• Is there a deal? Was a deal made?
• If there is a deal, how do courts enforce deals?
• Assuming there is a deal, is there any reason for the court not to enforce the deal?
• Exactly what is the deal?
• Once we know what the deal is, did anyone not do what he agreed to do?
• Is there any legally recognized excuse for not doing what you promised?

I. INTRODUCTION
A. Contract: An exchange relationship, created by an agreement containing at least one promise recognized as enforceable in law
   1. Offer, Acceptance, Consideration
B. What Makes an Agreement into a Contract?
   1. Cohen v. Cowles Media: Moral and ethical obligation alone does not create a contract. Not every promise is a K. The lack of belief by either party that they had entered into a legally binding K is why this is not a K.
C. The Enforcement of Contracts: Introduction to Remedies
   1. You can breach a K; you just have to pay.
   2. Expectation damages: the amount of money required to put the victim in the position she would have been in had the K not been breached. (e.g. difference between K price and substitute price)
      a) Direct Damages: actual loss under the contract itself
      b) Consequential Damages: recoupment of losses beyond the K that resulted from the breach (e.g. store could not open in time)
      c) Incidental Damages: Expenses incurred in dealing with effects of breach (e.g. negotiation costs, expense in finding new contractor)
   3. Specific Performance – compels D to perform (most often deals with sale of land)
   4. Judgment for damages is merely an adjudication that the breacher owes that amt to the victim. The enforcement of it is separate and may never be recovered.
   5. Keltner v. Washington County: Emotional distress damages are not recoverable under K law. In some jurisdictions, the rule has been modified to allow for some of the considerations of RST 2d.

II. STATUTORY LAW METHOD: UCC ARTICLE 2 AND THE SALE OF GOODS
A. Introduction to Article 2
   1. Creation of the UCC
      a) Most Ks are governed by rules and principles of common law (when UCC does not apply); there are some areas in which legislatures have enacted statutory rules for Ks in general or particular types of Ks
      b) Uniform state commercial laws were desirable b/c variations (1) created confusion and uncertainty in interstate transactions; and (2) impeded interstate commerce
      c) Uniform model statutes were drafted and recommended to state legislatures; first model law was enacted by many state legislature and needed updating, which led to promulgation of the UCC (actual law) in the ‘50s
   2. UCC Article 2
      a) Applies to sale of goods but not services (some transactions include both)
      b) Where UCC does not apply, state’s common law of contracts would apply (or common law of torts). Statutory law and UCC are mandatory rules; common law rules are default rules
      c) Pass v. Shelby
         (1) UCC would not apply if K was primarily for services rather than goods (contract for sale of goods would protect warranty)
            (a) Gravaman test – looks to portion of transaction upon which the complaint is based.
                (Problem with gravaman test the case will be the same every time; P will win b/c he can point to faulty part of transaction)
            (b) Predominant purpose test – looks at the transaction as a whole to determine whether the predominant purpose of the transaction was the provision of services or the sale of goods
         (2) In this case the court found that the predominant purpose test was better (as have most courts).
      d) Custom Communications Engineering, Inc. v. E.F. Johnson Co.
         (1) Issue: 4-year statute of limitations applies to this dealership agreement b/c it falls under the UCC. If not, the 6-year statute of limitations under common law would apply.
         (2) Uses predominant purpose test in deciding whether K deals w/ the sale of goods or services.
      e) Gatekeeping function of UCC
         (1) Courts can strategically use UCC to determine whether case will go forward (does it merit a trial?). Increases court system efficiency, saves time and resources.
         (2) Some rules become so fact-fact-specific in their application that they give judge ultimate discretion in what goes forward
III. CONTRACTUAL ASSENT AND THE OBJECTIVE TEST

A. Objective Standard for Determining Assent
   1. Ks are formed by mutual consent; both parties must intend to enter the K and agree on its terms. Legal assent is determined by apparent intent shown by overt acts and words (obj. test), rather than subjective state of mind.
      a) Economic efficiency is achieved by using the objective test (allows for reasonable reliance). You discourage people from entering contracts if they cannot rely on outward manifestations.
      b) Toward the end of the 19th century, the objective standard became more widely used (along with the formalist classical conception of contract law). As classicism passed its apex, more flexibility was allowed into the system to reflect how people act and gives effect to reasonable expectations.
   2. Kabil Development Corp. v. Mignot: Subjective evidence is admissible as support for objective test of K (testimony re state of mind is acceptable)

B. Determination of Objective Meaning
   1. Four factors for determining reasonableness:
      a) Attributes (experience, training, commercial sophistication)
      b) Background information actor possessed
      c) Relationship between the parties
      d) Context of the transaction

C. Deliberate Undisclosed Intent
   1. Lucy v. Zehmer: internal assent of the parties is not necessary for K formation provided manifest words and actions can reasonably be interpreted to indicate intent to K

IV. THE OFFER

A. What is an Offer?
   1. The hallmark of an offer is that the recipient of the offer must reasonably understand that the offeror has given her the initiative to create the K by accepting the offer.
   2. The wording and context must make it clear to indicate that acceptance will bind the parties immediately.
   3. Fairmount Glass Works v. Grunden-Martin Woodenware Co.: Once the offeree accepts an offer, a K is formed. A price quote alone is not an offer, but accompanied by specific language so indicating, it can be construed to be.
   4. People v. Braithwaite
      a) Tried to use K law to define an offer. Court finds there was no valid offer b/c conversation the police record did not show that D had real ability and intent to deliver on cocaine.
      b) In order for there to be a valid offer, the offeror must have ability and intent to deliver.

B. Advertisement as Offer or Solicitation?
   1. What makes a Proposal an Offer Rather Than a Solicitation?
      a) Lefkowitz (p. 68): The test of whether a binding obligation may originate in advertisements addressed to the general public is “whether the facts show that some performance was promised in positive terms in return for something requested.” Normally an advertisement is a solicitation for offers. However, an advertisement can be construed to be an offer if it contains content that would lead a reasonable person to believe it was an offer because of definite nature of the terms.
      b) Time Magazine: The law disregards trifles (even though mailing was probably an offer)
      c) Leonard v. Pepsi: This wasn’t an offer (Distinguishes from Lefkowitz b/c ad specifically indicated that details were in the catalog). Even if it was an offer, it was a joke. Obj standard: any reasonable person would understand it was a joke.

C. Offers under UCC Article 2
   1. Offers Under Article 2:
      a) UCC 2.204. Formation in General (p. 83)
         (1) A K for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a K
         (2) Agreement sufficient to be a K for sale may be found even if moment of making is undetermined
         (3) Even though one or more terms are left open a K for sale of goods does not fail for indefiniteness if the parties have intended to make a K and there is a reasonably certain basis for giving remedy.

V. ACCEPTANCE

A. Overview of the Offer and Acceptance Model
   1. Offer is made
   2. If offeree accepts, K comes into effect immediately
      a) Substantive aspect of acceptance: agreeing to terms
      b) Procedural aspect of acceptance: communication of assent; in absence of instructions, within a time and procedure that is reasonable
   3. Counteroffer
      a) Changes or adds term to offer; constitutes rejection of original offer and formation of new offer
b) Offeree becomes offeror

4. Revocation: Offeror can shorten period for acceptance by revoking offer, as long as offer has not been accepted

B. Nature, Mode and Effect of Acceptance

1. Acceptance: The Offeree’s Signification of Assent to the Offer
   a) Most offers are directed to specific group or person (exception = ads)
   b) Necessary conditions for acceptance
      (1) Acceptance must be knowing, voluntary and deliberate act
      (2) Assent is measure by an objective standard
      (3) CL rule: acceptance must mirror the offer
          (a) Terms of the K are what is in the offer
          (b) If offer doesn’t contain terms, default rules. If no default rules – can fill in gap fillers (with what is reasonable) OR K fails for indefiniteness
   c) What constitutes effective acceptance?
      (1) Keller v. Bones: written K can waive the need the need for communication of an acceptance. (The contract was accepted by signature before the 5pm deadline).
      (2) Specific performance is the remedy for the sale of land

2. The Acceptance Must Accord with Both the Substantive Terms and the Procedural Requirements of the Offer
   a) Substantive Nature
      (1) Terms setting out the transaction (the proposed K); acceptance must mirror the offer
      (2) Modern cases tend not to be so rigid on “mirror image”; additional words may not be new terms, or may not significantly alter the terms of the offer
   b) Procedural Nature
      (1) Procedure must be followed if offeree wishes to accept; in absence of specific instructions, acceptance may be in any mode and manner that is reasonable
      (2) When instructions are not followed, it may be considered acceptance if it is reasonable, consistent with manner proscribed in the offer, and no less protective of offeror’s rights than what was set out
   c) Roth v. Malson.
      (1) Majority opinion: An acceptance must be absolute and unqualified. (Focuses on manifestation and procedural approach)
      (2) Dissent: Intent of parties should be considered. Cites UCC rule: K may be made in any manner sufficient to show agreement, including conduct by parties which recognizes existence of a K.
      (3) *** The tension in the majority opinion and dissent are extremely important.

C. The Effective Date of Acceptance

1. An acceptance takes effect when it is communicated to the offeror
2. MAILBOX RULE: Where the mail is an expressly or implied authorized medium of acceptance, a properly addressed acceptance takes effect when deposited in the mail
3. Mailbox rule can be avoided by specifying that acceptance will only be effective on receipt

D. Inadvertent Manifestation of Acceptance

1. Glover v. Jewish War Veterans
   a) A private organization is not bound to provide reward money to a person who has accepted inadvertently (i.e. provides information not knowing about the reward)
   b) According to the objective test, this would have been a K, but this is an exception to the rule

E. Silence as Acceptance

1. Usually silence is not acceptance. Usual rule, if an offeree fails to respond, the inaction is rejection.
2. RST 2d: list of exceptional circumstances in which an offeree’s silence or inaction could operate as acceptance:
   (a) where offeree takes benefit with reasonable opportunity to reject, and has reason to know that compensation was expected; (b) where offeror has given offeree reason to understand assent may be manifested by silence or inaction, and offeree intends to accept the offer; (c) where by previous dealings, this was the M.O. (ducks in the freezer where friend always leaves for payment later)

F. Termination of the Power of Acceptance

1. The Ways in Which the Offeree’s Power of Acceptance May be Terminated
   a) Lapse of Offer (if duration not specified, reasonable amount of time)
   b) Rejection (offeree cannot change her mind after she rejects)
   c) Counteroffer (combination of rejection of old offer, creation of a new offer; response may be counteroffer even if it does not propose substantive terms diff from the offer, but it is communicated too late or not in accordance with prescribed procedure).

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1 Exception to rule: Under proper circumstances, an offeror may make a binding commitment not to revoke the offer before it lapses. Such a promise is called an “option” or a “firm offer.” See discussion of Chapter 11.
d) **Revocation** (offeror can change mind before acceptance; revocation only becomes effective when it is COMMUNICATED to the offeree). Must have received notice of revocation, or reliably learned in some other way that offer is no longer open for acceptance)

e) **Death or Mental Disability** of the Offeror (if offeror dies or becomes mentally incapacitates, offer lapses)

2. Lapse of an Offer by the Passage of Time
   a) *Vaskie v. West American Insurance Co.*: expired statute of limitations does not cause K to lapse when the offer was made before statute of limitations expired

3. Revocation of the Offer
   a) *Hendricks v. Behee*: No K until acceptance of an offeror is communicated to the offeror. Can revoke until acceptance is put in mail; mailbox rule does not apply to revocation, which must be rcvd directly by offeree
   b) *Dickenson v. Dodd*: If revocation is communicated to the potential buyer (by a third party) before he communicates acceptance to the seller, the revocation is effective.

G. Acceptance by Performance: Distinction Between Bilateral and Unilateral Ks

1. The Bilateral-Unilateral Distinction
   a) Action required to signify acceptance is generally symbolic; what is imp is that it manifests assent
   b) **Bilateral K**: both parties make a promise to perform
   c) **Unilateral K**: Offeree’s acceptance is also performance, and offeror’s promise is the only outstanding promise at time of K formation
   d) *Carlill v. Carbolic Smoke Ball Co.*
      (1) Advertisement to pay 100 pounds to anyone who used the smoke ball and contracted the flu (and noted that money was set aside to show sincerity) was an offer - a unilateral K that became enforceable upon P’s acceptance and meeting of the condition.
      (2) Advertisement offering a reward is an offer for a unilateral K. Anyone who performs conditions accepts offer, and the offeror has the duty of immediate performance.
      (3) Inequality of unilateral K – offeree can never breach (they don’t promise anything.)
   e) *Harms v. Northland Ford Dealers*: P accepted offer by entering tournament and paying fee. P met condition by scoring hole-in-one. Ds were required to adhere to terms of K known by P. Undisclosed rules cannot be part of the bargain.

2. Performance as an Exclusive or Permissive Method of Acceptance
   a) Unless the offer clearly requires acceptance only by performance, it can be accepted either by promise or performance (converse is also true).
   b) Can accept by any reasonable method consistent with the terms of the offer unless method of acceptance is prescribed unambiguously.

3. Communication of Acceptance by Performance
   a) Acceptance does not need to be given before or at the time of acceptance; it can be given after, provided that the offeror had not revoked the offer in the interim
   b) RST 2d § 54: **Modern Rule on notification**: where an offer invites acceptance by performance, no notification is necessary to make the acceptance effective unless the offer requests notification. However, if the offeree “… has reason to know that the offeror has no adequate means of learning of the performance with reasonably promptness, the contractual duty of the offeror is discharged…” unless the offeree notifies the offeror of the acceptance with reasonable diligence, the offeror learns of acceptance within a reasonable time, or the offer dispenses with notification.

4. Acceptance of an Offer by an Act that Takes Time to Complete
   a) RST 2d § 45. **Option K Created by Part Performance or Tender**.
      (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option K is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
      (2) The offeror’s duty of performance under any option K so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.
   b) RST 2d § 62. **Effect of Performance by Offeree Where Offer Invites Either Promise or Performance**
      (1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of the beginning of it is an acceptance by performance.
      (2) Such an acceptance operates as a promise to render complete performance.

H. Offer and Acceptance Model in Perspective

1. K formation does not always fit neatly in offer-acceptance model (e.g. negotiations, standard form transactions)

VI. ACCEPTANCE UNDER UCC ARTICLE 2: BATTLE OF THE FORMS (p.131)

A. Basic Principles of Acceptance under UCC Article 2
1. UCC Article 1-103 provides: principles of law and equity supplement the provisions of Article 2 “unless displaced by the particular provisions of” Article 2.

2. Principles of UCC 2-204 (Ch. 4)
   a) K for sale of goods if either words or conduct show intent to make an agreement
   b) K may be found even if moment of making unknown
   c) Not fatal if terms are open, if there is intent for K and court can find reasonably certain basis for remedy

3. UCC 2-206. Offer and Acceptance in Formation of K
   a) Reasonableness is default for ambiguous language
      (1) Unless otherwise unambiguously indicated by the language OR the circumstances,
      (2) Offer to make a K invites acceptance in any manner, by any medium reasonable in circumstance
      (3) An order or other offer to buy goods for prompt shipment invites acceptance EITHER by prompt promise to ship OR shipment
      (4) Shipment of non-conforming goods does not constitute acceptance IF the seller promptly notifies the buyer that the goods are offered only as an accommodation. (If the seller does not notify the buyer that the goods were NOT intended as acceptance, then the seller is bound to deliver conforming goods.)

4. ****ProCD v. Zeidenberg
   a) Easterbrook: K formed when D clicked on button agreeing to terms of use (noncommercial use only)
   b) Rule: license inside of box are acceptable (term on box was that purchase was subject to the license)
   c) Standardization of forms important for business; he had option to return
   d) ***Many K professors think this case was poorly decided.
   e) Easterbrook does not talk about where offer or acceptance happened – he takes a step back and looks at it as a whole. In many cases, outcome hinges on where the starting point is. Easterbrook uses the opinion to explain why the outcome makes sense, providing policy argument in favor of the outcome

B. The Battle of the Forms – UCC 2-207
1. The Rationale and Aim of UCC 2-207
   a) CL approach to battle of the forms is irrational w/ battle of the forms (“mirror image” and “last shot rule”)
   b) Sets out a way to resolve standard form issues where problems arise because terms were not actively negotiated or even read

2. Basis Structure of UCC 2-207. Additional Terms in Acceptance or Confirmation (p. 140)
   a) Structure of the Section
      (1) Court should not apply CL “mirror image” rule and find counteroffer where there is no clear indication that differences were intended to be a counteroffer.
      (2) Additional terms are to be construed as proposals for addition to K. Between merchants, terms become part of K unless other conditions are met.
      (3) Where no K resulted from communications, but performance occurred, terms should be based on parts where communications agree.
         (a) Clauses like 2-207 are used to reach holdings judges want to reach.
         (b) As a matter of law, we try to protect the consumer from having to be bound by those terms he would not agree to. When judges are faced with terms they find unacceptable, they tend to use 2-207 or CL principles to say those terms were never accepted or no K.
   b) Concept of Materiality
      (1) Material: relates to an imp aspect of the transaction.
      (2) One attribute of a material alteration is that it would cause “…surprise and hardship if incorporated w/o express awareness by the other party…”
   c) Concept of “Merchant” in UCC
      (1) UCC 2-104(1): Involved in business or possessing expertise in relation to either the goods or the transactions.
      (2) Purpose: distinguish professional buyer/seller from casual

3. Expressly Conditional Acceptance
   a) UCC 2-207(1): Response to an offer could qualify as counteroffer when:
      (1) If it would otherwise be acceptable, it is not timely, so offer has lapsed before it becomes effective as acceptance
      (2) Where language is clear that offeree does not intend to accept but proposes K on other terms
      (3) Where acceptance makes it clear by use of specific language that the offeree’s acceptance is conditional upon the offeror’s agreement to the offeree’s terms

4. Conduct Recognizing a Contract Under 2-207(3)
   a) Under CL: if offeror accepts counteroffer w/ performance, it does not matter if he performed w/o realizing that response to the offer had variant terms and was therefore a counteroffer
b) Under Article 2, an offeror should only be held to have accepted a counteroffer if it is clear that he deliberately and knowingly gave assent to its terms.
c) Where no such specific and unequivocal acceptance occurs and no performance follows, there is no K
d) If parties perform, a K exists.

