as enforceable (Kirksey v. Kirksey)
2. Then equity courts used reliance for enforceability (Seavey v. Drake)
3. Reliance on the promise is a substitute for consideration, enforcement (Geremia)
4. Now reliance is recognized in both equity and law courts as sufficient as consideration (Forrer v. Sears Roebuck)

C. Promissory estoppel = stopping someone from saying there isn’t consideration, basically the same as reliance (Ricketts v. Scothorn)
1. Only available for statements of fact; not available for promise (Prescott v. Jones)
2. Requirements for promissory estoppel (Geremia and Forrer v. Sears)
   a. Was there a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character by the promisee?
   b. Did the promise induce such action?
   c. Can injustice be avoided only by enforcement of the promise?

V. Contracts that are conditional
A. Legal restraint of future conduct is sufficient for consideration
B. Asymmetric flexibility
1. A cancellation/termination clause invalidates contract if and only if its is unrestricted – because there is no restraint on future conduct
2. Different termination powers will not invalidate
3. If flexibility is limited, courts can change flexibility to make the K enforceable
C. Mutuality of obligation
1. To have consideration, both parties must be bound or neither will be
D. In a contract that assumes, but does not explicitly state, one party’s obligation, the courts as a function of law will assume an implied obligation for purposes of fulfilling mutual obligation (Wood v. Lucy)
E. Illusory promise = communication that takes the form of a promise, but lacks substance (Nat Nal Service Stations v. Wolf)
1. A promise is not consideration if by its terms the promisor reserves a choice of alternative performances unless: (Restatement, 2d § 77, p. 297)
   a. each of the alternative performances would be consideration if it alone had been bargained for; OR
   b. 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
F. It is tortious for an ER to discharge and EE contrary to public policy (Sheets v. Teddy’s FF)

VI. Gap filling implication
A. By operation of law, courts can add terms or change terms that do not go the essence of the contract to make the contract conform to the law (Wood v. Lucy)
B. UCC 2-306(2) agrees

Statute of Frauds
I. Contracts do not need to be in writing to be enforceable
   Exception: Certain classes of contracts must be in writing and signed by the party to be charged to be enforceable
   A. Contracts for the Sale of Land
      1. Cover “any interest in land” – land, tenements, hereditaments
      2. Does not cover contracts related to the sale of land (real estate broker)
   B. Contracts not to be performed within 1 year
      1. 1 year runs from making of contract to completion of performance
      2. Covers K “not to be performed within the space of 1 year from the making of the K”
         a. K that cannot be completed within 1 year → falls within statute
         b. K that can be completed within 1 year, even though it doesn’t have to → not within the statute
      3. Standard test: Whether the performance called for by the K must necessarily extend for a year or more under the terms of the K, disregarding possibilities of discharge through conditions or events not expressly stated in the agreement
   C. Contracts for the Sale of Goods
      1. No writing is required if the purchase price is < $X (now $5,000)
      2. A merchant’s failure to answer the written confirmation of a sale within 10 days of its receipt is tantamount to a sufficient writing
      3. Enforceability is limited to the portion of one party’s obligation that is proportionate to the other party’s part performance
   D. Memorandum, or writing, need only be evidence of the K and its essential terms
   E. If because of the Statute of Frauds there is no remedy at law, party can sue at equity
   F. Partial performance (reliance) can save an oral K from being barred by Stat. of F.
      1. Use promissory estoppel to avoid a draconian application of Statute of F.

Chapter 3 – The Making of Agreements
I. Mutual Assent
   A. Generally, to constitute a contract both parties must agree to the same thing in the same sense (Embry v. Hargadine McKittrick)
   B. But, if words or actions, judged by a reasonable person, manifest an intention to agree in regard to the matter in question, the agreement is establish, AND it is immaterial what may have been the real, but expressed, state of mind (Embry v. Hargadine McKittrick)
      1. Objective theory of assent – outward manifestation constitutes assent when assent is sufficient to create reasonable reliance by the other party (McDonald, p. 337)
      2. Subjective theory of assent – intent of parties constitutes assent, “meeting of the minds” – courts DO NOT USE
NB   Restatement 2d Contracts § 21 (1979) Use objective theory to determine creation of contract, BUT an action to show your belief the promise will not affect legal relations may prevent the formation of a contract (McDonald, p. 338)

NB   Leaving terms open may show there was no offer or acceptance regardless of how your actions may have been interpreted (Restatement, 2d § 33)

C.   In construing every contract, the aim of the court is to arrive at the intention of the parties, by reading the correspondence as a whole (Fairmont Glass)
1.   This looks like subjective, but is actually objective.

