A. The Legal Meaning of “Contract”

i. A contract may be defined as an **exchange relationship** created by oral or written **agreement** between **two or more persons**, containing at least one **promise**, and recognized in law as **enforceable**.

1. **An oral or written agreement between two or more persons**
   a. It is a voluntary, consensual relationship, created only because the parties, acting with free will and intent to be bound, reach an agreement on the essential terms of their relationship.
   b. It is enough that the words and conduct of a part, evaluated on an **objective standard**, would lead the other party to reasonably understand that an agreement was reached.
   c. Under the **statute of frauds**, there are some types of contracts that must be recorded in a signed writing to be enforceable. However, most contracts are not covered by the statute of frauds.

2. **An exchange relationship**
   a. The very essence of contract is a **reciprocal** relationship in which each party gives up something to get something.

3. **At least one promise**
   a. For a contract to exist there must be a promise – that is, some commitment for the future, some assumption of liability lasting beyond the instant of the agreement.
   b. A promise is an **undertaking to act or refrain from acting** in a specified way at some future time.
   c. This promise may be made in clear and **express** words, or it could be **implied** – inferred from conduct or from the circumstances of the transaction.
      i. **An Instantaneous Exchange = No Contract**
         1. Where an exchange is entirely instantaneous, and neither party makes any promise to the other, their exchange is not regarded as a contract.
      ii. **A Promissory Exchange = Bilateral Contract**
         1. If promises exist on both sides after the moment of agreement, then a bilateral contract exists.
      iii. **A Promissory Exchange by Implication = Bilateral Contract**
         1. It is not always necessary for promises to be stated in express terms. Often, the circumstances of the transaction, the conventions of the marketplace, or the policy of the law imply a promise even in the absence of promissory language in the agreement.
      iv. **A Promise for Performance = Unilateral Contract**
         1. When, at the point of contract formation, only one party has a promise outstanding, the contract is called unilateral.

4. **Enforceability**
   a. Contracting is often described as an act of **private lawmaking** by which persons create a kind of personalized “statute” to govern their relationship. One can only envisage a contract as private legislation if it has the attribute of any law – **recognition and enforcement** through the **compulsive power of**
the state, acting through its courts. It is therefore a hallmark of contract that it creates law binding on the parties and confers on them rights and obligations cognizable in law.

b. If a promise is broken, the disappointed party can sue.
   i. Court will first adjudicate any questions concerning the existence of a valid contract and try to resolve any disputes over its terms and their breach.
   ii. Once it is established that a contract was entered into and breached, the court will enforce it by giving a remedy for the breach.

1. The primary remedy for breach of contract is not specific performance of the promise.
2. Usually, it is a judgment awarding damages to the disappointed party. The disappointed party must prove that the breach caused financial loss.
   a. Expectation damages are the most common – represent the economic loss suffered by the victim as a result of the breach, and are measured as the amount of money needed to put the victim in the position she would have been in had the contract not been breached.
      i. Direct damages
      ii. Consequential damages – losses beyond the contract that resulted from the breach
      iii. Incidental damages – expenses occurred in dealing with the effects of the breach

B. The Sources, Nature and Traditions of Contract Law

i. Classical Contract Law
   1. Law as a science – relatively formalistic and rigid.
   2. Classical theory stressed the facilitation of contractual relationships and favored a strictly objective approach – if parties manifested intent, classicists favored enforcement of the transaction and were not inclined to probe the actual state of understanding of either party.
   3. Heavily influenced by the legal philosophy of positivism, which stressed the primacy of legal rules and considered the court’s principle role to be finding and applying those rules to the facts of individual cases.

ii. Contemporary Contract Law
   1. As twentieth century wore on, insight into human interaction grew. Law began to be studied in a multidisciplinary way, taking into account its social context and the actual workings of the legal system.
   2. Sociological jurisprudents – studied the relationship between law and society.
   3. Legal realists – stressed the dynamics of the legal process, challenged the preeminence of rules, and advocated a looser, more flexible approach to legal analysis.

iii. Contract as State Law
   1. Except in some very narrow and specific circumstances, contracts are governed by state law. Therefore, there is no single and unified law of contracts in the United States.

C. The Meaning of “Common Law”
Contracts

COURSE OUTLINE

i. “Common Law” Used to Designate Our Legal System as a Whole
   1. Designates a country whose **legal system is based on the common law of England**.
   2. Common law places great reliance on the role of courts as participants in the creation of law, while the civil law focuses heavily on the code as the source of law and subordinates the judicial lawmaking role.

ii. “Common Law” Used to Denote the Judge-Made Component of Our Legal System
   1. Distinguishes those areas of the **law that derive principally from judicial** decision rather than from statute.
   2. Contract is a common law subject because most of its rules are not found in legislation, but have been developed by courts.

iii. “Common Law” Used to Denote a Process or Approach to Legal Analysis
   1. Even in an area governed by statute, the **courts play a vital role** in interpreting and developing the law by applying general rules to specific cases.

II. INTRODUCTION TO STATUTORY LAW METHOD: UNIFORM COMMERCIAL CODE

ARTICLE 2 – SALE OF GOODS

A. An Introduction to Article 2

i. The Creation of the UCC
   1. Enacted in every state except Louisiana

ii. The Style and Jurisprudence of the UCC
   1. Text of UCC-1-102:
      a. This Act shall be liberally construed and applied to promote its underlying purposes and policies.
      b. Underlying purposes and policies of this Act are:
         i. to simplify, clarify, and modernize the law governing commercial transactions
         ii. to permit the continued expansion of commercial practices through custom, usage and agreement of the parties
         iii. to make uniform law among the various jurisdictions
   2. The **UCC tries to find a contract whenever legally possible; if UCC is silent on an issue, state common law will decide.**

iii. Working with Article 2

B. The Scope of Article 2

i. Covers the sale of **goods**, which are moveable at the time of the sale. If it is not a sale of goods, it is not covered by the warranty provision of Article 2 of the UCC.

ii. In cases of mixed transactions, most jurisdictions follow one of two approaches:
   1. “**Gravamen**” Test – looks to that portion of the transaction upon which the complaint if based to determine if it involved the sale of goods or services.
   2. **“Predominant Factor/Predominant Purpose” Test** – looks at the transaction as a whole to determine whether its predominant purpose was the sale of goods or the provision of a service. Takes into account the following factors:
      a. Language of the parties’ contract,
      b. The nature of the business of the supplier of the goods and services,
c. The reason the parties entered into the contract (i.e. what each bargained to receive), and
d. The respective amounts charged under the contract for goods and services.

Note: Even where the cost of goods exceeds the cost of the services, the predominant purpose of the contract may still be deemed the provision of service where the other factors support such a finding.

III. CONTRACTUAL ASSENT

A. The Objective Standard for Determining Assent

i. Assent to a contract is determined by regarding the apparent intent of the parties as shown by their overt acts and words.

ii. A person can be bound if his words or actions, reasonably interpreted, indicate assent even though he did not mean to make it or to make it on the apparent terms.

B. The Reasonable Person Construct

i. Manifestations of assent are interpreted from the standpoint of a reasonable person in the position of the party to whom the manifestation was made.

ii. Don’t ask what the words did mean, but rather how they should have been understood if interpreted reasonably in the context of the transaction.

C. Deliberately Undisclosed Intent

i. If purpose was to gain unfair advantage or evade responsibility, could be held liable for fraud.

ii. If purpose was a joke/to have fun at other party’s expense, objective standard may hold jokester accountable for something not intended.

D. Remedies

i. Expectation Damages – The amount of money needed to put the victim in the financial position she would have been in had the contract not been breached.

ii. Specific Performance – Court order compelling the defendant to perform the contract.

E. Modern Approach to Choice Between Damages and SP

i. burdensome on system to enforce an order for specific performance.

ii. if loss is calculable with some accuracy, an award of damages likely more efficient – compensates plaintiff w/out forcing performance out of a reluctant defendant.

iii. in some cases (esp. those involving personal services), courts hesitate in making an order of SP because it comes uncomfortably close to involuntary servitude.

F. Case Summaries

i. Kobil Development Corp. v. Mignot (Oregon Supreme Court, 1977)
Plaintiff alleged oral contract with the Defendant to provide helicopter service for a
construction job. Breach occurred. Defendant claimed no breach because no contract.
Defendant objected to testimony from Kabil VP during trial regarding his subjective belief
that a contract had been formed. Court held that although it subscribes to the objective theory
of contracts, it need not follow that the test prevents a party from testifying on whether he
thought he was entering into an agreement.
Rule: Subjective evidence can supplement objective evidence when determining whether a
contract has been formed by mutual assent.

ii. Lucy v. Zehmer (Virginia Supreme Court, 1954)
Lucy argued breach on Zehmer’s agreement to sell him a farm for $50,000. Parties had
conversation in bar. Zehmer wrote agreement to sell on a napkin, but contends it was a joke.
Court held Zehmer upheld the contract, stating that not only did Lucy believe, but the
evidence shows he was warranted in his belief that the contract represented a serious business
transaction and a good faith sale and purchase of the farm.
Rule: Court must look to the outward manifestation of a person’s intent rather then to his
secret and unexpressed intention.

IV. OFFER AND ACCEPTANCE

A. What is an Offer?

i. The Definition of an Offer
The manifestation of willingness to enter into a bargain, so made as to justify another person
in understanding that his assent to that bargain is invited and will conclude it. The wording
and context of the offer must make it clear to the offeree that her acceptance will bind the
parties immediately. If the offeror retains the right to make the final decision, the proposal
is not an offer but merely an invitation to negotiate or to make an offer to the person
making the proposal.

ii. Interpreting Intent to Determine if It is an Offer
When it is not clear, from the content of the document or the context, interpretation is
considered a matter of law for the judge to decide. If contextual evidence exists, the
ascertainment of meaning becomes a factual matter more properly handled by a jury.

B. Intent to Contract

i. Objective theory of contracts: Contract law follows the objective theory of contracts. That
is, a party’s intent is deemed to be what a reasonable person in the position of the other party
would think that the first party’s objective manifestation of intent meant. For instance, in
deciding whether A intended to make an offer to B, the issue is whether A’s conduct
reasonably indicated to one in B’s position that A was making an offer.
   1. Example: A says to B, “I’ll sell you my house for $1,000.” If one in B’s position
would reasonably have believed that A was serious, A will be held to have made an
enforceable offer, even if subjectively A was only joking.

ii. Legal enforceability: The parties’ intention regarding whether a contract is to be legally
enforceable will normally be effective. Thus if both parties intend and desire that their
“agreement” not be legally enforceable, it will not be. Conversely, if both desire that it be
legally enforceable, it will be even if the parties mistakenly believe that it is not.
   1. Example: Both parties would like to be bound by their oral understanding, but
mistakenly believe that an oral contract cannot be enforceable. This arrangement will
be enforceable, assuming that it does not fall within the Statute of Frauds.
iii. Presumptions: Where the evidence is ambiguous about whether the parties intended to be bound, the court will follow these rules: (1) In a “business” context, the court will presume that the parties intended their agreement to be legally enforceable; (2) but in a social or domestic situation, the presumption will be that legal relations were not intended.

1. Example: Husband promises to pay a monthly allowance to Wife, with whom he is living amicably. In the absence of evidence otherwise, this agreement will be presumed not to be intended as legally binding, since it arises in a domestic situation.

iv. Intent to put in writing later: If two parties agree (either orally or in a brief writing) on all points, but decide that they will subsequently put their entire agreement into a more formal written document later, the preliminary agreement may or may not be binding. In general, the parties’ intention controls. (Example: If the parties intend to be bound right away based on their oral agreement, they will be bound even though they expressly provide for a later formal written document.)

v. Where no intent manifested: Where the evidence of intent is ambiguous, the court will generally treat a contract as existing as soon as the mutual assent is reached, even if no formal document is ever drawn up later. But for very large deals (e.g., billion dollar acquisitions), the court will probably find no intent to be bound until the formal document is signed.