5. Distinction Between Additional and Different Terms in an Acceptance
a) Drafting Anomaly: UCC 2-207(1) discusses “add’l or difft terms,” while 2-207(2) discusses “addl” only
b) Comment to UCC – Use “knock-out rule.” Conflicting terms cancel each other out.
c) Northrop v. Litronic Industries: Trial court used “knockout rule” and eliminated difft term between Ks.

5. Distinction Between Additional and Different Terms in an Acceptance
d) Posner aff’d b/c that rule was used by the majority of courts, but noted it would be better to consider the omission of the word “difft” from UCC 2-207(2) as a drafting error and to treat it the same as “addl.”

d) Class Note of Fairness and Policy Decisions
(1) Importance of ability to determine in concrete and specific terms which outcome would be the most “fair” and define what we mean by “fair”
(2) Judges use the “fair” system all the time. Abusive; or just the way it works?
(3) Matter of policy: what kind of judicial system do we want?

6. Confirmatory Memoranda
a) Klocek v. Gateway, Inc.: Does not follow reasoning in ProCD; applies UCC 2-207, finding that P was not a merchant and thus that the Standard Terms (printed terms inside the box) did not automatically become part of the parties’ agreement w/o P’s assent; unless the terms state that the agreement is off unless you agree.

7. CLASS NOTE: UCC 2-207 has been eviscerated in the amendment and will almost certainly not be around by the time we practice. New form has changed significantly******

VII. PRELIMINARY AND INCOMPLETE AGREEMENTS
A. The Problem of Indefiniteness
1. Hallmark of an offer: clear, definite, specific
2. UCC 2-204(3): If parties intended a K and there is a reasonably certain basis for giving a remedy, K should not fail for indefiniteness even if terms are left open.
3. Court may use gap fillers if it desires to enforce – cases where it cannot or should not – lease agreement when parties agree to agree on a material term at a later date (e.g., rent)
4. Academy Chicago Publishers v. Cheever: The publishing agreement was not a valid K because it was missing essential terms. If the essential terms are so uncertain that there is no basis to determine breach, there is no K, even if both parties act as if a K has been formed.

B. Deferred Agreement
1. Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher: K fails for indefiniteness – agreement to agree for which material term is left for future negotiation (e.g., rent price) is unenforceable. Dissent: Promotes judicial intervention to set rent at a “reasonable rate” in order to avoid forfeiture.

C. Effect of an Agreement to Reduce to Writing
1. K can come into existence in a signed, written agreement (if the parties intend to be bound), even though they contemplate the later execution of a formal writing. Courts evaluate parties’ intent from interactions.

D. Obligation to Bargain in Good Faith
1. Jenkins v. County of Schuylkill: No K in letter identifying P as prime candidate when clause denoted that no K could be entered until agreement was confirmed and accepted by the Board. Promise to negotiate in good faith is not an offer that can be accepted.
2. Generally, vagueness does not void a K. UCC encourages courts to use gap fillers.

E. The Tort of Interference with Contract Relations: Liability for Enticing a Party to Abandon the Duty to Negotiate in Good Faith or to Renego an “Agreement in Principle”
1. Texaco, Inc. v. Pennzoil Co.: 3d party can be liable for tort if it convinces a party involved in negotiations to stop negotiating or to renege on an “agreement in principle.” 3d party must have had knowledge of the existence of the original K and actively induced the original breach.

VIII. STATUTE OF FRAUDS
A. The Basic Principle
1. Certain types of Ks are required to be in writing or they are not enforceable by law. Required components:
   a) Writing
   b) Signature
   c) Content (must have at least enough content to prove a K was made and to identify its subject matter and reveal its material terms) – RST 2d § 131
2. Three questions
   a) Is this K subject to the statute of frauds? (If the answer is no, K is enforceable even if it is not in writing, so the analysis need not proceed any further; but is the answer is yes, the next question is necessary.)
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b) Is there a signed writing in a form sufficient to satisfy the statute? (If the answer is yes, K is enforceable. If no, K is not enforceable unless the third question can be answered affirmatively.)
c) Do any recognized exceptions to the statute of frauds apply?

3. Three categories to which statute is applied
   a) K for sale or transfer of interest in land
   b) K that cannot be performed within one year from the time of execution
   c) K for the sale of goods over $500, proposal for over $5000

B. The Statute of Frauds Relating to Ks at CL

1. Sales and Transfers of Land
   a) RST 2d § 125(1): “A promise to transfer to any person any interest in land is within the Statute of Frauds.”
   b) Roberts v. Karimi.
      (1) Seller’s note, seller’s affidavit from prior litigation, and unsigned memo of sale formed writing sufficient to meet the requirements of the statute of frauds. Court noted that the purpose of the statute of frauds is to protect people from the fraudulent enforcement of agreements that were never made, not to allow parties to evade genuine agreements reached.
      (2) Documents not a part of the K but that prove existence of K can be used to affirm existence of K.

2. Ks Not Performable Within One Year of Execution
   a) C.R. Klewin, Inc. v. Flagship Properties, Inc.
      (1) Justice Ellen Peters: Oral K was NOT unenforceable when K could be completed in one year, even if the K contemplates performance will be completed over a period of time over one year.
      (2) Not w/in SOFs; K can be enforced. K of infinite duration does not fall within the SOFs (i.e., K that could be completed in 1 year, even if K contemplates performance over time exceeding 1 year.)

3. Part Performance Exception to the Statute of Frauds Relating to Ks at CL
   a) Part Performance Doctrine: Under some circumstances, conduct by the parties following the alleged oral agreement may itself provide enough proof of the K so as to dispense with the need for a writing.
   b) Courts have been begrudging in recognizing the scope and application of this doctrine
   c) Burns v. McCormick.
      (1) Halsey promised Ps that if they gave up home & business to care for him, he would give them his house and lot after his death. They complied, but after his death, there was no writing to prove the promise. Court held that the SOFs applied and the Ps were not entitled to the land.
      (2) Not every part performance will move a court of equity, though legal remedies are inadequate, to enforce an oral agreement affecting rights in land.
      (1) The court will not lightly refuse to apply the clear rule of the SOFs. Evidence of past performance must be unequivocally referable to a K and P must show reasonable reliance on the K that would make it unjust for D to hide behind statute of frauds. (Nashan met this burden).

C. The Statute of Frauds Under UCC Article 2

UCC 2-201. Formal Requirements of the Statute of Frauds (p. 189)

1. Except as otherwise provided, K for the sale of goods for price of $500 or more is not enforceable unless there is some writing sufficient to indicate that K for sale has been made b/t the parties and signed by the party against whom enforcement is sought. A writing is not insufficient b/c it omits or incorrectly states a term agreed upon but the K is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

2. B/t merchants if w/in a reasonable time a writing in confirmation of the K and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies requirements of sub-section (1) against such party unless written notice of objection to contents is given w/in 10 days after received.

3. A K which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable.
   a) If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
   b) If the party against whom enforcement is sought admits in his pleading…
   c) W/r/t goods for which payment has been made and accepted or which have been received and accepted.

IX. CONSIDERATION

A. Consideration – The Basic Doctrine

1. Introduction to Consideration Doctrine
   a) Courts have used consideration as a concept to distinguish those promises that were both important from a societal point of view and capable of enforcement by the legal system.

2 Proposed amendment raises the amount to $5K.
b) Concept of exchange remains at heart of consideration.
   (1) RST 2d § 17. Requirement of a Bargain: manifestation of mutual assent to the exchange and a consideration.
   (2) RST 2d § 71. Requirement of Exchange; Types of Exchange.
      (i) To constitute consideration, a performance or a return promise must be bargained for.
      (ii) …bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
      (iii) Performance may consist of: (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation.
      (iv) …may be given to the promisor or some other person… may be given by the promisee or by some other person.

2. The Elements of Consideration
   a) The requirement of an exchange
      (1) Promise to make a gift is generally not a K. Any promise to make the gift is not supported by consideration (there is no return promise)
      (2) Congregation Kadimah Toras-Moshe v. De Leo.
         (a) Where nothing is given or received in exchange for a promise, traditional K doctrine refuses to enforce the promise because of lack of consideration
         (b) No writing, no consideration, no reasonable reliance = no K. Judges determine conditional gift vs. consideration by looking at intent (to give a gift or induce an action)
      (3) Hamer v. Sidway.
         (a) K was enforceable where nephew gave up his right to smoke, swear, and drink until age of 21, and was thus entitled to the money promised by his uncle if he met said conditions
         (b) Courts do not evaluate value of benefit/detriment.
   b) The requirement of a bargain.
      (1) Patel v. American Board of Psychiatry & Neurology, Inc.: K to waive requirement not enforceable b/c there was no exchange and therefore no consideration. Unbargained detriments are not relevant to K but to estoppel.

3. The Elusive Purpose of Consideration Doctrine
   a) Consideration doctrine serves both formal (evidentiary, cautionary, channeling – if court is to enforce a promise, must know it was seriously expressed) and substantive purposes (protecting parties’ private autonomy, protecting party who relied to his detriment on the promise, preventing unjust enrichment)
   b) Carlisle v. T&R Excavating, Inc.: Court finds there was no consideration where husband offered to help wife by providing services with free labor for her business. Past performance cannot be consideration because no bargaining is required to obtain that which one already has.

B. What Suffices as Consideration?
1. Adequacy of Consideration
   a) It is not the job of the courts to review the adequacy of consideration, provided it is not nominal or sham
   b) Freedom to K includes freedom to make a bad deal
   c) Where application of doctrine leads to results that are unduly illogical or harsh, legal rules tend to evolve or new theories arise to provide a remedy
   d) Apfel v. Prudential-Bache Securities, Inc.: Novelty of ideas are not required to validate a K; only value. Loss of value cannot be used as reason not to pay amount provided in K. Consideration exists even where this value is extinguished.
   e) Batsakis v. Demotsis: Courts do not look at adequacy of the consideration; only agreement the parties reach

2. Preexisting Duties
   a) RST 2d § 73. Performance of Legal Duty (is not consideration)... a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.”
   b) State v. Avis: Private investigator has no preexisting duty to the state (or public) to provide information, and thus can receive reward money promised by the state to informant providing information leading to the arrest and conviction of a criminal.

3. Settlement Agreements
   a) Whether or not settlement of questionable claims or defenses can serve as consideration is area of dispute.
   b) RST 2d § 74. Settlement of Claims.
      (1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
         (a) The claim or defense is in fact doubtful b/c of uncertainty as to the facts or the law, or
         (b) The forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.
(2) The execution of a written instrument surrendering a claim or defense by one who is under not duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists

c) **Fiege v. Boehm**: *Settlement of an invalid claim, if you have sincere belief that it is valid, is enforceable* (e.g., promise to pay child support in exchange for forbearance of bastardy proceedings.)

C. **Mutuality and its Limits**

1. What “Mutuality of Obligation” Means
   a) If one of the parties has neither contributed nor promised to contribute anything meaningful in the eyes of the law, there is no K. No universal requirements that both parties be bound to a K at the same time, to the same extent, or under the same circumstances
   b) Trend to enforce Ks that seem seriously and reasonably made, even if mutuality seems to be lacking

2. Performance as Consideration
   a) E.g. **Hamer v. Sidway, Carlill v. Carbolic Smoke Ball**
   b) **Weiner v. McGraw-Hill, Inc.**
      (1) Promise not to discharge without cause was enforced in employment case where P substantially relied on the assurance and gave up other opportunities. **Mutuality, in the sense of requiring reciprocity, is not necessary when a promisor receives other valid consideration.**
      (2) There is never mutuality in a unilateral K. One side is never bound b/c they never promised.

3. Conditional Promises as Consideration
   a) **Iacono v. Lyons**: Perfect mutuality makes a K enforceable where parties agreed to split Vegas winnings 50-50. Consideration consists of benefits and detriments to the contracting parties. The detriments (risk) must induce the parties to make promises and the promises must induce the parties to incur the detriment.

4. Discretionary Promises as Consideration
   a) What if Iacono’s promise had promised to split her winnings if she was “feeling generous at the time”? Would there be any real risk? **Illusory promise.**
   b) Sometimes courts find consideration where discretionary promises make commercial sense.
   c) Many courts claim that satisfaction clause does not give buyer complete discretion as to claim of dissatisfaction, but that claim must be made reasonably or in good faith.
   d) **Wood v. Lucy, Lady Duff-Gordon**: A promise to bind oneself to the commitments of the K can be implied.

5. Introduction to Exclusive Dealings, Output and Requirements Ks under the UCC
   a) UCC 2-306. Output, Requirements and Exclusive Dealings. (p. 239)
      (1) …such output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded
      (2) A lawful agreement…for exclusive dealing … imposes… an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

6. **Third Story Music, Inc. v. Waits**: Although courts have read implied covenants in agreements in order to make K enforceable where the parties intended to enter agreement but would otherwise lack mutuality, this case is diff b/c there was consideration w/o implied covenant (Warner had to pay TSM a minimum royalty). Court refuses to read an implied covenant over the express language allowing Warner to refrain from marketing an album.

X. **PROMISSORY ESTOPPEL**

A. An Overview of Promissory Estoppel

1. The Origins and Nature of Promissory Estoppel as a Theory of Recovery
   a) **Promissory estoppel** sometimes protects a promisee who has relied to his detriment on the promise, even though consideration or other elements of enforceability are not otherwise present
   b) If consideration is present there is no need to resort to promissory estoppel
   c) Promisors in promissory estoppel have not necessarily engaged in misstatement; they may have just changed their minds and reneged.
   d) RST 2d § 90. Promise Reasonably Inducing Action or Forbearance.
      (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisor 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. The remedy granted for breach may be limited as justice requires.
      (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
   e) RST 2d § 90 is an area where drafters stated a view of what the law should be rather than reporting current state of the law, and is quite controversial in some of its details

2. The Theoretical Context of Promissory Estoppel and Why it Matters
   a) Status of promissory estoppel in the law is debated
(1) Some argue it should be a substitute for consideration (alternative means of determining if promise is worthy of enforcement as a K) (e.g., Williston)

(2) Some argue it should be an independent theory of recovery more akin to tort law or general equitable principles than K law (e.g., Gilmore – book titled Death of Contracts)

(3) Three camps after Gilmore:
   (a) Those who agree with Gilmore that promissory estoppel is more akin to tort than K
   (b) Those who argue the basis of promissory estoppel is promise or consent, and thus should be seen as a K theory (but argue over the importance of reliance)
   (c) Refuse to take sides in favor of K or tort and argue that it spans both, lives in the never-never land between, or inhabits a land all its own.

   b) Deli v. University of Minnesota. (1998) : Promissory estoppel is a K claim and that P is limited to recover only damages that could be awarded under a K claim (i.e., no emotional distress damages)

B. Promissory Estoppel and Non-Commercial Promises
1. Gratuitous promises are generally not enforceable as Ks.

   2. Kirksey v. Kirksey: No consideration where woman moves to her brother-in-law’s house at his request w/ promise to give her a place to raise family. When he required them to leave, she sued for breach of K, but no relief given. (Dissent: loss and inconvenience incurred in move was sufficient consideration to supt promise.)

   3. Ricketts v. Scothorn: $2K promissory note to granddaughter was enforced after his death because she quit working in reliance of it, and it would have been “grossly inequitable … to resist payment on the ground the promise was given without consideration.”

   4. Wright v. Newman: P was obligated to pay child support under the doctrine of promissory estoppel where he had assumed paternity, even after knowing that he was not the child’s father. (Dissent: D did not rely upon the promise to her detriment; therefore, no promissory estoppel).

