Hill v Gateway

When party anticipatorily repudiates, what is the difference between bring suit before and bring suit after actual damages occur? How does the doctrine of avoidable consequences affect this, in construction, employment, K for the sale-of-goods?

What is the difference, if any, between ambiguity and mutual mistake?

Contracts

Chapter 1

I. What is the measure of Expectancy? – Losses caused and gains prevented by the defendant’s breach, in excess of savings made possible

a. Construction Contracts

i. When seller breaches the remedy is either the cost of completion or the improvement in value the construction would have made, ways to decide:
   • Ugly fountain (CoC) (Grovers v John Wunder)
     a. Plaintiff should be free to do what he wants with his land
     b. Doing it for personal, not monetary value
   • Unreasonable economic waste (DiV) (Peevyhouse v Garland Coal)
     a. Primary purpose is economic
   • Willful breach
     a. Split the windfall
     b. Order special performance and let parties negotiate a soloution
   • Basically, you are calculating the damages on either what the breaching party saved or what the injured party lost

ii. (Rockingham County v Luten Bridge) When buyer breaches the remedy is the profit the builder would have made minus the expenses saved by not completing construction

   • Mitigation starts at the time of repudiation by the breaching party. Doctrine of avoidable consequences, a party is only allowed to recover expenses which they could have reasonably avoided. Recovery of expenses is dependent on time of breach
   • Law assumes you may accept other business, so there is no offset for employment accepted afterwards unless it would not have been possible otherwise
   • (Weed case, Leingang) No offset for fixed costs because they are not saved

b. Should we discourage efficient breach of contracts?

i. Reasons against efficient breach:
   • Encourages performance of contracts
   • Enforces moral obligation
Discourages unjust enrichment

ii. Reasons for:
   Discourages economic waste
   • Theoretically benefits both parties or at least does hurt either party

c. Contracts for delivery of chattels
   i. (Acme Mills, wheat sale) When seller breaches the remedy is the market price at time and place of delivery minus the contract price at the time of delivery
      • (Missouri Furnace v Cochran – coke sale) Buyer is not entitled to damages resulting from risks taken to avoid damages before they occur. Market price is the upper limit for recovery of damages.
      • Reversed: Injured party must not need take risks to mitigate damages until they become actual (Reliance Cooperage, wooden staves)
   ii. When buyer breaches the remedy is the contract price minus the market price
      • (Neri v Retail Marine, boat sale) If seller has an unlimited supply of the good, and it would be profitable for him to sell another, then damages are not mitigated if he sells the same good to another party
   iii. Distinction between a wholesale and retail market for goods
   iv. Sale Manufacture of goods
      • Reliance costs, variable + allocated share of fixed costs
      • Expected profit, Profit
      • Formula is Kprice – expenses saved.

d. Employment contracts
   i. (Parker v 20th Century Fox) If seller breaches the employee is entitled to the amount of the contract minus the amount the employee has earned or reasonably could have earned because they have been freed from the prior K’s obligations.
      • Damages are not mitigated by work refused by the employee that is not considered to be equivalent or substantially similar
      • Burden is on defendant to prove that plaintiff did not use due diligence to find similar work
      • Measure of damages: Amount of salary employee would have earned under K – amount earned or with reasonable effort would have earned because K was breached
      • Collateral sources do not mitigate damages
      • (Floor lady, Billetter) No reduction in damages for refusing to mitigate by accepting lower pay

II. Forseeability

a. (Hadley v Baxendale, crankshaft delivery) Damages that are not foreseeable by breaching party are not recoverable
i. Could not be reasonably foreseen in the normal course of business
   - (Hector Martinez) Just because damages were not the most foreseeable result does not make them unrecoverable
   - (Victoria Laundry, dry cleaning) Special circumstances outside the normal course of things are not recoverable

ii. Had not been specially contemplated by both of the parties
   - (Lamkins, Tractor sale) Tacit agreement test – loss was foreseeable, but if breaching party thought it would have been held responsible in the result of a breach it would not have entered K

b. (Valentine v Gen American Credit) Damages for emotional distress are unrecoverable unless contract was of a highly personal nature and recovery for monetary damages alone would be only nominal
   i. (Hancock v Northcutt) Breach of house construction contract not emotional distress

c. Certainty doctrine
   i. Damages arising from lost profits expected from the contract are held to a high evidentiary standard – reasonable proof
   ii. (Boxing - Dempsey v Chicago) There must be an acceptable level of proof that the damages would have happened

III. Reliance damages

a. If an injured party cannot be put in his expectancy position he may be still recover damages resulting from reliance

b. Reliance damages may occur before or after the K is formed.
   i. (Anglia Television v Reed) A party may assume responsibility for expenses already incurred before they signed the K that they would not have previously been liable for had they not made the K

b. (Security Stove v American Express) Damages may include expenditures that are made valueless because of the breach even if they would not led to a profit had the K been performed. K is made not to seek a profit but for some other purpose.

d. (Albert v Armstrong, rubber foundations) Reliance damages are mitigated by the breaching party’s showing that there would have been lost profits had there been full performance. Burden is on the breaching party.

e. Incidental reliance is recoverable if the collateral transaction was made in dependence on the breached contract being performed and was a foreseeable expenditure.

f. Essential reliance is that which is required to perform the K

IV. Restitutional damages – a quasi contractual recovery

a. A non-contract based recovery

b. There does not need to be a formal contract between the two parties. But there must be an element of good faith

c. Not available to a party that has fully performed

d. Unjust Enrichment
i. If an employment contract is breached, by either party, the employee may recover for market value of the benefit conferred upon the other party
   - (Algernon Blair Construction) Even if employee would have not profited had there been full performance
   - Cannot recover more than market price
   - Must keep in mind the other parties expectancy – if the non-breaching party is trying to get restitution we need to look to expectancy of the breaching party
   - At what point is restitution unjust? Remember parties allocate risk by signing construction contracts.

ii. (Britton v Turner) If the employee breaches the employer has a counter-claim in K then that can trump damages recoverable under restitution.
   - Unlike in a construction K where a party who has not substantially performed must be shown to unjustly enrich the buyer, a party who has not substantially a labor K automatically is show to have imparted value upon the receiver
   - Value recoverable by laborer if laborer breaches is amount of labor received less expectancy…Value of P’s work (mkt rate may amt to unjust enrichment and incentive to breach)
     – Damages to D (salary price – value of work)
   - Forces employee not to breach unless necessary
   - Forces employer not to drive employee from his service

e. Reliance within restitution / Detrimental reliance – both an equitable and legal remedy, it depends on which is sought in restitution
   i. If a plaintiff relies on another party to purchase and makes improvements, he may recover those in restitution if the K is held unenforceable (Kearns v Andree, house sale)
      - (Datatronics) That the other party did not benefit is not necessary for damages in restitution if the other party was put in a detrimental position
      - Prepatory expenditures are not recoverable in restitution

f. Do we give full reliance damages (including un. enrich.) or only benefit conferred on the other party. Tension between (Datatronics) versus (Algemon Blair)

g. (Thatch v Durham, sheep sale) Down payments cannot be recovered under restitution

h. A party cannot recover in restitution under a contract that has been fully performed (Oliver v. Campbell, Lawyer on retainer)
   i. The purpose of a restitution is to prevent unjust enrichment of one party by another and a K is a standard by which to judge how the parties value their exchange. If a K is fully performed then neither party has benefited at the expense of the other party.
i. Restitution is part equity and part law, but mostly equitable in nature since its purpose is to promote fairness, and conscionability