C. ADVERTISEMENTS AS OFFERS

i. Is an Advertisement an Offer or a Solicitation?
Most advertisements in the mass media are not offers to sell, because they do not contain sufficient words of commitment to sell. They may just be invitations to the public to come and purchase.

1. What Makes a Proposal an Offer Rather than a Solicitation?
If the advertisement contains words expressing the advertiser’s commitment to sell a particular number of units, or to sell the items in a particular manner, there may be an offer.

   a. Look for words of commitment – these suggest an offer.

      i. Example: “Send three box tops plus $1.95 for your free cotton T-shirt,” is an offer even though it is also an advertisement; this is because the advertiser is committing himself to take certain action in response to the consumer’s action.

2. The Impact of Legislation on the Interpretation of Advertisements

ii. Case Summaries

1. Lefkowitz v. Great Minneapolis Surplus Store – Advertisement saying “First Come-First Served.” This is clear, definite, and explicit, and leaves nothing open for negotiation.
   Rule: Ads can constitute offers if they call for performance of a specific act without further communication and leave nothing for further negotiation.

2. Harris v. Time, Inc. – There was a contract, because the offer existed and the acceptance came in the form of opening the envelope – Unilateral contract (BUT case ended up being dismissed on other grounds).

3. Leonard v. Pepsico – Pepsi Points contest with advertisement using a Harrier Fighter Jet. The absence of any words of limitation renders this alleges offer sufficiently
contracts

Indefinite so that no contract could be formed. Obvious joke would not give rise to contracts.

Rule: An advertisement isn’t transformed into an enforceable offer merely by a potential offeree’s expression of willingness to accept the offer through completion of an order form.

V. ACCEPTANCE

A. Overview

i. To accept the offer, the offeree must not only signify assent to a contract on the terms proposed by the offer, but must do so within the time and in accordance with the procedure proscribed by the offeror or, in the absence of such instructions, a time and procedure that is reasonable under the circumstances. Acceptance has both a:

   1. Substantive aspect – assent to the contract terms, and
   2. Procedural aspect – communication of that assent in the proper time and manner.

ii. An offeree who has some interest in entering into a transaction with the offeror but does not like the terms could respond to the offer by making a counteroffer.

iii. As long as the offer has not yet been accepted, the offeror can revoke the offer even before the time for acceptance has expired. Offeror must notify the offeree that the offer is revoked.

B. Offeree Must Signify Assent to Contract

Manifestation of assent (acceptance) must be a knowing, voluntary and deliberate act.

C. Acceptance Must Accord with Both the Substantive Terms and the Procedural Requirements of the Offer

i. Substantive

   1. The terms setting out the transaction that if being offered – the proposed contract.
   2. Many older cases required “mirror image” acceptance of the substantive terms.
   3. Modern cases less rigid. A response at variance with the offer may nevertheless qualify as an acceptance provided that the offeree’s intent to contract is apparent and the variations are not material – they do not significantly depart from the offer.

ii. Procedural

   1. The procedure to be followed by the offeree if he wishes to accept the offer.
   2. The offer need not provide a procedure for acceptance.
   3. In the absence of instructions on acceptance, the offeree may accept within a reasonable time, and the communication of acceptance may be by any mode and in any manner that is reasonable.

D. The Effective Date of Acceptance

Acceptance takes effect when it is communicated to the offeror.

i. The Mailbox Rule – A properly addressed acceptance takes effect when deposited in the mail. Offeror can avoid the mailbox rule by specifying in the offer that acceptance will be effective only on receipt. The Mailbox Rule does not apply when revoking an offer.

   1. Rejections are valid when received.
   2. Acceptances are valid when mailed.
E. Special Issues

i. **Lost in transmission:** If the acceptance is *lost in transmission* or *delayed*, the applicability of the mailbox rule depends on whether the communication was properly addressed.

   1. **Properly addressed:** If the acceptance is *properly addressed*, it is effective at the time of dispatch even if it is lost and *never received* by the offeror at all. (But a court might “discharge” the offeror in this circumstance, for instance if he had sold the goods to someone else.)

   2. **Not properly addressed:** If the acceptance is *not* properly addressed, or not properly dispatched (e.g. sent by an unreasonably slow means), it will be effective upon dispatch only if it is received within the time in which a properly dispatched acceptance would normally have arrived. If it comes later than this “normal” time, it will not be effective until receipt.

ii. **Option contracts:** The acceptance of an *option contract* is effective upon *receipt* by the offeror, *not upon dispatch.*

iii. **Risk of mistake in transmission:** The risk of a *mistake in transmission* of the terms of the offer is upon the offeror. That is, a contract is formed on the terms of the offer *as received by the offeree.*

   1. **Example:** A intends to offer to sell 100 widgets at $5 each. Instead, the telegraph company transmits the offer as an offer to sell 200 widgets at $4. If B accepts without knowledge of the error, A will be stuck having to sell 200 widgets at $4.

      a. **No right to “snap up” obviously wrong offer:** However, if the offeree *knows* or *should reasonably have known* that the offer has undergone a mistake in transmission, she *cannot “snap up”* the offer.

F. **Inadvertent Manifestation of Acceptance**

   i. There are situations in which the subjective state of mind is too compelling to disregard.

   ii. The *offeree must know of the offer to intentionally accept it* (e.g. a reward for information). If the offeree learns of the offer after he has rendered part of the performance requested by the offer, he may accept by completing the performance.

G. **Silence as Acceptance**

   i. Inaction is rejection.

   ii. **Exceptions** in Restatement in which offeree’s silence or inaction could operate as acceptance:

      1. **Benefit of Services:** When offeree takes benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with expectation of compensation.

      2. **Reason to Understand:** When offeror gave offeree reason to understand that assent may be manifested in silence and the offeree in remaining silent intends to accept the offer.

      3. **Prior Conduct:** Where because of previous dealings it is reasonable that offeree should notify offeror if he does not intend to accept.

H. **TERMINATION OF THE POWER OF ACCEPTANCE**
i. Ways in which Offeree’s Power of Acceptance May be Terminated

1. **Lapse of the Offer:**
   If an offer does not specify its duration, it is deemed to remain open for a reasonable time, which is determined in light of the circumstances of the transaction.

2. **Rejection:**
   If an offer is not accepted before its lapse, it is rejected. If offeree communicates to offeror that she does not intend to accept, offer rejected. Once an offer is rejected, it is no longer effective, and the offeree cannot accept it if she changes her mind.

3. **Counteroffer:**
   A suggestion of a contract on different terms is a counteroffer AND a rejection of the original contract. The offeree becomes the offeror when she makes a CO. Therefore, CO = 1) Rejection of original offer and 2) a New offer.

4. **Revocation:**
   If offer is option or firm offer, then binding and no revocation allowed. If offer is not option or firm offer, then offeror has no obligation to keep offer open. Offeror can revoke any time before acceptance. Revocation ONLY effective when communicated to offeree: (both acceptable ways)
   a. Direct Revocation: offeree learns about revocation from offeror.
   b. Indirect Revocation: offeree learns about revocation in some other reliable way.

5. **The Death or Mental Disability of the Offeror:**
   If one of the parties dies or becomes mentally incompetent after contract is made, the contractual duties of the deceased or incompetent party usually pass to his estate or legal custodian. If the offeror dies or becomes mentally incompetent between the time the offer is made and the time that it is accepted, the offer lapses. Applies even if the offeree did not know or have reason to know of the intervening death or disability, because no contract can be created if the offeror has lost the ability to form contractual intent before acceptance.

6. **Lapse of an Offer by the Passage of Time**
   If an offer does not specify its duration, it is open for acceptance within a reasonable time. The reasonableness of the time an offeree takes to accept an offer is measured from the perspective of the offeree. (Statute of Limitations)

ii. **Revocation of the Offer**
   Unless an offer qualifies as an option, the offeror is free to revoke it at any time before it is effectively accepted – EVEN IF THE OFFER STATES IT WILL BE KEPT OPEN FOR A SPECIFIC PERIOD OF TIME.

   1. **Lost revocation:** If the letter or telegram revoking the offer is lost through misdelivery, the revocation never becomes effective.

iii. **Case Summaries**

   1. **Hendricks v. Behee**
      Rule: There is no contract until acceptance of an offer is communicated to the offeror. Communication of acceptance of a contract to an agent of the offeree is not sufficient, and does not bind the offeror. Unless the offer is supported by consideration, an
offeror may withdraw his offer at any time before acceptance and communication of that fact to him.  
Rule: Revocation must be communicated; until it is communicated, it does not take effect.  The mailbox rule does not apply to a revocation, which must be received by the offeree to be effective.

2. Dickenson v. Dobbs
Rule: Revocation of an offer must be communicated to an offeree, but it does not have to be direct or intentional communication.

I. BILATERAL AND UNILATERAL CONTRACTS AND PERSPECTIVES

i. Acceptance by Performance – the Bilateral Unilateral Distinction

1. If, at the point of contract formation, both parties have made promises to be performed at a future date, the contract is said to be bilateral.

2. A contract is unilateral when the offeree’s performance is complete at the point of contract formation, and only the offeror’s promise is outstanding when the contract is created.  Alt: Unilateral describes a contract in which the obligation of one party is completely performed at the instance of formation, and all that remains is the promise of performance by the other at some future time.

ii. Performance as an Exclusive or Permissive Method of Acceptance

1. Unless the offer clearly requires acceptance to be only by performance, it can be accepted either by performance or promise.  (Conversely, unless the offer clearly requires acceptance to be only by promise, it can be accepted either by promise or performance.)

2. This is in accord with the broader principle that unless a method of acceptance is unambiguously prescribed as exclusive, the offeree may accept by any method that is consistent with the terms of the offer and is reasonable.

VI. OFFER AND ACCEPTANCE UNDER THE UCC: BASIC PRINCIPLES

A. UCC 2-204 expresses three principles:
   i. A contract for the sale of goods should be recognized if either the words of conduct of the parties show an intent to make an agreement.
   ii. A contract may be found even though the court cannot determine the exact moment of its making.
   iii. It is not fatal to contract formation that some terms are left open, provided that it is clear that the parties intended to make a contract and the court can find a reasonably certain basis for giving an appropriate remedy.

B. BATTLE OF THE FORMS

i. Prevents a party from slipping out of a contract, as one would be able to under the “mirror image” rule for merchants with regards to the sale of goods.  Party with the parting “shot” is denied unwarranted advantage.

1. Wherever possible, the UCC tries to find a contract, so as to keep the parties from weaseling out (as they often try to do when the market changes).
ii. Example:
   1. Both offer and acceptance are on pre-printed forms, with blanks left for “negotiated” terms.
   2. One sends a purchase order form, filled with fine-print clauses favoring the buyer. The buyer fills in blanks on details of product, order, quantity, etc.
   3. Seller’s order department responds with acknowledgement form favoring the seller.
   4. Sometimes, here a dispute might arise prior to shipment of any of the goods. Usually, the seller goes ahead and ships the goods and either before or after the buyer has paid for them, disputes erupt concerning the adequacy of the seller’s performance. THEN, the parties consult the purchase order and acknowledgment, and discover that these forms were not in complete agreement on some or many “non-negotiated” terms.

iii. UCC § 2-207 then steps in
   1. Determines whether a contract has been formed at all by the exchange of documents.
   2. If there is a contract, it determines what the terms of that contract are.

iv. UCC § 2-207 Additional Terms in Acceptance or Confirmation
   1. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

   2. Additional term in acceptance: Where the offeree’s response contains an “additional” term (i.e. a clause taking a certain position on an issue with which the offer does not deal at all), the consequences depend on whether both parties are merchants.
      
      a. At least one party not merchant: If at least one party is not a merchant, the additional term does not prevent the offeree’s response from giving rise to a contract, but the additional term becomes part of the contract only if the offeror explicitly assents to it.
      
      b. Example: Consumer sends a purchase order to Seller, which does not mention how disputes are to be resolved. Seller sends an acknowledgement form back to Consumer, which correctly recites the basic terms of the deal (price, quantity, etc.), and then says, “All disputes are to be arbitrated.” Even though the acknowledgement (the “acceptance”) differed from the purchase order by introducing the arbitration term, the acknowledgement formed a contract. However, since at least one party (Consumer) was not a merchant, this additional term will only become part of the contract if Consumer explicitly assents to that term (e.g. by initialing the arbitration clause on the acknowledgement form).

