Questions to think about in every factual situation

- Is there a deal? Was a deal made?
- Exactly what is the deal?
- Is there any reason for the court not to enforce the deal?
- Once we know what the deal is, did anyone not do what he/she agreed to do?
- Is there any legally recognized excuse for not doing what he/she promised?

I. Introduction

A. Definition of a contract
   1. A contract signifies a legal relationship that must have specific qualities and consequences
   2. Definition: A promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty
   3. A contract is an exchange relationship, created by agreement between two or more parties, containing at least one promise, and recognized as enforceable in law
   4. In most cases an oral agreement is sufficient and no other formalities are needed

B. Contractual Assent
   1. Objective Standard
      a. Contracts are formed by mutual consent; both parties must intend to enter the contract and they must agree on its terms
      b. A person could be bound to a contract if her words and actions, reasonably interpreted, indicate assent, even if she did not mean to make it
      c. Contract law cannot rely on the parties’ state of minds when rendering decisions
      d. A subjective test is ok in situations where both parties agreed to use their intentions and not expressive actions

   Kabil Developments Corp. v. Mignot—Dispute over helicopter services. Court allowed testimony of subjective intentions because it was in line with parties’ objective actions.

   2. Reasonable Person Construct
      a. The law is generally concerned with protecting a party’s expectations based on her reliance on a manifestation only to the extent that her reliance was reasonable
      b. Courts today seek a reasonable interpretation of a manifestation from the perspective of the party who observed it, taking into account his attributes (experience, training, commercial sophistication, etc.), background information, relationship between parties, and context of the transaction
Lucy v. Zehmer—Agreement to sell a farm as a joke. Court found that seller’s objective actions were enough for a reasonable person to believe he was serious.

II. Offer

A. In General
   1. Definition: The manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it
   2. The offeror must make it reasonably clear to the offeree that his acceptance will bind the parties immediately
   3. Generally, if no such contextual evidence exists, interpretation of the offer and acceptance is a matter of law for a judge; if contextual evidence does exist, interpretation is left to a jury
   4. An offer typically constitutes a specific product and a specific quantity for a specific price

Fairmont Glass Works v. Grunden-Martin Woodenware Co.—Dispute over who made an offer due to price quoting on mason jars. Court held that the words “for immediate acceptance” constituted an offer.

B. Advertisements
   1. In general, an advertisement is a solicitation to make an offer (but not always)

Lefkowitz v. Great Minneapolis Surplus Store—Plaintiff claimed advertisement for $1 article of clothing was an offer he accepted. Court agreed, as it was “clear, definite, and explicit, and leaves nothing open for negotiation.”

Leonard v. Pepsico—Pepsi Stuff Harrier Jet case. Court held it was not an offer because it reserved details for the catalog, and did not contain specific language of an offer.

C. Post-offer
   1. To accept the offer, the offeree must not only signify assent to a contract on the term proposed by the offer but most do so within the time and in accordance with the procedure prescribed by the offeror, or, in the absence of such instructions, a time and procedure that is reasonable under the circumstances
   2. If an offeree ignores an offer, her inaction counts as a rejection
   3. As long as the offer has not yet been accepted, the offeror can cancel it even before its time has expired, if the offeror notifies the offeree it is revoked

D. A resignation is simply a rejection of an employment offer

III. Acceptance
A. Nature, Mode, and Effect of Acceptance
   1. The reasonable meaning of the offeree’s manifestations is determined by
      the same process of interpretation as applied to the offer
   2. Because the objective test requires the manifestation of intent to accept,
      the offeree’s decision to accept is not usually effective until it has been
      communicated to the offeror

   Keller v. Bones—Dispute over faxing of acceptance of offer to buy ranch. Court held
   that the signing of the acceptance formed the contract (and not the communication of it)
   because it contained the words “upon execution by Seller, this agreement shall become a
   binding contract.”

   Roth v. Malson—Plaintiff signed on “counteroffer” line but kept the deal the same. Court
   held that it was a counteroffer and not an acceptance because of the objective test.

C. The effective date of acceptance
   1. An acceptance generally takes effect when it is communicated to the
      offeror

D. Inadvertent Manifestation of Acceptance

   Glover v. Jewish War Veterans of United States, Post. No. 58—Plaintiff offered
   information leading to conviction of a murder suspect, but didn’t know about reward.
   Court held that it is impossible to assent to a contract without knowledge of its existence.

E. Silence as acceptance
   1. Silence generally means rejection of an offer
   2. Exceptions where silence can mean acceptance
      a. An offeree takes the benefit of offered services with reasonable
         opportunity to reject them and reason to know that they were offered
         with the expectation of compensation
      b. The offeror has stated or given the offeree reason to understand that
         assent may be manifested by silence or inaction, and the offeree in
         remaining silent and inactive intends to accept the offer
      c. Where because of previous dealings or otherwise, it is reasonable that
         the offeree should notify the offeror if he does not intend to accept

F. Termination of the power of acceptance
   1. Ways in which the offeree’s power of acceptance may be terminated
      a. Lapse of the offer
         1. If an offer does not specify its duration, it is open for acceptance
            within a reasonable time

   Vaskie v. West American Insurance Co.—Dispute over acceptance after no expiration
   date was given. Court held that the amount of time thought to be satisfactory to the
   offeror by is governed by a reasonable person in the position of the offeree.

   b. Rejection
c. Counteroffer  
d. Revocation  

_Hendricks v. Behee_—Dispute over when real estate offer was accepted or revoked. Court held that an offer may be revoked before its acceptance is communicated to the seller.

_Dickenson v. Dodds_—Dispute over indirect revocation of standing offer. Court held that formation of another contract instantly revoked the previous offer.