   5. Allegheny College v. National Chautauqua County Bank: Cardozo discussed promissory estoppel at length but decided on consideration grounds that P’s agreement to accept Johnston’s $ was an implicit obligation to perpetuate donor’s name in accordance with her wishes. Fund was set up on reliance of promise to give the $

   6. In re Morton Shoe Co.
         a) RST 2d § 90(2) eliminates requirement of reliance in context of charitable subscriptions and marriage settlements. However, this portion of § 90 has gained limited acceptance.
         b) CJP borrows $ from banks so it can make immediate distribution to recipients before receiving actual pledge amount, and thus had sufficient reliance on the debtor’s contribution to make it enforceable. Used consideration doctrine and found there was consideration, rather than § 90. (CJP agreed to apply the pledged amount in accordance with the charitable purposes set out in its charter).

C. Promissory Estoppel in the Commercial Setting
1. Promissory Estoppel and Commercial Promises
   a) East Providence Credit Union v. Geremia: Promise by P to pay insurance premium was made in exchange for valid consideration (repayment with interest). If they had not found consideration, the case would have been decided for P on promissory estoppel grounds because of Ds reliance on this promise.
   b) Ypsilanti v. General Motors Corp: No promise. Solicitation of a tax abatement, representations of job creation, and the fact that a manufacturer uses hyperbole in seeking concession does not create a promise. Even if there were a promise, reliance on it would not have been reasonable.

2. Promissory Estoppel and Commercial Promises: Specific Example of Employment Disputes
   a) Some courts distinguish between pre-hire and post-hire promises; some do not
   b) Most courts hold strongly to policies underlying the employment-at-will doctrine (e.g., that employers should not be held to promises, and that reliance on them is unreasonable)
   c) Lord v. Souder: No consideration for a K claim, but P can recover for promissory estoppel, since the promise was definite, her reliance was not unreasonable, there was sufficient injury, and public policy favors Lord by preventing unfairness.
   d) RST 2d § 139. Enforcement by Virtue of Action in Reliance. A promise by which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the SOFs if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires…
   e) RST 2d § 139 has earned less than full acceptance by the courts
   f) Stearns v. Emery-Waterhouse Co.: Action for breach of K was barred by the SOFs (employment K that took more than one year to perform).

3. Promissory Estoppel in Commercial Negotiations
   a) Hoffman v. Red Owl Stores, Inc.: Departure from trad’l view that party is free to break off negotiations at any time for any reason. Promissory estoppel was found for Ps b/c of their reliance obligations.
b) **Gruen Industries v. Biller**: A conditional promise is not reasonable basis for reliance. No recovery under Promissory Estoppel: 1) no injustice will result from not enforcing the promise; 2) alleged promises were made informally; 3) there was legal representation present (no one taken advantage of); and 4) D were not unjustly enriched b/c of P’s promise.

c) **Hoffman Rule**:  
1. Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?  
2. Did the promise induce such action or forbearance?  
3. Can injustice be avoided only by enforcement of the promise?

D. **Remedies in Promissory Estoppel Actions**
1. Type of remedy depends on whether we classify Promissory Estoppel as contract claim or “other”  
2. Scholars disagree whether Promissory Estoppel is about enforcing promises seriously made or whether it is aimed at compensating honest and reasonable reliance  
3. **Cohen v. Cowles Media**: P was entitled to recover under promissory estoppel, and after several appeals, verdict and judgment for $200K allowed to stand.  
4. **Wheeler v. White**, 398 S.W.2d 93 (Tex. 1965): It is reasonable to conclude that all that is required to achieve justice is to put the promisee in the position he would have been in had he not acted in reliance upon the promise.

XI. **OPTION CONTRACTS AND FIRM OFFERS**

A. **Option Contracts**
1. Offers are generally revocable until accepted  
2. Under classical view, absent independent consideration, any promise to keep offer open is a legal nullity  
3. If parties want to avoid that result, they can enter into an option K in which the promise to keep open is supported by consideration  
4. Purpose of Option K: allows offeree some time to decide whether to accept  
5. Offer is firm and cannot be revoked; if counteroffer is made or rejected, original offer still remains in effect  
6. Consideration is required to compensate the offeror for risk assumed in agreeing to keep offer open  
   a) Courts have more lenient standards for consideration in option K  
   b) Standards are lower b/c courts recognize value of option K (can plan, investigate, deliberate w/o fear that offer will be revoked; option Ks come at beginning of bargaining; strong requirements hurt negotiations)  
   c) **RST 2d § 87(1)(a)**: provides that offer is binding as option K if it is in writing, signed by the offeror, recites consideration for the making of the offer, and proposes an exchange on fair terms w/in reasonable time

B. **Promissory Estoppel and Offers**
1. Free revocation of offers can cause hardship and courts have recognized exceptions to general principle  
2. RST 2d § 45 addresses situations where acceptance is through performance, but performance cannot be accomplished instantaneously. It seems unfair to snatch offer away just when offeree is about to claim reward  
   a) RST 2d § 45 creates an option K once the offeree begins (or tenders) the requested performance  
   b) Offeree has no obligation to complete but offeror has lost power to withdraw  
   a) Facts: SubK’or D made bid to P for construction work. P relied on the bid when drafting his own bid for a project, and P was awarded the job. D then said he had made a mistake and could not do the job at that price, and that there was no K b/c he revoked his offer before P communicated acceptance. P found another subK’or and sued for the price difference.  
   b) Holding: Although there was no option K or bilateral K binding on both parties, there was substantial reliance on the bid that was reason to make the promise binding. Absence of consideration not fatal to enforcement of promise. Purpose of § 90 is to make a promise binding even w/o consideration.  
4. **James Baird Co. v. Gimbel Bros., Inc.** (2d Cir. 1933)  
   a) Learned Hand takes a different approach than decision reached in Drennan, holding that an offer can be revoked before it is accepted and that there is no room for “promissory estoppel” in this context

   a) Facts: General K’or made bid to government renovation project brought action against SubK’or that submitted low bid for mechanical portion of subcontract, seeking to recover damages caused by SubK’or’s bid withdrawal  
   b) Holding: Judgment for subK’or, holding: (1) traditional bilateral K had not been formed at time subK’or withdrew bid, and (2) evidence was insufficient to establish general K’or’s detrimental reliance on bid.  
   c) Discusses Drennan case, and how it has been criticized b/c lack of symmetry of detrimental reliance: SubK’ors bound to general, but general is not bound to sub-K’ors, leaving Gen. K’or free to bid shop, bid chop, and encourage bid peddling.

C. **Firm Offers Under the UCC**
1. **UCC 2-205. Firm Offers.** Offer by merchant to buy or sell goods in a signed writing, which by its terms gives assurance that it will be held open is not revocable for lack of consideration during the time stated, or if no time is stated, for a reasonable time (not exceeding three months)

**XII. OBLIGATION BASED ON UNJUST ENRICHMENT**

**A. Unjust Enrichment (UE)**

1. **The Relationship Between UE and K**
   a) UE is NOT based on a promise; has some relationship to K, but it is distinct, functioning as a separate and independent cause of action, arising where the claimant has conferred a benefit on the recipient under circumstances that make it unjust for the recipient to keep the benefit w/o paying for it
   b) Examples where Unjust Enrichment is available:
      (1) Where K is unenforceable or K has defect allowing one party to set it aside (e.g., K does not comply w/ SOFs). Even though K cannot be enforced, buyer has cause of action for return of down payment due to UE
      (2) Where person collapses on street unconscious and bystander rushes him to ER. He did not K for care, but principle of UE would give hospital basis for claiming he pay cost of medical services

2. **Elements of UE**
   a) Injustice
      (1) Can justly keep benefits w/o payment if gifts or if the benefit was not asked for and cannot be returned (officious intermeddler)
      (2) Would be unjust not to pay where, e.g., hospital provided services in emergency assuming patient would have wanted care
   b) Enrichment (the benefit)
      (1) Where benefit can be restored, court may order specific restitution
      (2) Where benefit cannot be restored, $ judgment is awarded for value
      (3) Court determines value: quantum meruit (as much as deserved) for market price of services; quantum valebant (as much as they are worth) for market value of goods

3. **Terminology**
   a) Restitution: remedy for UE (VALUE OF BENEFIT, NOT PROMISE)
   b) “Quasi-K,” “K in law”: terms indicating it is not real K case, but treated as such to fit into K form of action
   c) Quantum Meruit = Ex Contractu = Quasi-K = K-implied-in-law = UE = Restitution

4. **Distinction between Factually and Legally Implied Ks**
      (1) Facts: P offered to send copy of a plagiarized book to D, who pursued claim of copyright infringement. P demanded payment, to which D argued there no K; he did not have to pay.
      (2) Holding: Demurrer for failure to state a claim. No facts to infer existence of a K, none of the letters mention payment, volunteers have no right to restitution; no reimbursement for unjust enrichment. This was an implied K based on what was implicit in their conduct: K in fact
      (1) Facts: D was injured, and with permission a coworker gave his name to P, a personal injury atty. They met to discuss the case, but did not discuss fee arrangements. P started working on the case, and at the end of the month, sent a formal contingency fee agreement to D calling for 50/50 split of the recovery, after costs. D balked and found other counsel. P sued in quantum meruit.
      (2) Holding: P’s unclean hands (in failure to send the contingency agreement before starting work and charging a ridiculously high fee) and D’s rejection of services preclude any quantum meruit recovery. The parties never entered into an attorney-client relationship. There was no K and no obligation to reimburse for work on the case. **Quantum meruit is an equitable remedy.**
      (3) If there had been a remedy, it would have been measured at the value of the services (not value of promise); court would consider what other attorneys are paid, using an objective standard

5. **Volunteers and Intermeddlers**
   a) **Estate of Cleveland v. Gorden**, 837 S.W.2d 68 (Tenn. Ct. App. 1992)
      (1) Facts: Gorden took care of her aunt and paid the majority of her expenses, under the expectation that she would be reimbursed. Her aunt told a companion that Gorden would get everything she had, but her will left only furniture to her niece, and the rest to her church. (D was reimbursed)
      (2) Holding: A person who pays another’s debt b/c of a moral obligation is not an officious intermeddler and is entitled to reimbursement unless the gift was gratuitous. The presumption that family members’ services are gratuitous can be rebutted by proof of an express agreement to pay for services or by proof of circumstances showing that the relative accepting the services knew or should have known that the relative performing them expected compensation or reimbursement.
      (3) **Rule: Officious intermeddler or volunteer cannot claim restitution.**
B. Moral Obligation and the Material Benefit Rule

1. The Meaning of “Moral Obligation” in this Context
   a) A promise is not enforceable as a K merely b/c the promisor has some moral duty to perform it.
   b) Sometimes courts do recognize a binding legal promise under “moral obligation” w/ limited scope. Moral obligation is excep't to rule of consideration doctrine, allowing prior detriment to be sufficient consideration.
   c) RST avoids the term “moral obligation” to avoid confusion.
   d) Three circumstances in all situations where moral obligation exists:
      (1) Some benefit was conferred on promisor by the promisee before the promise was made
      (2) Benefit unjustly enriched the promisor
      (3) Promisor subsequently made a promise to pay for the benefit
   e) Moral obligation has clear link to restitution, but unlike restitution (and like K and promissory estoppel), it is a promissory theory of liability.

2. Moral Obligation Where a Debtor Promises to Pay a Preexisting Unenforceable Legal Debt
   a) RST § 82 provides “a promise to pay all or part of an antecedent K’ual or quasi-K’ual indebtedness owed by the promisor is binding if indebtedness is still enforceable or would be except for the effect of a SOLs”
   b) Situations where moral obligation can be enforced:
      (1) Where a debtor borrows $ and fails to repay, and creditor fails to bring suit before SOLs expires. If debtor makes new promise to repay, enforceable w/o new consideration and in absence of reliance.
      (2) Where one files for BR and his debts are discharged, if he makes new promise to repay creditors, the promise is supported by moral obligation and does not need consideration to make it binding.
      (3) Where obligation can be voided on ground that assent was obtained by fraud, duress, mistake, or b/c of lack of capacity. A voidable obligation is enforceable unless person w/ right to avoid elects to exercise this right. If person subsequently ratifies voidable obligation by promising to perform, doctrine of moral obligation renders promise enforceable even if no consideration was given (unless ratifying promise was subject to same defect as the initial promise).

      (1) Facts: P saved D from death or serious injury by falling with a pine block from an upper floor of a mill to keep it from injuring D. D made a promise to pay $15 every two weeks to the P b/c of the injuries P sustained while saving D. After D’s death, P sued estate for continued payment.
      (2) Holding: Moral obligation from P preventing death or serious harm to D was consideration to make promise enforceable, and D received substantial material benefit from P’s act.
      (3) Rule of law: Moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.
   b) RST 2d § 86
      (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
      (2) A promise is not binding under Subsectn 1: a) if promisee conferred benefit as a gift or for other reasons the promisor has not been UE’d; (b) to the extent value is disproportionate to benefit.
      (1) Facts: Tallas promised P $50K for his services and help, and expressed his intention to add P to his will as an heir. Tallas died w/o adding P, and P sued estate.
      (2) Holding: Decision for the estate, holding that P provided the services gratuitously and w/o expectation of payment. Past consideration is not valid, and even if Utah accepted the moral obligation exception (which they did not), the promise was not an enforceable K b/c the services were given gratuitously.
      (1) Reached opposite conclusion from Dementas
      (2) Facts: IPAT asked P to find a builder for their new premises. P recommended D to IPAT and set up a meeting between them. After bringing D and IPAT together, P had D sign a letter agreeing to pay a 3% commission if D received the bid. D got the bid, refused to pay P, and P sued.
      (3) Holding: The court held that services rendered (by the P) prior to the promise constituted “beneficial” or “meritorious” consideration, which imposed a moral obligation that could be treated as implied consideration.

XIII. POLICING KS FOR IMPROPER BARGAINING

A. General Introduction
   1. Policing power given to courts to look beyond manifestation of assent
   2. If assent was induced by improper means, court may choose not to enforce in whole or in part
3. Remedial aspect is important
   a) Gen. Rule: K is avoidable (can choose to rescind K) rather than void (nullity in the law)(some exceptions)
   b) If K is avoided, the general rule is that each party is entitled to restitution of any benefits conferred on the other under the K up to time of avoidance (based not on K but unjust enrichment)
   c) Sometimes K is enforced with excision of term
   d) Sometimes $ damages are awarded

B. Misrepresentation and Fraud
   1. The General Principles and Elements of Misrepresentation
      a) RST 2d § 164. When a Misrepresentation Makes a K Voidable. If a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the K is voidable by the recipient.
      b) RST 2d § 162. When Misrepresentation is Fraudulent or Material
         (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
            (a) knows or believes that the assertion is not in accords with the facts, or
            (b) does not have the confidence that he states or implies in the truth of the assertion, or
            (c) knows that he does not have the basis that he states or implies for the assertion.
         (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so
      c) RST 2d § 160. When Action is Equivalent to an Assertion (Concealment). Action intended or known likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist.
      e) RST 2d § 161. When Non-Disclosure is Equivalent to an Assertion. Only (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation; (b) where he knows that disclosure would correct a mistake of the other party as to a basic assumption on which that party is making the K and non-disclosure amounts to failure to act in good faith; (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing; (d) where the other person is entitled to know b/c of relation of trust and confidence between them.
      f) UCC Article 2 has no provision concerning misrepresentation.

   2. Affirmative Fraud
      a) Sarvis v. Vermont State Colleges, (Vt. 2001)
         (1) Facts: P lied on his resume about certain jobs that he had held, when in fact he was in prison during said time. He entered into three employment Ks with D, which D terminated upon learning of his criminal convictions. P filed complaint alleging that D was liable for breach of all three Ks and wrongful termination.
         (2) Holding: Court granted D’s MSJ concluding that it was reasonable to discharge P b/c of his material misrepresentations about his criminal record, and that P had notice that dishonesty and fraud were just ground for dismissal.
         (3) Rule of law: Misrepresentation during hiring process can be basis for rescission of employment K.
      b) In re House of Drugs, Inc., 251 B.R. 206 (2000), United States Bankruptcy Court, D.N.J.
         (1) Facts: D failed to disclose info re other mall stores going out of business when debtor signed lease.
         (2) Holding: RD Elmwood did not engage in fraud by failing to disclose material information to debtor (debtor did not reasonably rely upon RD Elmwood’s material omission).
         (3) Rule: Legal fraud requires: (1) material misrepresentation by the D of a presently existing or past fact; (2) knowledge or belief by the D of that representation’s falsity; (3) an intent that the P rely thereon; (4) reasonable reliance by the P on representation; and (5) resulting damage to the P (proven by clear and convincing evidence).
         (4) Rule: An omission may constitute material representation for purpose of determining fraud.
         (1) Facts: P sued for rescission of sale on a house she bought w/o knowledge that it was haunted.
         (2) Holding: The house is haunted as a matter of law. D reported house as haunted in national publications and is therefore estopped to deny the existence of the ghosts.
         (3) Note: Spirit of equity is an important consideration in the opinion, written by Justice Rubin.
         (4) Dissent: Caveat emptor

   3. Silence as Fraud: Fraudulent Nondisclosures and the Duty to Speak
      a) Silence is not tantamount to fraud in every situation. Sometimes parties are entitled to keep info from other
      b) In re House of Drugs, Inc., 251 B.R. 206 (2000), United States Bankruptcy Court, D.N.J.
         (1) Facts: D failed to disclose info re other mall stores going out of business when debtor signed lease.
         (2) Holding: RD Elmwood did not engage in fraud by failing to disclose material information to debtor (debtor did not reasonably rely upon RD Elmwood’s material omission).
         (3) Rule: Legal fraud requires: (1) material misrepresentation by the D of a presently existing or past fact; (2) knowledge or belief by the D of that representation’s falsity; (3) an intent that the P rely thereon; (4) reasonable reliance by the P on representation; and (5) resulting damage to the P (proven by clear and convincing evidence).
         (4) Rule: An omission may constitute material representation for purpose of determining fraud.