   3. Both merchants: But if both parties to the transaction are merchants, then the additional terms are to be construed as proposals for addition to the contract and automatically become part of the contract, as a general rule, unless:
      a. The offer expressly limits acceptance to the terms of the offer
      b. They materially alter it
         i. Example: a disclaimer of warranty will always be found to materially alter the contract, so if the seller includes such a disclaimer in his acknowledgement form after receiving the buyer’s purchase order, the disclaimer will not become part of the contract.
c. Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

4. Conduct by both parties which recognized the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

a. Acceptance silent: If an issue is handled in the first document (the offer), but not in the second (the acceptance), the acceptance will be treated as covering all terms of the offer, not just those on which the writings agree.
   i. Example: Buyer’s purchase order says that disputes will be arbitrated; Seller’s acknowledgement is silent on the issue of arbitration. The Seller’s form will be found to be an acceptance, and disputes will be arbitrated.

b. Conflicting terms in documents: If an issue is covered one way in the offering document and another (conflicting) way in the acceptance, most courts apply the “knock out” rule. That is, the conflicting clauses “knock each other out” of the contract, so that neither enters the contract. Instead, a UCC “gap-filler” provision is used if one is relevant; otherwise, the common law controls.
   i. Example: Buyer’s purchase order states that disputes will be litigated in New York state court. Seller’s acknowledgement form states that disputes will be arbitrated. Most courts would apply the “knock out” rule, whereby neither the “New York courts” nor “arbitration” clauses would take effect. Instead, the common law – allowing an ordinary civil suit to be brought in any state that has jurisdiction – would apply.

c. Response diverges too much to be acceptance: If a purported acceptance diverges greatly from the terms of the offer, it will not serve as an acceptance at all, so no contract is formed.

d. Contract by parties’ conduct: If the divergence referred to in the prior paragraph occurs (so that the exchange of documents does not create a contract), the parties’ conduct later on can still cause a contract to occur. Section 2-207(3) provides that “conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.”
   i. Example: Buyer’s purchase order is for 100 widgets at $5 each. Seller’s acknowledgement form is for 200 widgets at $7 each. Buyer does not say anything in response to the acknowledgement form. Seller ships the 200 widgets, and Buyer keeps them. Even though the exchange of documents did not create a contract, the parties’ conduct gave rise to a contract by performance.

ii. Buyer’s failure to return goods: One way in which the parties’ conduct can give rise to an agreement without a formal offer and acceptance involves purchases of retail goods whose warranty terms are contained inside a sealed box and are thus unknown to the buyer until after the purchase. If the seller gives the buyer the right to...
cancel the transaction by returning the goods if the buyer is unhappy with the terms she discovers when opening the box, and the buyer in fact retains the goods, the court is likely to decide that the buyer’s retention constitutes agreement to the seller’s proposed terms.

1. Example: D sells shrink-wrapped software, with the terms of the software license printed on a card inside the sealed box. P buys the package at a retail store without knowing the terms of the license inside. He then opens the software, uses it, and is presented with a screen that says, “By using this software, you agree to be bound by the terms of the license found in your box. If you don’t want to be bound, send the package back, and you’ll get your money back.” P uses the software, then violates the license by copying and reselling the software. P will probably be found to be bound by the license, because his actions (retaining and using the goods rather than returning them) will be found to constitute “conduct ... which recognizes the existence of a contract” under UCC § 2-207(3). [ProCD v. Zeidenberg]

iii. Terms: Where a contract by conduct is formed, the terms “consist of those terms in which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.” §2-207(3). For instance, the price term would be a “reasonable price at the time for delivery,” as imposed by §2-305’s price “gap filler.”

e. Confirmation of oral contract: If the parties initially reach an oral agreement, a document later sent by one of them memorializing the agreement is called a “confirmation.”

i. Additional terms in confirmation: If the confirmation contains a term that is additional to the oral agreement, that additional term becomes part of the contract unless either: (1) the additional term materially alters the oral agreement; or (2) the party receiving the confirmation objects to the additional terms.

ii. “Different” term in confirmation: If a clause contained in the confirmation is “different” from a term on the same issue reached in the oral agreement, the new clause probably does not become part of the agreement.

v. UCC §2-207 makes 2 major changes to the common-law rule (common Law Rule: offer & acceptance should mirror each other):

1. A document can constitute an acceptance “even though it states terms additional to or different from those offered or agreed upon,” thus abolishing the “mirror image” rule.

2. Between merchants, the additional terms proposed in the acceptance can become part of the contract in certain circumstances if the other party (offeror) merely remains silent. Here 2-207 modifies the common-law rule that a proposal for a contract can’t be accepted by silence.

[offer] + [acceptance] = (k) even though there may be different or additional terms
VII. PRELIMINARY AND INCOMPLETE AGREEMENTS

A. The Problem with Indefiniteness

i. If the indefiniteness can be explained only by the conclusion that the parties had not really reached agreement on the essential terms of their relationship, there is no contract to enforce.

ii. However, if a court is persuaded that, despite the indefiniteness, the parties really did intend to contract, it should make every effort to try to resolve the indefiniteness and enforce the contract.

iii. UCC 2-204 (3) states that in sale of goods, if parties intended to make a contract and there is a reasonably certain basis for giving a remedy, a contract should not fail for indefiniteness even though the terms are left open.

iv. An agreement may be indefinite because it:
   1. Completely omits some matter vital to exchange
   2. Does not fully, unambiguously deal with the matter
   3. Deliberately leaves that matter open for negotiation

B. Case Summaries

i. Academy of Chicago Publishers v. Cheever
   Court stated that agreement did not provide means of determining the intent of the parties, as it did not shed light on the minimum number of stories to be included or which stories.
   Rule: A contract will be enforced if there is some ambiguity, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.

ii. Martin Delicatessen v. Schumacher
   Deferred agreement…“Annual rentals to be agreed upon” leaves no room for legal construction or resolution of ambiguity.
   Rule: Agreement to agree is too indefinite to constitute a contract.

C. The Effect of an Agreement Reduced to Writing

i. Where the parties have not yet signed a contemplated formal agreement, there may be a question of whether they are bound.

ii. The parties may intend to be bound immediately on reaching agreement, even though they contemplate the later execution of a formal writing. To determine if they are bound immediately or will not be bound until the writing is executed, the court must interpret their intent from their language and dealings in context.

iii. There is a third possibility argued by some: the parties may not yet have formed a contract, but they may have bound themselves to a preliminary agreement to continue negotiating in good faith – to continue to make a good faith effort to try to reach agreement.

   1. Agreement to agree: The court will generally supply a missing term if the parties intentionally leave that term to be agreed upon later, and they then don’t agree. See, e.g., UCC §2-305(1)(b), which allows the court to supply a reasonable price term if “the price is left to be agreed by the parties and they fail to agree.…”

D. Part performance: Even if an agreement is too indefinite for enforcement at the time it is made, the subsequent performance of the parties may cure this indefiniteness.

i. Example: A contracts to make a suit for B, without specifying the type or color of material to be used. This is probably unenforceable for indefiniteness when made. But if A begins to
make the suit with gray cotton cloth, and B raises no objection, the indefiniteness will be cured by this part performance.

E. The Tort of Interference with Contract Relations
   i. Liability could be imposed for enticing a party to abandon the duty to negotiate in good faith or renege on an agreement in principle.
   ii. Requires that the defendant had knowledge of the contract rights and actively induced the breach of those rights (e.g. Texaco v. Pennzoil Case)

VIII. STATUTE OF FRAUDS

A. The Basic Principle
   i. Most contracts do not have to be in writing to be legally enforceable, though it may be harder to prove their existence. However, certain contracts are required by law to be in writing – relatively small and discrete list.
   ii. Three requirements that must be satisfied before a contract subject to the Statute of Frauds can be enforced: a writing, signature, and sufficient content to evidence the contract.

B. Writing: The agreement must be recorded in writing.
   i. Restatement 2nd 132: “The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction.”
   ii. Restatement 2nd 133: “The statute must be signed by a single writing not made as a memorandum of contract” – which implies that the purpose of the statute is evidentiary; even an internal memorandum or an informal letter addressed to third party can satisfy the writing requirement.

C. Signature:
   i. The writing must be signed by the party against whom the contract is to be enforced. The writing can also be signed by the agent of party to be charged, but most statutes require that the agent be authorized in writing to sign on behalf of the party. (**ONLY enforceable for the QUANTITY of goods specified in this writing.)
   ii. “Signature” is broad: any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer. (Initials, thumbprint, arbitrary code, writing, printing, stamping, or by other means will qualify). If writing contains 1++ documents, signature doesn’t need to be on every page, as long as the document on which it appears can be tied to other writings.

D. Content:
   i. The writing need not be full and complete as long as it has enough content, at minimum, to prove that a contract was in fact made, and to identify its subject matter and reveal its material terms.

E. Why mount a defense based on the Statute of Frauds?
   i. To submit a motion to dismiss or an application for summary judgment. The alleged oral contract that the P has said exists is declared non-existent if Statute of Frauds defense prevails, which saves judicial resources and costs of trial.
   ii. Narrow and specific exceptions to the statute that allow enforcement of the contract despite non-compliance with the statute:

F. Logical sequence of questions to ask:
   i. Is this contract subject to the Statute of Frauds?
1. If NO, the contract is likely oral, no further questions.
2. If YES, Question #2:
   ii. Is there a signed writing in a form sufficient to satisfy the statute?
      1. If YES, contract enforceable.
      2. If NO, contract is unenforceable unless answer to #3 is Yes.
   iii. Do the recognized exceptions to the statute of frauds apply?

G. What kinds of transactions are covered under this statute?
   i. Contracts for the sale of land or the transfer of interest in land
   ii. Contracts that cannot be performed within one year from the time of their execution.
   iii. Contracts for the sale of good
   iv. An Executor or Administrator of state who agrees to answer the duty of the deceased.
   v. Guarantor duty: if not in writing
   vi. Consideration of marriage: something you promise in exchange for marriage

H. UCC Article 2 (2-201) Formal Requirements (this is currently being revised)
   i. Oral contract for $500 or more IS NOT enforceable unless there is some writing to indicate a contract has been made, and it is signed by that party against whom enforcement is sought.

I. Case Summaries
      Rule: An oral contract that does not specify explicitly the time for performance is a contract of indefinite duration, and is therefore not enforceable under Statute of Frauds.
   ii. Burns v. McCormick
      Rule: Part performance does not become sufficient grounds for recovery of a transfer of an interest in land under the Statute of Frauds – a writing is still necessary.

J. Past Performance Doctrine
   i. Under some circumstances, courts acknowledge that conduct by the parties following the alleged oral agreement may provide enough proof of the contract so as to dispense with the need for a writing – sometimes referred to as the “part performance” doctrine.
   ii. At common law, this exception has primarily been applied to contracts for the sale of land but can sometimes be found in relation to the one-year rule as well.
   iii. Restatement 2nd, § 129:
      1. A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the statute of frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can ONLY be avoided by specific enforcement.

IX. CONSIDERATION

A. Introduction
   i. Often find that although the consideration doctrine is the basis of a decision, the court is really concerned with the legitimacy of the transaction in issue and is using consideration to achieve an appropriate result.
      1. A court may stretch to find consideration when the promise appears to be seriously intended and fairly obtained, or
      2. May apply the doctrine to invalidate a promise that appears to have resulted from advantage-taking or unfair dealing in an effort to police bargaining behavior.
Consideration is an essential element of contract, and a promise is not recognized or enforced as contractual unless consideration has been given for it. (However, an obligation assumed without consideration may be enforceable under an alternative theory such as promissory estoppel, restitution, etc.)

B. Elements of Consideration

i. Restatement – In order for a promise to be supported by consideration, the parties must bargain for a performance of return promise.