F. Mailbox Rule  
1. Acceptance counts as soon as it is placed in the mail  
2. Only counts if mail is an authorized medium of acceptance  
3. Can only be ignored if explicitly stated in contract (ie “offer is accepted upon receipt only”)  
4. Is widely accepted as a standard common law rule

IV. Bilateral and Unilateral Contracts

A. Acceptance by performance distinction  
1. Bilateral- both parties have made promises to be performed at a future date  
2. Unilateral- one party’s obligation is completely performed at the instance of formation, and all that remains is the promise of performance by the other party at a future date  
3. Promisee can never be in breach because their failure to perform is simply a failure to accept the offer

_Carlil v. Carbolic Smoke Ball Co._—Reward given for anyone who tries the product and gets sick. Court held that performance of stated terms denotes acceptance.

_Harms v. Northland Ford Dealers_—Hole-in-one truck prize case. Court held that contest organizers were bound by their announced terms and not unannounced terms in a unilateral contract.

3. Acceptance by performance is usually the desired method, but it is not necessarily the exclusive manner of acceptance  
1. Unless the offer clearly requires acceptance to be only by performance, it can be accepted either by performance or promise  
2. Unless a method of acceptance is unambiguously prescribed as exclusive, the offeree may accept by any method that is consistent with the terms of the offer and is reasonable

B. Communication of Acceptance by Performance  
1. The acceptance of a unilateral contract is accomplished immediately in performance
2. Where an offer invites acceptance by performance, no notification is necessary to make the acceptance effective unless the offer request notification

C. Function of performance
   1. Acceptance
   2. Consideration
   3. Makes performance of other party due

V. Offer and Acceptance under the UCC

A. UCC 2-204
   1. General guidelines for deciding if a contract for the sale of goods has been formed
      a. A contract for the sale of goods should be recognized if either the words or conduct of the parties show an intent to make an agreement
      b. A contract may be found even though the court cannot determine the exact moment of its making
      c. It is not fatal to contract formation that some terms are left open, provided that it is clear that the parties intended to make a contract and the court can find a reasonably certain basis for giving an appropriate remedy

*ProCD v. Zeidenberg*—Defendant breached contract of software license agreement. Court held that further contracts (like license of use agreements) can be made after purchase in order to protect both consumers and businesses

B. UCC 2-207 (Battle of the Forms)
   1. Rationale and Aim
      a. Involves situations in which both parties use standard forms whose provisions conflict
      b. Was designed to avoid the effects of “mirror image” and “last shot” rules of common law in standard form contracting
      c. Is not very well drafted
   2. Basic Structure
      a. When no contract is formed, but parties perform anyway, and there are disputes regarding the terms of performance, the UCC states generally that only those terms agreed upon must be followed; every other term should be thrown out
      b. If an additional term is added and one of the parties is not a merchant, it gets thrown out
      c. If an additional term is added and both parties are merchants, it generally gets included, unless one of the two exceptions occur
         1. It materially alters the contract
         2. Other party objects
      3. Remedies for different (not additional) terms
a. Knockout Rule (knocks out conflicting terms on both sides)
b. Omission of different terms added by one party
c. Drafting error rule

4. Confirmatory Memoranda
   a. If additional term added in confirmation to oral contract, it is generally included unless one of two exceptions occur
      1. It materially alters the contract
      2. Other party objects
   b. If a different term is added, it generally is not included

_Klocek v. Gateway, inc._—Consumer wanted to return computer after 5 day period ran out. Court held that the act of keeping the computer past 5 days didn’t show that he expressly agreed to the terms of the contract

VI. Preliminary and Incomplete Agreements

A. Indefiniteness
   1. If indefiniteness can be explained only by the conclusion that the parties had not really reached an agreement on the essential terms of their relationship, there is no contract to enforce
   2. If the court is persuaded that, despite the indefiniteness, the parties really did intend to contract, it should make every effort to try to resolve the indefiniteness and enforce the contract
   3. Grounds on which an offer may be indefinite
      a. Completely omits some matter that is vital to the exchange
      b. Does not fully, clearly, and unambiguously deal with that matter
      c. Deliberately leaves that matter open for future negotiation

_Academy Chicago Publishers v. Cheever_—Widow of an author breached contract to publish manuscripts. Court held that too many important terms were not addressed, so there was no contract.

B. Deferred Agreement

_Joseph Martin Delicatessen v. Schumacher_—Contract stated lease would be renewed with rent determined later. Court held that “a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.”

C. Good Faith bargaining

_Jenkins v. County of Schuylkill_—Defendant kept stringing along plaintiff and didn’t award him the building contract. Court held that the agreement not to bargain with other parties did not bind the parties to make come to an agreement themselves.

VII. The Statute of Frauds
A. Statute says even though contract is formed, even though you can prove it and it’s fair and reasonable, if there is not the requisite writing with the requisite signature, it cannot be enforced

B. If an oral contract cannot possibly be performed within one year, it violates the statute of frauds

C. Requirements to satisfy the Statute
   1. A writing (can be a series of writings)
   2. Signature (only signature required is the one of the person who refuses to acknowledge the contract)
   3. Sufficient content to evidence the contract

Roberts v. Karimi—Seller tried to back out of property sale by claiming statute of frauds. Court held that the purpose of the statute is to protect persons from fraudulent enforcement of agreements never made, and not to allow parties to evade genuine agreements they have reached

C.R. Klewin v. Flagship Properties, inc.—Building Company changed contractors in middle of job. Court held that statute of frauds applies if “by its terms, the agreement is not to be performed within a year”

Nashan v. Nashan—Son-in-law sues father-in-law after he moved when promised a house and job. Court held that sometimes part performance of an oral contract can dispense the need for a written contract

D. Under the UCC
   1. Contract for any value of $500 or more must be in writing
   2. Exceptions
      a. Goods are unique
      b. Payment or goods have been received/accepted

VIII. Consideration

A. The Basic Doctrine
   1. Showing consideration meant that the plaintiffs had to state the considerations that led to the promisors to make the alleged promises
   2. The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration
   3. To constitute consideration, a performance or a return promise must be bargained for

B. Elements
   1. Where nothing is given or received in exchange for a promise, traditional contract doctrine refuses to enforce the promise, citing the lack of consideration
2. Consideration requires that the benefit or detriment serving as consideration be given in some sense in exchange for the promise to be enforced.