D.   If both parties make a contract knowing that the contract is a sham, there is no contract, the contract is not enforceable, no recovery (NY Trust Co v. Island Oil, p. 333)

E.   Disclaimers must be conspicuous to be effective against employees and that conspicuous is a matter of law (McDonald v. Mobil Coal Producing, p. 334)

F.   When an employer issues a manual that confers greater rights than an employee previously had, the employees continued work ordinarily demonstrates acceptance of the offer of new rights (Torosyan v. Boehringer Pharmaceuticals, p. 342)

G.   When an employer issues a manual that reduces the employees’ rights or benefits, continued work is not conclusive evidence of acceptance of the offer (Torosyan v. Boehringer Pharmaceuticals, p. 342)

H.   An advertisement for the sale of goods is not an offer (Moulton v. Kershaw)
1.   Look to language used to determine if the communication was an advertisement
2.   Concerned with over commitment of seller

I.   Test for advertisement or offer = whether the facts show that some performance was promised in positive terms for something requested

J.   A binding offer may be implied from the fact that deliberately misleading advertising intentionally leads the reader to the conclusion that one exists

K.   An offer that is ambiguous as to quantity is not automatically void. As long as the quantity is set before the assent and before withdrawal of the offer, quantity ambiguity is ok (Moulton v. Kershaw)

L.   An agreement to agree is not sufficiently certain or specific to make the contract enforceable (Joseph Martin Deli)

M.   A contract must be sufficiently definite/specific to be enforceable (Joseph Martin Deli)

N.   Restatement says:
1.   The terms of a contract must be reasonably certain, must provide a basis for determining the existence of a breach, and provide appropriate remedy. (Define each parties obligation, give parties way to know if there is breach, and provide for remedy)

2.   If it is found that both partied manifested an intent to conclude a contract, the indefiniteness of the quoted language does not prevent the award of the liquidated damages.

3.   An agreement for the sale of goods that leaves the price to be agreed is enforceable (Restatement 2d § 2-305)
4. UCC § 2-207 will tolerate a discrepancy btw offer and acceptance
5. Interpreting ambiguity in favor of the seller because he is the one taking the risk and it seems that there is a tacit assent on the part or the buyer that the buyer leaves the delivery up to the seller

O. Ambiguity in meanings attached to terms (Raffles v. Wichelhaus)
1. If both parties attach different meanings to a term and both don’t know – no contract
2. If both parties attach different meanings to a term and both know – no contract
3. If one party knows the other attaches a different meaning to the term – contract and the term is that of the person who does not know

P. Tacit Agreement Test = Promisor’s liability limited to what he would have likely assented to if it had been presented (Lamkins v. I’nat’l Harvester)

Q. Examples of indefiniteness that preclude enforcement:
1. Failure to include term (Nader, Joseph Martin Deli)
2. Failure to make included term sufficiently definite (Fairmount Glass)
3. Ambiguity (Raffles v. Wichelhaus)
4. Vagueness (Frigaliment Importing Co. p. 360)

R. An offer in writing followed by tender of such performance by the offeree before revocation of the offer shall not be denied effect by reason of the fact that the tender was not accepted by the offeror

II. Control Over Contract Formation
A. Master of the Offer
1. Offeror can determine the substance of the exchange, the identity of the offeree, the time, the place, and the form or mode of acceptance (p. 367)

B. Mailbox Rule
1. The offer does not come into effect until the offeree receives it (Caldwell v. Cline, p. 368)
2. The acceptance is valid as soon as the offeree places it in the mailbox

C. Termination of the offer
1. Power of acceptance lasts for a reasonable time, after the reasonable amount of time, the offer is void; a reasonable time is question of fact (Textron v. Froelich)
2. Offeror can withdraw at any time until acceptance
3. Offeror’s offer is automatically terminated at offeror’s death (Jordan v. Dobbins, p. 377)
4. Offeree’s counter-offer
5. Lapse of time (Restatement § 36)
6. Constructive revocation = when the offeree knows the offeror is no longer is a position to perform, i.e. sold Ferrari to someone else

D. Unilateral v. Bilateral (Davis v. Jacoby)
1. Unilateral contract can only be accepted by performance
   a. Only unilateral if specifically stated by offeror
   b. Unilateral contract can be withdrawn at any point up until full completion of performance
2. Bilateral contract is exchange of mutual promises
3. In ambiguous cases:
   a. The offeree can choose to accept by performance or by promise
   b. Restatement § 31 has preference for promise – bilateral
      i. Protects both parties, generally