C. The Requirement of a Bargain

i. A bargain is an exchange in which each party is promising to give up something concrete and real and views his promise or performance as the price of the other’s promise or performance.

ii. The bargained-for-price may include not only promises and acts, but also promises to forbear and actual forbearance from performing acts one is legally entitled to perform.

1. Equal Value Not Required
   In most cases, the courts will not examine whether a bargained-for promise or performance is commensurate in value with the counter-promise or performance, so long as the contract is not “unconscionable.”

2. Adequacy not considered
   The court will not inquire into the “adequacy” of the consideration. As long as the promisee suffers some detriment, no matter how small, the court will not find consideration lacking merely because what the promisee gave up was of much less value than what he received.
   a. Example: D is desperate for funds during WWII, and promises to pay P $2,000 after the war in return for $25 now. Held, there is consideration for D’s promise, so P may collect. Mere “inadequacy of consideration” is no defense. [Batsakis v. Demotsis]

iii. Promises to make gifts: A promise to make a gift is generally unenforceable, because it lacks the “bargain” element of consideration.
   1. Example: A says to B, his daughter, “When you turn 21 in four years, I will give you a car worth $10,000.” The four years pass, A refuses to perform, and B sues for breach of contract. B will lose.

D. Case Summaries

i. Congregation v. DeLeo (MA Supreme Court, 1989)
   Defendant suffered a prolonged illness, during which time he was visited by the Plaintiff, the Rabbi of his Congregation. Defendant promised the Rabbi a $25,000 donation; Congregation planned to build a library named after the Defendant with the funds. Defendant died intestate and survived by his wife. Plaintiff brought suit for the $25,000. Court ruled that this was an oral gratuitous pledge with nothing given by the Congregation in exchange for the promise. Furthermore, the Congregation hadn’t begun work on the library – they weren’t relying on the promise.
   Rule: No consideration, no contract.

ii. Hamer v. Sidway (NY Court of Appeals, 1891)
Uncle Story promised nephew $5,000 if he refrained from drinking, smoking, carousing, etc. until his 21st birthday. Nephew agreed and upon turning 21 he wrote to his uncle asking for the money. Uncle was happy for the Nephew but wanted to hang on to the money until Nephew was able to manage it responsibly. Uncle Story died without having paid the $5,000, and Plaintiff brought suit to recover. Court ruled for Plaintiff, stating that Nephew gave up things he had a legal write to do, in exchange for the $5,000 – valid unilateral contract of a promise for a performance with adequate consideration. 

**Rule:** A valuable consideration may consist either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

### iii. Patel v. American Board of Psychiatry (US Court of Appeals, 1992)

Defendant promised to accept Plaintiff’s out-of-country internship for his board certification. Defendant later reneged on that promise. Court found for the Defendant, stating that there was no contract b/c no consideration. The two parties didn’t exchange anything, and the Defendant didn’t want anything from the Plaintiff. Question as to if there was even a promise in this case.

### iv. Carlisle v. T&R Excavating (Ohio Court of Appeals, 1997)

Plaintiff had Defendant married and shortly after, Plaintiff began doing bookkeeping work for the Defendant. She refused payment for her work. Defendant said he would instead help with the construction of her business later. Defendant began the work on Plaintiff’s school, but quite before the job was finished. Couple separated during this time. Plaintiff sued for damages. Court ruled in favor of the Defendant, stating that there is no evidence that the parties exchanged services in a bargain – promise to perform work free of charge if reimbursed firm for cost of materials used was not supported by consideration, and thus was not enforceable contract. Also, no showing was made that Plaintiff had reasonably relied to her detriment on promise, as required to allow recovery under theory of promissory estoppel.

**Rule:** Past consideration cannot support a contract.

### E. PREEXISTING/ANTECEDENT DUTY RULE AND SETTLEMENTS

#### i. A preexisting legal duty cannot serve as consideration for a contract. Anything that is received in exchange for a promise to do what one is already obligated to do is a mere gratuity or a bribe. If a party does or promises to do what he is already legally obligated to do, or if he forbears or promises to forbear from doing something which he is not legally entitled to do, he has not incurred a “detriment” for purposes of consideration.

1. **Modification:** This general rule means that if parties to an existing contract agree to modify the contract for the sole benefit for one of them, the modification will usually be unenforceable at common law, for lack of consideration. Be on the lookout for this scenario especially in construction cases.
   - **Restatement:** The Second Restatement and most modern courts follow this general rule, but they make an exception where the modification is “fair and equitable in view of circumstances not anticipated by the parties when the contract was made.”

#### ii. Case Summaries

1. **Fiege v. Boehm**

   **Holding:** Monetary support for bastard child. Forbearance to sue for a lawful claim or demand is sufficient consideration for a promise to pay for the forbearance if the party forbearing had an honest intention to prosecute litigation which is not frivolous,
vexatious, or unlawful, and which he believed to be well founded. “…if she makes
the charge in good faith.” Court stated that in this case, there was no proof of fraud or
unfairness. Court stated that Boehm gave testimony which indicated that she made
the charge against Fiege in good faith.

F. MUTUALITY

i. “Mutuality of Obligation”

1. The idea that both parties to a contract must give something of legal value in order to
get something in exchange. If one of the parties has neither contributed nor promised
to contribute anything that is meaningful in the eyes of the law, there cannot be said to
be a contract.

2. An illusory promise is not supported by consideration, and is therefore not
enforceable. An illusory promise is a statement which appears to be promising
something, but which in fact does not commit the promisor to do anything at all.
   a. Example: A says to B, “I’ll sell you as many widgets at $4 apiece, up to
1,000, as you choose to order in the next 4 weeks.” B answers, “Fine, we’ve
got a deal.” B then gives A an order for 100 widgets, and A refuses to sell at
the stated price because the market has gone up. B’s promise is illusory, since
she has not committed herself to do anything. Therefore, A’s promise is not
supported by consideration, and is not binding on him.
   i. Right to terminate: If the contract allows one or both parties to
terminate the agreement at his option, this right of termination might
make the promise illusory and the contract therefore unenforceable.

3. Situations in which a party’s obligation might seem illusory:
   a. A party simply performs but never obligates itself to do anything.
   b. A party promises to do something only if a future state of affairs comes to
   pass, and it doesn’t, so the party’s obligation never ripens into anything –
   conditional promise.
   c. One party’s performance is left to its own discretion.

ii. Performance as Consideration

iii. Conditional Promises as Consideration

1. Unless the condition comes to pass, the promise does not become enforceable. Where
the outcome of the conditional event is uncertain or unknown, however, the promisor
takes on some risk by making the promise. The risk may be sufficient to serve as a
“legal detriment.” The promisor may never have to carry out the promise, but
assumption of the risk of an obligation is enough.

iv. Discretionary Promises as Consideration

1. Courts sometimes stretch to find consideration where discretionary promises make
commercial sense. If the promise seems seriously and reasonably made, the modern
trend is to enforce it.

2. If, however, circumstances suggest that the promisor wasn’t acting seriously or didn’t
intend a real obligation, courts are less likely to find that a contract has been formed.
3. One frequently occurring example of a discretionary promise is one subject to a
“satisfaction clause.” Most courts say that such an agreement does not give the party
complete discretion to claim dissatisfaction. Rather, you must act reasonably, in good
faith, or in accordance with some other standard supplied by the court (standards may
differ by jurisdiction).

v. Promises to Pay Past Debts
   1. General rule: Most states enforce a promise to pay a past debt, even though no
      consideration for the promise is given. Thus promises to pay debts that have been
      discharged by bankruptcy, or that are no longer collectible because of the statute of
      limitations, are enforceable in most states.
      a. Writing required: Most states require a signed writing, at least where the
         promise is to pay a debt barred by the statute of limitations.

vi. Promise to Pay for Benefits Received
   1. Generally: A promise to pay for benefits or services one has previously received will
generally be enforceable even without consideration. This is especially likely where
the services were requested, or where the services were furnished without request in
an emergency.

X. PROMISSORY ESTOPPEL

A. A theory that sometimes protects a promisee, who has relied to his detriment on the promise,
even though consideration or other elements or enforceability are not otherwise present. PE has its
strongest expression where the lack of consideration threatens to make a promise unenforceable.

B. The core application of promissory estoppel is in the realm of nonreciprocal promises.

C. Elements (as outlined in Deli v. Univ. of Minnesota):
   i. A promised may be enforced when
      1. It is clear and definite,
      2. The promisor intended to induce the promisee to rely on the promise,
      3. the promisee detrimentally relied on the promise, and
      4. Enforcement of the promise is required to prevent an injustice.

D. Promissory Estoppel: (Restatement § 90)
   i. A promise which the promisor should reasonably expect to induce action or forbearance
      on the part of the promise or a third person and which does induce such action or forbearance
      is binding if injustice can be avoided only by enforcement of the promise.

E. You have to show why there was actual reliance and why the reliance was reasonably foreseeable.
   i. Factors that are relevant: policies implicit in the transaction type, the reason for the non-
      performance, the degree of disproportion associated with enforcement of the promise, and any
      historical patterns of enforcement associated with the transaction type.

F. Damages = amount of reliance (which is not always the full amount of the promise).

G. Promissory Estoppel in the Commercial Context
   i. Most jurisdictions have admitted the possibility of using promissory estoppel to some degree
      in the commercial context.
ii. In Township of YPSILANTI v. GM, the Court held that:
   1. The hyperbole and puffery used by manufacturer’s representatives, in negotiating with
      township for tax abatement allegedly needed to keep manufacturing operation in
      township, did not constitute a “promise” to continue production in township for any
      definite period of time, and
   2. Township did not “reasonably rely” on any representations that were made – even if
      the finding of a contract could be sustained, reliance on the promise would not have
      been reasonable.

H. PE in Employment Disputes
   i. Most courts hold strongly to the employment-at-will doctrine. Employers should not be held
      liable for vague promises of employment for an indefinite duration, even in the face of
      substantial reliance on the part of employees. Even if fairly clear promises are made, reliance
      on those promises us not reasonable in light of the at-will nature of employment. Expenses of
      preparing to take a job and opportunities foregone while on the job are simply the usually
      byproducts of working life, as are the expenses incurred by employers to train employees and
      to forgo opportunities to seek other workers. Both sides take some risks in light of the
      flexibility they gain.
   ii. A few courts recognize that there can be a genuine injury if an employer promises stable
      employment and then does not follow through. Such courts are more willing to apply
      promissory estoppel to fashion some sort of relief.

I. PE in Commercial Negotiations
   i. Some courts have allowed the use of PE in situations where the defendant has, by his conduct,
      inexorably led the plaintiff down the primrose path, and the plaintiff has suffered thereby.
   ii. Full enforcement of the contract that might have been is not in order, but at least the plaintiff
      might be entitled to reimbursement of the expenses it suffered (e.g. Hoffman v. Red Owl
      Stores Case).