Hamer v. Sidway—Pledge to give money if didn’t engage in bad behavior until 21. Court held that consideration can exist in a gratuitous pledge if the promisee suffers a legal detriment as an inducement for a promise.

Patel v. American Board of Psychiatry & Neurology—Indian medical internship case. Court found no consideration because the plaintiff’s detriment in applying was not part of the bargain, and there was no detriment in informing him it met the requirements (because he didn’t have to do anything).

3. Illusory promise—A statement which appears to promise something, but does not commit the promisor to do anything at all
C. The Elusive Purpose of Consideration Doctrine
   1. Contract law has a job to do, and at some point overzealous formalities can prevent that job from getting done

Carlisle v. T & R Excavating, inc.—Husband and wife contracting case. Court held that past consideration does not qualify as consideration.

D. What suffices as consideration
   1. It is not the job of the courts to review the adequacy of consideration

Apfel v. Prudential-Bache Securities—Investment bank computerized book entry case. Court held that consideration existed because plaintiffs believed they received something of value at the time of formation.

Batsakis v. Demotsis—Greek money lending case. Court found that mere inadequacy of consideration (a very one-sided deal) will not void a contract.

2. An exception to the rule takes place when the exchange is manufactured for the specific purpose of making a promise enforceable (someone knows they need to have consideration so they “fake” a bargaining)

E. Gifts
   1. Promises to make gifts are generally unenforceable
   2. Once a gift has been given, however, it cannot be revoked for lack of consideration

F. Preexisting Duty Rule and Settlements
1. A person who promises to take on a new obligation suffers a legal detriment; if bargained for, the promise to take on that obligation can serve as consideration
2. Preexisting Duty Rule- A preexisting legal duty cannot serve as consideration for a contract
3. Forbearance in pursuing a patently invalid claim does not constitute good consideration, even if bargained for

*State v. Avis*—Private investigator wants reward for apprehending criminal. Court held that, although a preexisting duty is usually present for PIs, it was the reward that induced the action, so it was consideration.

*Fiege v. Bohm*—Paternity case where ex-boyfriend agrees to support child, but it’s not his. Court held that plaintiff’s objective belief that defendant was the father showed her claim was not invalid, and it didn’t matter that she was wrong because the father entered into a contract.

F. Mutuality

1. Limits
   a. If the alleged contract is not binding on one party due to a lack of consideration, out of fairness it should not be binding on the other party either
   b. Mutuality of Obligation- Both parties must contribute or promise to contribute something meaningful in the eyes of the law for there to be a contract

*Weiner v. McGraw-Hill*—Wrongful termination case involving promise of employment. Court held consideration existed because promise induced the employer to stay.

*Iacono v. Lyons*—Las Vegas gambling case. Court held consideration existed because of the bargaining element.

*Wood v. Lucy*—Marketing fashion designer case. Court found that a promise that seemed illusory was enforceable because of an implied promise that the offeror would be doing work for the offeree.

2. Output and Requirements Contracts
   c. Output contract- the buyer agrees to purchase whatever *output* the seller produces
   d. Requirements contract- The seller agrees to provide whatever goods the buyer *requires* to satisfy its needs
   e. Quantity is the main consideration; not price
   f. No quantity unreasonably disproportionate to any stated estimate may be tendered or demanded
   g. Exclusivity is implied (buyer will not buy from others)
IX. Promissory Estoppel

A. Overview
   1. Definition- A theory that 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
   2. If consideration is present, there is no need to resort to it

*Deli v. University of Minnesota*—Gymnastics coach sex tape case. Court held that extra-contractual damages are limited to instances where a breach of contract is accompanied by an independent tort (there was none in this case).

*Wright v. Newman*—Paternity case involving promise to give child support. Court held that because plaintiff relied upon the promise to their detriment, recovery by promissory estoppel was appropriate.

*In Re Morton Shoe Company*—Company pledged $20,000 to Jewish philanthropic organization. Court sided with organization, citing consideration as well as the relied upon detriment of organizing a budget based on the gifted amount.

3. Questions courts look at to prove promissory estoppel
   a. Was the promise one which the promisor should reasonably expect to induce action or forbearance of definite and substantial character on the part of the promise?
   b. Did the promise induce such action or forbearance?
   c. Can injustice be avoided only by the enforcement of the promise?

B. In the commercial context
   1. If promisees rely to their detriment on promises but the promisors do not bargain for that reliance, the promisees rely at their own risk

*East Providence Credit Union v. Geremia*—Dispute over loan where the bank agreed to insure car used as collateral. Court held that a breach of a material term of the contract made it void, so defendant didn’t have to pay balance on loan.

*Ypsilanti v. General Motors*—Chevy Caprice factory case. Court held that reliance on the promise of continued employment was unreasonable.

*Lord v. Souder*—Wrongful termination suit for “snitching.” Court held that promissory estoppel can be invoked in employment-at-will situations if an employee reasonably relies on a promise to induce action, and that promise is binding because injustice can be avoided only by its enforcement.

C. In commercial negotiations
**Hoffman v. Red Owl Stores, inc.**—Defendant keeps stringing along plaintiff and a deal is never made. Court held that promissory estoppel can be applied to precontractual negotiations because of the good faith requirement.

**Gruen Industries v. Biller**—Businessmen in Watch Company screwed out of an acquisition deal. Court decided against businessmen, stating that promissory estoppel is not to be used to support a “no lose” situation.

X. **Options and Firm Offers**

A. Option Contracts
   1. The purpose of an option contract is to allow the offeree some time in which to decide whether to accept the offer
   2. Requires a writing, signature, and fair terms
   3. Any attempted revocation during the term of the option contract will be ineffective
   4. Anything that serves as consideration in a contract generally can serve as consideration in an option contract

B. Promissory Estoppel and Offers
   1. Once the offeree begins the requested performance of the offeror, an option contract is created

**Drennan v. Star Paving**—mistaken subcontractor bid to general contractor. Court held that plaintiff’s demonstrated reliance on defendant to perform made the offer irrevocable.