E. Option Contract

1. An offer, coupled with a promise, not to revoke the offer for a period time
   or if no period of time specified, for reasonable period of time
2. “An offer is binding as an option contract if it (a) is in writing and signed
   by the offer, recites a purported consideration…” (Rstmt § 87)
   a. A pretense of consideration will suffice
3. Must have separate consideration for it
   a. Bargain for option contract (Mier v. Hadden)
   b. Or 3 or 4
4. Part performance of the requested performance is consideration for an
   option contract not to revoke a unilateral contract offer (walking a few
   steps across bridge) (Brackenbury v. Hodgkin)
5. Preparations to perform may constitute justifiable reliance sufficient to
   create an option contract not to revoke the offer (buying shoes)
6. Once the option contract has been formed, if the offeror attempts to
   prevent the offeree from completing the contract, the offeree can sue
   a. sue at equity for specific performance most of the time
   b. sue at law for damages under expectancy
7. Offers with option contracts have special durability against deviant
   acceptance – b/c there is the option contract to keep the offer open

III. Precontractual Obligation

A. Offer is revoked when offeree finds out subject of offer has already been sold
   1. Principle of Indirect Communication = Where an offer is for the sale of
      land or other things, if the offeror, after making the offer, sells or contracts
      to sell the interest to another person, and the offeree acquires reliable
      information of that fact, before he has accepted, the offer is revoked
      (Dickinson v. Dodds)
         a. Applies only to duration of offer; i.e. seller of land is not required
            to have title to land up until conveyance

B. Irrevocability of subcontractor offers
   1. When a subcontractor makes a bid to a general contractor, that offer is
      irrevocable b/c of reliance/promissory estoppel (Drennen)
         a. Reliance/promissory estoppel/consideration for option contract
         b. Baird v. Gimbel Bros takes the opposite position

IV. Conduct Concluding a Bargain

A. Acceptance
   1. Counter offer is rejection of original offer (Hyde v. Wrench)
   2. A response that is ambiguous will be viewed as what was requested
      (Livingstone v. Evans)
   3. Mirror image rule – acceptance must be the mirror image of offer
   4. Mirror image rule dumped by UCC § 2-207 (only applies to sale of goods)
a. The mere fact that the 2d form contains different or additional terms does not fail acceptance

b. A definite expression of acceptance operates as acceptance even though it states terms additional to different from those offered or agreed upon, unless:
   i. if the person sends the 2d communication expressly says no K, unless you agree to all the terms of my form, the second parties form is not acceptance and no K

c. The additional terms are proposals for additions
   i. If the parties are merchants, the additional terms automatically become part of the contract, unless
      (a) The additional terms are material – then the terms do not become part of the contract

d. Does not embrace silence as acceptance

e. Sort of ends Deviant Acceptance Rule

5. Deviant Acceptance Rule = the introduction of a “new” or “variant” term means that the offer is dead the process of contract formation must start over again

6. Immaterial variances between offer and acceptance are usually disregarded and acceptance is good

7. Acceptance can’t change any of the terms in the offer, but an inquiry into the offer while manifesting assent is acceptance and does create a contract (Livingstone v. Evans)

8. An acceptance may be valid despite conditional language if the acceptance is clearly independent of the condition (Ardente v. Horan, p. 418)

9. Offers with option contracts have special durability against deviant acceptance – b/c there is the option contract to keep the offer open

B. Battle of the Forms

1. Whoever fired the last shot wins

C. Silence as acceptance (Hobbs v. Massasoit Whip Co)

1. Where an 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
   a. Keep item while having reasonable opportunity to reject, OR
   b. Offeror says silence is acceptance AND offeree intends silence as assent, OR
   c. Prior dealings btw parties may provide a basis for concluding that the offeree was reasonable in inferring assent from silence

2. Offeror must live with ambiguity that he has created by asking

3. Unsolicited goods statutes – authorize the recipient to treat unordered merchandise as a gift

4. Silence can only be acceptance under limited circumstances (Rstmt, 2d § 69 – p. 447)
   a. Where an 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

D. Unsolicited goods
1. Unsolicited goods statutes authorize the recipient to treat unordered merchandise as a gift

V. The Effects of Adopting a Writing
A. Parol Evidence Rule (Mitchell v. Lath)
1. If the parties have put their agreement in a writing that they both 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
2. Written agreement is complete and not subject to change by parol evidence unless (Mitchell v. Lath)
   a. Oral agreement must be in collateral form, AND
   b. Oral agreement must not contradict express or implied provisions of the written contract, AND
   c. Oral agreement must be an agreement that the parties would not ordinarily be expected to embody in the writing
3. The purpose of the parol evidence rule is to give special effect to writings only in those cases where the parties intended the writing to be a final and complete statement of their agreement (Hatley v. Stafford)
4. Restatement version of parol evidence rule:
   a. Oral agreement is valid with written agreement;
      i. If not inconsistent and made for separate consideration
      ii. If not inconsistent and would reasonably be outside the written agreement
   b. Consistent test – doesn’t contradict an express written provision
5. Policy considerations underlying parol evidence rule
   a. Desire for certainty
   b. Predictability
   c. Interest in reducing litigation
   d. Unease about juries
6. Problem = determination of whether the writing was intended by both parties as the full, complete, and final terms of the deal.
   a. Hatley test = Restatement, 1st § 240
      i. An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration…if the agreement is not inconsistent with the integrated contract, AND
         (a) is made for separate consideration, OR
         (b) is such an agreement as might naturally by made as a separate agreement by parties situated as were the parties to the written contract
7. Generally:
   a. Hard to know if parties intended to displace all prior agreements
b. Applies only to prior agreements, not to prior representations of fact
c. Only to prior or contemporaneous agreements
d. Agreements made after the writing are not covered
e. Inclusion in the writing of a merger or integration clause (this writing is the only representation) cannot be taken at face value – don’t automatically make the writing a complete integration
   i. Because the question is still whether the parties intended to displace all other agreements when they made the writing
f. Does not interfere with attempts to interpret the writing