V. Statute of Frauds
   a. Sale of land
   b. Sale of goods – written contract required for any value over $5000. Writing sufficient to indicate that a contract for sale has been made between parties and signed by party trying to enforce.
   c. Contracts “not to be performed in one year” – contract must be incapable of being performed in 1 year

VI. Equitable relief / Specific performance
   a. Must be a valid contract or part performance in the sale of land to seek equitable relief
   b. Awarded when the value of performance is not reasonably ascertainable and remedy in a court of law would be inadequate. An interstitial relief.
      i. Inadequacy of legal remedy for the sale of land is presupposed
      ii. Unacceptably high degree of risk in under-compensating the injured party
   c. Only available when there is no remedy in law
      i. Difficulty of proving damages
      ii. Difficulty of procuring a suitable substitute with awarded damages
      iii. Likelihood that damages would not be paid
      iv. You are not guaranteed equitable relief if there is no adequate remedy in law
         • (Northern v Bliss, steel maker) The court must be sure that compelling specific performance will be adhered to and will be a solution to the action brought. Courts abhor supervision of specific performance
         • Impracticability of equitable solution may prevent judgment
         • (Grayson-Robinson Stores v Iris Constr, Dept Store case) – example of a specific performance that was compelled even though it was known that it would not be followed through
   d. In a contract for the sale of goods specific performance is allowed if:
      i. (Van Wagner, sign) The goods cannot be valued
      ii. Uniqueness is not the key if the unique item can be economically valued with reasonable certainty w/o a high risk of undercompensation
      iii. The losses that will result from failure to deliver the goods are not ascertainable
      iv. Unlikely that an award for damages could be recovered
v. (Curtice Bros v Catts, Tomato case) If a breach by the seller in the sale of goods will cause lost profits that cannot be reasonably ascertained, then specific performance can be compelled. Breach by one differs only in degree from a breach by all.

e. In an contract for employment
   i. An injunction enforcing a noncompete clause if, the labor is of a unique quality (Pro football player considered unique v. run-of-the-mill musician is not) – non compete clause will be enforced but employment itself will not be compelled
   ii. (Fitzpatrick v Michael, nurse) A court will not compel the specific performance of a personal service contract, court could have appointed a receivership
   iii. (Fullerton Lumber) – A non-compete pledge will only be enforced to a reasonable extent necessary to prevent harm to the employer.

f. Mutuality of specific performance –

g. Powers of equity to compel performance
   i. Receiver -
   ii. Contempt of court – criminal sanctions
   iii. Injunction – stop an individual from doing an act
   iv. Replevin – to recover goods that another holds illegally. Is not an equitable remedy, it only compels specific performance.

Chapter 2

Reasons to Enforce Promises

I. Formality – substitutes for consideration
   a. Oral pledge – gratitious promise not relied upon by charity held not enforceable (Congregation of Kadimah v Deleo, gift to synagogue)
   b. The Seal – deprived of all legal effect in most states, in 20 states the seal still has some power to fill in for the absence of consideration
   c. Written instrument – legislation was attempted, but failed – page 199
   d. In other countries (ex. Germany), promises of gifts are enforceable so long as they are accompanied by some sort of formality

II. Consideration – A legal benefit to the promisor or a legal detriment to the promisee. A detriment to the promisor will always be a detriment to the promisee.
   a. Must be bargained for (Hamer v Sidway)
   b. Must be a promise of performance, a forbearance, or a performance
   c. What is bargained for does not necessarily have to be the motive for inducement. Simmons v United States, p 212. It must just be some of the motive. A requirement of mutual inducement; very flexible.
   d. (Fischer v Union trust, retarded daughter, also Schnell v Nell) Nominal Consideration – Does not constitute consideration because what is bargained for is a ritual. Closely resembles a gratuitous promise.
e. Adequacy of consideration – mere inadequacy of consideration will not void a contract. – sufficient but not adequate consideration. Inducement, however tenuous, will allow consideration to stand.

f. Forbearance of a legal action that may be invalid: competing views
   i. (Duncan v Black) – Claim must have some legal basis; otherwise consideration would be founded in illegality.
   ii. (Restatement) – party need only reasonably believe claim to be valid and assert the claim in good faith.

III. Promises based on past performance or moral obligation
a. (Mills v Wyman) – held that a promise out of moral obligation to the promisee was not enforceable.
   i. Promisor did not receive a direct economic benefit from the promisee’s action.

b. (Webb v McGowin) – held that a promise made for moral obligation is enforceable.
   i. There was a direct economic benefit to the promisor gained from the past act. Perhaps it was held to be “enforceable” because of restitution and not K.
   ii. Was act performed gratuitously or in expectation of reimbursement?
   iii. Element of whether the party conferring the benefit can reasonably expect to be compensated. Was the act gratuitous or in expectation of payment?
   iv. Could Webb have sued in restitution if the defendant had not made the promise? Good litmus test. Promise strengthens restitution interest and help set a price and infer that there would have been a pre-contractual acceptance by promisor. Solidifies restitution.

IV. Reliance - A promisee may enforce a promise that lacks consideration if she relied on the promise.
   a. (Kirksey v Kirksey) and (Rickets v Scothom, promises granddaughter $$) - A promise made where the plaintiff has reasonable belief to rely on the promise is enforceable.

   b. (East Providence Credit Union v Germania, insurance) Promissory estoppel – when injustice can be avoided only by enforcement of the promise of future performance, look at:
      i. Must reliance necessarily be detrimental to the promisee?
      ii. Enforcement of charitable contribution doesn’t necessarily require forbearance.

   c. Equitable estoppel – when a person is barred, because of their misrepresentation of fact of a present condition, from asserting a right they would have otherwise had.

   d. What role does bargaining play in reliance???

   e. (Seavey v Drake) Part Performance – valuable improvements to land in lieu of a oral promise of conveyance of that land is enough to take an oral promise out of the statute of frauds, look to:
      i. Availability and adequacy of other remedies
      ii. Definite and substantial character of reliance
      iii. Reasonableness of forbearance or action
iv. Foreseeability of action or forbearance

f. (Forrer v Sears Roebuck) – Reliance on an employment-at-will Contract – two choices: damages or no
   i. Depends upon how direct damages were
   ii. Was there a misrepresentation as to certain future employment
   iii. Did employee promise or suggest certain future employment?
   iv. Was there a specific time employee suggested?
   v. Did employee give add’l consideration for employment beyond what would normally be expected of him?
   vi. (Hunter v Hayes) If employee is never employed then they may get damages stemming from reliance


g. Damages stemming from promissory estoppel
   i. Restore the status quo
      1. Relies on tort principles, gives reliance damages only, which is the whole reason you are making the promise enforceable in the first place!
      2. Remedy to take if status quo is easy to ascertain
      3. Largely based on trial court discretion
   ii. OR Make the promise binding and give damages as a normal contract would (the full expectation interest)
      1. Route taken by most courts (except lost profits)