J. Other Possible Applications
   i. Promise to make a gift: The P.E. doctrine is most often applied to enforce promises to make
      gifts, where the promisee relies on the gift to his detriment.
      1. Intra-family promises: The doctrine may be applied where the promise is made by
         one member of a family to another. (Example: Mother promises to pay for Son’s
         college education, and Son quits his job. Probably the court will award just the
         damages Son suffers from losing the job, not the full cost of a college education.)
   ii. Charitable subscriptions: A written promise to make a charitable contribution will
      generally be binding without consideration, under the P.E. doctrine. Here, the doctrine is
      watered down: usually the charity does not need to show detrimental reliance. (But oral
      promises to make charitable contributions usually will not be enforceable unless the charity
      relies on the promise to its detriment.)
   iii. Gratuitous bailments and agencies: If a person promises to take care of another’s property
      (a “gratuitous bailment”) or promises to carry out an act as another person’s agent (gratuitous
      agency), the promisor may be held liable under P.E. if he does not perform at all. (However,
      courts are hesitant to apply P.E. to promises to procure insurance for another.)
   iv. Offers by sub-contractors: Where a sub-contractor makes a bid to a general contractor, and
      the latter uses the bid in computing his own master bid on the job, the P.E. doctrine is often
      used to make the sub-bid temporarily irrevocable.
Contracts

COURSE OUTLINE

v. Promise of job: If an employer promises an at-will job to an employee, and then revokes the promise before the employee shows up for work, P.E. may apply.  
   1. Example: A offers a job to B, terminable by either at any time. B quits his established job. Before B shows up for work, A cancels the job offer. A court might hold that even though B could have been fired at any time once he showed up, B should be able to collect the value of the job he quit from A, under a P.E. theory.

vi. Negotiations in good faith: A person who negotiates with another may be found to have a duty to bargain in good faith; if bad faith is found, the court may use P.E. to furnish a remedy.  
   1. Example: A, owner of a shopping mall, promises that it will negotiate a lease for particular space with B, a tenant. B rejects an offer of space from another landlord. A then leases the space to one of B’s competitors for a higher rent. A court might apply P.E., by holding that A implicitly promised to use good faith in the negotiations and breached that promise.

   a. Promises of franchise: The use of P.E. to protect negotiating parties is especially likely where the promise is a promise by a national corporation to award a franchise to the other party. (Example: P, a national company that runs a fast food chain, promises B a franchise. B quits his job and undergoes expensive training in the restaurant business. If A then refuses to award the franchise, a court might use P.E. to enforce the promise, at least to the extent of reimbursing B for his lost job and training expenses.)

XI. OPTIONS AND FIRM OFFERS

A. Option Contracts
   i. A contract with an option to keep the offer open.
      1. Purpose: to allow the offeree some time in which to decide whether to accept the offer. It makes the offer firm, insulating it from the usual events that otherwise terminate the power of acceptance.

      a. Common law requires consideration: The traditional common-law view is that an option contract can be formed only if the offeree gives the offeror consideration for the offer. The consideration compensates the offeror for the risk he assumes when he commits to keeping the offer open. Anything that serves as consideration in a contract generally can serve as consideration in an option contract. The offeree can pay for the option, render some other performance, or promise to render a performance.

      b. Modern (Restatement) approach: But the modern approach, as shown in the Restatement, is that a signed option contract that recites the payment of consideration will be irrevocable, even if the consideration was never paid.

      2. Any attempted revocation by Offeror during the term of the option contract will be ineffective.

      3. Offeree makes no promise to ultimately accept the offer.

B. “Firm offers” under the UCC
   i. The UCC is even more liberal in some cases: it allows formation of an irrevocable offer even if no recital of the payment of consideration is made. By §2-205, an offer to buy or sell goods is irrevocable if it: (1) is by a merchant (i.e., one dealing professionally in the kind of goods in question); (2) is in a signed writing; and (3) gives explicit assurance that the offer will be
held open. Such an offer is irrevocable even though it is without consideration or even a recital of consideration.

1. **Example:** Jeweler gives Consumer a signed document stating, “For the next 120 days, I agree to buy your two-carat diamond antique engagement ring for $4,000.” Even though Consumer has not paid consideration for the irrevocability, and even though there is no recital of consideration in the signed offer, Jeweler’s offer is in fact irrevocable for 120 days, because it is by a merchant (Jeweler professionally sells or buys goods of the kind in question), is in a signed writing, and explicitly assures that the offer will be held open.

   a. **Three month limit:** No offer can be made irrevocable for any longer than three months, unless consideration is given. §2-205.

   b. **Forms supplied by offeree:** If the firm offer is on a form drafted by the offeree, it is irrevocable only if the particular “firm offer” clause is separately signed by the offeror.

ii. **Offers by sub-contractors:** Most importantly, an offer by a sub-contractor to a general contractor will often become temporarily irrevocable under this rule.

   1. **Example:** A, sub-contractor, offers to supply steel to B on a job where B is bidding to become the general contractor. B calculates his bid in reliance on the figure quoted by A. B gets the job. Before B can accept, A tries to revoke. If B can show that he bid a lower price because of A’s sub-bid, the court will probably hold A to the contract, or at least award B damages equal to the difference between A’s bid and the next-lowest available bid. But observe that B, the offeree, is not bound, so B could accept somebody else’s sub-bid.

XII. **UNJUST ENRICHMENT AND MATERIAL BENEFIT**

A. A cause of action that arises where the claimant has conferred a benefit on the recipient under circumstances that make it unjust for the recipient to keep the benefit without paying for it.

B. Also available in situations in which a contract is unenforceable or the contract has a defect that allows one of the parties to set it aside (avoid it).

C. Elements:
   
   i. **One party must have been enriched by obtaining property, services, or some other economic benefit from the other, and**
   
   ii. **The circumstances must be such that it would be unjust for the beneficiary to keep the benefit of that enrichment without paying or compensating the other party for the benefit.**

D. If the court finds that there has been unjust enrichment, the remedy granted is **restitution,** which may consist of an order for the return of the benefit itself or a money judgment for its value.

   i. The most common valuation standard used the market value of the goods or services – quantum merit (as much as deserved) refers to the market value of the services, and quantum valebant (as much as they are worth) is used to denote the market value of goods.

E. It is not always unjust for a person to retain a benefit that was imposed and cannot be returned. That is, the person who conferred the benefit had no justification for providing it without being asked, and the benefit cannot simply be given back. That person is an **“Officious Intermeddler,”** and the law should not encourage his meddling.

F. **MORAL OBLIGATION**
i. **A moral obligation is not enforceable as a legal right.** A promise is not enforceable as a contract merely because the promisor has some moral duty to perform it. Unless a bargained-for detriment has been exchanged for the contract, contract law provides no legal basis for enforcement that rests purely on the ground that it is morally right that the promisor should perform.

ii. **However, courts do sometimes recognize a binding legal promise under circumstances they describe as “moral obligation.”** Applies only in narrow circumstances.

   1. **Where a debtor promises to pay a preexisting unenforceable legal debt (debt barred by the statute of limitations)** – a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of the statute of limitations (Restatement § 82).
   2. **Promise to perform a voidable obligation** – if a person enters into a voidable contract and subsequently ratifies it by making a promise to perform, the doctrine of moral obligation renders this promise enforceable even though no new consideration was given for it.
   3. **Promise to pay a debt discharged in bankruptcy** – at common law, if the debtor makes a promise after bankruptcy to pay the discharged portion of the debt, this promise is supported by a moral obligation and does not need new consideration to make it binding.

iii. It is an exception to the consideration doctrine and allows a prior detriment (past performance) to be treated as sufficient to support the later promise given on account of it. The prior benefit is conceived of as creating a moral obligation that justifies dispensing with the requirement of an exchange.

iv. Like promissory estoppel, MO is a promissory theory of liability, but it focuses on a detriment suffered prior to the promise rather than a detriment subsequent to and in reliance on a promise.

v. **Elements:**
   1. Some benefit was conferred on the promisor by the promise before the promise was made.
   2. The benefit unjustly enriched the promisor.
   3. The promisor subsequently made a promise to pay for the benefit.

vi. Some courts have been willing to develop the more generalized doctrine of moral obligation where the prior benefit does not constitute an unenforceable legal – the **material benefit rule.**

   1. **Case Example - Webb v. Mc Gowin**
      a. Webb saved McGowin from death or grievous bodily harm and in so doing, seriously injured himself. McGowin promised to pay for Webb’s care for the rest of his life. This was a material benefit to McGowin of infinite more value that any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate Webb for the services rendered.
      Rule: Where the Where the promisee cares for, improves, and preserves the property of the promisor, though done without request, it is sufficient consideration for the promisor’s subsequent agreement to pay for the service, because of the material benefit received.
XIII. POLICING CONTRACTS FOR IMPROPER BARGAINING – MISREPRESENTATION, AND FRAUD

A. If the court finds that the apparent manifestation of one party’s assent was induced by improper means, it may refuse to enforce the contract as a whole or some aspect of it.

B. The remedy is to allow the victim of the improper conduct to avoid the contract.
   i. A contract that is void – a legal nullity.
   ii. A voidable contract – the aggrieved party can elect either to keep it in force or to exercise a right to rescind it (avoid it).
      1. If a contract is avoided, the general rule is that each party is entitled to restitution of any benefits conferred on the other under the contract up to the time of avoidance.
      2. A party entitled to avoid a contract may either sue affirmatively for avoidance or may use the right of avoidance defensively if sued by the other party.

C. Misrepresentation – an assertion not in accordance with the facts (also recognized as a tort).
   i. When a fact forming the basis of the contract is misrepresented, the problem is perceived not as a matter of breach but as a question of accountability for making a false statement.
   ii. If a misrepresentation is made with the knowledge that it is untrue (called “scienter”) and with an intent to mislead the other party, it is fraudulent.
      1. Might take the form of an express statement, or
      2. A deliberate concealment of or failure to disclose a fact.
   iii. A fraudulent misrepresentation is most serious form and most likely to justify relief.
   iv. A negligent misrepresentation (made carelessly rather than dishonestly) could also give rise to a remedy.
   v. Restatement 2nd § 164 states that a misrepresentation makes a contract voidable if it is either fraudulent or material. Most courts include materiality as an element of fraud.

D. Nondisclosure – Silence as Fraud?
   i. General rule is that a party who proposes a contract does not have an obligation to affirmatively disclose facts concerning the subject matter of the contract. Disclosure of material facts is required if the parties are in:
      1. A fiduciary relationship, or
      2. A relationship of trust or confidence.
      3. Also, where a material fact is known to one party by virtue of his special position and could not be readily determined by the other party in the exercise of normal diligence.

E. Possible Claims:
   i. Fraud in the inducement
   ii. Fraud in the factum
   iii. Material misrepresentation

F. Remedies for Fraudulent Misrepresentation
   i. Allow the victim to rescind the contract and to obtain restitution for any performance that has been rendered.
   ii. Permit the victim to keep the contract in force and sue for any loss in value of the performance as a result of the fraud.

G. Case Summary
   i. Sarvis v. Vermont State Colleges
Plaintiff misrepresented material facts related to his candidacy upon which the defendant relied when making its employment decision. A contract of employment procured by fraud in the inducement could be rescinded.

H. DURESS – the compulsion of a manifestation of assent by force or threat

i. May consist of a threat of physical violence to the other party or someone the party cares about or of economic harm or loss – sometimes called “economic duress.”

ii. Restatement, 2nd §175 – If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
   1. The protection of the victim outweighs any reliance interest that the party making the threat may have.

iii. Case Summaries

1. In re: House of Drugs, Inc. v. RD Elmwood Associates
   In its adversary action against landlord, debtor asserted fraud and a violation of New Jersey’s implied covenant of good faith and fair dealing by failing to disclose to debtor the status of two tenancies, contained within a shopping mall at the time debtor negotiated to assume a lease in the mall.
   Holding: The court found no fraud by the landlord and no violation of the implied covenant of good faith and fair dealing. Debtor performed an independent investigation, was represented by counsel, knew of one of the tenant’s bankruptcy, and had a general conviction concerning retail store turnover. These facts imposed on debtor a duty of reasonable diligence.

2. Stambovsky v. Ackley
   Plaintiff contracted to purchase a house from defendant. After the sale was complete, Plaintiff learned the house had a reputation as being possessed by poltergeists.
   Holding: Rescission was appropriate since defendant took unfair advantage of plaintiff’s ignorance of house’s haunted reputation, which reputation defendant herself had created and perpetuated.

3. CUMMINGS v. HPG INTERNATIONAL, INC
   Plaintiff claimed that it would not have bought the roofs it bought but for Defendant’s misrepresentations, and so its deceit claim, based on Defendant’s allegedly fraudulent misrepresentations, was not barred by the existence of an express warranty.
   Holding: There was no evidence to suggest that defendant knew or should have known that its statements about its product were false. Therefore, both the deceit claim and the negligent misrepresentation claim failed.