B. Default rules
1. Law supplies a set of background condition to interpret and enforce contracts
   a. No text can completely specify its own means of interpretation
   b. The court will supply missing terms to incomplete contracts
   c. The court will construe words of general import as their specific meaning
   d. Interpretation of a contract depends on context, background, culture
   e. A contract will not be interpreted literally if doing so would produce absurd results = rule against absurd results
   f. A contract must be interpreted as a whole
   g. When a K is clear in and of itself, circumstances extrinsic to the document may not be considered and where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the K is a question of law and no trial is necessary to determine the legal effect of the K
   h. When a K is ambiguous all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not contradicting or changing the K terms
2. Determining if the contract is ambiguous
   a. Bethlehem Steel – court only looks to the “4 corners” of the document to determine if the contract is ambiguous
   b. Pacific Gas and Elec. v. Thomas Drayage – court must allow parties to present evidence to determine if there is ambiguity

VI. Standardized Forms
A. Common law “duty to read” (like duty to mitigate)
   1. Not reading is no defense to enforcement (Mundy v. Lumberman)
   2. Accepting a contract without reading, imposes the risk of those unread terms on the accepting party (Hill v. Gateway 2000)
B. Conspicuous terms are binding, even if not read (Mundy v. Lumberman)
C. Contract cannot disclaim implied warranty of merchantability (AKA exculpatory contracts), unless it is freely and equally bargained for (not through standardized form) (Henningsen v. Bloomfield Motors)
D. Disclaimers only valid if understandable by reasonable person (Henningsen)
E. Contract cannot go against public policy
1. Freedoms of contract is restricted by law for the good of the community.

F. Contract that is too broad, not understandable, and no bargain is not enforceable (Richards v. Richards)

G. Greenfield dislikes un-bargained for mandatory arbitration for consumers

H. Agreements to arbitrate that are freely and fairly entered into are enforceable (Broemmer v. Abortion Services)

I. Adhesion Contract = a standard form contract prepared by one party offered on a take it or leave it basis to the party in the weaker position who has little choice about the terms (Broemmer v. Abortion Services)
1. Contracts of adhesions will not be enforced unless they are [1] conscionable and [2] within the reasonable expectations of the parties.

VII. A person is bound by what he signs

A. Assuming a person has a reasonable opportunity to read the contract, if she so chooses, the signing is a manifestation of assent and binds the signer to all of the terms of the K

B. Exceptions:
1. Misrepresentation of document - Told that what you are signing is not a K
   a. If the party misrepresents the character of the document, the signing party will not be bound by it (Allied Van Lines, p. 511)
2. Claim check – if received by recipient as a claim check only, not as a K
3. Prevented from OR induced not to read
4. Important term is inconspicuous or hidden (Mundy)
5. Term is confusing in presentation or articulation – difficult to comprehend by reasonable buyer (Henningsen v. Bloomfield Motors)

Chapter 4 – Policing the Bargain

I. Revisions of Contractual Duty

NB Function of courts = enforce the parties’ agreement, not to make a new agreement for them or shelter one party from obligations that have proved burdensome

A. Duress (Austin Instrument v. Loral Corp.)
1. A contract is voidable on the grounds of 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 free will.
2. Mere threat or breach by itself is not duress
   a. Duress is tested by the state of mind induced in the victim
   b. Where a party for purely malicious and unconscionable motives threatens, for the sole purpose of injuring, the threat is wrongful and shows duress (Wolf v. Marlton Corp)
3. Must also appear that the threatened party could not obtain goods from another source of supply
4. The ordinary remedy of an action for breach of contract is inadequate (Smithwick v. Whitley)
5. A threat to do something you have the contractual right to do is not duress (Wolf v. Marlton)
6. The point of the duress rule is to whether it is rightful to use particular types of pressure for the purpose of extracting an excessive or disproportionate return

B. Pre-existing Duty Rule
1. A promise to do something you are already obligated to do is not new consideration, in renegotiation
2. Ineffective in practice
   a. Strike down agreements where there is not coercion
   b. Upholds agreements that actually have coercion
   a. Tension yields to encourage settlement of dispute, notwithstanding the consequences of coercion – Duncan v. Black wins!