V. Promises of Limited Commitment
   a. A promise is consideration if the performance promised would be consideration if it alone were bargained for
      i. How much flexibility may the promisor maintain before we hold the promise unenforceable?
      ii. Fairness of defendant not only isn’t consideration but negates any recovery in restitution
   b. Mutuality of obligation – both parties must be bound or neither will be, exceptions:
      i. Not allowed to escape liability by setting up your own fraud by claiming other party was not bound due to your misrepresentation
      ii. Infants, insane, seriously handicapped
      iii. Written K where one party has signed and other has not
   c. Promises of unequal packages, one party is bound for 12 mo another only for 1 mo… still consideration as long as cancellation is not left unrestricted
      i. Still enforceable, courts will not inquire into adequacy
      ii. As long as consideration is past nominal
   d. Outputs and Requirements K
      i. Are enforceable
      ii. Consideration for buyer is his detriment in not being able to buy from anyone else and sellers detriment is that she must sell all that buyer wants to purchase. Flexibility must not allow one party a virtual escape from the K
iii. Obligation of good faith, reasonable quantity, implied promise to stay in business

iv. *(Lisa Locomotive)* Difference between a promise to buy all one needs and all one desires

v. More easily enforceable if there is a provision forbidding turning to other suppliers

e. Conditional Promises
   i. *(Obering v Swain-Roach, lumberland sale)* A promise made that is enforceable on the fulfillment of a certain condition is only enforceable after that condition has been met, unless there is an anticipatory repudiation of the other party’s willingness to perform when the condition is met
   
   ii. Courts are looking for the slightest bit of restriction on both parties actions, if it exists then the consideration is there. If one party has a full unilateral right to indiscriminately cancel the contract then it will not be enforceable

f. Implied Promises
   i. *(Wood v Lady Duff, bitch fashion mogul)* If it can be inferred from a contract that lacks mutuality that there is a reasonably implied promise of performance there can be said to be consideration.

   ii. Look to see if defendant’s profit or other incentives are strongly tied to his performance

   iii. A way to “get around” mutuality. Drives a nail in the coffin of mutuality.

g. Public policy
   i. There are situations in which public policy mandates performance of a contract that would not otherwise have been enforceable
      1. *(Sheets v Teddy’s Frosted Foods)* Employment at will

**Chapter 3**

I. Mutual Assent – there must be mutual assent before the formation of a K *(Embry v Hargadine)*

   a. Subjective theory – both parties must intend to form the K.
      
      i. Only use the phrase “meeting of the minds” when referring to the subjective theory

      ii. Can be carried too far when it is allowed to overcome a clear objective manifestation

   b. Objective – A manifestation of assent to the other party according to a reasonable standard constitutes assent. Party does not necessarily need to intend to enter into the K to be bound.
      
      i. Whittier *(pg 328)*, we should only use this standard when one party is injured since its rationale lies in tort

      ii. Can be carried too far be construing as legally irrelevant any subjective evidence
c. Mutual assent in employment (at-will) contracts (McDonald v Mobile Coal)
   i. Employee Handbooks
      1. Employment at will can be viewed as a unilateral K that is continuously accepted by showing up for work – modifications to the terms of employment are accepted automatically
      2. If they outwardly manifest an offer on the part of an employer they will be construed as such
      3. Reasonable reliance by the employee is consideration for the K, also maybe the benefit to the employer in terms of better employee moral, etc
      4. If offer greater rights to employee, then continued employment constitutes acceptance
      5. If lesser rights then continued work does not constitute acceptance b/c not bargained for
      6. Also, construe as equitable/promissory estoppel

d. An agreement does not fail to reach the status of a K merely because it leaves certain particulars of performance to be filled in by one of the parties (Fairmont Glass)
   i. Available remedy plays a large part in enforcing open-ended agreements
      1. Goods K should have a fixed quantity and price (Wilhelm)
      2. If there are different combinations of goods seller could have purchased, try the “least-level-of-benefit” remedy (Whitman v Namquit)
   ii. Look to past history of K or purchase to fill in terms

e. Agreements to agree – held not enforceable unless:
   i. There must be a standard agreed upon which to set the price
      1. In rental agreements: FMV, third-party arbiter, history or course of dealings, extrinsic event or standard (Joseph Martin v Schumacher). Dissent says that tenant need only establish a right to renew, supported by public policy

f. Doctrine of Certainty – A manifestation of intention will not be understood as an offer it cannot be used to form a contract unless the terms are reasonably certain to provide basis for determining remedy & existence of a breach. What can be made certain, is certain.
   i. The more terms are left open, the less likely the K was intended to be binding
   ii. Courts lean toward finding a K, especially if there has already been part performance or substantial forfeiture will result

g. Vagueness (Chicken) & Ambiguity (Raffles, Peerless ship) - results when there is a reasonable interpretation given by both parties to what they are assenting to, but it turns out to be different
i. Latent ambiguity – both parties agree to what they think is an unequivocal term, but term is really ambiguous. Rescission is allowed for mutual mistake.
ii. Patent ambiguity – both parties agree to an ambiguous term b/c they don’t want to iron out all details. Turns power of interpretation over to the courts.
iii. Custom can be a basis for resolving ambiguity
iv. Not allowed to be unilaterally aware of ambiguity and claim as a defense to cancellation

h. Mutual Assent to terms in K shipped with the goods (Gateway, supplement 26) – as seen in section VIII, buyers may give a blanket assent to all terms in a contract, but what about additional terms that are not even seen until they arrive with the goods and state silence as acceptance of terms?
   i. Economic advantage of such devices, especially in a telephone sale
   ii. Buyer may have had additional methods of discovering terms before payment
   iii. When is K formed?
       1. When sale is made – in this case the buyer would have no way to know terms and there would be no mutual assent to them
       2. When time period to return goods lapses -- in this case the buyer would have no recourse if seller wished to revoke “offer” before shipment but after payment.
   iv. Should materiality of terms affect this type of behavior?
i. Duress as a defense to mutual assent – if a party is “deprived of free will” then they may claim they did not mutually assent
   i. In a K that revises an existing agreement to raise the price of goods, the remedy is the excess cost paid (Austin v Loral), requirements:
      1. Threatened party could not obtain goods from another supplier
      2. Ordinary remedy for breach would not be adequate if goods could not be obtained
   ii. Withholding goods with a demand for payment amounts to conversion
   iii. Pre-existing duty rule – a promise to do what one is already legally obligated to do is not consideration.
      1. This rule is easily manipulated since a party can slightly alter their performance and call that consideration for the new term
      2. Pre-existing duty rule yields to the policy of encouraging settlements, therefore it has been subrogated in contracts between creditors and debtors
   iv. What constitutes deprivation of free will?
1. An economic loss large proportionate to the consideration demanded under duress

2. No legal remedy available to recover loss sustained through duress

v. Phrase that it is not a breach of contract to do something you have a legal right to do is untrue. If you make a threat with malicious and unconscionable motives, however lawful, to induce a state of mind, can be considered duress.

vi. In its beginning, it was focused on tortious conduct

vii. Now, duress asks the question whether it is “rightful to use particular types of pressure for the purpose of extracting an excessive return.” Just b/c you cannot be made to answer for making a threat does not mean you can use it.