C. Firm Offers under the UCC
   1. An offer by a 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 during the time stated or if no time is stated for a reasonable time
   2. In no event may such period of irrevocability exceed 3 months

XI. **Obligation based on Unjust Enrichment and Material Benefit**

A. The relationship between unjust enrichment and contract
   1. Unjust Enrichment- A cause of action that arises where the claimant has conferred a benefit on the recipient under circumstances that make it unjust for the recipient to keep the benefit without paying for it
   2. Unjust enrichment is not based on a promise
   3. Unjust enrichment is neither contract nor tort

B. The elements of unjust enrichment
   1. One party must have been enriched by obtaining property, services, or some other economic benefit from the other
2. The circumstances must be such that it would be unjust for the beneficiary to keep the benefit of that enrichment without paying or compensating that other party for the benefit

3. Proper remedy for unjust enrichment is restitution, either by return of the benefit or a money judgment for its value

*Martin v. Little, Brown and Co.*—Volunteer alerts publisher of copyright and wants reward. Court found that no contract was made or implied because there was never any reference to being compensated.

*Feingold v. Pucello*—Lawyer does work for someone who isn’t a client. Court held that unjust enrichment didn’t apply because defendant never accepted the benefit.

*Estate of Cleveland v. Gorden*—Niece pays for all of aunt’s expenses. Court held that plaintiff’s volunteer to pay should be repaid based on the fact that both plaintiff and defendant suggested there would be compensation.

### C. Moral Obligation

1. The definition of moral obligation in a legal context
   a. A prior detriment may be treated as sufficient to support a later promise given on account of it
   b. Situations in which doctrine is used
      1. Some benefit was conferred on the promisor by the promise before the promise was made
      2. The benefit unjustly enriched the promisor
      3. The promisor subsequently made a promise to pay for the benefit

2. Application where a debtor promises to pay a preexisting unenforceable legal debt
   a. 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

*Webb v. McGowin*—Plaintiff saved defendant’s life on construction site. Court held that a prior material benefit can justify the enforcement of a subsequent promise.

*Dementas v. Estate of Tallas*—Dead Greek guy pledged money to friend. Court held that moral obligation exception didn’t apply because services performed were not done so with the expectation of compensation.

3. Instances where past consideration *does* apply to enforce a contract
   a. Statute of limitations has run
   b. Debt has been discharged in bankruptcy
   c. Minor has come of age after incurring debt

### XII. Policing Contracts for Improper Bargaining
A. Fraudulent Misrepresentation
   1. General principles and elements
      a. A lie as to a fact is present
      b. The lie is introduced at the time of formation of the contract
      c. There can be no intention to assent if the lie was used to induce you to assent
      d. A fraudulent misrepresentation may take the form of an express statement, a deliberate concealment of a fact, or a failure to disclose a fact
      e. Possible remedies for fraudulent misrepresentation
         1. Allow the victim of the misrepresentation to rescind the contract and obtain restitution for any performance that has been rendered
         2. Allow the victim to keep the contract in force and sue for any loss in value of the performance as a result of the fraud
   2. Affirmative Fraud
      a. Concealment- taking action to prevent someone from learning the truth

* Sarvis v. Vermont State Colleges*—Ex-con lied on resume and was fired. Court found that plaintiff fraudulently and intentionally induced the defendant into entering an employment contract by knowingly misrepresenting material facts.

3. Silence as Fraud

* In Re House of Drugs*—Lease agreement of a store in a mall with many closing stores. Court held that debtor could have easily discovered information withheld by owner, so no fraud existed.

* Stambovsky v. Ackley*—Haunted house case. Court held that buyer could not have possibly known about haunting, so fraud did exist.

4. Misrepresentations of Fact, Opinion, and Future Action

* Cummings v. HPG International, Inc.*—collapsing roof case. Court held that no fraud exists when an assertor of a claim believes it to be true at the time of contract formation.

5. Distinction between fraudulent and negligent misrepresentation
   a. The essential difference between fraud and negligence lies in the state of mind of the party making the misrepresentation
   b. A negligent misrepresentation is not deliberately false but is made carelessly: The party making the misrepresentation failed to exercise reasonable care in obtaining or communicating the information
c. There is a stronger emphasis on materiality in negligence cases than fraud cases

6. Fraud in the Inducement distinguished from Fraud in the Factum
   a. Fraud in the inducement means that the misrepresentation relates to a fact that forms the basis of the contract and falsely gives the other party an incentive to enter into the contract
   b. Fraud in the inducement is the most common type of fraud
   c. Fraud in the factum relates to fraud in the actual document (Telling someone to sign something but telling them it's something other than what they think it is)
   d. Fraud in the factum typically renders a contract void (not just voidable)

B. Duress
   1. Elements
      a. A party’s manifestation of assent is induced by an improper threat by the other party
      b. The threat leaves the victim no reasonable alternative
      c. Often accompanied by a hasty, unwise decision

_Germantown Manufacturing Co. v. Rawlinson_—Embezzlement case involving judgment notes. Court held that duress occurred because victim had no reasonable alternative (husband going to jail).

2. Market or Circumstantial Pressure Distinguished from Duress

_Quigley v. KPMG_—Employee claimed duress when forced to sign employment agreement. Court held that “duress requires circumstances more egregious than the ordinary pressure faced by every employee who needs the job.”

3. Economic Duress, Bad Faith, and Contract Modification
   a. The application of consideration doctrine and the preexisting Duty Rule to Modifications

_Rinck v. Association of Reserve City Bankers_—Employee terminated after merger when she was promised employment. Court held that employee’s decision to remain with company was “new consideration” and performance would fulfill a unilateral contract.

   b. The application of duress doctrine to modifications

_Alaska Packers’ Association v. Domenico_—Salmon cannery flew in workers from San Francisco. Court held that the agreement to increase their wage was invalid because it lacked consideration because the nature of the work didn’t change after the increase.