2. § 2-209 UCC eliminates the pre-existing duty rule for the sale of goods

C. Accord and Satisfaction (Marlton Remodeling v. Jensen)
1. Payment made with the condition that it is full and final payment of a disputed amount which is cashed ends the dispute
2. A single claim, including both its disputed and undisputed elements, is unitary and not subject to division so long as the whole claim in unliquidated (Air Van Lines v. Buster)
3. Partial payment of an undisputed claim is not accord and satisfaction of the entire agreement
4. Requires unliquidated claim OR bona fide dispute

D. Modification/Amendment (p. 594)
1. Change to contract can be either offer or contract
   a. Offer – could replace the old contract if it accepted before being revoked
   b. Contract – extinguishes the old contract
2. Consideration is required to modify or escape from an unperformed K
3. Does not apply to K for the sale of goods
   a. An agreement modifying a K w/in Art. 2 of UCC needs no consideration to be binding (§ 2-209)
4. One way to change is a novation/executory accord/compromise/settlement
   a. A substitution of a new bilateral contract for the original debt

II. Mistake, Misrepresentation, Warranty and Nondisclosure
   NB Scale of bad behavior (not bad to bad) = Mistake, Unreasonable, Bad Faith, Malicious

A. Mutual Mistake (Sherwood v. Walker)
1. A contract is void due to mutual mistake when:
   a. the mistake is mutual, AND
   b. the mistake deals with a material fact
2. Difference of substance = voids contract
3. Difference of quality = contract remains binding
4. Only if both parties are aware of risk or uncertainty and include it in the contract, the contract is valid – not voidable for mutual mistake (Restatement)
   a. Otherwise, unilateral mistake, etc…., up in the air

B. Rescission – K never happened
1. Voids the contract
2. Puts the contract back where they were before the contract
3. Only get back money paid under contract, not expenses incurred otherwise
4. Available for mutual mistake b/c both parties were mistaken
   (Beachcomber Coins Inc. v. Boskett)

C. Unilateral Mistake (p. 622)
1. = only one of the contracting parties was mistaken
2. Unilateral mistake is generally not a ground for rescinding a contract
3. Exceptions:
   a. Rescission available when one party knew or and, saying nothing, claimed the benefit of the other party’s mistake
   b. Unilateral mistake is grounds for rescission where enforcement of the contract would be unconscionable
4. A party who is promptly informed of the other’s discovery of an honest mistake that results in an “unfair, one-sided” contract should not be permitted to demand enforcement
5. Overly harsh results are alone enough to warrant rescission for unilateral mistake (unconscionability)
6. Example:
   a. Relief is routinely given in the mistaken-bid cases if the offeror’s error reasonably should have been known by the offeree before acceptance
      i. Cub’s hat hypo – offeror enters $0.30 instead of $4.30

D. Implied Warranty (Hinson v. Jefferson)
1. If you sell land subject to restrictive conditions there is an implied warranty that the land can be used under those restrictive conditions
2. If the land cannot be used subject to that condition, the contract can be rescinded for breach of implied warranty
3. If the problems can be reasonably identified or buyer should be on notice, no rescission

E. Fraud/Misrepresentation (Cushman v. Kirby)
1. Contract is void if founded upon fraud and/or misrepresentation
2. Mistake is a basis for not enforcing a K, not a basis for expectancy
3. Where a person has full information but only discloses part of his information and leads the other to believe he has made a full disclosure with the intent to deceive and prevent investigation and if his words and conduct result in reliance and the result desired, he is guilty of fraud against which equity will relieve (Crompton v. Beedle)
4. Silence alone is insufficient to constitute fraud unless there is a duty to speak, i.e. duty to disclose (Cheever v. Albro)
5. Where material facts are only accessible to the seller and he knows them not to be w/in the reach of the diligent attention, observation, and judgment of the purchaser, the seller is bound to disclose such information to buyer
6. Damages for fraud = such damages as will compensate the person for the loss or injury actually sustained and place the person in the same position that he would have occupied had he not be defrauded, no expectancy
   a. If the injury is temporary in the sense that restoration can cure the harm, damages = the reasonable cost of repair
   b. If the injury is permanent and beyond full repair, damages = value of the property before the injury – value of the property after the injury.