   4. Misrepresentation of Fact, Opinion, and Future Action
      a) Cummings v. HPG International, Inc., (1st Cir. 2001): P sues for faulty PVC roofs that were found to be subject to catastrophic failures after the 10-year warranty period for deceit, claiming it purchased the roofs
5. The Distinction Between Fraudulent and Negligent Misrepresentation
   a) Essential difference is in state of mind.
   b) Negligent misrepresentation = careless
      (1) Less morally culpable
      (2) Element of materiality more central to negl. misrep. analysis

6. The Choice of Remedy for Fraud; Punitive Damages
   a) Damages: generally rescission (accompanied by restitution is there has been partial performance; or
      damages for loss caused by the fraud (measured as the difference in value been actual worth of
      performance and what it would have been worth as represented)
   b) B/c fraud is deliberate tort, tort law could be used if P wished to obtain damages instead of rescission.
      Punitive damages not usually allowed in K cares, but where D has committed an intentional tort (e.g.,
      fraud) can recover punitive. Both remedies are based on same wrongful act
   c) Seaton v. Lawson Chevrolet-Mazda, Inc. (Tenn. 1991): Car dealer sold new model “demonstrator” w/o
      telling buyer it had been in a wreck and repaired. Customer sued for rescission for fraud. Court allowed
      award of punitive damages in addition to rescission and refund

7. Fraud in the Inducement Distinguished from Fraud in the Factum
   a) Fraud in the Inducement: Misrepresentation relates to a fact that forms the basis of K and falsely gives the
      other party an incentive to enter the K
   b) Fraud in the Factum: False representation as to the document being executed

C. Duress

1. The Elements of Duress
   a) Coercion: threat of adverse consequences (including economic harm)
   b) RST 2d 175. When Duress by Threat Makes a K Voidable.
      (1) 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 K is voidable by the victim.
   c) RST 2d § 176. When a Threat is Improper
      (1) Threatened act is (a) crime or tort, (b) criminal prosecution, use of civil process and threat is made
      in bad faith, (c) breach of duty of good faith under K; if resulting is exchange is not on fair terms
      and: (a) the threatened act would harm recipient and not benefit threat-or; or (b) effectiveness of
      the threat is increased by prior unfair dealing; or (c) use of power for illegitimate ends
      (1) Facts: D’s husband embezzled $ from P. P convinced D to sign two promissory notes as
      confession to judgment (waiver to right to defend suit and authorization for creditor to obtain
      judgment by default). D was told this would keep her husband out of jail. The second promissory
      note ended up being for over $200K. D petitioned to open judgment and allow case to go to jury.
      (2) Holding: Sufficient evidence of the defenses to constitute a meritorious defense. (Threat of
      criminal process for private benefit is duress. D had no reasonable alternative but to sign.)
      (3) Rule of law: Petition to open a confessed judgment and allow the case to go to a jury is within the
      court’s discretion, and petitioner must bring petition promptly and must sufficiently demonstrate a
      meritorious defense.

2. Market or Circumstantial Pressure Distinguished from Duress
   a) Quigley v. KPMG Peat Marwick, LLP: Requirement to sign arbitration clause is not duress in a regular
      employment K, even where employee wrote “U.D.” after his signature to indicate “under duress.”

3. Coercion by a Nonparty and the Distinction Between Void and Voidable Contracts Induced by Duress
   a) Where party to the K coerces the other to enter under duress, easy to justify granting remedy: party who
      made threat is guilty of misconduct, and protection of victim o/w reliance interest; duress from 3d party
      becomes more difficult: reliance interest is not from person who is guilty of misconduct
   b) U.S. ex rel Trane Co. v. Bond (1991): distinguishes duress that renders K voidable as defense only against
      perpetrator of threat and more serious duress that renders K void so even innocent 3d party cannot enforce
      (Remands to determine if threats were sufficient to meet 2d standard)
   c) RST 2d 174: Treats effect of duress by 3d party differently from Trane Co. K is void only where
      manifestation of assent is “physically compelled”
   d) Trane Co’s test is broader, recognizing physical compulsion as one of the bases for declaring K void, but
      recognizes threats of dire force as well

D. Duress and Bad Faith in Relation to K Modification

1. Application of Consideration Doctrine and the Preexisting Duty Rule to Modifications
   a) K amendments require consideration to be valid
b) Agreement can be avoided if induced by duress

c) Preexisting duty rule: If person promises that she is already obliged to do, there is no consideration b/c the promisor suffers no detriment in merely promising to perform a legal duty that she already has

(1) New elements taken on may be trivial, b/c courts do not normally inquire into adequacy of consideration unless it is nominal or sham

(2) Where the parties agree to modify the terms of an existing K in a way that affects the obligations of only one of them, a consideration problem may arise

d) Rinck v. Association of Reserve City Bankers (1996)

(1) Facts: During merger P was assured that she would keep her job with same salary and benefits. In reliance of this, she did not seek alternative employment. When she was terminated, she filed a complaint alleging breach of K and seeking reinstatement and compensatory damages.

(2) Holding: Reverses MSJ for D. Oral statements were sufficient to overcome usual presumption that employment is at will. Jury could find new consideration in P’s promise to continue employment through the merger in reliance of job security.

e) Alaska Packer’s Association v. Domenico (9th Cir. 1902): Fishermen working during salmon season for lump sum plus commission threatened to cease work unless the salary was increased. Parties signed new K agreeing to increase. Court held wage increase was invalid b/c there was no new consideration.

2. The Application of Duress Doctrines to Modifications

a) Could the fishermen’s K have been valid if they had added a provision agreeing not to spit? If yes, we need another theory for K avoidance.

b) Austin Instrument, Inc. v. Loral Corp. (N.Y. 1971)

(1) Economic duress is demonstrated by proof that “immediate possession of needful goods is threatened” or by proof that one party has threatened to breach by withholding goods unless the other party agrees to a further demand.

(2) It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of K would not be adequate.

(3) Holding: Classic case of economic duress: threat to stop delivering unless prices were increased deprived D of free will, especially where D’s relationship with government would be jeopardized by failure to deliver and D had to work overtime b/c of P’s delay.

3. Supervening Difficulties as a Basis for Upholding a Modification Without Consideration

a) Courts have widely recognized the validity of modification w/o new consideration: where events following the formation of K create a difficulty not anticipated by the parties at the time of K’ing, a fairly bargained modification of the K to take account of that unforeseen difficulty is valid

b) New England Rock Services, Inc. v Empire Paving, Inc. (Conn. 1999): P was blasting rock for a site for D, to be paid on the lesser of rate based on cubic yardage of material blasted or on time and materials basis. P experienced unforeseen serious problems w/ water seepage requiring it to use a more costly and time-consuming process. P&D signed amended K to pay based on time and materials basis. D reneged. P filed suit for addl amt owed under K. Court held “unforeseen difficulties” is exctn to “preexisting duty rule.”

4. K Modifications Under UCC Article 2

a) Departs from CL by declaring that no consideration is needed to validate an agreement modifying a K for sale of goods

b) UCC 2-209. Modification, Rescission and Waiver

(1) Modification does not need consideration

(2) If K requires modification, must be signed separately by other party

(3) Requirements of Statute of Frauds must be satisfied if K as modified is within its provisions

c) 2-209 is meant to get rid of technicalities when modifications are necessary and desirable

d) Still requires that modifications be made in good faith. General standard is a subjective test focusing on party’s state of mind; merchant standard also looks at objective criterion of accepted commercial mores.

E. Undue Influence

1. Where no false representation or improper threat can be pinpointed, but K was nevertheless executed under circumstances that would make its enforcement unjust = undue influence or unconscionability

2. Undue influence is typically applicable only when victim is particularly vulnerable to the persuasion of the other party b/c of some kind of relationship of submissiveness, dependence, or trust

3. Rudolf Nureyev Dance Foundation v. Novreeva-Francois (S.D.N.Y. 1998): Heirs of Nureyev objected to the transfer of U.S. assets to dance foundation (RNDF) arguing that he was unduly influenced by his attorney. RNDF sued for DJ that gifts were valid. Court granted judgment for RNDF, finding that attorney followed wishes of Nureyev, who was strong-willed person not easily manipulable and surrounded by close friends.

4. Tinney v. Tinney (R.I. 2001): Court reached dift result where widowed woman left ¼ interest in her property to a handyman who had become close to the family and had a reputation for becoming close to elderly ladies and
taking their worldly goods. Testimony of witnesses showed that woman, who had formerly been imperious, domineering matriarch, had been affected by her husband’s death and apparently succumbed to handyman’s influence and to his threats to leave if she did not adopt him.

5. **Odorizzi v. Bloomfield School District** (Cal. 1966): After criminal charges were made against him for homosexual activity, P resigned from job as schoolteacher b/c of undue influence exerted by authoritative figure at a time when he lacked capacity to make a valid K (severe mental and emotional strain, lack of sleep for 40 hours). Court held this was not a matter of law, but of fact, and reversed demurrer

F. **Unconscionability**

1. The Derivation and Meaning of “Unconscionability”
   a) Not in accordance with what is right. Offends the conscience b/c it is unreasonably excessive, unscrupulous, or egregious. Arose in courts of equity, accelerated into use by inclusion in UCC; RST 2d followed UCC and declared unconscionability a general doctrine
   b) UCC 2-302: Unconscionable K or Clause.
      (1) Court may refuse to enforce the K or may enforce K w/o unconscionable clause or limit application of unconscionable part
      (2) Opposite party has reasonable opportunity to present evidence as to its commercial setting, purpose, and effect
   c) RST 2d § 208: Same 2-302(1)
   d) Both provisions do little more than recognize the power of the court to refuse enforcement of an unconscionable K in whole or in part. Both identify the COURT rather than the jury as arbiter

2. The Elements of Unconscionability
   a) **Germantown v. Rawlinson**: court found that unconscionability constituted a third meritorious defense (in addition to fraud & duress)
   b) **Williams v. Walker-Thomas Furniture** (1965): “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with K terms which are unreasonably favorable to the other party.”
   c) Concept of “Unfair Surprise” mentioned in RST comment.
      (1) Procedural Unconscionability: “bargaining naughtiness”
      (2) Substantive Unconscionability: relates to terms of resulting K
   e) Contracts of Adhesion
      (1) One party with superior bargaining power, is able to dictate the terms of the K to the other on a take it or leave it basis, and weaker party has no choice but to “adhere” to the terms
      (2) Standard forms can have dangerous side effect of allowing strong corporations to impose their terms on weaker parties. Adhesion becomes unconscionable and is actionable if the abuse of bargaining dominance imposes unfair terms.
   f) **NEC Technologies, Inc. v. Nelson**, (Ga. 1996): TV caught fire and caused property damage to Nelson’s home, but no personal injury. Sales K contained limited express warranty covering the set itself but excluding all liability for incidental or consequential damages. Court found no procedural unconscionability and no substantive unconscionability (legislature allows for limiting consequential damages; no personal injury involved). UCC 2-719(3) allows for limiting of consequential damages unless it is unconscionable to do so, e.g., excludes personal injury

3. Unconscionability in Transactions Between Sophisticated Businesses
   a) Unconscionability is more likely to be seen in consumer settings than commercial
   b) **Southwest Pet Products, Inc. v. Koch Industries, Inc.**, (D.Ariz. 2000): K excluded implied warranties and excluded D from liability for incidental or consequential damages. If goods failed to conform, D would either replace or pay buyer difference between K price and market price. Level of vomitoxin exceeded acceptable limits, and P sued. K was not unconscionable b/c it was standard in the industry, and P signed many Ks with those terms. No procedural unconscionability b/c P is equal to D in bargaining power and could have altered K terms.
      (1) Rule: Substantive unconscionability must be determined at the time of contracting.
      (2) Rule: Substantive unconscionability looks at the terms of the K to see if they are so one-sided as to oppress or unfairly surprise an innocent party.

4. Relief for Unconscionability
   a) Various remedial options: nonenforcement of K as whole, severance of unconscionable term, adjust of the term to get rid of unconscionable effect
(1) Facts: Gateway Standard Terms and Conditions included statement that by keeping merchandise beyond 30 days you were accepted the terms, one of which was an arbitration clause.

(2) Holding: UCC 2-207 does not apply: acceptance of offer occurred when product was kept longer than 30 days; not a K of adhesion, since consumer can purchase elsewhere or not at all; not procedurally unconscionable (no unfair bargaining) since terms were set out clearly, no high-pressure tactics, 30 days to reject the terms; found there was substantive unconscionability b/c of the cost of the ICC arbitration. Remands case so parties can seek appropriate substitution of an arbitrator pursuant to Federal Arbitration Act.

(3) Use of 2-207 allows practically any conclusion judge wishes to find b/c law is so malleable in this area. Must balance policy concerns: freedom to K (and decreased costs to consumers) versus concern with consumers’ welfare.

c) **Sosa v. Paulos**, (Ut. 1996)

(1) Facts: One hour before surgery member of staff had P signed w/o reading two medical consents and a “Physician-patient arbitration agreement.” Complications to the surgery led to P suing D for malpractice. D moved to stay the suit and compel arbitration.

(2) Holding: The agreement was unconscionable. Procedurally unconscionable in that she was vulnerable, anxious, as patient awaiting surgery. Substantively unconscionable in that it required a patient who did not obtain an award of more than half the amount claimed to pay the arbitrators and doctor’s attorney fees, as well as paying the doctor for his time spent in arbitration.

(3) Although there is a clause allowing severance of any invalid terms and allowing the agreement to remain in force, court finds that allowing severance would destroy doctrine of procedural unconscionability by allowing party in stronger bargaining position to coerce with a severance clause. Sometimes severance is valid, but not here.

(4) Argument in favor of using standard forms to limit liability or mandate arbitration: keeps medical costs down, helps to weed out weak cases, provides mechanism for judge to use gate-keeping role

5. Unconscionability as a tool of last resort

**XIV. POLICING KS**

**A. Introduction**

1. Some Ks are fairly bargained but not enforced
   a) Criminal offense (e.g., drug trafficking)
   b) Not crime, but either forbidden by statute or CL or against public policy (e.g., transfer of license)
   c) Incapacity: Minors or Adults suffering from mental illness or defect that renders them incapable of forming requisite contractual intent

**B. Illegality**

1. **The Diversified Group v. Sahn:**
   a) Coleman held subscription rights to season tickets that were explicitly nontransferable. Any attempt to transfer could result in their cancellation. Coleman sold them to D for $90K above ticket price. D sold rights to a portion of the tickets to Haber for $140K above ticket price in a K providing that Haber would have no rights against D and that D would have no further obligations. Before Haber could use or obtain the tickets, MSG canceled the Coleman subscription and refunded $ to Coleman. Haber was repaid face value of tickets, but D refused to pay him the $140K above face value. Haber sued D for rescission of K and refund on grounds that K violated N.Y.S. anti-scalping law.

   b) Court held that K was illegal and awarded SJ against D. Declines application of in pari delicto potior est conditio defendentis (where the parties are equally at fault, the condition of the defendant is the better one) b/c it found that statutory policy overrode the general equitable principles expressed in the maxim.

   c) Note: in pari delicto rule is a flexible and discretionary standard that allows the court to weigh not only the degree of responsibility of each party, but also the equities between them and the wider public interest

   d) Factors to consider: Whom is the law protecting? What policy interest does the law serve?

   e) If you treated this in terms of K and restitution you would get the same result even w/o statute. Sue on terms of unjust enrichment.