_Austin Instruments v. Loral Corp._—Economic duress by subcontractor for government contract. Court found economic duress when one party to a contract has threatened to
breach the agreement by withholding goods unless the other party agrees to some further demand, and there is no reasonable alternative available.

d. Unforeseen Difficulties rule (an exception to preexisting duty rule) requirements
   1. After the contract is made, it must become apparent that the performance of the contract is subject to substantial and burdensome difficulties not anticipated, and not within contemplation of the parties at the time when the contract was made
   2. Party benefiting from the modification must conform to standards of honesty and fair dealing
   3. The change in the performance of the party who assumes the increased obligations must be reasonable and manifestly fair in view of the changed conditions

e. Contract modification under UCC Article 2
   1. Has no provisions governing duress, capacity, misrepresentation, or undue influence
   2. Contains 2 definitions of “good faith”: Honesty in fact in the conduct or transaction concerned, honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade

C. Undue Influence
   1. Undue influence and unconscionability may be available to a party who cannot pinpoint a false representation or improper threat as the inducing cause of the contract but who can show that the contract was nevertheless executed under circumstances that would make enforcement unjust
   2. Undue influence is applicable when the victim is particularly vulnerable to the persuasion of the other party because of some kind of relationship of submissiveness or, dependence, or trust
   3. Things to look for in undue influence claims
      b. Special relationship between the parties (close relatives, attorney/client, supervisor/employee, intimacy partners)
      c. Mental state of the promisor (needs to be competent)
      d. Whether promisee takes away free will from promisor (this is questionable)
      e. Whether it was fair based on the relationship or the outcome

*Rudolf Nureyev Dance Foundation v. Nourreeva-Francois*—Dance foundation case. Court held that attorney’s actions benefited Nureyev and his foundation, so no undue influence.

*Tinney v. Tinney*—Creepy handyman likes old ladies case. Court found undue influence because he used his intimacy as influence during a widow’s vulnerable time.
Odorizzi v. Bloomfield School District—Gay teacher forced to resign. Court found undue influence based on a number of factors: 1) Discussion of the transaction at an unusual or inappropriate time 2) Consummation of the transaction in an unusual place 3) Insistent demand that the business be finished at once 4) Extreme emphasis on untoward consequences of delay 5) The use of multiple persuaders by the dominant side against a single servient party 6) Absence of 3rd party advisers to the servient party 7) Statements that there is no time to consult financial advisers or attorneys.

D. Unconscionability
   I. The contract is so unfair it would offend the conscience of the court to enforce it
   II. If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term
   III. Elements
       a. Unconscionability is a legal matter only decided by a judge, not a jury
       b. Often includes an “unfair surprise” element
       c. Generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party
       d. Procedural unconscionability- The circumstances surrounding the assent to the contract are unconscionable
       e. Substantive- The terms of the actual contract are unconscionable
       f. Adhesion- One of the parties, having superior bargaining power, is able to dictate the terms of the contract to the other on a take-it-or-leave-it basis, and the weaker party has no choice but to adhere to the terms

Southwest Pet Products, Inc. v. Koch Industries, Inc.—Toxic pet food case. Court held that contract was not unconscionable because Koch did not know at the time that its product contained high levels of toxic substances.

IV. Relief available
   a. Nonenforcement of the contract as a whole
   b. Removal of the unconscionable term(s)—severance
   c. Adjustment of the term to get rid of its unconscionable effect—rewriting

Sosa v. Paulos—Surgeon made patient sign a severance clause just before surgery. Court found that was procedurally unconscionable.

XIII. Policing Contracts on grounds other than improper bargaining

A. Illegality
1. In general, the court will not award damages when a contract is illegal (not always the case though)

*Diversified Group v. Sahn*—Reselling of Knicks tickets case. Court held that breaching party should have to pay damages because the statute gave room for scalpers to recover even though their actions are illegal.

*Danzig v. Danzig*—Attorney referral fee case involving 2 brothers. Court held that the statute did not apply to the brother who was not an attorney.

2. Public Policy concerns

*Stevens v. Rooks Pitts & Poust*—Law partner noncompetition case. Court held that the noncompete clause was invalid because it hindered both the lawyer’s ability to take on clients and the clients’ ability to choose counsel.

3. Rule of Reason
   a. Definition- A noncompetition clause will be upheld to the extent that it is reasonable as to its duration, the geographic area that it covers, and the scope and extent of the activity it restrains
   b. Court typically examines the totality of the circumstances, including the degree to which it is needed to protect the legitimate interests of the party in whose favor it operates, any undue hardship that it will impose on the restrained party, and the general public interest
   c. Most commonly found in sales of businesses, partnership agreements, and employment contracts

B. Incapacity
   a. In deciding whether a contract should be avoided on the grounds of incapacity, courts usually take into account not only the degree and seriousness of the mental incompetence, but also whether the vulnerability of the incompetent party attracted exploitation by the other
   b. When incapacity is not present, the court may look toward undue influence
   c. Minority
      i. In most cases, a minor’s lack of contractual capacity makes the contract voidable
      ii. Narrow exception exists where an emancipated minor contracts for necessaries furnished to him

*Webster Street Partnership v. Sheridan*—Minors entered into a lease agreement and failed to pay rent. Court not only denied landlord’s request to recover rent, but also made landlord pay back all rent paid by the boys (because it was not a necessary).
**Halbman v. Lemke**—Minor bought car from adult that subsequently broke down. Court held that adult should repay purchase price, and minor didn’t have to return the car because he no longer had possession of it.