7. There is no duty on the seller to inform the buyer of the obvious (reasonable buyer would be on notice) when the buyer does not inquire (Eytan v. Bach)

F. Concealment
   1. = hiding the fact that there is problem with the property
   2. Basis for/sufficient for rescission
   3. Not necessarily a requirement of rescission

G. Duty to Disclose (p. 645)
   1. Distinguish btw casually acquired information from deliberately acquired (p. 624)
      a. Casually acquired information = free, no cost
      b. Deliberately acquired information = discovery/research/expertise cost
      c. Casually acquired inform must be disclosed; deliberately acquired information need not be
         i. Rule of nondisclosure of deliberately acquired information promotes efficiency by encouraging the deliberate search for socially-useful information – b/c you can take advantage of it
   2. Seller has an affirmative duty to disclose material facts where:
      a. Disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material, OR
      b. Disclosure would correct the other party’s mistake as to a basic assumption on which the party is making the contract AND if nondisclosure amounts to failure to act in good faith and in accordance with reasonable standards of fair dealing, OR
      c. Disclosure would correct a mistake of the party as to the contents or effect of a writing, OR
      d. The other person is entitled to know the fact b/c of relationship of trust and confidence between parties
   3. Nondisclosure = fraud and misrepresentation
      a. Especially where nondisclosure of material facts affects the value of property, and the facts are not reasonably capable of being known to the buyer
   4. Policy of finality of contract give way to rescission to promote honest dealings when there is a fraudulent misrepresentation or a negligent misrepresentation

H. Different protections and requirements for sellers and buyers
1. Seller is in better position to know about the property
   a. Information is valuable, presumably we want to encourage parties to uncover information because, in aggregate, that will enhance the value of resources
   b. Encourage the uncovering of information by letting the parties trade/act on information
2. Efficiency/Best use of resources
   a. If buyer uncovers information that will make property more valuable, the seller should take advantage of it
   b. But, if the seller has information that will decrease the value of the property, there is no protection for the withholding of information
3. Buyer is taking additional risk
   a. Seller gets cash – no risk
   b. Buyer gets land – risk
   c. Courts are more willing to protect risk taking party

III. Unconscionable Inequality
    A. Rule of Unconscionability (Woollums v. Horsley)
       1. Courts of equity will not order specific performance where the contract is founded in fraud, imposition, mistake, undue advantage, or gross misapprehension
       2. Courts will not enforce a contract that is unconscionable (Williams v. Walker-Thomas Furniture)
          a. Unconscionable, generally = absence of meaningful choice, determined by consideration of all the circumstances surrounding the transaction, on the part of one of the parties AND terms which are unreasonably favorable to the other party
             i. Meaningfulness of choice is negated by a gross inequity in bargaining power
          b. Unconscionability test = whether the terms are so extreme as to appear unconscionable according to the more and business practices of the time and place
          c. UCC unconscionability test = whether, in light of the general commercial background and the commercial needs of the particular trade, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the contract formation
          d. Penalty provisions are unconscionable, therefore, illegal
             i. Keep all goods/work if there is any defect
          e. BUT, if a term is substantively reasonable, it will still be enforced (Gianni Sport v. Gantos)
             i. Reasonableness is the primary consideration in unconscionability
       3. Choices a court has with an unconscionable (at the time the K was made) contract: (p. 696)
          a. Rescind
          b. Refuse to enforce the contract
c. Enforce the remainder of the contract w/o unconscionable clause
d. Limit the application of any unconscionable clause as to avoid any unconscionable result

B. If court can’t rescind, can withhold specific performance b/c:
1. No fraud – courts will not rescind, BUT could refuse specific performance b/c specific performance would result in great hardship (Kleinberg v. Ratett)
2. Inadequacy of consideration – courts will not rescind (courts will not inquire into adequacy, Fischer v. Union Trust), BUT could refuse specific performance of an unconscionable contract (p. 692)
3. No good faith or fair dealing – courts will not rescind, BUT could refuse specific performance
4. Unclean hands = extension of illegality – criminal, immoral, or unfair conduct in the transaction

C. Cleanup principle (p. 692)
1. When an equity court hears a case, court can give damages in lieu of equitable relief – b/c equity unavailable or unconscionable – will proceed to give whatever remedies are needed for a complete and final disposition of the issue raised
   a. b/c convenience, save time, save money, avoid duplicated effort
   b. Main obstacle = constitutional guarantee of jury trial

D. In every contract there is a duty of good faith and fair dealing in the contract’s performance and enforcement (Restatement § 205)
1. Even large, sophisticated businesses have a duty to good faith because even a contract btw such large, sophisticated firms can be unconscionable (Gianni Sport v. Gantos)

E. Other means to prevent inequitable contracts
1. Compulsory contracts
   a. For a supplier of essential goods or services is deemed “quasi-public” and are required to provide service on a nondiscriminatory basis to all who request it
   b. Works to remove unequal bargaining power
2. Prohibited terms
   a. Courts will not enforce certain contracts/terms
3. Requirements of form
   a. Courts deny legal effect of clauses or terms that would escape the notice of normally-attentive readers
4. 3d party draft the contract
   a. As a way to get around unequal bargaining power, have an impartial 3d party draft the contract