2. **Danzig v. Danzig:** J offered 1/3 of any fee he received from client steered into his office by S. For a while J paid, but then breached for a client where 1/3 fee was $89K. As a general rule, Ks which are illegal or against public policy are not enforced. Rule subject to exception where court determines parties are not in pari delicto (not equally culpable). Rule should not be applied: “where no serious moral turpitude is involved, where the D is the one guilty of the greatest moral fault, and where to apply the rule will” unjustly enrich D. Both prohibitions: Washington’s barratry statute and RPC apply only to J. Steven may be able to prove facts in support of his claim that entitle him to relief – MTD should not have been granted (Dissent: K should not be enforced b/c it is contrary to the statute, RPC, and general public policy vs. the brokerage of lawyer services. These policies are aimed at protection of public, rather than protection or punishment of either party)
C. Contracts in Violation of Public Policy

1. Concerns
   a) Court has to resolve tension between competing concerns of enforcing the K and upholding public policy (and sometimes the need to balance the equities between the parties)
   b) Court recognition of public policy not statutorily sanctioned comes very close to judicial law making

2. Stevens v. Rooks Pitts & Poust.: P had signed a partnership agreement containing non-competition clause, stating that upon withdrawal a partner would receive 4/5 of his share of interest, but the remaining 1/5 would be given only if he did not engage in the practice of law in competition to the partnership in the Chicago metropolitan area for a period of one year after leaving. P joined a GP firm in Chicago and D would not give him the remaining 1/5. P filed complaint seeking DJ that the noncompetition clause is unenforceable b/c it restricts his clients’ choice of legal counsel in violation of rule in IL Code of Prof. Conduct. Both parties applied for SJ. Clause is unenforceable b/c it contravenes with public policy, and should be severed from the agreement.

3. Note: Usual approach to noncompetition clauses is “the Rule of Reason”
   a) Noncomp. clause upheld to the extent that it is reasonable as to:
      (1) Duration
      (2) The geographic areas that it covers
      (3) The scope and extent of the activities it restrains.
   b) Evaluates totality of circumstances, including:
      (1) Degree to which it is needed to protect legitimate interests of the party in whose favor it operates
      (2) Any undue hardship it will impose on restrained party
      (3) General public interest
   c) Given greatest deference in context of sale of business; most careful scrutiny in context of employment noncompetition clauses
   d) Partnership noncompetition clauses protect leaving partner from taking customers, clients, staff, or secrets

4. Harmon v. Mount Hood Meadows, Ltd., (Or. Ct. App. 1997): P signs ski release on season pass releasing ski resort from all liability, is injured boarding chair lift, and sues for negligence. D moves for SJ arguing P’s claim is barred by release. P argues the clause is overbroad, barring claims not only for negligence, but for gross negligence and wanton or willful misconduct, and thus violates public policy. Court holds that even if the clause is over broad and may be against public policy in some cases, it is not overbroad in P’s case “as applied,” (where there is no willful/wanton misconduct) and MSJ was properly granted to D.

5. Note: Surrogate Parenting Contracts
   a) When surrogate reneges on K, clashing policy interests: freedom to K vs. ethics of arrangements and impact on parties & society
   b) In the Matter of Baby M., (N.J. 1988): K is unenforceable: K issue takes second place to statutes and public policy relating to adoption and custody. Arrangement was equivalent to adoption and violated adoption statutes forbidding payment for adoption, and making surrender of custody revocable. Also against public policy to bind a mother to advance commitment made before baby is born to give up child
   c) R.R. v. M.H., (Mass. 1998): Modified K terms trying to cure problems in Baby M: payments were for services and medical expenses, not payment for adoption or surrender of parental rights. Court still refused to enforce K. Although Mass. has no statute, principles of adoption law apply and consent is therefore ineffective unless given at least four days after the child is born.

D. Incapacity

1. Incapacity and Exploitation
   a) Where minor seeks to avoid a K, public interest in protecting minors from exploitation is generally strong enough to o/w protecting reliance on K
   b) Mental incompetence protection is not as absolute and is more carefully weighted against the need to protect other party’s legitimate reliance
   c) Courts also looks for improper conduct on part of competent party

2. Minority
   a) Age is typically fixed by statute.
   b) Minor can avoid K by showing he was a minor when he made K; does not need to show other party was guilty of improper bargaining or deliberate advantage-taking
   c) K is voidable; minor can disaffirm the K up until a reasonable time after he has reached the age of majority
   d) Webster Street Partnership, Ltd. v. Sheridan (Neb. 1985): D could not recover for damages due to broken lease of minors; had to refund the security deposit and rent paid. The apt was not a necessary, b/c the boys were living away from home voluntarily. Even if the apt was a necessary, the boys wouldn’t be liable b/c not emancipated.

   (1) RULE: Minors lack contractual capacities and have right of avoidance for Ks entered.
   (2) Exceptions: Emancipated minor can K for necessaries
(a) Emancipated: where parents’ duty of support is terminated as a result of certain voluntary acts of the minor, such as marrying or entering the armed services. Moving out does not constitute emancipation.

(b) Emancipation does not mean that minor acquires full k'ual capacity; only that b/c his parents no longer have duty to support, he is personally responsible in quasi-K

(c) Necessaries: flexible term w/o fixed definition; includes goods and services that are clearly essential to maintain the minor’s existence but can extend beyond that to cover items that are appropriate to the minor’s standard of living.

(d) If an unemancipated minor Ks for necessaries, parents may be liable b/c they have duty to support minor, and supply of necessaries to him may unjustly enrich the parents.

e) **Halbman v. Lemke** (Wis. 1980): D sold P a car; P paid 4/5 of the asked amount and was to make weekly payments for the remainder. The car’s engine broke and P could not pay for repairs. He wrote to D disaffirming the sale and demanding return of $. D had to give P his $ back. P did not have to pay D for the loss of value of the car b/c it was no longer in his possession. **RULE:** Upon avoidance, a minor is entitled to recover all consideration given under K, and he is required to return whatever he received under the K, but only responsible for returning what he has at time of disaffirmance.

f) **Zivich v. Mentor Soccer Club, Inc.**, (Oh. 1998) **RULE:** Public policy justifies giving parents authority to enter into exculpatory agreements on behalf of their minor children.

g) **Shields v. Gross**: Brooke Shields was not allowed to disaffirm a K made by her mother when she was 10 for photos. NY Statute abrogated minor’s right to disaffirm consent to the publication of photographs given by parent. (Dissent disagreed that statute was intended to abrogate the minor’s right of disaffirmance; but was only to provide process for avoiding criminal and civil liability for publishing minor’s name or image)

3. Mental Incapacity

a) Rebuttable presumption that an adult has contractual capacity

b) Older test was “cognitive test”: at time of K’ing, party must have had such a severe mental illness that she was unable to understand the nature and consequences of the transaction

c) Many courts have broadened the test to include cases in which the party may have understood the transaction, but illness affected ability to act rationally in relation to the transaction

d) Stupidity does not equal mental incapacity

e) RST 2d 15. Mental Illness or Defect

   (1) Voidable if by reason of mental illness or defect: he is unable to understand nature and consequences or is unable to act in reasonable manner w/r/t transaction and other party has reason to know of the condition

   (2) Where K is made on fair terms and other party is w/o knowledge of defect, power of avoidance terminates to the extent that K has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust

f) **Farnum v. Silvano** (Mass. App. Ct. 1989): Sale for real estate at almost half market value was allowed rescission where buyer knew of seller’s mental incapacity and had been warned not to proceed.

h) **Hauer v. Union State Bank of Wautoma** (Wis. App. Ct. 1995): P suffered brain injury in motorcycle accident and was adjudicated to be incompetent. Later a doctor decided she could manage her affairs and guardianship was cancelled. Her monthly income consisted of social security disability and interest from a mutual fund. A man convinced her to get a loan from her bank with her mutual fund as collateral. When he defaulted, the loan claimed the mutual fund, and P sued for rescission of the K. Court held that the bank acted in bad faith by making the loan w/ knowledge that P depended on the interest for her livelihood and had suffered from a brain injury. (Case was held NOT to be analogous to minority cases)

XV. **K INTERPRETATION AND CONSTRUCTION**

A. Interpretation

1. Interpretation, or the Search for Meaning

   a) Analysis starts with examination of words used and the reasonable expectations such words inspire, also considers context of situation. Sometimes looks at conduct and other circumstances to imply K terms; or construe Ks to include certain terms when parties did not intend them

   b) Courts invoke default rules of law to fill gaps in parties’ agreements

      (1) Search for intent is process of interpretation

      (2) Tests of what is fair, just, or otherwise required by relevant public policies is process of construction

   c) In interpretation, K law must provide a mechanism for juggling various sources of evidence that are potentially unreliable or conflicting

   d) Not actual intent, but what a reasonable party would have expected under the circumstances
e) Guilford Transp. Indust. v. Public Utilities Commission (2000): License agreement allowed “appurtenances” including wires to cross over P’s land. Disagreement over whether fiber optic cables constitute “wire.” Ambiguity in the document leaves unresolved whether it was the parties’ intention to include fiber optics within the license. Interpretation is matter of fact and is remanded to factfinder.

2. Sources of K Meaning and Standards of Interpretation
   a) Difficulty in interpretation is determining what types of clues are relevant and how conflicts among them are to be resolved.
   b) RST 2d § 202. Rules in Aid of Interpretation.
      (1) Words and other conduct; purpose is given great weight
      (2) Writing is interpreted as a whole
      (3) Where language has general prevailing meaning, interpreted in accordance; where technical terms are used, given technical meaning within the field
      (4) Course of performance accepted or acquiesced without objection is given great weight in interpretation of meaning
      (5) Wherever possible, manifestations of intention are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.
   c) RST 2d § 203. Standards of Preference in Interpretation
      (1) Reasonable, lawful, effective, over the opposite
      (2) Express terms over course of performance and dealing and usage of trade; course of dealing over usage of trade
      (3) Specific and exact over general
      (4) Separately negotiated or added terms over standardized
   d) UCC 1-205. Course of Dealing and Usage of Trade
   e) UCC 2-208. Course of Performance or Practical Construction.
   f) Frigaliment Importing Co. v. B.N.S. Int’l Sales Corp., (S.D.N.Y. 1960): Disagreement between US supplier and Swiss corporation over the meaning of “chicken.” Since P allowed shipment of birds, D clearly believed it would comply with the K by delivering stewing chicken. P failed to meet burden that chicken was meant in the narrower definition.

3. Interpretation of Standard Contracts
   a) Atwater Creamery Co. v. Western Nat’l Mutual Ins. Co: P sought DJ against D, its insurer seeking coverage for losses resulting from a burglary where burglary did not leave “evidence of forcible entry” required by language of policy. P had filed claims and been reimbursed for two smaller robberies without showing such proof in the past. Reasonable expectations of the insured as to coverage govern to defeat the literal language of the insurance policy.

B. Construction of K Obligations (p. 460)
   1. Introduction
      a) Search for meaning of ambiguous K terms starts with circumstances surrounding the K formation
      b) Sometimes this is insufficient – not enough clues
         (1) Perhaps issue was not considered
         (2) Perhaps parties discussed issue but it was not resolved
         (3) Perhaps the evidence is contradictory and there is no reliable way to resolve the conflict
      c) As discussion moves away from fact to what could or should have happened, public policy issues increasingly come into play
      d) K Construction – generally couched in terms of parties’ probable intent; often supplements manifest intent
      e) Courts try to balance parties’ freedom to K with other imp’t public polices
   2. Gap Fillers
      a) Introduction to Gap Fillers
         (1) Standard terms can be used to fill out the parties’ intent; only used when gap is left
         (2) Article 2 of the UCC will supply (as long as the parties’ had an intention to be bound) a price, a method of payment, a method of delivery, if the parties fail to do so
         (3) Landrum v. Devenport: Failure to include a price on a K does not cause the K to fail where parties intended to be bound and there was a reasonably certain basis for giving an appropriate remedy, the law would imply a “reasonable” price.
         (4) Barnett: Consent theory of K – has suggested that gaps in a parties’ specific agreement should be filled by reference to conventional or common sense understanding in the community to which the parties belong, if any such understanding exists. Entering the K implies tacit assent to commonly understood norms. Any other term supplied by a default rule of law would impose state’s choice upon private actors under the guise of K law, which challenges basic autonomy of the parties.
         (5) Economic Approach: Function of gap fillers and default rules is to promote efficiency in K law.
(a) If most reasonable parties would negotiate a certain type of K provision, perhaps the law should choose that provision as default and only those parties who wished to avoid the default would need to go into the matter in any detail in their K, saving costs.

(b) Forced Information or Bargaining: The law may be able to establish a default rule that is so disadvantageous that the parties are forced to negotiate and reveal secret information or overcome barriers that stand in their way. Threat of default rule encourages parties to do what it takes to reach a more efficient result.

b) Specific Gap Fillers – The Implied Warranty of Merchantability

(1) CL: traditional rule was “caveat emptor”
(2) Increasing concerns about defective products and consumer protection began to erode this rule
(3) UCC 2-314. Implied Warranty: Merchantability; Usage of Trade (ONLY FOR MERCHANTS)
   (a) Must be excluded or modified for it not to apply
   (b) Goods must:
      (i) Pass w/o objection in the trade under K description
      (ii) Of fair average quality within the description
      (iii) Are fit for ordinary purposes for which such goods are used
      (iv) Run of even kind, quality and quantity within each unit
      (v) Adequately contained, packaged, and labeled
      (vi) Conform to promise or affirmation of fact made on container or label
   (c) Other implied warranties may arise from course of dealing or usage of trade

(4) UCC 2-316. Exclusion or Modification of Warranties

3. Using Good Faith to Interpret and Construe Ks

a) Good Faith and the Example of Output and Requirements Ks
   (1) Where quantity term in the K is measured not by specific number but by the output of the performing party or the requirements of the purchasing party.
   (2) Courts sometimes seek to protect parties’ expectations by construing “output” or “requirement” in light of the good faith output or req. of the parties. (In the case of sale of goods, UCC 2-306 does this explicitly.)
   (3) Indiana-American Water Co. v. Town of Seelyville (1998): 25-year K specified that Company agreed to sell to the Town and the Town agreed to purchase “…such quantities of water as the Town may hereafter from time to time need…” Town announced plans to develop well field of its own and the water company sued, seeking DJ that town would breach K by creating its own water supply. Court held that development of water supply would not breach K terms or town’s duty of good faith. Town’s decision was a legitimate, long-term business decision and not merely a desire to avoid the terms of its K.

b) General Obligations of Good Faith and Fair Dealing
   (1) Most courts hold that performing contractual obligations in good faith is a general duty that applies to all Ks.
   (2) RST 2d § 205. Duty of Good Faith and Fair Dealing
   (3) UCC 1-203. Obligation of Good Faith.
   (4) Courts struggle to determine what good faith requires in light of particular agreement of the parties
   (5) United Airlines, inc. v. Good Taste, Inc. (1999): P terminated catering K with D w/ 90-day notice, as required by no-cause termination provision. D argued they relied on the fact that P would not use the 90-day termination provision as it never had in the past when it expanded its business to take on the K. Under IL law, the K could be terminated at will and the implied covenant did not require P to have a legitimate business reason for termination. D neither alleged nor proved “opportunistic advantage-taking.” (Dissent: Different legal inference should have been drawn: that either party could terminate the K for no cause if the reason for termination was consistent with the parties’ reasonable expectations. Quotes RST 2d § 205 – that discretion must be exercised “reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations…”

XVI. PAROL EVIDENCE RULE

A. Introduction to the Parol Evidence Rule

1. The Purpose, Premise, and Content of the Rule
   a) Where a written memorial of an agreement exists, the parol evidence rule limits party’s ability to offer extrinsic evidence and to have the fact finder consider such evidence in interpreting the K.
   b) Definition of parol evidence: evidence other than the written memorial of agreement that is offered by a party to prove alleged K terms, including:
      (1) Evidence of alleged oral agreements made before or contemporaneously w/ execution of writing.
(2) Alleged written agreements made before the writing
(3) Contemporaneous writings are not treated as parol
c) Rule is based on the assumption that when parties record their agreement in writing, they often intend the writing to incorporate the final version of what they have agreed, and to supercede terms that they may have discussed or agreed to in earlier discussions
d) Reasons why parol evidence is not allowed
   (1) If evidence is not relevant, it increases length and cost of litigation
   (2) Rules serves as control over jury if evidence is unreliable or misleading or perjured
e) Broad terms of Parol Evidence Rule
   (1) Where writing is “fully integrated” no parol evidence may be admitted to contradict or augment it
   (2) To the extent that the writing does not express the entire agreement of the parties but nevertheless is the final record of the matters it covers, parol evidence may be admitted to supplement the writing by filling the gaps left in the writing. The evidence may not contradict what has been included in the writing.
   (3) If the writing is unclear or ambiguous, parol evidence may be used to clarify the unclear or ambiguous terms, but again, cannot contradict what has been clearly included in the writing.