I. EXCONOMIC DURESS, BAD FAITH AND CONTRACT MODIFICATION

i. Case Summary

1. Austin Instrument Inc. v. Loral Corp. – the application of duress doctrine to modifications
   Defendant was awarded a Navy contract for radar sets that required them to subcontract out for some of the components. They entered into a contract with the Plaintiff.
### ii. Supervening Difficulty as a Basis for Upholding a Modification without Consideration

1. Where events following the formation of contract create a difficulty not anticipated by the parties at the time of contracting, a fairly bargained modification of the contract to take account of that unforeseen difficulty is valid. This principle is sometimes called the “supervening or unforeseen difficulties” exception to the preexisting duty rule.

2. For the exception to apply, the following standards must be satisfied:
   
a. After the contract is made, it must become apparent that the performance of the contract is subject to substantial and burdensome difficulties not anticipated, and not within the contemplation of the parties at the time the contract was made. The difficulties need not be so severe that they would give the party benefiting from the modification grounds to be excused entirely from performance, but they must not simply be attributable to his error of judgment in setting the price for the performance.

b. The party benefiting from the modification must conform to standards of honesty and fair dealing. It must be clear that he is not attempting to take advantage of the necessities of the other party or to coerce a promise of further compensation.

c. The change in the performance of the party who assumes the increased obligations must be reasonable and manifestly fair in view of the changed conditions.

### iii. UCC Article 2 has no provisions governing duress, misrepresentation, or undue influence, and therefore, the common law principles of these doctrines apply to sales of goods.

### iv. Article 2 does depart from common law by declaring that no consideration is needed to validate an agreement modifying a contract for the sale of goods.

#### 1. Modifications must satisfy Article 2’s general test of good faith.

### J. UNDUE INFLUENCE

i. Typically applicable only when the victim is particularly vulnerable to the persuasion of the other party because of some kind of relationship of submissiveness, dependence, or trust.

ii. The wrong the doctrine seeks to address is essentially the abuse of power.

iii. Restatement, 2nd §172(2) provides that a person whose manifestation of assent is induced by undue influence may avoid the contract. Defines undue influence as “…unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that the person will not act in a manner inconsistent with his welfare.”

iv. Restatement, 2nd §175(2) – The victim can avoid a contract induced by the undue influence of a nonparty unless the other party to the contract in good faith, and without reason to know of the undue influence, gives value or relies materially on the transaction.
v. Case Summary

1. **Odorizzi v. Bloomfield School District**
   Plaintiff was employed as an elementary school teacher by Defendant. He was arrested, and after just having returned home from his booking and questioning, the principle and superintendent came to his home. They said he should resign his position immediately. No need to get an attorney, just resign immediately and we will not publicize the incident jeopardizing his chances for future employment.

Holding: The teacher’s consent to the transaction had been obtained through the use of undue influence. According to the court, it was possible that the teacher's exhaustion and emotional turmoil wholly incapacitated him from exercising his judgment and that he was overly persuaded into signing his resignation document.

K. UNCONSCIONABILITY

i. A contract is unconscionable if the transaction is so unfair that it would offend the conscience of the court to enforce it.

ii. UCC Article 2 (and the Restatement) recognizes unconscionability and says court may:
   1. Refuse to enforce the contract,
   2. Enforce the remainder of the contract without the unconscionable clause (“severance”), or
   3. Limit the application of the unconscionable clause so as to avoid any unconscionable result (rewriting – adjustment of the term to get rid of its unconscionable effect).

iii. Determination of unconscionability is made by the judge not the jury.

iv. Unconscionability defies precise definition, but most courts make the distinction between procedural (most common) and substantive unconscionability. Courts balance the elements and make be satisfied with a very modest showing of one, if the other is shown emphatically.

1. **Procedural Unconscionability**
   a. Relates to the way the contract was formed – “bargaining naughtiness” or “unfair surprise,” focusing on unfair bargaining tactics, disparity of power leading to imposition, and other factors that make it possible for one party to take unfair advantage of the other.

2. **Substantive Unconscionability**
   a. Related to the terms of the resulting contract, focusing on whether, as a result of behaving in a procedurally unconscionable way, one of the parties was able to impose an unfair contract or term of the other.

v. Adhesion Contracts

1. Contracts in which the parties occupy substantially unequal bargaining positions, and the party in the inferior bargaining position is forced to “adhere” to the terms in the other’s printed form on a take-it-or-leave-it basis, rather than having the terms dickered out. Modern cases tend to hold that a contracting party is bound only by those provisions that are not unfairly surprising.

2. Examples include life insurance policies, consumer loan agreements, and residential leases.

vi. When deciding whether a contract is unconscionable, **unconscionability must exist at the time the contract was made**. Therefore, an event occurring after contract formation that makes the terms lopsided (e.g. a draught causing the price of oranges to quadruple) cannot
result in unconscionability, although it may sometimes provide a basis for relief under the doctrine of changed circumstances.

**XIV. POLICING CONTRACTS ON GROUNDS OTHER THAN IMPROPER BARGAINING**

**A. ILLEGALITY**

i. If a contract is made, and is legal when made, but becomes illegal thereafter, the contract is discharged. A contract is illegal if either the consideration or the object of the contract is illegal.

ii. Some contracts are illegal because they are expressly prohibited by statute (e.g. gambling contracts and contracts in restraint of trade). Other contracts are illegal because they violate public policy (e.g. contracts to defraud or injure third parties).

iii. Effects of Illegality

1. An illegal contract is void, and the general rule is that if a contract is illegal the courts will not intercede to aid either party. If the contract is partly performed, neither party can recover in restitution for benefits conferred. The rationale is that the public importance of discouraging such transactions outweighs the considerations of possible injustice between the parties.

2. Some exceptions:
   a. **Severable portions may be enforced.**
   b. **“Locus penitentiae” doctrine** – some decisions hold that where one party to an illegal contract repents and repudiates the contract before any part of the illegal purpose is carried out, that party may obtain restitutionary recovery for the value of what he gave in performance prior to repenting and repudiating.
   c. **Not “in pari delicto”** – the innocent part is said to be not “in pari delicto” – not guilty of serious moral turpitude and is not as blameworthy are the other party.

**B. INCAPACITY**

i. Minors

1. With a few narrow exceptions, a minor can avoid his contract simply by showing that he was a minor at the time he made it. A minor does not have the capacity to bind himself to a contract.

2. In most cases, a minor’s lack of contractual capacity makes the contract voidable, not void.
   a. The minor may choose to avoid or disaffirm the contract on the grounds of incapacity, or to keep it in force.
   b. A minor may disaffirm the contract, expressly or by conduct, at any time before reaching majority or within a reasonable time after reaching majority.
   c. Once the contract is disaffirmed, it comes to an end and the minor cannot change his mind and seek to enforce it.

ii. Mental Incapacity

1. An adult is presumed to have contractual capacity. A mentally incompetent party may overturn the presumption by **evidence** that establishes that she lacked **contractual**
capacity at the time of entering the transaction. Conduct must be attributable to a psychiatrically recognized condition, not poor business sense.

2. Most courts, treat incapacity as rendering the contract voidable, not void.

3. If the incompetent person chooses not to avoid the contract, it is binding, and her incapacity cannot be raised as a defense by the other party.

4. Restatement, 2nd §15 contract may be voided if by reason of mental illness or defect:
   a. he/she is unable to understand the nature and consequences of the transaction, or
   b. he/she is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

5. The other party’s knowledge or reason to know of the mental defect is relevant to the incompetent’s right to avoid the contract, or to the remedy available if avoidance is allowed.

XV. CONTRACT INTERPRETATION AND CONSTRUCTION

A. A contract can be based on either words or conduct. The intent of the parties remains central. Where unclear, the courts look to the reasonable expectations that the words and the conduct of the parties engender.

B. The objective theory of contracts demands that the court focus on what a reasonable party would have expected under the same circumstances.

C. Where terms are ambiguous, must look to the context of the transaction.

D. Restatement:
   i. Words and other conduct are interpreted in the light of all the circumstances, and if the principle purpose of the parties is ascertainable it is given great weight.
   ii. A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
   iii. Express, specific and exact terms are given greatest weight.

E. Where words and circumstances yield insufficient clues, courts resolve disputes using general principles of law through the process of “construction.”
   i. Construction is generally couched in terms of the parties’ probable intent.
   ii. Courts seek to balance the parties’ freedom to contract with public policy.

F. Interpretation vs. Construction
   i. Pure interpretation focuses on discerning the actual intent manifested by the parties. Pure construction supplies contractual content based on public policies or general principles of law.

G. Gap Fillers
   i. Standard contract terms used to fill out the parties’ agreement.
   ii. Come into play when there truly is a gap as to the parties’ intention.
   iii. Article 2 Example:
       1. So long as the parties had the intent to be bound, Article 2 will supply among other things a price, a method of payment, and a method delivery if the parties failed to do so.
iv. The relevant contract term is often determined in light of what is “reasonable” under the circumstances.

v. There are specific Gap Fillers – e.g. the Implied Warranty of Merchantability.
   1. A merchant seller and a buyer do not need to manifest any intent to include an implied warranty of merchantability in their contract. So long as the statutory elements are present, the warranty arises – unless the parties affirmatively negated.

H. General Obligations of Good Faith and Fair Dealing
   i. Restatement, 2nd and UCC 1-203 – Every contract imposes upon each party a duty of good faith and fair dealing in its performance or enforcement.

XVI. PAROL EVIDENCE RULE – reinforces and extends the preference given to written contract terms.

A. Parol evidence refers to evidence other than the written memorial of agreement that is offered by a party to prove alleged contract terms. It includes evidence of alleged oral agreements made before or contemporaneously with the execution of the writing and alleged written agreements made before the writing.

B. The Rule limits a party’s ability to offer extrinsic evidence and to have the court consider such evidence in interpreting the contract. It considers evidence of any term alleged but not reflected in the writing to be questionable.

C. If a party offers the evidence not to contradict a writing but instead to add a term relating to a matter on which the writing is silent, the parol evidence rule may or may not bar the factfinder’s consideration of the evidence, depending on the circumstances.
   i. If the writing is relatively final, thorough, and complete – “fully integrated” – the evidence is not admissible.
   ii. If the writing is incomplete or “partially integrated,” often the evidence will be admissible to fill out the terms of the writing. However, even here the evidence may not contradict what has been included in the writing.
   iii. If the writing is unclear or ambiguous, parol evidence may be used to clarify the unclear of ambiguous term but, again, cannot contradict the writing.

D. Judge decides whether PE is admissible. If yes, factfinder evaluates its credibility.

E. A widely accepted modern rule adopted by the Restatement is that parol evidence is admissible if it concerns a term that would naturally be omitted from the written agreement. Under the Restatement, a term will be treated as naturally omitted if:
   i. The term does not conflict with the written integration, and
   ii. The term concerns a subject that similarly situated parties would not ordinarily be expected to include in the written agreement.

F. The Use of Merger or Integration Clauses
   i. Purpose is to invoke the strongest possible protection from the parol evidence rule and encourage courts to resolve the dispute on the basis of the writing alone.
   ii. Courts typically give them great weight, but not always conclusive effect.

G. Escape from the PE Rule: Exceptions for Evidence of the Validity or Voidability of the K
   i. At common law, extrinsic evidence that would successfully demonstrate that an alleged contract is either void or voidable (e.g. misrepresentation or fraud) is admissible, even in the face of the PE Rule.
XVII. MISUNDERSTANDING, MISTAKE AND CHANGED CIRCUMSTANCES

A. MISUNDERSTANDING
   i. Arises when parties differ in their subjective interpretation of contract terms.

   ii. When there is no basis (words or conduct in light of context) to prefer one party’s interpretation over the other, and neither party is to blame, courts find “misunderstanding” or “complete misunderstanding.”

   iii. Courts may then conclude that any manifestation of mutual assent is illusory (not real) – no real “meeting of the minds,” and no contract has been formed.

   iv. Inapplicable when one party’s interpretation is more reasonable than the other’s. In that case, a contract will likely be formed based on the reasonable interpretation.