**Zivich v. Mentor Soccer Club, Inc.**—Child injured playing soccer after mother signed exculpatory clause. Court upheld that validity of the clause, citing a public policy reason that, without it, non-profit organizations would not be as effective, as they would constantly be wary of liability.

d. Mental incapacity
   i. The crucial time for measuring incapacity is the time of contracting
   ii. Most courts treat incapacity as rendering the contract voidable
   iii. The other party’s knowledge or reason to know of the mental defect is relevant to the incompetent’s right to avoid the contract, or to the remedy available if avoidance is allowed
   iv. Usually derives from an illness, injury, old age, or substance abuse
   v. Expert testimony from a psychiatrist is often required to establish mental incapacity

**Farnum v. Silvano**—Old lady sells her home to lawnmower for $\frac{1}{2}$ of market value. Court granted rescission of the contract based on mental incapacity, but also because the lawnmower knew of the old lady’s inability to act in a reasonable manner.

**XIV. Contract Interpretation and Construction**

A. Introduction
   1. Interpretation—The process of discerning the meaning intended by the parties to a contract
   2. Construction—The process of adding contract terms by legal implication
   3. Varying approaches
      a. 4 Corners—Judge will only look at the actual document for evidence
      b. Plain Meaning—Judge will look at context, but not evidence of what parties said in pre-contractual negotiations
      c. Liberal—Judge will look at everything

B. Important things to look at in contract interpretation
   a. The actual contract
   b. Negotiations involved in forming the contract
   c. “Trade usage” terms
   d. Price context
   e. Conduct of the contracting parties

C. Interpretation of Standard Contracts
   a. Always construed against the issuing party
Atwater Creamery Co. v. Western National Mutual Insurance Co.—Burglary insurance case. Court found that the creamery’s reasonable expectations that they would be covered outweighed the language that they were not covered.

XV. Parol Evidence Rule

A. Excludes evidence related to the time period prior to the formation of the written contract (exclusionary rule)
B. Application Prerequisites
   a. Written contract
   b. Disputed evidence is introduced before the formation of the contract
C. Courts resort to extrinsic evidence primarily when the written terms are unclear, ambiguous, or incomplete
D. Cannot be used simultaneously with the statute of frauds
E. Ancillary writings signed at the same time of contract are exempt from the rule
F. Fully Integrated Writing
   a. Document is final, and intended by the parties to include all the details of their agreements
   b. No evidence of prior or contemporaneous agreements or negotiations may be admitted which would either contradict or add to the writing
   c. Evidence may be submitted regarding ambiguous terms
G. Partially Integrated Writing
   a. Document is final, but not intended by the parties to include all details of their agreement
   b. No evidence of prior or contemporaneous agreements or negotiations may be admitted if this evidence would contradict a term of the writing
   c. Evidence may be submitted regarding ambiguous terms
H. Stages in dealing with parol evidence
   a. Decide whether the evidence is admissible (judge)
   b. Factfinder evaluates its credibility along with all of the other evidence presented at trial (jury)
I. Application of the Rule

Masterson v. Sine—Trustee attempted to sell option on a house. Court allowed extrinsic evidence of an oral agreement on the basis that it was an agreement that might naturally be made as a separate agreement by the parties at the time of written contract.

J. Merger and Integration Clauses
   a. Used to invoke the strongest possible protection from the parol evidence rule

Bristow v. Drake Street, Inc.—Wrongful termination of associate producer of musical. Court held that extrinsic evidence showing the producer’s salary was contingent on the show remaining open should not have been allowed. This was because the agreement was clear on its face, and the party could have easily included it in the original agreement but chose not to do so.
**UAW-GM Human Resource Center v. KSL Recreation Corp.**—Court held that the inclusion of an integration clause renders the parol evidence rule inapplicable unless there is evidence of fraud to invalidate such a clause.

K. Under the UCC
   a. Generally the same as common law (slightly more liberal)
   b. A fully integrated agreement may be explained or interpreted by reference to “course of dealing,” “usage of trade,” and “course of performance”

**XVI. Misunderstanding, Mistake, and Changed Circumstances**

A. Misunderstanding
   1. When parties use the same words, but, unknown to each other, intend materially different meanings
   2. A court may conclude that any manifestation of mutual assent is illusory in such a case
   3. Essential questions
      a. What are the basic assumptions of the parties making the contract?
      b. How do you allocate risk when the assumption no longer applies?

**Raffles v. Wichelhaus**—The famous “Peerless” ship case. Court held that because both parties sought different meanings, no meeting of the minds occurred, and no contract was formed.

**Konic International Corp. v. Spokane Computer Services, Inc.**—Employee ordered a surge protector for “fifty six twenty.” Court held that because both parties attached different meanings of fifty six twenty, there was no contract.

B. Mistake
   a. General Guidelines
      i. Mistake must relate to a fact that was in existence at the time of the contract
      ii. Mistake must relate to something that is central to the contract, and must have a significant effect on the benefits the mistaken party receives or the burdens he undertakes under the contract
      iii. It must be unfair or otherwise inappropriate to allocate the risk of the mistake to the aggrieved party
   b. Mutual Mistake
      i. Relates to facts in existence at the time of the contract
      ii. Shared by both parties
      iii. Relates to a basic assumption on which the contract was made
      iv. Has a material effect on the agreed exchange of performances
      v. Complaining party did not bear the risk of mistake
Wood v. Boynton—Man bought a stone for $1 that turned out to be a diamond. Court held that the contract was valid because there was no mistake to the identity of the thing, just a mistaken belief as to its probable value.

Sherwood v. Walker—Barren cow case. Court held that a contract was void because the mistake went to the whole substance of the agreement (even though there was no mistake as to the identity of the creature).