2. The Process of Dealing with Parol Evidence
   a) Decide whether evidence is admissible
   b) If admissible, evidence is presented to the fact finder, who evaluates its credibility with all of the other evidence presented at trial. Evidence still has to persuade fact finder that parties agreed to the alleged term

B. Application of the Parol Evidence Rule

1. Difficult to apply
   a) Potential for good and harm
      (1) Serves cause of fairness by acting as barrier to party trying to claim K terms never agreed to
      (2) Defeats fairness by excluding evidence of actual agreed term
   b) Formal Rules
      (1) “Plain meaning” rule; “4 corners” approach to integration
      (2) Classical approach: judge’s determination of admissibility was purportedly made on the basis of the writing itself, and judge paid little attention to the specific circumstances of the parties
      (3) Emphasized logical and objective resolution of disputes
      (4) Williston emphasized a modest departure from strict application, focusing on whether reasonable parties would naturally and normally enter into the agreement w/o demanding that it be included in the writing.
   c) Mitchell v. Lath (1928): Majority: 4 Corners rule – writing appeared to be complete on its face and parol evidence was not allowed w/r/t alleged promise to remove ice house that was not in written K. [Dissent: Advocated approach that would take the nature and content of the alleged parol evidence into account in judging whether the parties intended the writing to be integrated. (How could the parties have intended for this writing to be complete expression of their agreement, if it omitted an agreement that the parties had in fact reached?)]
2. Masterson v. Sine (Cal. 1968): Evidence that the option was not assignable (b/c of family relationship and intent to keep property in the family) should not have been excluded. Since the option clause does not explicitly provide that it contains the complete agreement and the deed is silent on the question of assignability. The case is not one where the parties “would certainly” have included the collateral agreement in the deed.
   a) Rule: Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled; rule must be based on the credibility of the evidence.
   b) Dissent: Argues majority opinion undermines the parol evidence rule, materially lessens reliance which may be placed upon written title for real estate, and opens door to new technique to defraud creditors.
3. Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co. (Ca. 1968): Lower court incorrectly refused to admit any extrinsic evidence that would show proof that indemnity clause was only meant to cover injury to property of 3d party and not P’s property. Rule: Test of admissibility of extrinsic evidence is not whether the document appears to be plain and unambiguous, but whether the evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

C. Parol Evidence Under the UCC

1. UCC strongly reflects Llewellyn’s legal realist philosophy (and he may well have been content to omit a parol evidence rule altogether and considered it in all cases
2. Parol evidence rule made it into UCC with a very contextual approach
3. UCC 2-202. Final Written Expression; Parol or Extrinsic Evidence
   a) Terms w/r/t which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement w/r/t such terms as included therein
may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(1) By course of dealing, usage of trade, or course of performance
(2) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement

b) Comment: Rejects assumption that b/c writing is final on some matters it is to be taken as including all the matters agreed to. States that consistent add’l terms not reduced to writing may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms.

c) Nankuli Paving & Rock Co. v. Shell Oil Co. (9th Cir. 1981): Highly controversial case showing how far 9th Circuit was willing to depart from “4 corners” and plain meaning rules. Parties entered K in which P agreed to purchase its asphalt requirements from D and D agreed to charge it “purchase price at time of delivery.” About 10 years into the relationship, D nearly doubled its price b/c of OPEC. P claimed that it was entitled to lower price and that D had obligation to price protect stemming from D’s past protection and general usage in the asphalt trade. 9th Cir. upheld verdict in favor of P.

D. The Use of Merger or Integration Clauses
1. Merger or integration clauses are used in Ks to show that the document supercedes past agreements and that it is final and definitive, as a protection against parol evidence

a) Courts typically give these clauses great weight, but they are not always conclusive

b) Problems can arise when sophisticated and powerful party drafts agreement with such language that is unnoticeable by the less sophisticated K’ing party

2. Bristow v. Drake Street, Inc. (7th Cir. 1994)(Posner): P entered 2- year K w/ Powers under which he was not allowed to fire her except for criminal conduct. He closed the show and fired her a month after; she sued for breach of K. Standard integration clause bars evidence of what the parties really meant under the parol evidence rule. Although evidence of trade usage may have been admissible, D did not introduce any such evidence.

3. UAW-GM Human Resource Ctr v. KSL Recreation Corp. (Mich. App. 1998): P entered K with CMC to hold convention, w/ CMC’s knowledge that P had to have convention at a hotel where employees were union represented. Letter agreement signed was silent on matter. Resort was sold to D who replaced hotel staff w/ non-unionized staff. P tried to cancel, but D would not return security deposit. Court ruled that merger clause made K conclusive and parol evidence is not admissible to show that agreement is not integrated except in cases of fraud that invalidate integration clause or where an agreement is obviously incomplete “on its face” and parol evidence is necessary for filling gaps.

E. Escape from the Parol Evidence Rule
1. Parol evidence rule rests on assumption that writing reflects a valid K
2. At CL, extrinsic evidence that would prove an alleged K is either void or voidable is admissible, even in the face of the parol evidence rule. This gets tricky in issues of misrepresentation, hard to draw lines

a) Is merger clause in a K enforceable where the signing party relied upon negligent (rather than deliberate) misrepresentation?

b) Court differentiates negligent misrepresentation from intentional misrepresentation and upholds merger clause, in which Sound agreed that it was entering into the K free from influence by or in reliance upon any representations other than those set out in the K.

XVII. MISUNDERSTANDING, MISTAKE, AND EXCUSE
A. Misunderstanding
1. Where parties simply misunderstand each other and there is no basis on which to prefer one or the other party’s interpretation. A court may conclude that any manifestation of mutual assent is illusory, and no K was formed

2. Classic case: the ships Peerless

a) P agreed to sell, and D agreed to buy, cotton arriving from Bombay on the ship Peerless. There were at least two ships Peerless, one slated to leave Bombay in October and one in December. In plunging cotton market, D refused to accept the cotton that arrived by the later ship, arguing he had meant the earlier ship when he agreed to purchase.

b) Court held for the D, persuaded by the argument that where the P meant one ship and the D another, there could be no meeting of the minds and no K.

3. Konic Int’l Corp. v. Spokane Computer Svcs, Inc., (Id. Ct. App. 1985): Different meanings of “fifty-six twenty” indicated there was no meeting of the minds, price was a material issue, and there was no K.

B. Mistake
1. CL courts have long recognized mistake as equitable grounds for providing relief
2. When relief is available:

a) Mistake must relate to a fact that existed at the time of the K (not mistake in judgment or mistaken prediction of future events)
b) Mistake must relate to something central to the K and it must have a significant effect on the benefits the mistake party receives or burdens undertaken

c) It must be unfair or otherwise inappropriate to allocate the risk of the mistake to the aggrieved party

3. Mutual Mistake

a) Classic Cases

(1) Wood v Boynton (1885): Court did not allow rescission of sale of stone when it was found to be a diamond worth $1K rather than the $1 topaz the parties had guessed it to be. Court found no mistake as to identity of things sold; only mistaken belief as to probative value.

(2) Sherwood v Walker (1887): Rescission was available when cow believed to be barren was found to be pregnant, since breeding cows were worth much more, and the mistake went to the whole substance of the agreement (even though there was no mistake as to the identity of the creature).

b) RST §§ 152, 154. Mutual mistake is grounds for voiding a K if:

(1) Mistake relates to facts in existence at the time of the K

(2) Mistake is shared by both parties

(3) Mistake relates to basic assumption on which the K was made

(4) Mistake has material effect on the agreed exchange of performance

(5) Complaining party did not bear the risk of the mistake

c) Mattson v. Rachetto, (S.D. 1999): Mistake in K granting land to Ds w/ leaseback provision allowing Ps to cultivate hay and livestock for their lifetime. Lease was invalid by statutory law, and Ds put up electric fence surrounding property. Ps were granted rescission of sale b/c of mistake (which was no fault on either of their parts).

d) RST 2d § 154. When a Party Bears the Risk of Mistake:

(1) The risk is allocated to him by agreement of the parties, or

(2) He is aware, at the time the K is made, that he has only limited knowledge w/r/t the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(3) Risk is allocated to him by the court on ground that it is reasonable in the circumstances to do so.

e) Estate of Nelson v. Rice, (Ariz. Ct. App. 2000): Estate bears risk where oil paintings were sold and later found to be worth over $1 million dollars. They had opportunity to learn if paintings were valuable and failed to do so.


4. Mutual Mistake vs. Unilateral Mistake

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

5. Relief for Mistake

a) Note on Drennan v. Star Paving Co.: Court did not use mistake to invalidate the K; they found that there was a unilateral mistake b/c D was the only party who was mistaken (screwed up calculation of bid). B/c Drennan reasonably relied on the bid, court concluded loss should fall on the mistaken party

b) Where only one party is mistaken, it will take a strong showing of unconscionability or unfairness to relieve that party of the consequences of its own mistake actions.

b) Where party seeks to establish the error, there is great difficulty:

(1) Must overcome the operation of the parol evidence rule
(2) Must persuade the court not only that an error has been made, but also that she is entitled to relief from that error under the doctrine of mistake.

c) Often the relief requested is not avoidance of the K but a reformation to reflect the terms to which the parties actually agreed.

d) **Rancourt v. Verba**: P was entitled to rescission of sale (and not abatement in purchase price) where P was unable to obtain permit for lakeshore residence, which D knew to be intent in buying the property from D.

### C. Excuse Due to Changed Circumstances

#### 1. Impracticability

a) CL: No excuses.

b) **Paradine v. Jayne** (1647): German prince ejected T from land; court did not allow him to stop paying rent.

c) **Taylor v. Caldwell** (1863): Changed approach. When music hall burned down, court held that b/c of “impossibility of performance,” owner was excused from responsibility to provide hall and pay damages.

d) Doctrine has broadened; not necessary that performance be objectively impossible.

e) **RST 2d § 261.** Discharge by Supervening Impracticability. Unless language of K is to contrary, when performance is made impracticable w/o fault by occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, duty to perform is discharged.

f) **UCC 2-615.** Excuse by Failure of Presupposed Conditions.

g) Neither provision expressly mentions two crucial elements of materiality and risk allocation, but these concepts lurk in the background of decisions.

h) **Ling v. Bd. of Trustees of Doane College** (1999): Requirement of notice was waived where “Supervening impossibility” prevented it; not D’s fault that the visa could not be renewed and P could not be rehired.

i) **Clark v. Wallace County Cooperative Equity Exchange** (Kan. 1999): B/c P could have obtained grain elsewhere to provide to D under K, it was not objectively impracticable.

j) **Opera Company of Boston v. Wolf Trap Fdtn** (4th Cir. 1987): Power outage led to cancellation of performance; trial court found for P in that D should have foreseen and made arrangements in case of such occurrence. Circuit Court holds that foreseeability is just one factor to be considered in resolving who bears the risk of changed circumstances and that trial judge failed to consider or make findings that it was so likely that D should have guarded against the risk or provided for non-liability against risk. Remanded.

#### 2. Frustration of Purpose

a) Not available defense at CL: **Krell v. Henry**: K for use of flat during procession of king’s coronation. Couldn’t apply Taylor b/c K was not impossible to perform, it had just lost all value. Decision XT’d rational to excuse performance where change in circumstances following the K defeated the mutually understood purpose of the K. Assumption must be fundamental to the K and must be shared.

b) **RST 2d § 265.** Discharge by Supervening Frustration. 4 requirements: (1) principal purpose understood by both parties; (2) substantial or severe that it is not a risk assumed under K; (3) non-occurrence was basic assumption; (4) risk should not be placed on person seeking relief.

c) **UCC** does not contain analogous provision. Sometimes 1-103 allows use of CL provision.

d) **7200 Scottsdale Rd. Gen. Partners v. Kuhn Farm Machinery, Inc.** (1995): D K’d with P to use premises for convention, which was cancelled after Gulf war started. P was not entitled to relief on ground that fear of terrorist activities resulted in less than expected attendance which made the convention uneconomical.

### XVIII. CONDITIONS AND PROMISES

#### A. Components of a Contract: Conditions and Promises

1. The Nature of Promises and Conditions. **RST § 224:** defines condition as “an event, not certain to occur, which must occur … before performance under a K becomes due.”

2. Non-Events and Past Events.

a) Event does not need to be affirmative happening; can be negative contingency.

b) Event can be something that happened in the past (travel ins. purchased on condition that regular health ins. does not cover travels abroad)

3. The Purpose of Conditions: (a) sequencing of performance; (b) limiting of circumstances; or (c) allowing escape where necessary

4. Sequencing: Conditions Precedent and Concurrent Conditions

a) **Condition precedent**: where condition must be satisfied before the performance subject to that condition will become due.

b) **Concurrent Conditions**: set of promises that are dependent on each other and must be performed simultaneously.

5. Conditions Subsequent

a) NOT third order of sequencing; it is the same for sequencing purposes as a condition precedent
b) Condition subsequent discharges a duty that is already in existence. “Buyer’s duty to pay is excused if building permit is not issued.” (Where condition precedent would be “Buyer’s duty to pay is conditional upon permit being issued.)

c) Principal difference is allocation of burden of proof

6. Express, Implied and Construed Conditions
a) Implied: implied in fact
b) Construed: implied in law

7. Pure and Promissory Conditions
a) Pure Condition
b) Pure Promise
c) Promissory Condition: term that is both a promise and a condition

8. Interpretation to Determine When an Event is a Condition
a) Koch v. Construction Technology, Inc. (Tenn. 1996): Court determined that clause that k’or would pay sub-k’or after it had been paid was a question of sequencing rather than condition precedent. Sub-K’or was entitled to payment even where owner forfeited.

B. Express, Implied, and Construed Conditions
1. Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co. (N.Y. 1995): Condition was not met where written consent of L for sublease was not delivered until 23 days after deadline.

2. Jacob & Youngs, Inc. v. Kent (N.Y. 1921): Where K specified that Reading pipe be used and it was not, court found proper measure of damages was NOT replacement of pipe with Reading pipe, but difference in value (which was nominal). Although the Reading pipe was a condition and a promise, there was substantial performance and duty to pay could not be discharged. Idea of WASTE.

3. Cardozo classifies sets of promises in three categories:
   a) Promises that are so plainly independent that they can never be conditions of each other
   b) Promises that are so plainly dependent that they must always be conditions
   c) Promises that are dependent in matters of substance but independent w/r/t insignificant departures.

4. Had use of Reading pipe been an express condition (if you do not use we do not have to pay); the court would have enforced it

5. RST treats substantial performance problems in terms of material or total breach

C. The Various Uses of Conditions
1. The Use of a Condition to Allow a Party to Escape the Contract
   a) Pure condition
      (1) No promise that the condition will occur
      (2) Where language is not clear, general rule is that a condition will be interpreted as pure if its fulfillment or nonfulfillment is beyond the control of the parties.

   b) Meritt Hill Vineyards v. Windy Heights Vineyard, Inc.
      (1) Conditions: (a) seller shall retain deposit if deal does not close; and (b) seller would have obtained title insurance policy and received confirmation that mortgages were in effect and that proposed sale did not constitute default
      (2) At closing, buyer discovered neither condition in (b) had been met. Court dismissed buyer’s claim for consequential damages but granted SJ to buyer for return of deposit. Conditions precedent contained no words of promise. Failure to meet condition discharged duties of buyer, but was not a breach (b/c no promise to perform conditions), so seller was not liable for damages.

   c) Fry v. George Elkins Co: Court concluded buyer had promised to make a good faith effort to fulfill condition of sale. Where condition was to obtain loan at certain rate, seller provided recommendation, lender was ready and willing to loan, and buyer refused to fill out paperwork, buyer was liable for damages (house sold at a lower price).

2. Conditions of Satisfaction
   a) Deals with this type of condition in mutuality and illusory promises (if a person retains unlimited discretion re whether to perform, she has made no commitment, and her apparent promise is an illusion, i.e. no legal detriment). Condition may be express from K, or implied or construed

   b) Guideline re satisfaction (not absolute rule):
      (1) If it deals w/ matters of taste or artistic judgment, the party’s dissatisfaction must be in good faith
      (2) If it deals with matters of a technical or commercial nature, the dissatisfaction must be reasonable

   c) Mattei v. Hopper, (Cal. 1958)(from Ch 9, C-4)
      (1) Buyer bought land for shopping center with condition that he obtained satisfactory leases. Buyer did obtain leases, but Seller reneged. Seller argued that the buyer’s promise to buy the property was illusory and did not constitute consideration.
(2) Court disagreed, holding that the buyer’s promise was not illusory b/c his discretion was not absolute or unfettered. Implied that the satisfaction must be measured by good faith standard or objective standard based on reasonable commercial standards.