B. MISTAKE
   i. Parties reach agreement, but one or both of the parties reach the agreement on the assumption that a certain state of affairs exists. At some point later, it becomes clear that the assumed state of affairs does not exist and did not exist at the time the contract was reached. Had he known, the aggrieved party argues that he would not have entered into the contract.

   ii. The modern rule is that where parties enter into a contract under a mutual mistake concerning a basic assumption of fact on which the contract was made, the contract is voidable by the adversely affected party, if (1) the mistake has a material effect on the agreed exchange and (2) the adversely affected party did not bear the risk that the assumption was mistaken.

   iii. Doctrine of Mistake seeks to strike a balance between the party who is adversely affected by the mistake and the party who would be adversely affected if the court were to grant relief from the contract.

   iv. Mutual Mistake
      1. Will be grounds for voiding a contract if:
         a. The mistake relates to a fact that was in existence at the time of the contract.
         b. The mistake is shared by both parties.
         c. The mistake relates to a basic assumption on which the contract was made (something central to the contract, rather than a minor or peripheral matter).
         d. The mistake has a material effect on the agreed exchange of performances.
         e. The complaining party did not bear the risk of the mistake.

      2. Restatement – A party bears the risk of a mistake when
         a. The risk is allocated to him by agreement of the parties, or
         b. He is aware, at the time the contract was made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
         c. The risk is allocated to him by the court b/c it is reasonable to do so.

   v. Case Summary
      1. Raffles v. Wichelhaus “The Peerless”
Court refused enforce a contract based on mutual mistake, when defendant intended to buy cotton on a ship named peerless sailing in Oct. while plaintiff intended to sell cotton on a ship named peerless sailing in Dec.

Holding: Lack of offer and acceptance another way to get same result – acceptance did not mirror. Neither party liable for expectation damages when mutual mistake. Both parties have to not know of other’s meaning or both have to know of other’s meaning to have mutual mistake.

vi. Third-Party Error – one who selected third party who made mistake (i.e. telegraph) bears the burden

vii. Unilateral Mistake
1. Where only one party is mistaken, it will take a strong showing of unconscionabililty or unfairness to relieve that party of the consequences of its own mistaken actions.
2. Relief also more likely when there has been no reliance.

<table>
<thead>
<tr>
<th>Mutual Mistake</th>
<th>Unilateral Mistake</th>
</tr>
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<tbody>
<tr>
<td>The mistake relates to a fact that was in existence at the time of the contract.</td>
<td>The mistake relates to a fact that was in existence at the time of the contract.</td>
</tr>
<tr>
<td>The mistake is shared by both parties.</td>
<td>The mistake is shared by one party only.</td>
</tr>
<tr>
<td>The mistake relates to a basic assumption on which the contract was made.</td>
<td>The mistake relates to a basic assumption on which the mistaken party made the contract.</td>
</tr>
<tr>
<td>The mistake has a material effect on the agreed exchange of performances.</td>
<td>The mistake has a material effect on the agreed exchange of performances that is adverse to the mistaken party.</td>
</tr>
<tr>
<td>The complaining party did not bear the risk of the mistake.</td>
<td>The mistaken party did not bear the risk of the mistake.</td>
</tr>
</tbody>
</table>

Either (a) the effect of the mistake is such that enforcement of the contract would be unconscionable or (b) the other party had reason to know of the mistake or his fault caused the mistake.

viii. Mistaken Bid
1. Problem: Contractors in making bids to owners rely on estimates from sub-contractors. Once their bid is accepted by the owner they are bound, but the subcontractor is still free to walk away or to change their bid (Drennan v. Star Paving Case – plaintiff recovered on Promissory Estoppel, relied on the bid and had no reason to know that it was a mistake).

ix. Relief for Mistake
1. Rescission (avoidance)
2. Restatement – reliance damages or reforming of terms of contract.
3. The party seeking to establish the error in written contract has to 1st overcome the Parol Evidence Rule and 2nd, must convince court that she is entitled to relief.

C. Excuse Due to Changed Circumstances
Contracts

COURSE OUTLINE

i. Impracticability
   1. The change in circumstances so drastically increase the burden on the party claiming relief that performance can be fairly regarded as impractical.

   2. Restatement (and UCC) – Where after a contract is made, a party’s performance is made impractical without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

   3. Case Example: Clark v. Wallace Country Cooperative Exchange
      a. Clark sought to be excused from his obligation to deliver because his crop was damaged by the weather. Court held that only objective impracticability may relieve a party of his contractual obligation. In this case, there was no objective impracticability since the corn was not identified to be from specific land – Clark had the ability to deliver the grain by purchasing it elsewhere. Difficulties with the weather are reasonably foreseeable to farmers.
      b. Vs. Taylor v. Caldwell in which opera house had been completely destroyed – impossible to perform in opera house.

4. **Look for materiality and risk allocation

ii. Frustration of Purpose
   1. Performance will also be excused where a change in circumstances following the contract defeated the mutually understood purpose of the contract.

   2. The assumption must be fundamental to the contract and must be shared.

   3. Restatement – Where, after a contract is made, a party’s principle purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

iii. Relief – generally only available if the supervening change in circumstances imposes a severe and unwarranted burden on the party seeking relief and it is not appropriate to place the risk of the change on that party.

XVIII. CONDITIONS

A. An event, not certain to occur, which must occur before performance under a contract becomes due.

B. Express, Implied, Construed Conditions

   i. Express Condition – stated clearly and expressly in a contract with articulated intent by both parties to make it a condition.

   ii. Implied Condition – can be inferred as a matter of evidence from the language in context.

   iii. Construed Condition – where there is not enough evidence to draw a factual inference, but either a rule of law recognizes a condition under the circumstances or the court concludes as a
matter of law that it is reasonable and fair, given the nature of the relationship and the usual expectations in this type of contract.

<table>
<thead>
<tr>
<th>Promise</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition</strong></td>
<td>An undertaking to perform or refrain from performing a certain act.</td>
</tr>
<tr>
<td><strong>Example</strong></td>
<td>“I agree to sell you my car for $10,000.”</td>
</tr>
<tr>
<td><strong>Result if promised performance/condition does not occur</strong></td>
<td>Nonperforming party breaches contract and incurs liability. Other party’s performance may be excused.</td>
</tr>
<tr>
<td></td>
<td>Party not fulfilling condition does not breach contract or incur liability. Other party’s performance is excused.</td>
</tr>
</tbody>
</table>

C. The Various Uses of Conditions

i. Inserted to allow a party to escape the contract if a specified event occurs or fails to occur.

ii. Used to allow one of the parties to exercise judgment by making that party’s performance contingent upon her being satisfied with a specified outcome or state of affairs.

iii. Used to allow for alternative performances. That is, if the condition occurs, the party must perform in one way, and if it does not occur, she must perform in another.

iv. Used as a means of sequencing performances by making one performance a condition of the other.

“Pure” – if its fulfillment or non-fulfillment is beyond the control of the parties.

“Promissory” – if one of the parties has some ability to influence the outcome of the event (e.g. will buy your house if I am able to sell mine for $150,000).

v. Conditions of Satisfaction

1. One form of an escape clause used where a party’s desire for the contract is contingent upon her being satisfied with the outcome of some uncertain event (e.g. sale of property on credit conditional on the seller’s satisfaction with the buyer’s credit rating).

2. May be express, implied or construed.

3. **If a party retains unlimited discretion to decide whether to perform, she really has made no commitment**, and her apparent promise is an illusion (illusory promise). It therefore does not constitute a legal detriment.

4. General guidelines used by courts:
   a. If the satisfaction relates to **matters of taste or artistic judgment**, the party’s dissatisfaction must be in good faith.
   b. If the satisfaction relates to **matters of a technical or commercial nature**, the dissatisfaction must be reasonable.
Contracts

COURSE OUTLINE

D. Excuse of Conditions by Waiver or Estoppel

Basic point of both doctrines is that after the contract has been entered, the party who is the beneficiary of the condition manifests the intention, reasonably interpreted from words or conduct, that he will not require the condition to be satisfied as a prerequisite to his performance – he abandoned the condition, so that his duty to perform becomes unconditional.

i. Waiver – a knowing a voluntary abandonment of a right.
   1. B/c no consideration given for the waiver, the non-waiving party may raise it only if the waived right is a nonmaterial or ancillary part of the contract.
   2. If the right is a material part of the exchange, it can only be abandoned by a modification of the contract which requires consideration for relinquishing it.
   3. Unlike estoppel, waiver does not require justifiable reliance and detriment.

ii. Estoppel – where the beneficiary of a condition indicates by words or conduct that he will perform the contingent promise despite non-fulfillment of the condition.
   1. The party to be estopped must have known or had reason to know that his words or conduct were likely to have been relied on by the other party, and they must in fact have been relied on by that party to her detriment.
   2. Unlike waiver, estoppel is not confined to nonmaterial changes in contract, and the behavior need not meet the same standards of knowing and voluntary abandonment of a right - a party may be estopped on the basis of careless action.

E. Obstructive or Uncooperative Conduct

Where a promisor prevents fulfillment of a condition in breach of the duty not to hinder or impede its occurrence, the proper response is to excuse the condition, making the promise unconditional. If the promisor then fails to perform, he is in breach of the contract.

F. Unfair Forfeiture

Based on the court’s determination that enforcement of the condition would result in undue and unfair hardship to the party to whom the performance is due.

XIX. MATERIAL BREACH AND SUBSTANTIAL PERFORMANCE

A. Total Breach – a breach so serious that it allows the other party to decline her performance, terminate the contract, and sue for full expectation damages.

B. Partial Breach – breach of lesser gravity, and the performance of the breaching party, even though it falls short of what is required by the contract, is called substantial performance.

C. Substantial Performance
   i. Materiality is a factual question, not simply a matter of assumption, to be decided by evaluating the discrepancy between what was promised and what was performed and assessing how central the nonconformity is to the bargain and its impact on the reasonable expectations of the victim of the breach.

   ii. Consequences
      1. Usual measure of damages is the cost to the victim of rectifying the defective performance.
         a. Exception (Jacobs v. Young Case): An award of the cost of rectifying the nonconformity is not appropriate where the breach is neither material nor willful, and the cost of remedying the defect would be grossly out of proportion to the harm. Court held it to be more proper to award the victim no more than the amount by which the defective work had reduced the market value of the product of performance – the house.
2. The **Recovery of the Breaching Party: Unjust Enrichment**  
   a. If a party materially breaches the contract, he cannot recover any damages.  
      i. Exception: If the breacher has partially performed before his breach,  
         most courts recognize a claim in unjust enrichment for restitution of  
         any benefit that has been conferred on the other party.  
      ii. Not entitled to receive the market value of the performance, only the  
          actual economic enrichment of the other party.  
      iii. Restitutionary claim also limited by the contract value and offset by  
           any damages to which the other party is entitled as a result of the  
           breach.

D. **Concept of Cure**  
   i. Sometimes a potentially material breach can be averted by cure – fixing the problem before it  
      becomes serious.  
   ii. Must be given the opportunity to cure the defective performance – right to declare total breach  
      will only arise if cure fails within time allotted by the contract (i.e. if the delay us a material  
      breach, the attempt at cure is ineffective).

E. **Breach and Substantial Performance Under UCC: Perfect Tender, Cure, and Installment Contracts**
   i. **Perfect Tender Under Article 2**  
      1. The seller’s principle obligation is to tender delivery of the goods at the time and  
         place provided in the contract. Upon delivery, the buyer has the right to inspect the  
         goods. If the tender conforms to the contract, she must accept them.  
      2. If the seller makes a material and incurable breach, the buyer would be able to reject  
         the goods, refuse payment, and claim total breach.  
      3. If the breach is minor, the buyer is confined to the remedy for substantial  
         performance.  
      4. **“Perfect Tender Rule”**  
         a. If the goods or the tender of delivery fail in any respect to conform to the  
            contract, the buyer may:  
            i. Reject the whole; or  
            ii. Accept the whole; or  
            iii. Accept any commercial unit or units and reject the rest.  
         b. Subject to the general obligation of good faith.

   ii. **Seller’s Right to Cure**  
      1. Article 2 gives the seller the right to cure the nonconformity and avoid rejection of the  
         goods and termination of the contract.

   iii. **Installment Contracts**  
      1. Buyer may reject any nonconforming installment.  
      2. Whenever nonconformity or default with respect to one or more installments  
         substantially impairs the value of the whole contract there is a breach of the whole.