j. Accord and Satisfaction – an exception to the pre-existing duty rule, perhaps based on the uncertainties inherent in a credit society

i. Common law = Retention of money by a creditor will satisfy the entire debt if:
   1. There is a dispute over the amount owed or an unliquidated claim
   2. The debtor manifests assent to make payment in full

ii. UCC = creditor, unless he assents to the contrary, can reserve his claim to the full balance even if he accepts money intended to be “payment in full”

iii. Accord without satisfaction (executory accord)
   1. Creditors offer of accord is viewed as a unilateral contract effective on receipt of substituted amount
   2. Creditor has no remedy to enforce the accord
   3. Creditors claim to original debt depends on whether agreement to accord was a substituted K or a window of opportunity for debtor to make alternate performance

II. Offers – the typical offer is a promise which, if accepted, transforms the offeror’s promise into a K

a. Offers made on a time delay
   i. When offers specify a time limit for acceptance, is the acceptance effective when the offeror receives it or when the offeree makes it?
      1. (Caldwell v Kline) – when the offeror receives it
      2. General rule – an acceptance is effective when it is sent.
         Note that offeror could no longer manifest assent before he learns of acceptance. (put out of offeror’s possession)
   ii. If an offer has a time limit attached, does it begin upon receipt of offer or when offer is sent, or upon reasonable belief of duration of transit? (Caldwell v Kline)

b. Advertisements are not views as offers – they are instead views as invitations to make offers. (Moulton v Kershaw) Ask, would the offeree have believed the advertisement/offer to be a manifestation of assent?
However, if there is an element of quantity in the advertisement, it may be interpreted as an offer.

c. Be sure to distinguish between offers and inquiries
d. Unilateral
e. Bilateral vs Unilateral – bilateral is preferred to be found if evidence of offeror-indifference
  i. Bilateral immediately and fully protects both parties
     1. Offeror is not able to revoke in the middle of performance, at the expense of offeree. But maybe offeree wants the right to revoke himself…
        a. When offeree begins performance of a unilateral K, an option K is created, whereby offeree can, if he chooses, complete performance in expectancy of return promise
        b. If the unilateral promise is to convey land, beginning performance can be thought of as part performance (Brackenbury v Hodgkin). Note: there are other ways to determine damages than equitable relief, pg 389
     2. Protection for offeror, assurance that performance will be fulfilled
  ii. Offer to sell is a clear offer for a bilateral Kleftrightarrow offer for reward is a clear unilateral
  iii. Look to intent of offeror, for he is the master of the offer
  iv. Previous dealings between offeror & offeree may demonstrate the trust inherent in a bilateral offer
  v. Offeree of bilateral K has power of acceptance revoked when:
     1. He rejects or counter-offers
     2. Time expires, if none specified, then reasonable amt
     3. Revocation by the offeror
     4. Death or incapacity of either party
     5. Any condition specified in the offeror that fails to happen
  vi. What if offeror does not specify whether offer should be accepted bilaterally or unilaterally?
     1. Offeree may accept either way
     2. What if offeree begins performance? Should be viewed as a promise to complete performance
f. Termination of the power of acceptance by offeror
  i. Death of the offeror terminates offer even if offeree does not know about it (disconnect from objective theory)
  ii. When a offeree can no longer reasonably believe there is a manifestation of assent, the offer is rescinded (Dickenson v Dodds, 390). Even if communication is indirect.
  iii. Once a reasonable time has passed
  iv. Revocation – majority holds that revocation is effective when it is received, not when it is sent
III. Option K / Irrevocable offers  
   a. Option K created by part performance  
      i. Where an offeror makes offer for unilateral K, beginning of performance creates an option K which offeree is entitled to finish  
      ii. Offeror’s performance is conditional on completion  
      iii. Preparations for performance do not constitute part performance  
   
   b. An offer is binding as an option K if it (Restatement)  
      i. Is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or  
         1. Note: purported consideration may be nominal and need not be actually delivered!  
      ii. Is made irrevocable by statute  
      iii. If the above two elements are unavailable, offer may still be made binding to the extent necessary to avoid injustice if offer can be said to reasonable induce reliance; under the same rationale as promissory estoppel  
   
   c. Binding an offer by reliance, competing views  
      i. (Baird v Gimball) – Not enforceable unless consideration is given for offer  
         1. A party should contract to protect itself instead of enforcing another’s offer  
         2. Promissory estoppel does not apply because an offer is not a promise – P.E only applies when the offeree does whatever is stipulated in the offer.  
         3. Offeror has no remedy even though his offer is now binding  
      ii. (Drennan v Star Paving) – If offeree reasonably relies on the offer, to his detriment, then it is binding on the offeror  
         1. Acting in justifiable reliance will make an offer a promise, to the extent necessary to prevent injustice.  
            a. Did offeror want offeree to rely on offer?  
         2. Think to enforcement of promises based on reliance: what is the remedy, expectancy or reliance?  
         3. Offeree cannot subsequently counter-offer or otherwise manifest intent to decline offer and still bind offeror.  
         4. UCC 2-205 states that an offer by a merchant to buy or sell goods in a signed writing that gives assurance it will be held open is not revocable  
         5. Would general contractor also be bound? Not unless sub also relied.  

IV. Counter-offers  
   a. Common law doctrine  
      i. Deviant Acceptance – if acceptance to an offer is “non-conforming,” the offer is summarily rejected and power of acceptance effectively terminated, exceptions:
1. **immaterial variations between offer and acceptance** –
   important to distinguish between material/immaterial
2. offeree’s acceptance makes explicit terms which were
   implicit in original offer
3. suggestion of new term
4. “grumbling acceptance”
5. Still rather strict, even with these “qualifying doctrines”

   ii. If deviant acceptance is deemed rejection, then look to see if it can
   be viewed as a counter-offer

   iii. UCC 2-204 has broadened the tolerance for formation of binding
   contracts

   iv. Subjective v Objective theory – Look to the reasonable
   interpretation of counter-offer, not what the counter-offeror
   intended.

   v. **Mirror Image Rule** – Acceptance must reflect all of the terms and
   only the terms that are in the offer.

   b. UCC 2-207, the *death knell* of the mirror image rule for transactions
      between merchants

      i. Battle of the forms

      1. There is a manifestation of assent only to the basic terms of
         the K

      2. We look at who sent the last form to resolve the disputed
         terms of a K.

      3. Add’t terms are viewed as proposals for addition to K, unless:

         a. The offer expressly limits acceptance to the terms of
            the offer

         b. They materially alter it

         c. Notification or objection to the terms is given in a
            reasonable time

      4. Bargaining power

      5. K relationship will still be maintained even if writings do
         not show that

V. **Silence as acceptance** – Silence will not constitute acceptance of an offer in the
   absence of a duty to speak (Hobbs v Massoit Whip)

   a. Past history of parties, pre-agreement that silence is acceptance, silence
      may be viewed as manifestation of assent

   b. What if offeror tries to impose duty to speak by making that the condition
      of acceptance? We look to offeree’s intent – whatever they say, goes.