Chapter 5 – Breach of Contract
I. Conditions
A. A condition is “an event, not certain to occur, which must occur, unless its nonoccurrence is excused, before performance under a contract becomes due (Merritt Hill Vineyard citing Rstmt, 2d §224)
B. Condition = some operative fact subsequent to acceptance and prior to discharge, a fact upon which the rights and duties of the parties depend
   1. If the condition does not occur, the parties are not obliged to perform
C. The occurrence of a condition creates a duty
D. The non-fulfillment of a promise = breach of contract; breach \( \rightarrow \) right to damages
E. The non-occurrence of a condition will prevent the existence of a duty in the other party; no right to damages
F. If a party prevents the occurrence of a condition necessary to performance, occurrence or nonoccurrence of the event is excused and the contract is unconditional
   1. Example of policy against forfeiture
G. Determining promise v. condition
   1. Depends on the intention of the parties, look at:
      a. Surrounding circumstances/Trade Customs
      b. Language of the contract
         i. Always view the language against the drafter b/c they created it
      b. Subject matter
   2. If you can’t determine, presumption for promise to avoid forfeiture (Restmt § 261)
      a. If ambiguous or unfair, courts will classify as promise (Howard v. Federal Crop Ins. Corp)
      b. Fairly strict requirements for a contract to be considered a condition (Id.)
H. Reasons for excusing non-occurrence of condition
   1. Impracticability
      a. War (Semmes v. Hartford)
   2. Reliance (Gilbert v. Globe & Rutgers Fire Ins)
      a. When a person relies on a promise that the K will be fulfilled, the other party is estopped from asserting a condition and using the argument that the non-occurrence relieves them of their duty
      b. As soon as the promise is removed via proper notice, estoppel is lifted
   3. Waiver
      a. = voluntary relinquishment of a known right
      b. irrevocable
      c. promise that is binding without consideration
   4. Absent a showing of material prejudice, an insured’s failure to give timely notice does not discharge the insurer’s continuing duty to provide insurance coverage (Aetna v. Murphy)
      a. Burden of proof on the issue of prejudice on the insurer
II. Conditions of Satisfaction
A. If an, impartial, 3d party, architect withholds certificate of satisfaction in bad faith, occurrence of the condition is excused (Second Nat’l Bank v. Pan-American Bridge Co.)
1. As long as the parties are in good faith, the court will enforce the settlement, even if the court itself would have decided the issue differently

2. Bad faith =
   a. Not following intent of the condition (Mauer v. Sch. Dist. # 1)
   b. Withholding not b/c the work is insufficient, but b/c owner told his to withhold (Fay v. Moore)
   c. If the architect doesn’t follow his independent judgment as to sufficiency (Fay v. Moore)
   d. Architect’s failure to inspect (Hartford Elec. Applic. v. Alden)

B. In a private party contract, unreasonable withholding of satisfactions when unreasonable excuses the occurrence of the condition (Haymore v. Levinson)

C. 2 types of contract provisions (Fursmidt v. Hotel Abbey Holding Corp)
   1. Contract relating to operative fitness, utility, or marketability = functional
      a. Satisfaction = reasonableness test
   2. Contract involving “fancy, taste, sensibility, or judgment of the party for whose benefit the contract was made” = aesthetic
      a. Satisfaction = bad faith test

III. Constructive Condition – The Order of Performance
A. When there is no express condition as to timing the courts have to decide whether the performance of one of the parties is a condition even though the parties have not said there is a condition.
   1. Express = timing is stipulated
      a. If express, see above, preference for promise (Howard v. FCIC)
         i. By being express, the parties explicitly chose the words and time of action and therefore, if they wanted a condition they are required to have said that
         ii. Both have to perform and then sue for breach (Nichols v. Raynbred)
   2. Constructive = no timing stipulated
      a. Promises are concurrently conditional (dependant), unless there is some reason to say they are not (Price v. Van Lint)
      b. Preference for promise and condition (= condition)
      c. Protects the buyer
      d. If condition doesn’t occur, no obligation

B. Dual nature of promise
   1. Promise is always an obligation
   2. Promise may also be a condition

C. Shift over time:
   1. Promises are independent and unconditional (Nichols v. Raynbred)
      a. Not necessary for the pl. to perform in order to enforce the def.’s obligation to perform
   2. Maybe yes, maybe no (Kingston v. Preston)
      a. Test for promise only OR promise and condition = look to intent of the parties and intent of the transaction
      b. Factors:
         i. Intent of transaction, circumstances, equity
3. Promises are concurrently conditional (dependant), unless there is some reason to say they are not (Price v. Van Lint)