F. **Anticipatory Repudiation and Prospective Nonperformance**
   i. **Anticipatory Repudiation**  
      1. When before the date for performance, the promisor makes it clear by words of  
         actions that she will not perform when the time for performance falls due = an  
         immediate breach.
2. At common law, a repudiation only gives rise to a right to withhold performance, cancel the contract, and sue for full expectation damages if it is material – a total breach.

XX. REMEDIES

A. Expectation Damages – tries to put the injured party in the same position he would have been in had the contract been performed.

General Formula for expectation damages = Lost Value (LV) + Incidental Loss (I) + Consequential Loss (C) - Cost Avoided (CA) - Loss Avoided (LA)

\[
\text{Contract Price – Cost Saved = Damages}
\]

i. Compensatory Damages (sometimes referred to as lost value)

1. Compensatory damages can be defined as the amount of money necessary to make up for the economic loss caused by the breach of contract.
2. For example, a seller of 10 bushels of wheat fails to deliver the wheat to the buyer at the agreed price of $10 per bushel on the set date of delivery. Compensatory damages would equal either $100 or the difference between the market price of the wheat and the contract price, if the buyer covered the transaction by buying wheat from another seller. The sum of damages enables the buyer to replace the good.

ii. Consequential Damages

1. Consequential damages are economic loss caused indirectly by a breach of contract.
2. For example, a retail store buys customized software to run its cash registers and inventory system. One day system breaks down completely and does not work. As a result, the store must close for a day to repair the system. The store’s loss of business for that day is a consequential damage of the breach of contract. Whether or not the store may sue for consequential damages depends upon the nature of the contract between the store and the software company.
3. Note: Consequential damages are only available when the breaching party knew or should have know about the circumstances.

iii. Liquidated Damages

1. Liquidated damages are damages specified in the contract itself. They may operate as a penalty for breach of contract; that is, the liquidated damages may not bear a reasonable relationship to the actual loss caused by the breach.
2. For example, you want to have your kitchen remodeling job finished in time for your big party, so you include a provision in the contract that says the contractor must pay you $100 per day for every day after the completion date.
3. Courts do not like liquidated damages clauses and will not enforce them if they have the effect of being a penalty.

iv. Specific Performance

1. Specific performance is an order by the court requiring the party that breached the contract to perform its obligation. The breaching party must do what it agreed to do in the contract.
2. For example, you enter into a written agreement to purchase a person’s house at a specific price and on explicit terms. If the seller refuses to sell, you may be able to bring suit to force them to sell at the specified price. If the court agrees, it may order specific performance of the contract.
3. Specific performance is a remedy that is usually available when the contract involves some kind of unique goods or other unusual benefit to the other party, and ordinary damages are not a sufficient remedy. Real property is often the subject of specific
Performance because, in most cases, each piece of property is unique. One-of-a-kind items such as antiques or items of special personal value may also be the subject of specific performance.

v. Limitations on Recovery of Expectation Damages

1. Reasonable Certainty of Damages – make sure that we know what damages are – don’t compensate for speculation.
   a. In order to be recoverable, damages must be established with *reasonable certainty*. In other words, damages which are speculative, remote, imaginary, contingent, or merely possible cannot be recovered.
   b. No damages will be awarded for the *mental distress or emotional trauma* that may be caused by a breach of contract. (Rest.2d §353.)

2. Foreseeability of Damages – must foresee the damages at the time of breach.
   a. Damages are limited to those losses which were *foreseeable*, i.e., in the contemplation of the parties at the time the contract was entered into. (*Hadley v. Baxendale*).
   b. Special damages are recoverable when special circumstances exist which cause some unusual injury to the plaintiff. The plaintiff can only recover special damages if defendant knew or should have known of the special circumstances at the time the defendant entered into the contract.

3. The Mitigation Principle
   a. The duty to mitigate damages means that the victim of a breach of contract cannot just let economic losses pile up and then force the party that broke the contract to pay all losses. The victim must attempt to reduce the amount of economic loss – shouldn’t recover damages that you could and should have avoided.
   b. For example, a homeowner and a roofing company contract for the installation of a new roof on the house. Assume that when the work is completed, the roof leaks. When notified of the leak, the roofing company refuses to correct the problem. The homeowner has a duty to repair the leak, or at least stop the damage from the leak and then file a claim against the roofing company for damages, including the cost of repair. The rationale of mitigating damages in this case is to give the owner an incentive to prevent destruction of the home. If there were no such duty, a homeowner may permit the leak to cause substantial damage to the house while pursuing a lawsuit against the roofing company. This leads to waste.
   c. RESTATEMENT (SECOND) OF CONTRACTS § 350(1) – Damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
   d. A party cannot recover for loss which he could have avoided or mitigated through his reasonable efforts. (*Rockingham County v. Luten Bridge Co.*)

B. Remedies Under the UCC

i. Seller Breaches – Buyer’s Damages
   1. When there is a repudiation of the contract by the seller the buyer may “cover” under UCC 2-711 (1)(a). Under UCC 2-712 he may recover as damages the difference
between the cost of goods in substitution for those due from the seller and the contract price together with incidental or consequential damages, or under UCC 2-713 he may have damages measured by the difference between the market price at the time of the breach and the contract price together with any incidental or consequential damages.

2. The Code remedy of “cover” gives the buyer the right to recover the cost of a good faith purchase of substitute goods made without unreasonable delay. The Code permits recovery of lost profits as consequential damages.

3. UCC 2-715(2)(a) bars consequential damages where the loss could have been avoided by “cover.”

4. The objective of the law of contracts is not to punish the breaching party but rather to grant relief to the victim of the breach, by making him “whole” again, i.e., the purpose of awarding damages for breach is to put the victim in the position he would have been in had the contract been fully performed.

ii. Buyer Breaches – Seller’s Damages

1. Article 2 of the UCC contains four provisions that concern the recovery of a seller’s general damages (as opposed to its incidental or consequential damages):
   a. 2-706 (contract price less resale price);
   b. 2-708(1) (contract price less market price);
   c. 2-708(2) (profit); and
   d. 2-709 (price).

2. UCC 2-708(1) provides for a measure of damages calculated by subtracting the market price at the time and place for tender from the contract price. If the goods have been resold, the seller can sue to recover damages measured by the difference between the contract price and the resale price under 2-706.

C. Reliance Damages – repaying P for all costs incurred in performing his obligations in reliance on the contract.

i. The promisee did something to their determent in reliance on the promise, and the court, orders the breacher to compensate them based on what the breachee did on reliance on the promise.

ii. Reliance damages is defined as the economic value of a party’s reliance interest is typically the dollar amount of whatever out of pocket costs (including labor) were incurred by the non-breaching party up to the time of the breach in reliance on the breaching party’s performance.

iii. Even the contract is unenforceable, can get reliance damages.

iv. Reliance damages are an alternative to expectancy damages when determining the expectancy interest fails.

v. Limitations on Recovery of Reliance Damages

1. Must have reasonable certainty (2d Restatement).

2. Losing contracts: If the breaching party can prove that it was a losing contract in the first place, the loss must be subtracted. If ∆ can prove the contract was losing one for ∏ then ∆ doesn’t have to pay. Contract must be shown to at least break even.

D. Restitution – D disgorges all benefits that P has given to him / her.

i. It is appropriate to seek restitution whenever the plaintiff has conferred a benefit on the defendant which it would be unjust for the defendant to retain. Restitution may be sought as
simply a remedy for injury arising under an independent cause of action in tort or contract, or restitution may serve as the cause of action as well as the remedy.

ii. It is important to remember that the defendant in an action for restitution need not necessarily be a “wrongdoer,” merely someone who has received a benefit at the expense of the plaintiff under circumstances where it would be unjust for the defendant to retain the benefit.

iii. The Restitution Interest is defined as the value of the enrichment received by the benefited party, and not on the value of the aggrieved party’s promises.

iv. Cases where restitution may be appropriate:
   1. Plaintiff Had Reasonable Expectation of Being Paid for Benefit (e.g. plaintiff conferred benefit in emergency and normally performs such services for pay; parties had pre-existing business relationship;
   2. Contract Cases/Recission and Restitution
      a. Where a contract is entered into based on fraud or mutual mistake, or where the defendant has breached a contract under which the parties have continuing obligations, the plaintiff may choose to have the contract rescinded.
      b. Recission terminates the parties’ rights under the contract, but restitution is required to put the parties in the positions they occupied prior to entering into the contract by forcing them to return any benefits they received under the contract.
      c. In a contract for the purchase of a defective widget, for example, the buyer will be required to return the widget and the seller will be required to refund the purchase price. The parties may also be required to pay any damages necessary to restore the status quo ante. For example, seller may have to pay any expenses incurred by the buyer in trying to get the widget repaired. The buyer, however, may have to pay the seller the reasonable rental value of the widget for the time that she possessed it.
   3. Quasi-Contract Remedies
      a. At common law, the procedural device for seeking a restitutionary remedy was to bring a quasi-contract action in assumpsit. Such an action could be brought where another cause of action might lie, by simply “waiving” the tort or contract. Alternatively, the action could be brought where no other cause of action was available.
      b. The remedies available in an action for quasi-contract were restitution of the value of services performed (quantum meruit); restitution of the value of goods sold and delivered (quantum valebant); and restitution of money had and received.
      c. Note that the quasi-contract plaintiff wins a simple money judgment and has no superior claim to defendant’s assets over other creditors.

E. Agreed Remedies

F. Non-economic and Non-compensatory Damages – Border Between Tort and Contract Damages

i. The general rule is that punitive damages (as opposed to compensatory damages) are not recoverable for breach of contract, even if the breach is willful.

ii. However, recent cases have tested the limits of this principle. In a cause involving tortious interference with an existing contract, the plaintiff may recover the full pecuniary loss of the benefits it would have been entitled to under the contract. The plaintiff is not limited to damages recoverable in a contract action, but instead is entitled to the damages allowable under the more liberal rules recognized in tort actions. (Rest.2d, Torts, § 774A.)

G. Specific Performance and Injunctions
Contracts
COURSE OUTLINE

i. Available when traditional substitutionary remedies (i.e. monetary damages) would be inadequate. While a court may refuse to grant specific performance where such a decree would require constant and long-continued court supervision, this is merely a discretionary rule of decision which may be ignored when the public interest is involved.

ii. Specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law. A remedy at law adequate to defeat specific performance must be certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.

H. Miscellaneous

i. **Loss of Profits**, present or future, as an element of general damages, may be recovered for a breach of contract if:
   1. The loss is the direct and natural consequence of the breach,
   2. It is reasonably probable that the profits would have been earned except for the breach, and
   3. The amount of loss can be shown with reasonable certainty.

ii. **Lost Volume Sales**
   1. One that has a predictable and finite number of customers and that has the capacity either to sell to all new buyers or to make the one additional sale represented by the resale after the breach is known as a “lost volume seller.”
   2. If the seller would have made the sale represented by the resale whether or not the breach occurred, damages measured by the difference between the contract price and the market price cannot put the lost volume seller in as good a position as it would have been had the buyer performed. In these cases the seller is allowed to recover as damages the profit on the lost volume sale.
   3. Restatement 2d § 350, Comment d (1979) notes that if a seller would have entered into both transactions but for the breach, then the seller has lost volume as a result of the breach. Thus, lost profits are awarded to a lost volume seller, notwithstanding that the seller resells the item that a buyer contracted to buy, based on the principle that the seller was deprived of an additional sale and the corresponding profit by the buyer's breach.

iii. **Employment Contracts**
   1. An employee, who was damaged as a result of a breach of an employment contract by the employer, has a duty to take steps to minimize the loss by making a reasonable effort to find comparable employment.
   2. If the employee through reasonable efforts could have found comparable employment, any amount that the employee could reasonably have earned by obtaining comparable employment shall be deducted from the amount of damages awarded to the employee (*Parker v. Twentieth Century-Fox*).