   c. Public policy may impose a duty to speak – Insurance companies

   d. Restatement

   e. Restitution remedy may be available even though there was no duty to
      speak (Austin v Burge)

   f. A recipient may keep and use any Unsolicited merchandise mailed to him
      without obligation to the sender

   g. Restatment – silence as acceptance only:
i. Where the offeree takes benefit with reasonable opportunity to reject and reason to know they were offered with expectation of compensation

ii. Where offeror has communicated silence as acceptance is okay and offeree intends to accept

iii. Previous dealings indicate notification only if not accepting

VI. Parol evidence rule - *If the parties have put their agreement in a writing that they intend as the final, complete and exclusive expression of their agreement, evidence of a prior or contemporaneous agreement may not add to, vary or contradict the terms of their writing.*

a. Applies to complete and final integrations – the parties both intend for the writing to contain all of the terms of the agreement
   i. Whether an agreement is integrated is preliminary to determining whether the parol evidence rule applies
   ii. Discharges all prior or contemporaneous, but not subsequent, agreements within its scope
   iii. Also applies to partial integrations if the purported oral agreement is in reference to and contradicts that part of the contract.
      1. Can still be supplemented, unlike a total integration, by consistent additional terms

iv. UCC, Pg 474
v. Restatement, pg 472
vi. Extrinsic agreements are admissible to establish
   1. Whether writing is or is not integrated; whether it is partially or completely integrated
   2. Meaning of the writing; whether or not integrated
   3. illegality, fraud, duress, mistake, lack of consideration

b. Complete Integration
   i. Whether doc was intended to be a complete int. is a question of fact for jury.
   ii. If found, discharges all prior agreements
   iii. Common law = Court should assume unless there is substantial evidence otherwise. UCC = no presumption that a writing apparently complete on its face is a complete integration
      1. Sophistication of document and experience of parties
      2. Would literal reading lead to unreasonable result?

c. Partial Integration
   i. Is partial int. if terms agreed to for separate consideration
   ii. There is an extrinsic term as might naturally be omitted from the writing
   iii. Test in (Mitchell v Lath; Hatley v Stafford) for oral evidence to alter partial integration written K
      1. The agreement must in form be collateral to the written K
      2. Inconsistency- Must not contradict or negate express or implied provisions of written K
3. Naturalness - Would not be one parties would ordinarily expect in the K – must not be too closely connected with the principle agreement…
   a. Look to surrounding circumstances as well as writing
   b. See if absence of parol agreement would lead to unreasonable result

d. Look to intent of parties. Did they intend an integration?
e. Two different views concerning written agreements
   i. Williston: Written agreement has a unique and compelling force
   ii. Corbin: A writing is integrated when the parties intend it to be and it means what they intend it to mean… UCC has adopted this view

f. Merger clause – Clause must be agreed upon
   i. Public policy; disclaimer of warranty must be explicitly bargained for
   ii. Unequal Bargaining power – clause has more power between to sophisticated business people than a consumer/merchant.

g. Exception for Fraud
   i. Even if contract is completely integrated, evidence of a parol or other extrinsic misrepresentation of fact by one party will be allowed
      1. Misrepresentation of present fact
      2. Promissory fraud – if, at the time of making a promise, the promisor intended not to perform

h. Policy justification is that PER prevents faulty testimony and allows a complete, certain written agreement.
   i. “Writing speaks for itself” = the contract was integrated, the integration was complete, the oral term is inconsistent with the written agreement, is within its scope, does not bear on its interpretation, and would not naturally be omitted from the writing.

j. Another type of application of PER is to written K; Use the PER to exclude provision of a K that are outside the bargain assented and would tend to defeat the purpose of the K
   i. Party under duress or emotional stress
   ii. Uneducated or uninformed party
   iii. Term written in technical legal jargon

VII. Methods of interpreting the wording of a contract
   a. Literalism v. rational result
   b. To what extant must ambiguity be resolved from within and not from outside the K, two different approaches:
      i. Only when the intention of the parties cannot be gathered from the “four corners of the document” can extrinsic evidence be given to explain ambiguity (Federal Ins., 506)
         1. Language is not rendered ambiguous just b/c parties don’t agree on its meaning
         2. Prevents moral hazard
3. Provides protection by putting a K in writing
4. Only allow *objective* extrinsic evidence to contradict literal reading

ii. Extrinsic evidence will be admitted before ambiguity is determined from K as long as it does not contradict the wording of the agreement (Pacific Gas, 504)
   1. Allows *subjective* extrinsic evidence of *objective relevance* .... Causing a shift in understanding of the judging parties
   2. Words can have more than one meaning: trade usage, judges interpretation v. parties interpretation, material context (Spaulding, 508)
   3. Before you can learn whether parol evidence would be inadmissible, must understand intention of words with multiple interpretation

VIII. Standardized forms
   a. Duty to read, or better put, one is “bound by what he signs”
      i. Reasons for:
         1. Risk of perjury
         2. Undermines written documents
         3. Coincides with objective theory of assent if we assume that a party reads all he signs – Llewellyn comment on pg 519: Assent to a standardized form is not an assent to each individual term but a “blanket assent to any not unreasonable and not indecent term” included in the document
      
      ii. Exceptions
         1. Misrepresentation of the document by one party
         2. Perceived as not a contract, claim checks etc…
         3. Presenter of K prevents or persuades other party from reading
         4. Assent is undermined b/c document is not viewed as a contract
      
      iii. At common law, signature is usually held as a manifestation of assent to a written contract as long as there was a reasonable time to read the it
   
   b. Factors to consider when analyzing standardized form provision (Mundy, 514)
      i. Ease of understanding, readable
      ii. Would casual reading have caught the provision?
      iii. Highlighting of important, abnormal conditions?
      iv. Difference between new K and changes in K?
      v. Context of provision, was it in a clearly stated and obvious K, or on an art catalog (Weisz, 515)
      vi. Would a reasonable person have expected this kind of provision to be in the K or document?
vii. Did party take the provision seriously or dismiss it as a technicality?

c. Two ways courts approached excluding unfair provisions of a standardized K
   i. Looked for one or more of the following elements:
      1. Failure of specific notice/attention
      2. Unequal bargaining power
      3. Provision out of context of document
      4. Severe curtailment of seller liability
      5. Reasonable party would not have understood term this way
   ii. Problem with this approach is that it only causes the drafters to word contracts more explicitly, etc… but it does not go to the core of the problem – getting rid of these unfair types of provision. It also tends to “torture the language,” and neuter the power of assent in situations where we need to enforce not-unfair provisions.
   iii. Llewellyn - The second approach will enforce all of the provisions as long as they are not violative of public policy (whatever that means).

d. Exculpatory contracts – especially disliked by public policy – the common conscious of the community -- since they allow un-punishable negligent behavior
   i. Tort concept of imposing liability on people who create unreasonable risk can outweigh Contract concept of allowing freedom of agreement. Motive is to prevent harm
   ii. May be void when Exculpatory phrase is very broad or is not bargained for
   iii. Another approach to standardized form K is economic. Element of imbalance to superior bargaining firm may be reciprocated to consumer in the form of expediency. Instead of forcing all customers to bear the loss in the form of higher prices, it may be more fair to exculpate the firm from rarely occurring circumstances in order to encourage safe behavior by customer.

e. (Broemmer) Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties
   i. A party is not bound to an unknown term if it beyond his reasonable expectations
      1. Unreasonably favors stronger party
      2. Contradicts other terms of deal
      3. eliminates fundamental purpose of transaction
      4. Bizarre or oppressive term

f. Restatements view
   i. When a party signs or manifests assent to a writing, he adopts writing as an integrated agreement if he believes such writing to be a normal writing for that type of agreement
   ii. Such language of the writing is interpreted by an objectively reasonable standard
iii. A term is not part of the agreement if the party believes there would be no assent if the other party knew of the term