(3) Court held good faith standard applied in this case b/c of number of variables and judgment calls (duration, renewal provisions, covenants, tenant mix, financial qualifications of tenants, etc.)

d) **Incomm, Inc. v. Thermo-Spa, Inc.**, (Conn. 1991)

(1) No express condition of satisfaction in agreement for advertising brochure. D disliked end product and refused to pay. P sued for price of labor and materials used up to time of K termination. D argued no obligation to pay b/c approval was implied condition of performance

(2) Court awarded judgment to P, holding that in this case it was only justifiable to imply condition of reasonable satisfaction (rather than good faith standard)

(3) Court was not willing to impose the harsher good faith standard where it was not expressly written in K, even where advertising brochure was more of a matter of taste or artistic judgment. This seems like a good standard: if people want the harsher standard, they should K expressly for it.

4. The Use of Conditions to Provide for Alternative Performances

   a) If condition is satisfied, one performance is rendered

   b) If condition is not satisfied, a different performance is rendered

5. The Use of Conditions to Sequence Performances

   a) K for sale of car

   (1) B promises to pay on Friday based on the condition that S promises to deliver car on Monday.

   (2) Delivery of car is an express promissory condition (both a condition and a promise)

   (3) If it did expressly say that it was a condition, it could be interpreted as a condition or found to be a constructive condition of exchange

   b) **Concurrent Conditions:** Where promises are dependent on each other (i.e., a promissory condition of each other) and they have to be performed at the same time

   c) Use of promissory conditions can structure the sequence of performance; allocates the risk of who goes 1st

   d) If K is silent on issue on sequence of performance, a court is likely to construe the performances as concurrent if at all possible

   e) **UCC 2-511(1):** “Unless otherwise agreed, tender of payment is a condition to the seller’s duty to tender and complete any delivery”

   f) **UCC 2-307:** “Unless otherwise agreed, all goods called for by a K of sale must be tendered in a single delivery and payment is due only on such tender…”

   g) **RST 2d § 234(2):** If one of the performances is capable of instantaneous completion… and the other will take time (such as the construction of a house), the usual rule is that the longer performance is construed as a condition precedent to the instantaneous one.

E. Excuse of Conditions

1. Waiver and Estoppel

   a) Similarities: After the K 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 performance

   b) **Waiver:** Knowing and voluntary abandonment of a right; one-sided relinquishment of right without anything being received in exchange

   c) **Estoppel:** Indication by words or performance that he will perform contingent promise despite nonfulfillment of the condition. 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 must in fact have been relied on by the other party to her detriment

   d) **Mercedes-Benz Credit Corp v. Morgan** (Ark. 1993): Where P accepted all late payments, it had waived its right to repossess merely b/c payment was overdue.

   e) **Gould v. Artisoft, Inc.** (7th Cir. 1993): Where employer did not include nondisclosure agreement of which signature was required, Gould was entitled to the stock promised as a condition of employment, despite the fact that he did not sign the agreement (employer had waived condition by failing to enclose)

2. Obstructive or Uncooperative Conduct

   a) In most Ks, implied that party cannot do anything to impede or hinder the occurrence of a condition necessary for K, as part of obligation of good faith and fair dealing.

   b) **Sullivan v. Bullock**, (Id. Ct. App. 1993): P breached K by not allowing D to finish performance. D was awarded damages (K value less costs saved)

3. Unfair Forfeiture:
a) Excuse to avoid unfair forfeiture not based on conduct of promisor after K has been executed; based on court’s determination that enforcement would result in unfair hardship to the party to whom the performance is due.

b) *J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.:* D did not submit lease renewal in time, and P sued to recover possession of premises (even where P had known D wanted to renew and D had made significant improvements in plans of renewal). In attempt to prevent unfair forfeiture, court remanded case for trial on whether P had acted in good faith reliance on apparent intent not to renew in reletting the premises.

XIX. BREACH AND REPUDIATION

A. The Distinction between Material and Non-Material Breach

1. Material Breach
   a) If the term is a promissory condition (both promise and condition), then its nonfulfillment results in two consequences – discharge from performance and claim of breach
   b) Where a breach is so serious that it allows the other party to decline her performance, terminate the K, and sue for full EDs, it is called a material and total breach
   c) Where breach is not of this gravity it is partial breach, and performance of breaching party, even though falling short of what is required by K, is substantial performance

2. Substantial Performance
   a) Where the term is not material, it will not completely excuse the owner from her return performance and allow her to obtain the additional cost of a substitute.
   b) Instead, she may be obliged to accept the nonconforming performance and to be content with damages (e.g., Jacob & Youngs v. Kent)

3. Total and Partial Breach and the Concept of Cure:
   a) If breach is material, it may be avoided by cure if it can be completed within proper time

4. *Seydel v. Ige* (Wash. Ct. App. 1997): Employee was promised transfer of stock in formation of K; when stock was not transferred, K was materially breached and gave P right to withhold further performance when breach was not cured, to sue for total breach.

5. *Worcester Heritage Society, Inc. v. Trussell*, (1991): P was not allowed to rescind sale of house where condition was that historical restoration would be completed in one year and restoration was not complete. P had option in K to engage a contractor to complete the work at charge costs to D.

B. The Consequences of Substantial Performance

1. The Proper Measure of Relief for Substantial Performance
   a) Substantial performance is still breach of K which entitled victim to remedy
   b) Damages are usually cost to victim of rectifying defective performance:
      (1) Cost of undoing and redoing defective work (Lyon’s solution)
      (2) Amount by which the defective work decreased the property value (J&Y)
   c) *Lyon v. Belosky Construction, Inc.*, (N.Y.App. 1998): Where D was K’d to build custom home at significant expense, Ps were entitled to receive damages in the amount required to redo the defective work.

2. The Recovery of the Breaching Party: Unjust Enrichment or Recovery Under the Contract
   a) If a party materially breaches, he cannot recover damages under the K. (no right to enforce K he violated)
   b) If breacher has partially performed, he has a claim in unjust enrichment for restitution of any benefit that has been conferred on the other party (measured in a restrictive way – limited by K value)
   c) *Carrig v. Gilbert-Varker Corp.*, (1943): Where 20/35 houses were built, court awarded EDs to developer based on extra costs incurred for new K’or. K was divisible, so K’d performance could be severed from part that was breached, and builder was entitled to have balance of K price due for completed houses offset against developer’s damages.

C. Breach and Substantial Performance Under UCC Article 2 (p. 614)

1. Perfect Tender Under Article 2
   a) UCC 2-601. *Buyer’s Rights on Improper Delivery.* Subject to provisions of this Article on breach in installment Ks and unless otherwise agreed under the sections on K’ual limitations of remedy, if the goods or the tender of delivery fail in any respect to conform to the K, the buyer may: (1) reject the whole; or (2) accept the whole; or (3) accept any commercial unit or units and reject the rest
   b) *Printing Cir of Texas, Inc. v. Supermind Publishing Co.*, (Tex. App. 1984): Where books did not conform to sample and were rejected, doctrine of substantial performance was not applicable. Goods must conform in every respect, and D was awarded refund of deposit.

2. The Seller’s Right to Cure a Nonconforming Tender
   a) UCC 2-508. Cure by Seller of Improper Tender or Delivery; Replacement
   b) Cure is designed to mitigate harshness of perfect tender rule. Cure is allowed up to the time at which performance was set. Additionally, if seller had reason to believe that the goods would be acceptable, he has a certain period beyond the set time for performance to cure.
c) **Ramirez v. Autosport,** (1982): Ramirezes were allowed to rescind K where they rejected the vehicle several times, D had reasonable ability to cure, and did not cure to the Ps satisfaction

3. **Installment Contracts**
   c) **UCC 2-612. “Installment Contract”; Breach**
      
      (1) An “installment K” is one which requires or authorizes delivery of goods in separate lots to be separately accepted, even though K contains a clause “each delivery is a separate K” or equivalent.
      
      (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
      
      (3) Whenever non-conformity or default w/r/t one or more installments substantially impairs the value of the whole K there is a breach of the whole. But the aggrieved party reinstates the K if he accepts a nonconforming installments without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

   d) **Graulich Caterer, Inc. v. Hans Holterbosch, Inc.,** 243 A.2d 253 (1968): P was hired to provide food for tent at 1964 World’s Fair, and sample food was sub-K’d out after sample food was approved. First installment of food was rejected as not meeting standards, P was given time to cure, but was unable to cure to D’s satisfaction and D was allowed to cancel the agreement, since time was of the essence.

**D. Anticipatory Repudiation and Prospective Nonperformance (?)**

**XX. K REMEDIES**

**A. Formulas**

1. Formula 1: Loss in Value + Other Loss – Costs Avoided – Loss Avoided
2. Formula 2: Incurred Costs + Profits + Other Loss – Loss Avoided
3. Ordinarily the formula includes both restitutionary (amounts already paid) and reliance damages

**B. The Goal and Fundamental Principles of K Remedies**

1. **Distinctions Among Expectation, Reliance, and Restitution Interests**
   a) K remedies operate on compensation principle; generally do not aim to deter, punish, or exact revenge
   b) RST 2d § 334. Purpose of Remedies. Judicial remedies under the rules stated in this RST serve to protect one or more of the following interests of a promises:
      
      (1) His “expectation interest”: interest in having the benefit of his bargain by being put in as good a position as he would have been in had the K been performed,
      
      (2) His “reliance interest”: interest in being reimbursed for loss caused by reliance on the K by being put in as good a position as he would have been in had the K not been made, or
      
      (3) His “restitution interest”: his interest in having restored him any benefit that he has conferred on the other party.

      
      (1) Holding: Only nominal damages may be awarded for breach of K to publish a book where promised advance was paid.
      
      (2) Restitution interest was protected by return of manuscript
      
      (3) P’s expectation interests were the advance (received) and the royalties (speculative and not awarded; failed for uncertainty)

2. **Theoretical Perspectives on the Compensation Principle**
   a) Goal is compensation rather than encouraging performance
   b) “Efficient breach”: rests on the view that purpose of K law is to facilitate the transfer of resources from less to more valuable uses. Sometimes it is more economical to breach and pay damages.
   c) Arguments vs. EB: normatively, ppl should be encouraged to honor promises; practical consequence is not EB w/ full compensation, but opportunism; those who enter Ks for reasons other than profit may prefer performance to compensation; courts do not accurately measure damages

**C. The Expectation Interest**

1. **Components of EDs**
   a) Direct damages (loss to P of value of K)
      
      (1) No performance: Value of entire K to P
      
      (2) Performance excused by breach: Value of K – costs saved by P not having to perform
      
      (3) Partial Performance: Difference in value b/t what P hoped to get from K and what he actually received
   b) Consequential Damages: damages resulting from breach
   c) Incidental Damages: P’s costs of coping w/ breach
d) **Mitsui v. Consolidated Rail Corp**: P could recover damages that were incidental where K barred recovery of consequential damages

2. **Introduction to Measurement of the Expectation Interest**
   a) **RST 2d § 347. Measure of damages (to injured party)**. Some argue that phrase indicates it is necessary to look at individual circumstances.
      1) Courts are reluctant to use subjective valuations
      2) Limitations to ED: established w/ reasonable certainty, mitigation; w/in reasonable contemplation of parties; no emotional distress
   b) **Carpel v. Saget Studios, Inc., (E.D.Penn. 1971)**: P K’d w/ D to provide wedding photos, but D failed to deliver. Court granted D’s MSJ b/c damages could not reach amount claimed (lost sentimental value is speculative, mental suffering not allowed, no punitive damages under K)

3. Measurement of the Expectation Interest by Reference to Market Value
   a) **Procopis v. G.P.P. Restaurants, Inc., (1974)**: Measure of damages of breach of K to purchase land is difference between purchase price and value of land conveyed (Ps failed to offer proof of fair market value)

4. Measurement of Expectation Interest by Reference to a Substitute Transaction
   a) **Handicapped Children’s Education Bd. v. Lukaszewski**, (Wis. 1983): Court held that P was entitled to damages in the amount of salary difference in what they had K’d to pay D and what they paid replacement.
   b) Court specified that employer is not free to hire the most qualified and expensive replacement and then recover difference, but only to take all reasonable steps to mitigate damages (which they did; replacement candidate was only applicant).

5. Measurement of the Expectation Interest When Performance is Deficient
   a) Valuation of partial performance can present challenges to the court
   b) Problem: Distinguishing where cost of completion would work unfair forfeiture (Jacob & Youngs test) or result of economic waste (Lyon test)
      1) No unanimity among the courts as to how to make determination;
      2) Courts consult a variety of factors: extent of waste; willfulness of the breach; desires and motivations of the nonbreaching party
   c) **Note on Peevyhouse v. Garland Coal & Mining Co.**
      1) Substantial academic and judicial controversy
      2) Where Ps agreed to let D strip-mine for coal for five year term so long as D performed remedial work, and D did not perform the work, the court held that the proper amount of damages was the diminution of value in the premises ($300) rather than the amount it would cost to restore the land ($25K), since even damages in the amount of $5K would exceed the value of the farm.

D. **Expectation Damages Under the UCC**

1. **UCC 1-106. Remedies to be Liberally Administered**. Puts aggrieved party in as good a position as if the other had fully performed; does not award special, consequential or penal damages except as provided in the Act or rule of law

2. Some differences between UCC remedies and CL remedies.
   a) Generally measures expectation interest by: comparing K price to market value; or comparing K price to substitute transaction
   b) Where breaching party performs deficiently, looks at the difference in value between rendered performance and promised performance

3. **Buyer’s Remedies Under the UCC**
   a) **UCC 2-711. Buyer’s Remedies in General**.
      1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or revokes acceptance then w/r/t any goods involved, and w/r/t the whole if the breach goes to the whole K, the buyer may cancel and whether or not he has, may in addition to recovering so much of the price as has been paid: (a) “cover” and have damages under the next section as to all the goods affected whether or not they have been identified to the K; or (b) recover damages for non-delivery as provided in this Article
      2) Where the seller fails to deliver or repudiates the buyer may also… in a proper case obtain specific performance or replevy the goods as provided in this Article…
   b) **The Buyer’s Action for Specific Performance (SP)**
      1) Very much the exceptional remedy for a buyer of goods
      2) UCC 2-716(1) specific performance may be decreed where the goods are unique or in other proper circumstances
      3) **If substitute goods are readily available, SP not available.**
   c) **The Buyer’s Remedies When the Seller Repudiates or Fails to Deliver, or When the Buyer Rightfully Rejects or Revokes Acceptance of the Goods**
(1) UCC 2-712. “Cover”; Buyer’s Procurement of Substitute Goods. (a) After breach, buyer may “cover”; (b) may recover difference between cost of cover and K price, plus consequential and incidental damages defined in 2-715, less expenses saved in consequence of the seller’s breach; and (c) Failure to cover does not bar him from other remedy

(2) If buyer covers, damages measured by 2-712. If buyer does not cover UCC 2-713 supplies relevant measure of damage

(3) UCC 2-713. Buyer’s Damage for Non-Delivery or Repudiation. Damages measured by difference in K price and market price at time buyer learned of breach, plus IDs and CDs, but less expenses saved. Market price determined as of the place for tender; where rejection of goods after arrival or revocation of acceptance occur, market price determined as of the place of arrival

(4) Questions of Interpretation
   (a) Buyer who enters into favorable substitute may argue he should be able to keep the fruits of his diligence; Seller argues that market cover measure more accurate captures actual damages and market should not apply: UCC Comment sides with seller.
   (b) Buyer may find expensive substitute, but seller may seek to limit the buyer’s damages to the market measure. Arguments about good faith, transaction entered without unreasonable delay, whether substitute was reasonable

(5) Chronister Oil Co. v. Unocal Refining, (7th Cir. 1994)(Posner): Cannot cover by “selling” to yourself what you already own. Damages should be measured by difference between market price and K price b/c that is what inventory is worth at time of breach, which is when performance should have been tendered.

d) The Buyer’s Remedies Upon Acceptance of Deficient Performance
   (1) UCC 2-714. Buyer’s Damages for Breach in Regard to Accepted Goods.
      (a) Must accept goods and give notification to recover for non-conformity resulting from seller’s breach (determined in any manner which is reasonable)
      (b) Damages: measured by difference in value of goods accepted and value of goods as warranted (at time and place of acceptance), except for special circumstances
      (c) In proper case, IDs and CDs may be recovered

4. Seller’s Remedies Under the UCC
   a) Seller’s Action for the Price.
      (1) Sometimes buyer accepts goods but refuses to pay; seller is entitled to K price
      (2) Court is not really awarding damages but enforcing obligation under the K
   b) Seller’s Remedies When the Buyer Repudiates or Wrongfully Rejects or Revokes Acceptance of the Goods
      (1) UCC 2-703. Seller’s Remedies in General
         (a) Withhold delivery
         (b) Stop delivery (2-705)
         (c) Proceed under the next section respecting goods still unidentified to the K
         (d) Resell and recover damages (2-706)
         (e) Recover damages for non-acceptance (2-708) or in a proper case the price (2-709)
         (f) cancel
      (2) UCC 2-706. Seller’s Resale Including K for Resale
         (a) Where resale is made in good faith in commercially reasonable manner, seller may recover difference between the resale price and K price plus incidental damages, less expenses saved in consequence of breach
      (3) UCC 2-708. Seller’s Damages for Non-Acceptance or Repudiation
         (a) Difference between market price at time and place of tender and K price (less expenses saved in b/c of breach)
         (b) If the measure of damages is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in 2-710, due allowance for costs reasonable incurred and due credit for payments or proceeds of resale
            (i) Note: this is used in case of “lost seller volume,” where market price or resale price might be the same as K price, but where if K had been completed, the seller could have made an additional profitable sale
      (4) New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. 2002 U.S. Dist. LEXIS 2596: D breached. P was lost volume seller (had the capacity to perform the K breached as well as other potential Ks due to large amount of production capacity), and is awarded damages for that time until it replaced D’s business and would not have had capacity to fulfill both Ks.
E. Limitations on Recovery of Expectation Damages

1. Reasonable Certainty of Damages (Courts may consider P’s circumstances, but they generally focus on economic losses measured from an objective point of view; P must prove economic damage due to breach and extent of damages)
   a) The Standard of Proof for Damages Generally
      (1) *Mears v. Nationwide Mutual Ins. Co.* (8th Cir. 1996): Contest winner who was promised two Mercedes-Benz automobiles was allowed the award. Court found K sufficiently certain b/c it provided a basis of determining existence of breach and giving appropriate remedy. In determining damages, court found jury award reasonable: value of two new M-Bs, cheapest model.
      (2) *Indefiniteness of amount is not a limitation to remedy where damages are clear*
         (3) *Locke v. U.S.* (U.S. Court of Claims 1960)
            (a) Type writer repair company was granted damages for U.S. govt breach of K in taking him off supply schedule. Court found that where a reasonably probability of damages can be clearly established, uncertainty as to the amount will not preclude recovery.
      (4) New business rule: If there is no evidence to calculate what your profits would have been or if you would have profited at all, difficult to prove damages
   b) Standard of Proof for Consequential Damages
      (1) *ESPN v. Office of Commissioner of Baseball* (S.D.N.Y. 1999): ESPN breached telecasting agreement by not showing games. Court rules that Baseball did not provide sufficient evidence of damages or method of calculation, but could be awarded nominal damages based on the breach.