Mattson v. Rachetto—Dispute over land. Court held that an unknowingly unlawful mistake voids a contract.

c. Party bears risk of mistake when
   i. The risk is allocated to him by agreement of the parties, or
   ii. He is aware at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
   iii. The risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so

Estate of Nelson v. Rice—Man bought cheap paintings that turned out to be valuable at an estate sale. Court held that the estate bore the risk that such paintings could be valuable.

d. Unilateral Mistake
   i. Relates to facts in existence at the time of the contract
   ii. May be by one party only
   iii. Relates to a basic assumption on which the mistaken party made the contract
   iv. Has a material effect on the agreed exchange of performances that is adverse to the mistaken party
   v. Mistaken party did not bear the risk of the mistake
   vi. Either the effect of the mistake is such that enforcement would be unconscionable or the other party had reason to know of the mistake or his fault caused the mistake

e. Relief
   i. Rescission
      1. Essentially “undoes” a contract and pretends like it never happened
      2. Party seeking is not entitled to retain favorable portions of the contract and disregard the rest
   ii. Reformation—Puts a contract into effect, but only for the terms under which the parties actually agreed

C. Changed Circumstances
   a. Developments have so changed the environment in which performance was to take place and are so contrary to the assumptions made at the time of contracting that the very premises of the contract have been overturned
b. Must be unexpected but does not have to be unforeseeable

c. Key issues are materiality and risk allocation

d. Impracticability
   i. It is no longer necessary that the performance become objectively impossible—it is enough that the change in circumstances so drastically increase the burden on the party claiming relief that performance can fairly be regarded as impracticable
   ii. More central in contemporary law than frustration of purpose doctrine

Clark v. Wallace County Cooperative Equity Exchange—Freeze destroyed a portion of farmer’s crop. Court held that he was not excused from delivering the whole crop because he could have gotten the rest of the product elsewhere.

e. Frustration of Purpose
   i. Where, after a contract is made, a party’s main purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made
   ii. Both parties must understand the main purpose of the contract

7200 Scottsdale Rd. General Partners v. Kuhn Farm Machinery—Iraq War cancellation case. Court held that Kuhn never established that both parties had a common understanding of the contract’s purpose.

XVII. Conditions and Promises

A. Terminology
   a. Promise- A commitment to act or refrain from acting in a specific way in the future
   b. Condition- An event, not certain to occur, which must occur before performance under a contract becomes due
   c. Condition Precedent- A condition that must be satisfied before the performance subject to that condition will become due
   d. Concurrent Conditions- A set of promises that are dependent on each other and must be performed simultaneously
   e. Condition Subsequent- A condition that discharges a duty that is already in existence
   f. Pure Condition- Failure to meet such a condition excuses other party from performance, but does not constitute breach of contract (fulfillment or nonfulfillment is beyond the control of both parties)
   g. Promissory Condition- Failure to meet such a condition constitutes breach of contract (one party has some ability to influence the outcome of the event)

B. Purposes
a. Allow a party to escape the contract if a specified event occurs or fails to occur
   i. Breach of a Promise leads to Damages; Nonoccurrence of a Condition leads to Dischargement
   ii. For the nonoccurrence of one promise to nullify a promise of the other party, the conditions must be related to and dependent on one another
b. Allow one of the parties to exercise judgment by making that party’s performance contingent on being satisfied with a specified outcome or state of affairs
   i. If satisfaction relates to matters of taste or artistic judgment, the party’s dissatisfaction must be in good faith
   ii. If satisfaction relates to matters of a technical or commercial nature, the dissatisfaction must be reasonable
c. Allow for alternative performances
d. A means of sequencing performances by making one performance a condition of another
   i. If a contract is silent on the sequence of performance, a court is likely to construe the performances as concurrent if they can be performed instantaneously and simultaneously
   ii. Generally, all goods called for by a contract must be tendered in a single delivery and payment is due only on such tender

*Coch v. Construction Technology, Inc.*—Owner failed to pay general contractor, who in turn did not pay subcontractor. Court held that the general contractor must pay the subcontractor because there was no condition precedent that required performance.

C. Express, Implied, and Construed Conditions
   a. Where the parties clearly and unambiguously express a condition, the court should strictly enforce it to give effect to their manifested intent

*Jacob & Youngs, Inc. v. Kent*—Famous reading manufactured pipe case. Court held that damages should be measured by difference in value, which is little or nothing. Dissent stated that a builder has no right to substitute his own judgment in place of owner’s.

D. Excuse of Conditions
   a. Waiver
      i. Knowing and voluntary abandonment of a right, either expressly or by implication from words or conduct
      ii. After the contract has been entered, the party who is the beneficiary of the condition manifests the intention that he will not require the condition to be satisfied as a prerequisite to his performance
      iii. Waiving party typically does so explicitly
      iv. Courts more likely to allow the waiver if its for a nonmaterial aspect of the contract
v. Does not require justifiable reliance

b. Estoppel
   i. Beneficiary of a condition indicates by words or conduct that he will perform the contingent promise despite nonfulfillment of the condition
   ii. Must satisfy a justifiable reliance requirement
   iii. May apply to material changes in contract
   iv. The behavior need not meet the same standards of knowing and voluntary abandonment of a right (implied, careless conduct is ok)

c. Obstructive or Uncooperative Conduct
   i. Where a promisor prevents fulfillment of a condition in breach of the duty not to hinder or impede its occurrence, the proper response is to excuse the condition

_Sullivan v. Bullock_—Homeowner blocks entry to her house for remodeling crew. Court held that her blocking excused the crew’s obligation to perform, and because it had nothing to do with the quality of work or failure to abide by contract, she must pay for services rendered.

d. Unfair Forfeiture
   i. Based on court’s determination that enforcement of the condition would result in undue and unfair hardship to the party to whom performance is due
   ii. Forfeiture must be unduly harsh and disproportionate
   iii. Example: If injured party notifies insurance company immediately of an accident orally, but the provision says it needs to be in writing within 10 days, the court will most likely excuse the condition, as long as injured party gives written notice soon after

E. Material Breach and Substantial Performance
   a. Factors to consider when determining whether a breach is material
      i. Whether the breach deprives the injured party of a benefit which he reasonably expected
      ii. Whether the injured party can be adequately compensated for the part of that benefit which he will be deprived
      iii. Whether the breaching party will suffer a forfeiture by the injured party’s withholding or performance
      iv. Whether the breaching party is likely to cure his breach
      v. Whether the breach comports with good faith and fair dealing