Chapter 4 – Reasons not to enforce Contracts

I. Mutual mistake – if a mistake is made by both parties, regarding the substance of the K, the K is not enforceable
   a. Assumption of risk – it parties were aware of a certain risk inherent in a deal, and contracted to include this risk, there is no rescission due to mutual mistake.
   b. Balance between usual allocation of risk between buyers and sellers and reasonably unforeseeable event
   c. Substance of the K?
      i. When mistake belief relates to a basic assumption of the parties upon which K is made, and materially affects the agreed upon performance.
      ii. Question is not, “would parties had entered into contract if they knew true state of things?” Instead it is whether the fundamental assumption upon which the agreed upon price rests was mistake.
      iii. Sale by description a good way to establish mistake
   d. Buyer has a duty to make a reasonable inquiry into unrepresented facts
   e. Hinson v Jefferson - Completed sales of land are not rescindable for mutual mistake because it would lead to instability of real estate market + unmeritorious complaints
   f. Unilateral mistakes usually due not make contract rescindable unless undue hardship would follow. Probably based upon restitution.
   g. Since mutual mistake is a contract doctrine – the mistake must be something mutually assented to under the objective theory. Fraud, a tort doctrine, can apply to silence and other things that are not usually part of K.
   h. Difference between the lower-cost info gatherer not disclosing info that might alter the deal and the higher cost info gatherer not using deliberately acquired information which took expense and expertise, this encourages society to be more information-rich as a whole.
   i. Let windfalls lie after-the-fact since it makes no difference to society… why not avoid transaction costs unless one party had a duty to disclose the information because of fraud or implied warranty

II. Implied warranties
   a. For sale of land - guaranteed to be suitable for contracted for use
      i. Land developers assume more risk than a consumer
      ii. Restricts the reach of caveat emptor to only things that could be reasonably discovered… on land it is easier to discover defects than in a completed house
      iii. Hesitant to apply mutual mistake theory to sale of land because of problems resulting from rescission

III. Fraud – intentional misrepresentations of existing fact
a. Partial disclosure – When seller has full information but represents only part of it, leading buyer believe it is full information and thereby relying on it, there is fraud

b. Duty to speak – when fact is material to purchase and not within diligent observation, attention or judgment of the purchaser
   i. A duty to disclose is rarely imposed where the parties deal at arms length and where the information is the type which the buyer would be expected to discover
   ii. Where disclosure is necessary to prevent a previous assertion from being misrepresentation
   iii. Disclosure would correct a mistake of the other party as to a basic assumption
   iv. Party is entitled to know because of a relationship of trust and confidence
   v. Superior knowledge over other party
   vi. Facts only accessible to seller
   vii. Not required to inform someone of the obvious (Eytan v Bach, 644).
   viii. Does buyer have a duty to inquire about certain things?
   ix. Can price of an item imply a duty to speak if the price is within the range of prices for something the item is not.

c. Damages for fraud
   i. For sale of land
      1. Temporary injury – cost of repair
      2. Permanent – variation in value of land
   ii. Be placed in same position had there been no fraud

IV. Factors to consider w/r/t not enforcing K because of mistake or misrepresentation
   a. Self protection – parties should be responsible for their own interests
   b. Mutual assent may be absent if mistake or misrepresentation exists
   c. Privileged information – should it be allowed?
      i. How was it acquired? Private or public means.
   d. Should it matter if one party knows other is mistaken?

V. Unconscionability – “shocks the conscience, produces an exclamation”
   a. Specific performance only (Wollums v Horsley) – when a unilateral mistake is made, it may not allow complete rescission and reinstatement of parties to prior position, but may also not allow the specific enforcement of the k
      i. Grossly inadequate consideration constitutes unconscionability, great hardship would result
      ii. Cleanup principle – When an equity court acquires jurisdiction of a case, it will proceed to give whatever remedies are needed
   b. All K, including the sale of goods
      i. What is the relative bargaining power of the parties, their relative economic strength, alternative sources of supply
         1. Two sophisticated businesspeople may allocate a risk that may be unconscionable if found in a david/goliath setting
2. Based on bargaining power
   
   ii. Is term reasonable
   
   iii. Anti-Paternalism counterargument – modern courts have begun reversing the paternalist movement
       
       1. Courts are reluctant to invoke common law principles to invalidate private choice
       2. Decisions to invalidate commercial contracts for unconscionability are few and far between because of courts reluctance to interfere w/ peoples right to contract.
   
   iv. Same argument as that used in standardized forms, do not enforce due to public policy
   
   c. Factors of unconscionability
       
       i. Absence of meaningful choice
       
       1. unequal bargaining power, relative bargaining power, economic strength, alternate sources of supply
       2. Formation process
       3. Other sellers in marketplace
       4. relative education of parties
       5. Where terms located on K
       6. Is the choice concerning whether buyer makes purchase OR whether buyer could go elsewhere to make the same purchase
       
       ii. AND, unreasonably favorable to one of the parties
       
       1. Commercial setting where K takes place, is this a general business practice
       2. Why was the unconscionable term included… was it to further the business arrangement or to provide a form of coercion to the stronger party
       
       iii. Problem is that a buyer has no choice in a if all merchants in a commercial setting are using a term, but if all the merchants are using the term, it is a general business practice
       
       iv. Gianni factors
       
       1. Does term make reasonable sense? Even if bargaining power is unreasonable if term makes reasonable sense it will be upheld.
   
   d. Does the more of a necessity a bargained for good is make a difference to whether or not a consumer has a meaningful choice? In other words, should absence of meaningful choice be viewed differently in the purchase of a refrigerator (absence may exist even there are other sellers) v. collectible stamp (choice may whether or not to buy stamp). We must draw the line somewhere.
   
   e. Compulsory K – If consumer must accept K (utility companies) there is a duty incumbent on company to deal with customer on “proper terms”
   
   f. Prohibited terms – If a term is so against public policy as to be illegal it will be excluded

VI. Implied obligation of good faith in K dealings
a. Best defined by talking about bad faith
   i. Lack of diligence
   ii. Evasion of spirit of the bargain
   iii. Willful rendering of imperfect performance
   iv. Abuse of power to specify terms
   v. Failure to cooperate

Chapter 5
 I. Differences between promises and conditions
   a. Fulfillment of a promise discharges a duty, occurrence of a condition creates a duty
   b. The non-fulfillment of a promise is called a breach of K, and creates in the other party a right to damages; The non-occurrence of a condition will prevent the existence of a duty in the other party; but it may not create any duty to pay damages at all, and it will not unless someone has promised that it shall occur
   c. S and B contract with for the purchase of a house on May 1 on the condition that S remove the ice house
      i. If the ice house is not removed on May 1, B is not obligated to pay purchase price to S
      ii. If S had additionally promised to remove Ice House, B would have a remedy for damages as well

II. Courts are generally inclined to find only a promise rather than a condition that is also a promise
   a. Restatement – Where it is doubtful whether words create a promise or an express condition, they are interpreted as creating a promise. But the same words may mean that one party promises performance and other party’s promise is conditional on that performance

III. Ways to determine whether a thing is a promise or a condition
   a. The expression of one thing is the exclusion of another – by making a term in a contract expressly conditional to performance, you imply that you do not wish to make other, like terms conditional unless stated.
   b. Underlying meaning of the contractual term – If the non-fulfillment of a proposed condition does not always lead to an event the condition intended to avoid, perhaps the occurrence of that event should be the condition precedent and not the proposed condition.
   c. In other words, what are the circumstances of the condition (trade usage, purpose, subject matter, context)
   d. Policy against forfeiture – Conditions should be tightly controlled when it would cause one party to lose a substantial amount on the occurrence of the condition
   e. The issue is the degree of clarity required to override the law’s presumption against conditions
   f. One court’s test: if wording in K is by party to perform = promise; if wording is by party who is not to perform act, that promise = a condition to their performance
IV. Different outcomes when one party acts in bad faith to prevent an event from happening
   a. If a promise, party is liable for damages
   b. If a condition, party should not be allowed to prevent a condition from not occurring and then reap the rewards.