2. Foreseeability of Damages
   a) Hadley v. Baxendale: For damages to be recoverable they must be foreseeable to parties at time of K’ing.
   b) General vs. Special (or Particular) Circumstances
      (1) *Wulschleger & Co. v. Jenny Fashions, Inc.* (1985): D was entitled to recover its lost profits resulting from distortion of skirts b/c P had reason to know of D’s intended use and D made reasonable efforts to prevent its loss.
   c) The Reasonable Contemplation of the Parties
      (1) *Kenford Company v. County of Erie* (1989): P was not entitled to recover damages for loss of anticipated appreciation in the value of land owned in periphery of the proposed stadium site when D was unable to obtain funding to build it. (P assumed risk; not reasonably foreseeable or contemplated by D during negotiation)

3. The Mitigation Principle
   a) Duty to Mitigate: Burden on the nonbreaching party to reduce the negative consequences of a breach; not really a duty. Do not have to avoid the consequences of breach; free to sit by and do nothing
   b) Ability to collect damages from the breaching party depends on reasonable efforts to mitigate. Without any effort, damages will not be available for consequences that could have been avoided by appropriate action
   c) Principle exists in tension with general compensation goal of K damages
      (1) Nonbreaching party cannot recover full damages of breacher unless he makes reasonable efforts to mitigate; consistent with underlying policies of K remedies, e.g., efficient breach, which encourages transactions increasing collective net benefits of K’ual relationships
      (2) Discourages wasteful behavior
   d) *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929)
      (1) Court held that D had no right to finish building bridge going from nowhere to nowhere when it was informed that the project was off
      (2) Damages: amount sufficient to compensate Luten for the costs it incurred prior to the county’s repudiation, plus the profit it would have received from the K had there been no breach.
   e) Reasonable Efforts to Mitigate Damages
      (1) Mitigation principle is typically raised as an affirmative defense by the breaching party; breaching party must prove that the nonbreaching party failed to mitigate
      (2) *Parker v. Twentieth Century-Fox Film Corp.* (Cal. 1970): Parker did not fail to mitigate damages by refusing role in Western b/c it was not comparative to the musical role offered by breached K.
      (3) Alternative employment must be comparable, or substantially similar, to that of which employee has been deprived; cannot be different or inferior
      (4) *Marchessault v. Jackson* (Maine 1992): D did a poor job performing K’d work to construct foundation for home. P sues for damages (cost to fix) and lost value. Court finds D failed to show that P failed to take reasonable steps to mitigate. Purpose of compensatory damages is to put P in same position he would have been had K not been breached, which is why he is awarded both.
   f) Mitigation of Damages Under the UCC
(1) Article 2 does not explicitly set out mitigation principle. However, seldom fully compensates for unreasonable action or inaction.

(2) UCC 2-715. Buyer’s Incidental and Consequential Damages.
   (a) IDs are expenses reasonably incurred in inspection, receipt, transportation and care of goods rightfully rejected, and any commercially reasonable expenses or commission in connection w/ cover or incident to delay or breach).
   (b) CDs are any loss reasonably foreseeable that could not have been prevented, and any injury resulting from breach of warranty.

(3) UCC 2-710. Seller’s Incidental Damages. Any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, transportation or care of goods after breach, associated with return or resale of goods.

F. Reliance Damages as Alternative to Expectation Damages
   1. Introduction to Reliance Damages for Breach of K.
      a) Usual measure of damages where recovery is based on theory of promissory estoppel rather than breach of K; where there is a bargained for exchange that is unenforceable for some reason, e.g. failure to satisfy Statute of Frauds.
      b) Must be established w/ reasonable certainty and have been within reasonable contemplation of the parties at time of K’ing.
      c) Fuller & Perdue article: argued vs. inflexible view of K damages.
   2. Reliance Damages When Expectation Damages are Inappropriate.
      a) Hawkins v. McGee: “hairy hand.” Court awarded the P the difference between the value of the hand had the operation been successful and the hairy hand that resulted. This is expectation damages.
      b) Sullivan v. O’Connor (Mass. 1973): Suggests EDs may not be appropriate.
         (1) P was entitled to recover for out-of-pocket expenses, worsening of condition for pain and suffering and mental distress of 3d operation.
         (2) Cannot measure against a perfect nose since we do not know the value; we can measure actual nose vs. now imperfect nose – these are consequential damages. Court mistakenly calls them reliance damages, but reliance damages are made in reliance of the promise; these damages are a result of the breach.
   3. Reliance Damages When EDs Cannot be Established.
      a) Hollywood Fantasy Corp. v. Gabor (5th Cir. 1998): Gabor was found liable for breach of K; damages awarded were limited to out of pocket expenses incurred in reliance of K. There was no evidence that P had strong reasons to expect a profit, and damages for lost profit were not awarded.
      b) Sullivan v. Oregon Landmark-One, Ltd. (Or. App. 1993): L breached agreement to make improvements to T’s leased property. Ts could recover for out-of-pocket expenses in preparing to open restaurant, but not for value of time spent preparing, since there was insufficient evidence that they suffered losses in reliance of lease agreement (e.g., they did not quit their jobs).
   4. Reliance Damages in a Losing K.
      a) Reliance damages may not be permitted where recovery would put P in better position than K would have.
      b) RST 2d § 349. Damages Based on Reliance Interest.
         (1) Difficulty in providing losses w/ reasonable certainty limits the significance of this provision.
         (2) Can be used as weapon or shield, shifting burdens of parties.
      c) Wartzman v. Hightower Productions, Ltd. (Quoting RST § 349)
         (1) Since “it is often hard to learn what the value of the performance would have been… the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost if the K had been performed.”
         (2) Affirmed award to D for reliance on investment that failed (P’s breach). The inability to establish that financial loss was inevitable does not make the appellants (Wartzman) insurers and does not preclude Hightower from recovering damages.

G. Restitution as Alternative to Expectation or Reliance Damages
   1. Expectation and Reliance damages focus on principles of compensation.
   2. Restitution damages focus on the benefit received by the breaching party and has a goal of preventing unjust enrichment.
   3. Introduction to Restitution as a K Remedy.
      a) Bausch & Lomb, Inc. v. Bressler (2d Cir. 1992): D breached agreement giving B&L distribution rights. Proper amount for restitution damage was “the reasonable value of services rendered, goods delivered, or property conveyed less the reasonable value of any counter-performances received by him.” In this case $500K paid upfront in royalties minus value of time B&L did have distribution rights.
4. Measurement of Restitution
   a) Measures benefit conferred on breaching party
   b) Several ways to determine value: market value, K price (not necessarily determinative), extent to which breaching party has been enriched; Court also considers egregiousness of breaching party’s behavior
   c) *Earthinfo Inc. v. Hydrosphere Resource Consultants, Inc.* (Colo. 1995): Dispute over royalties; P ceased making payments required. Court held that disgorgement of profits after the breach and return of property were appropriate restitutionary remedies.

5. Restitution to the Party in Breach
   a) Party who has substantially performed can recover in restitution, subject to damages caused by breach.
   b) *U.S. ex rel Palmer Construction, Inc. v. CSE, Inc.* (9th Cir. 1991): P breached, but was allowed to recover the reasonable value of services less the damages occasioned by the breach (never more than K price)

H. Agreed Remedies
   1. Sometimes parties agree to remedies for different purposes:
      a) Strongly encourage performance with penalty for breach
         (1) *Long standing CL rule that K penalties are unenforceable as against public policy*
         (2) Tension between freedom to K and remedial goals of K law
      b) Simplify and clarify remedies in advance rather than leaving to litigation
         (1) “Liquidated damages” clause: makes certain damages available to aggrieved party
         (2) Parties may agree to value likely to approximate damages that would be suffered under breach
         (3) Creates notice of extent of potential liability
         (4) Courts scrutinize very carefully, especially when they have the same effect as penalizing breach
      c) Limit remedies available for breach
         (1) Caps
         (2) Limit types of damages available (no refund, no consequential damages, replacement only rather than damages)
         (3) May specify method of dispute remedy
         (4) Courts are generally willing to enforce remedy limitations, unless it leaves the aggrieved party w/o reasonable modicum of remedy for breach
   2. Policing Liquidated Damages Clauses
      a) *RST 2d § 356. Liquidated Damages and Penalties.*
         (1) Liquidated damages are ok at an amt reasonable in light of anticipated or actual loss caused by breach and difficulties of proof of loss (consideration of difficulty of obtaining adequate remedy). Liquidated damages that are unreasonably large are unenforceable (PP grounds)
      b) *UCC 2-718. Liquidation or Limitation of Damages; Deposits*
         (1) Liquidated damages must be reasonable (in light of anticipated or actual harm caused by breach), the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. Term fixing unreasonably large liquidated damages is void.
      c) Trends in Enforcement
         (1) Older cases looked at anticipated harm (forward looking test)
         (2) Now UCC and RST rule allow you to look at both actual or anticipated damages in deciding whether to enforce
      d) *Lake River Corp. v. Carborundum Co.*, (7th Cir. 1985)(Posner): While Posner would like to enforce K b/t two sophisticated corporations, IL law is contrary to that. Liquidation of damages must be reasonable estimate at time of K’ing of likely damages from breach after breach occurs. The damage formula used in the K acted as a penalty by neglecting costs saved by not having to perform the K.

3. Remedy Limitations, Particularly Remedy Limitations Under the UCC
   a) If liquidated damages specified by K are low in comparison to actual damages suffered by nonbreacher, may ask court to ignore agreement
   b) *Wedner v. Fidelity Security Systems, Inc.* (Pa. Sup. Ct. 1973): Courts enforce limit on liability b/c it was agreed to by private K’ing parties and is not unconscionable
   c) *UCC 2-719. Contractual Modification or Limitation of Remedy.*
      (1) Generally validates K’ual remedy limitations, but do in some circumstances subject them to close level of scrutiny

I. Non Economic and Noncompensory Damages
   1. Damages for Pain, Suffering, and Emotional Distress
      a) K provides a choice: perform or pay. K rules should be neutral as between them.
         (1) Damages payable only if establishd w/ reasonably certainty, foreseeable, not reasonably avoidable
(2) Costs of litigation are not compensable

(3) Generally, emotional distress damages are not recoverable

(a) *Keltner v. Washington County*: did not discuss other criteria; just said due to nature of damages they were not recoverable

(b) Conversely, *Sullivan v. O’Connor* allowed damages for pain, suffering, and mental distress for botched cosmetic surgery

b) The Nature of the K Makes Emotional Damages Particularly Likely

(1) So personal in nature that breach will almost certainly cause distress, e.g., K to perform funeral or mortuary services (premature cremations, botched autopsies, missing body parts, etc.); no unanimity among jurisdictions as to types

(2) *Lane v. Kindercare Learning Centers, Inc.* (Mich. Ct. App. 1998): P was allowed to recover for emotional distress where K was personal in nature, and at the time of K, it was foreseeable that a breach of the K would result in mental distress damages, which would extend beyond mere “annoyance and vexation” normally associated with breach

b) The Nature of the Breach Makes Emotional Damages Particularly Likely

(1) *Lutz Farms v. Asgrow Seed Co.*, (10th Cir. 1991): Farmers were able to recover emotional distress damages for willful and wanton breach of seed supplier when they were forced into bankruptcy b/c of crop failure

(2) *Johnson v. Jamaica Hospital*, (N.Y. 1984): Daughter was abducted from D hospital. Parents are not able to recover for emotional distress b/c D had no duty on part of hospital to parents of hospitalized child; duty is only to child. Policy reasons for supporting no duty to parents rule: would invite open-ended liability for indirect emotional injury suffered by families in every instance where young, elderly, incapacitated experience negligent care

c) The Nature of the Breach Makes Emotional Damages Particularly Likely

(1) *Van Wagner Advertising Corp. v. S&M Enterprises* (N.Y. 1986): Billboard was not real property, but personal property. Remedy was limited to money damages, determined by lost revenues.

d) RST 2d § 353. Recovery for emotional disturbance will be excluded unless breach also caused bodily harm or the K or the breach is of such a kind that serious emotional disturbance was a particularly likely result

2. Punitive Damages

a) Intended to punish the breacher and deter others from following example

b) Courts do not favor punitive damages, which goal is not compensation

c) RST 2d § 355. Punitive Damages are not recoverable for a breach of K unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

d) UCC 1-106: “…neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.”

e) When ins. co. willfully denies claim w/o reasonable basis for doing so, some courts allow punitive damages, reasoning that the ins. co has a special relationship w/ their insureds that makes a willful and unreasonable breach of K an act of bad faith (tort specifically designed to circumstances)

f) *Seaman’s Direct Buying Service Inc v. Standard Oil. Co*: California acknowledged possibility of independent tort of bad faith breach of K outside of ins. K. Party may commit tort by denying, in bad faith and w/o probable cause, that a K exists in an effort to shield itself from liability (overruled by Freeman)

g) *Freeman & Mills, Inc. v. Belcher Oil. Co.*: Overrules Seaman’s b/c of confusion and uncertainty regarding its scope and application.

J. Specific Performance and Injunctions

1. Types of damages

a) Damages are often called substitutional remedies

b) In U.S., specific performance is the exception rather than the norm (not so in civil systems)

c) Determining whether SP should be enforced:

(1) Are damages inadequate?

(2) Determine factors a court is likely to weigh in deciding whether to enforce SP.

2. Inadequacy of Damages

a) RST 2d § 359(1). “SP or injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”

b) K for real estate: damages are generally inadequate b/c of unique locations and attributes of real estate.

c) Ks to sell goods generally not specifically enforceable.

(1) CL view: Only for truly unique goods, such as works of art or heirlooms

(2) Standard is somewhat relaxed under UCC: only where goods are unique or in other proper circumstances. (Comments suggest inability of disappointed buyer to cover may be indication that SP is appropriate.

d) *Van Wagner Advertising Corp. v. S&M Enterprises* (N.Y. 1986): Billboard was not real property, but personal property. Remedy was limited to money damages, determined by lost revenues.

3. The Discretionary Nature of the Remedy
a) Courts may decline to enforce SP where performance would cause excessive hardship or loss to D, where personal services are at issue (involuntary servitude)


4. Injunctive Relief as an Alternative to SP

a) Mandatory vs. prohibitive injunctions (e.g., the Blochs could have sought an injunction against the school filling Helen’s position)

b) Same requirements as SP: $ damages would be inadequate, necessary for balancing of equities

c) **New York Football Giants v. LA Chargers Football Club.**: Shady dealings for football K. “No party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity w/ a plea that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout.”

d) **Ticor Title Ins. Co. v. Cohen** (2d Cir. 1999): Issued injunction preventing Cohen from working in the title insurance business and from appropriating Ticor’s corporate opportunities w/ its current or prospective customers for six months (as required in noncompetition clause). Money damages would be insufficient to redress loss of relationship w/ client that would produce business in the years to come