D. 3 categories of conditions
1. No temporal relationship – Nichols v. Raynbred
2. One directional temporal relationship – one obligation must happen before the other
3. Simultaneous – concurrently conditional promises – both must happen at the same time
   a. Render or Tender rule = before one party can sue/say that the other has failed to perform, he must have had the present ability to perform OR have performed AND demanded other party’s performance (Rstmt §§ 234, 238 & Ziehen v. Smith)
      i. Tender = offer of present ability to perform her part of the simultaneous exchange
      ii. Exception: If the other party cannot perform or is unable to perform or has state he will not perform, requirement of render of tender is waived (Ziehen v. Smith)
      iii. A seller of land need not have legal title during the entire executory period of a real estate contract (Neves v. Wright)

E. General presumptions
1. With express time for performance, presumption for promise
2. With no express time for performance, presumption for condition

F. Safest course of action
1. Tender performance, demand other person’s performance, then sue

IV. Protecting the Exchange on Breach
A. Contracts for the sale of goods
1. When time is of the essence delivery must be made on the date due (Oshinsky v. Lorraine)
2. Perfect tender rule = sellers are required to deliver goods that comply exactly with the sales agreement (Ramirez v. Autosport)
   a. Courts have sought to ameliorate the harshness of this rule
   b. Chief objection = buyers in a declining MKT would reject goods for minor nonconformities and force loss on surprised suppliers
   c. UCC requires a balancing of interests of buyer and seller
3. Delivery of goods must generally be of the exact quantity ordered, otherwise the buyer may refuse to receive them (Prescott v. J.B. Powles)
4. Shift of pendulum away from perfect tender
   a. Day late is ok as long time is not of the essence (Beck v. Pauli)

B. Substantial Performance
1. There can be no recovery on the contract (as distinguished from restitution) unless the suing party has substantially performed (Plante v. Jacobs)
2. Test of substantial performance = whether the performance meets the essential purpose of the contract (Plante v. Jacobs)
   a. Essential purpose of construction K is more than just any house, but less than perfection
b. NOT a test of percentages

3. To satisfy a condition you must substantially perform
4. To satisfy an obligation you must fully perform
5. A party’s failure to substantially perform bars suit on the contract, but still can sue for restitution (Reynolds v. Armstead)

C. Cancellation
1. Cancellation = ending the relationship and recovering damages for lost expectancy
2. A general contractor’s failure to pay installments as they come due may justify cancellation of the contract and the abandonment of the work IF the breach is material OR done in bad faith and it is reasonable to cancel (Turner Concrete v. Chester Constr & Rockingham Cty v. Luten Bridge)
3. Material breach = performance does not meet the essential purpose of the contract
   a. Opposite of substantial performance
   b. Material breach = total breach = failure to pay AND announcement not to make further payments
   c. Test = does breach go to the essence or essential purpose of the K
      i. Cause of default (unforeseen difficult v. intentional refusal)
      ii. Extent of the default (not performing in a timely way, what is timely performance?)
      iii. Needs and expectations of the parties
      iv. Likelihood of continuation of non-performance (is this temporary non-performance or will continue into the future?, at the time of the default)
   d. A breach that causes little damage, may not justify cancellation
   e. Requirement encourages parties to work together to resolve situation
   f. If not a material breach, the other party cannot cancel, but may be able to suspend performance until the other party conforms his behavior and the party may sue for costs incurred up to that point

4. Anticipatory Breach (Greguhn v. Mutual Omaha & Rockingham Cty)
   a. Anticipatory repudiation = overt communication of intention not to perform
   b. Must have some sort of repudiation to get anticipatory breach
   c. Anticipatory breach = material breach IF
      i. [1] bilateral contract AND
      ii. [2] pl. has not completely performed
   d. Anticipatory breach does not (normally) apply to unilateral contract (Greguhn v. Mutual of Omaha)
      i. A fully performed bilateral K ~ a unilateral K
   e. If anticipatory breach applies (see above) then there is material breach then the other party can cancel the contract and then sue on the contract for lost expectancy
   f. Anticipatory breach discharges any remaining duties of the other party, even if time for performance has not yet arrived
g. Nonbreaching party is no longer required to remain ready and able to perform
5. Basically the same in equity, to get specific perform there cannot be a substantial or material defect or difference
6. Not a mathematical percentage, must go to essence of contract
7. Difficulty = nonbreaching party can suspend, but must remain ready to perform, therefore sitting idle, inefficient
8. Difficulty = nonbreaching party has to act before it can know the full consequences of that act
   a. Safest course of action = stop work, but remain ready to perform
      i. Problem = nonbreaching party must sit idle, inefficient