V. Circumstances where time limits on conditions are suspended & invalidated
   a. (Semmes v Hartford), 739 – Condition to file insurance claim within 12 months of injury thrown out because of “impracticality” imposed upon insured due to civil war.
   b. (Gilbert v Globe) – Effect of estoppel by defendant was to suspend the time limit condition until misrepresentation had ceased
   c. Effect of waiver of a right of condition precedent –
      i. Many courts hold waiver “once made is irrevocable and cannot be denied
      ii. Some courts hold there must be consideration for a waiver or reasonable reliance on a waiver, maybe under pre-existing duty doctrine
      iii. Waiver is relinquishment of a previously enjoyable right; estoppel is a misleading action leading to reasonable reliance
      iv. Why would waiver be an issue unless it reduced reliance? And if so, can one not say it is estoppel?

VI. Time is of the essence – if a court considers time to be of the essence of a K, a performance may be required by an exact date
   a. It is not desirable to try to achieve the conditioning of duty upon a performance on or by a specified time merely by putting into the contract the words “time is of the essence of the K”.
   b. Look to intent, language and circumstances of the K
   c. This type of clause is much more likely to be enforced in law than in equity

VII. Asking whether a provision is a condition is similar to stating the ‘materiality’ question: both seek to determine whether its performance was a sine qua non of the contract’s fulfillment. And that determination may not be made through a mechanistic process

VIII. The excusal of a condition
   a. Restatement: to the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.
   b. Competing doctrines: that which states that contracts should be enforced as written. And that which states that the rigor of the traditional principle of strict compliance has been increasingly tempered by the recognition that the occurrence of a condition may, in appropriate circumstances, be excused in order to avoid a “disproportionate forfeiture.”
      i. The extent of the forfeiture will depend on the extent that denial of compensation. In determining whether the forfeiture is disproportionate, a court must weigh the extent of the forfeiture by
the oblige against the importance to the obligor of the risk from
which he sought to be protected and the degree to which that
protection will be lost if the non-occurrence of the condition is
excused to the extent required to prevent forfeiture.

c. Three examples where willful breach has not precluded enforcement:
   i. Construction contracts – a builder’s deviation from contract
      specifications, even if such a departure is conscious and
      intentional, will not totally defeat the right to recover in an action
      against owner on the contract
   ii. Sales of Real property – the fact that a contract states a date for
      performance does not necessarily make time of the essence
   iii. Failure to deliver contract goods – a seller need not pay liquidated
      damages if buyer has suffered no actual damages

d. There will be no assumption of a contractual purpose to visit venial faults
   with oppressive retribution

e. Reasons why conditions precedent may not be enforceable
   i. Contract was one of adhesion
   ii. Enforcement of K will operate as forfeiture
   iii. Public policy: Reason for including provision in the contract can
      be protected by other means than forfeiture in all circumstances
      1. Insurance policy: loss of coverage must be weighed against
         an insurer’s legitimate interest in protection from stale
         claims. If this legitimate purpose can be protected by
         something other than automatic enforcement of the time
         limits, then strict enforcement is unwarranted. Balance with
         the right of parties to contract for an express condition.

IX. Conditions of satisfaction

a. If it is practicable to determine whether a reasonable person in the position
   of the obligor would be satisfied, an interpretation is preferred under
   which the condition that the obligor be satisfied with the obligee’s
   performance occurs if such a reasonable person in the position of the
   obligor would be satisfied. Good faith is employed when the K involves
   personal aesthetics or fancy. These requirements are employed to
   approximate what the parties would have expressly provided with respect
   to a contingency that they did not foresee.

b. Objective standard: Contracts conditions relating to operative fitness,
   utility or marketability
   i. Construction contracts generally fall into this category and
      condition of satisfaction involves operative fitness, mechanical
      utility, or structural completeness
   ii. If objective standard didn’t exist, mutuality of obligation is also
      tenuous

c. Subjective standard: Contract conditions relating to fancy, taste, sensibility
   or judgment
i. Allowed when no objective standards of reasonableness can be set up by which the effectiveness of the plaintiffs performance in achieving the effect sought can be measured.

ii. Mainly concerned with aesthetic appeal

iii. All that is required is a bona fide dissatisfaction

iv. Very difficult to detect bad faith

v. *In order to recover damages under a subjective standard, you must turn to objective evidence as pertains to the duties laid forth in the* K

d. Contracts where condition is satisfaction of a third party (such as an architect’s approval)

i. All that is required is good faith on party of arbitrator. Making the standard a reasonable one would encourage parties to sue whenever they disagreed with their third party’s decision, negating the reason they included such an arbitrator in the first place.

ii. Bad faith
   1. Gross mistake
   2. Arbitrator is conspiring w/ one of the parties
   3. Refusal to issue the certificate connected to some mater not entrusted to the architect

iii. This is the same as an ‘objective standard’ of satisfaction, except the parties simply choose the objective standard ex ante and agree to abide by the decisions of it.

X. Constructive conditions – Certain conditions that parties might not necessarily agreed to, but are nevertheless inserted in the interest of fairness and justice

a. Order of performance based on credit burdens/risks – constructive conditions are ingrained in contracts where one party presents a greater credit risk than the other

i. Employer v. Employee – Order of performance has been mitigated by statutes requiring wages paid at short intervals

ii. Theater v. Theater patron

iii. College v. College student

b. A promise is always an obligation of the party to perform, it will NOT always be a condition of the other party’s obligation to perform

c. Evolution of interpretation of bilateral contracts without express conditions

i. Nichols v Raynbred – No obligation to perform your side of the bargain before filing suit against other party

ii. Kingston v Preston – look to circumstances
   1. Evident sense of meaning of the parties
   2. Order in time on which the intent of the transaction depends on performance

iii. Van Lint v Price (Modern view) – Each parties performance is implied in law to be a constructive condition of the other parties obligation to perform. Unless the contract or the surrounding circumstances compel a contrary inference.
d. Simultaneous promises
   i. Restatement 234 – Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language of the circumstances indicate the contrary
      1. Only when there are different fixed durations upon when performance is due are promises not simultaneous
   ii. Restatement 238 (“Render or Tender”) – If the promises are concurrently conditional, then the party must either render performance or tender performance.

e. Concurrent promises
   i. The general rule requires that one tender performance and demand performance of the other party in order to maintain an action for breach.
      1. This requirement has been relaxed in equity courts, and tendering is not necessary to claim relief – must only have been ready and willing to perform
      2. If one does not tender performance, he may still be able to recover any down payment costs in restitution
   ii. If promises are concurrently condition, and there is a date mentioned in the K, it will be assumed that all obligations will be met on this date
   iii. Where performance of other party is impossible, rendering or tendering is not a requirement to recovery. Could the blockage to performance have been removed?
      1. Usually safest to tender and demand performance anyway.
      2. Must give defendant reasonable time to explain self
   iv. When the other party has repudiated their performance in advance, rendering or tendering is not necessary.
      1. If repudiating party can show that injured party would also not have performed their end of the bargain in the absence of the repudiation, recovery will be prevented

f. The policy of the law is to construct concurrent conditions to minimize credit risks.

XI. Breach
   a. Contracts for the sale of goods
      i. Perfect tender rule – sellers are required to deliver goods exactly as stated in the contract. No room for substantial performance.
      ii. Time is always of the essence
         1. Volatile marketplace
         2. Transfer of goods from buyer to sub-buyer
         3. Need for immediate use of goods
         4. Exception
a. If the goods were primarily for the buyer’s own use
b. Primarily based on skill and labor of seller
c. Nothing to indicate that late delivery would be of harm to buyer

iii. Courts have become more lenient in modern times via the UCC… however the perfect tender rule is still salient

b. In a construction contract for periodic payment to builder the payment to the builder is a condition to the builder’s obligation to continue performance and the builders continued construction is a condition to contractor’s continued payment… reread notes in supplement and OneNote

c. Substantial performance
   i. Based on unjust enrichment and policy against forfeiture
   ii. Not a complete discharge from duty; One who has rendered substantial performance, but less than full performance, and has already received the agreed price, has a defense in a suit by the owner for the restitution of that price. One would have a right to payment and could maintain suit for it.
   iii. Substantial performance means the party has performed the essential purpose of the contract
      1. Does not mean every detail is in strict compliance with the contract
      2. A lot closer to perfection than no performance at all
      3. In construction K
         a. Decrease in market value
         b. Purpose of construction
         c. Importance of defective structures to buyer
      4. Was breach willful?
   iv. Some courts hold that a willful breach by a builder will defeat a claim of substantial performance
   v. Damages when party has substantially performed in construction K
      1. For builder, recover K price less damage caused by incomplete performance
         a. Diminished value rule – difference between value of construction as it stands and the value had it been constructed perfectly
            i. Cost of replacement is an element to take into consideration. But this may be >> diminution in value
            ii. The diminished value rule contemplates the repair would not be made if allocated the cost-of-replacement
         b. Cost of replacement rule – Small items of defect or omission which can be remedied without the reconstruction of a substantial part of the building
c. Some authority (MA) that says if breach is willful, breaching party may not recover on the K or in quantum meruit.

2. Under what circumstances can builder cancel performance?
   a. We want to protect the K, so if there is only a “little” damage by contractor builder may not breach.
   b. Material breach – justifies canceling of K. You can’t have both material breach and substantial performance; Does breach defeat essential purpose of the K?
      i. Look at causes of default (unforeseen circumstance, or some intentional refusal of defendant to perform)
      ii. Extent/quantum of non-performance (how long was the delay)?
      iii. Need & Expectations of parties in connection to the K
      iv. Likelihood of continuation of non-performance
   c. If party is in breach, a reasonable time must be given before cancellation to say they are in “material breach”
      i. Maybe only refuse work until payment is made, instead of complete cancellation
      ii. May lead to inefficient outcome since parties do not know how to react in a way that will be retroactively be considered “reasonable” Puts an unfair burden on party that is not in breach.

3. Related to waste from chapter 1
   vi. In contract to specifically enforce the sale of land
      1. an immaterial misrepresentation will not preclude specific enforcement of the sale, damages are whatever the decrease in the value of land is
      2. There is no formula to what is immaterial w/r/t size of property… depends on circumstances of sale
      3. Mutual mistake must be material
   d. Anticipatory Breach – an overt communication of an intent not to perform. The standard rule is that a breach occurs when it is reasonably certain that a party is not going to meet its obligations under the contract
      i. A party insisting on something not covered in K prior to its performance will amount to a repudiation
      ii. A repudiation discharges other duty to perform or to remain ready to perform
iii. Injured party may either file suit before damages happen or wait until they accrue to recover. The doctrine of avoidable consequences may trump the damages resulting when actual breach occurs.

iv. Only applies to bilateral K where neither party has fully performed
   1. The doctrine is meant to promote efficiency by allowing a party to a bilateral contract to recommit his resources to another project

v. Anticipatory breach of unilateral obligations, two views of the ‘completed performance exception’
   1. no breach can amount to an anticipatory reach of performance not yet due… unless defendant has shows/has shown a propensity not to pay. Prevailing view.
   2. breach of current obligation coupled with announcement not perform in the future will amount to total breach
   3. Anticipatory breach of insurance obligations has several types of remedies
      a. Restitution of premiums
      b. Declaratory judgment (?)
      c. Judgment payable in installments (the middle ground between only awarding currently due payments and awarding the total lump sum based on “expectancy”)
      d. Equitable relief specifically enforcing payments
   4. “acceleration clause” makes entire amount due upon default of payment thereby avoiding the claim of immunity by unilateral obligation
   5. Main route of escape = leaving some sort of dependency of obligation within the K will allow the obligee to sue under anticipatory repudiation

STATUTE OF FRAUDS
Sale of land:

Note that unless otherwise stated, these are oral K.

When sale of land is connected to the agreement but not the agreement itself, it is outside the SoF. Some states have made an exception to this where the issue is a commission paid to a broker.

Contract to assign merely promissory notes for the value of land this is not a contract to convey land and does not fall under the SoF.

What if vendee does not pay to vendor what is stated in K, but retains his possession of the land? If payment was to be made at same time then the K is unenforceable. If
payment was to be made at a later time after land was conveyed then K is enforceable… logic gives way to justice.

Contracts not to be performed within one year (impossible to perform in one year)

Contract must not merely be realistically improbable that K would be performed in one year, but the K must explicitly state that the term is longer than one year.

If you promise payments to someone for life, this does not fall under the statute since they could die any day. If you promise someone payments for 14 months then this falls within the statute. They could die but this is an unforeseen change of conditions.

In K where one parties performance takes less than a year and the others takes longer then this falls under the statute of frauds.

Sale of Goods

An oral K is not sufficient to satisfy the sale of goods. Unless there are exceptions.

If the K is a "mixed" K and there services provided make up the bulk of the K then the K is enforceable. If goods are under a certain amount ($500,5000) then K is enforceable.

If transaction is between merchants, then failure to acknowledge written confirmation of an oral contract within 10 days of receiving it, constitutes acceptance of the K. Must have timely objection to written confirmation

A person's actual performance, received by another without objection, is pretty solid evidence for inferring a contract.

Enforceability is limited to the portion of one party's obligation that is proportionate to the other party's part performance.

If there is substantial beginning in an oral K where the goods are specially mfg'd for buyer, the goods are not suitable for sale to others, and the seller has made a substantial start on mfg'ing the goods, there is enforceability.