_Worcester Heritage Society, Inc. v. Trussell_—Society paid a guy to restore a house. Guy lost his job and couldn’t proceed. Court held that he had not materially breached the contract because he intends to finish the job.

b. Substantial performance is typically satisfied by fulfilling an “essential purpose” of the contact
c. Although substantial performance will preclude remedies for total breach, it is still a breach of contract
d. A material breacher has no right to enforce the contract that he has violated, so he may not recover damages
e. If the breach is not material and the breacher has rendered substantial performance, the breacher can enforce the contract and is entitled to the full contract price less any allowance to the other party for rectifying the defect
f. Does not apply when express conditions are present

Lyon v. Belosky Construction, Inc.—Builders messed up a house. Court held that the defect was substantial because the owners wanted a custom home at a significant expense, and builders were negligent in construction.

c. Under the UCC
  i. Perfect Tender Rule
     1. Seller’s principal obligation under a contract for the sale of goods is to tender delivery of the goods at the time and place provided in the contract
     2. If any nonconformity, the buyer may reject
     3. Exception—If buyer used nonconformity to avoid a contract that had become unfavorable due to market changes, he can’t reject
     4. Buyer’s Remedies
        a. Reject the whole
        b. Accept the whole
        c. Accept any commercial unit or units and reject the rest
     5. Seller’s right to cure nonconforming tender
        a. Seller may notify the buyer of its intention to cure a nonconformity, and if he does so before the expiration of his contracted performance, the contract has not been breached
        b. A seller has a reasonable time to cure a nonconformity that he reasonably believed would not occur
        c. Uncured nonconformity amounts to a total breach
  ii. Installment Contracts
     1. Buyer may reject any installment which is nonconforming if it substantially impairs the value of that installment and cannot be cured
     2. Buyer may also cancel the entire contract if the nonconforming installment is essential to the contract’s purpose
     3. Perfect Tender does not generally apply
XVIII. Remedies

A. Damages in general
   a. Typically measured from the time of the breach
   b. Damages = Loss in value + Other loss – Cost avoided – Loss avoided
   c. Must result from the breach, and be measured in a specific dollar amount
   d. New businesses cannot establish damages with reasonable certainty
      (unless the owner can show previous success in similar business under
      similar circumstances)
   e. Businesses cannot recover for damage to reputation

B. Expectation Damages
   a. Putting the nonbreaching party in as good a position as he would have
      been had the contract been performed (typical result)
   b. Pertains to the value of the contract from the plaintiff’s point of view
   c. Calculation: Value of defendant’s promised performance (generally
      contract price) – Whatever benefits plaintiff received from not having to
      complete his own performance (generally costs saved)
   d. Also takes into account if the contract would be a losing one
   e. Direct damages- The difference in value between what the plaintiff hoped
      to get from the contract and what the plaintiff actually received
   f. Consequential damages- Further damages sustained from the original
      breach (but-for)
   g. Incidental damages- Damages sustained from coping with the breach (ie
      the costs of arranging substitute performance)
   h. In general, the injured party has a right to expectation damages as
      measured by
      i. The loss in value to him of the other party’s performance caused
         by its failure or deficiency
      ii. Any other loss, including incidental or consequential loss, caused
         by the breach
      iii. Minus any cost or other loss that was avoided by not having to
         perform
   i. Courts are hesitant to assign a value to contract performance based on
      purely subjective considerations
   j. Courts rarely assign damages for “overhead” in part performance cases

Freund v. Washington Square Press—Publisher breached publishing agreement with
author. Court held that because the author did not prove with adequate certainty what his
royalties would be, he cannot recover them as expectation damages.

Carpel v. Saget Studios—Wedding photographer failed to perform. Court held that
damages could not be calculated, and granted summary judgment to photographer.

k. Substitute transaction measurements
Handicapped Children’s Education Board v. Lukaszewski—Special Education teacher breached employment contract. Court awarded Board damages for the extra money it cost to hire a more qualified person (they couldn’t find anyone with same qualifications).

1. Deficient performance measurements
   1. Extent of the waste
   2. Wilfullness of the breach
   3. Desires and motivation of nonbreaching party

Peveyhouse v. Garland Coal and Mining Co.—Defendant did not perform remedial work after it was done. Court awarded damages for diminution of value ($300) and not cost of performing work ($25,000).

C. Reliance Damages
   a. Putting the nonbreaching party in as good a position as he would have been in had the contract not been made
   b. Always a basis when the breaching party has fully or substantially performed
   c. Measured in terms of plaintiff’s costs, not defendant’s benefit
   d. If damages are reasonably avoidable, they cannot be recovered
   e. Must be reasonably foreseeable
   f. Essential Reliance—Costs the disappointed party incurs in preparing to perform under the contract (always awarded)
   g. Incidental Reliance—Costs the disappointed party incurs in preparing to take advantage of the benefits to accrue to it under contract (typically awarded)
   h. Plaintiff typically resorts to reliance damages when lost profits are difficult to prove
   i. If defendant can show that plaintiff had a losing contract, the loss will be calculated, limiting the plaintiff to expectation damages

Hollywood Fantasy Camp v. Gabor—Court held that plaintiffs should not be awarded lost profits or lost investment because they were too speculative.

D. Restitution Damages
   a. Restoring a benefit that has been conferred on the breaching party
   b. Commonly appropriate where a contract is unenforceable for some reason (indefiniteness, defect in the bargaining process, failure to satisfy statute of frauds)
   c. Can also act as an alternative to expectation or reliance damages
   d. Measured in terms of defendant’s benefit, not plaintiff’s costs
   e. Only available when there has been a total and material breach of the contract (and not available to breaching party)
   f. Not available if plaintiff has fully performed at the time of breach
   g. Losses from “losing contracts” not taken into consideration
   h. Only remedy where disgorging profits is available
i. Measurement
   i. Requires the court to measure the benefit conferred on the breaching party
   ii. Measures of non-monetary benefits: Market value (preferred), Extent to which breaching party was enriched
   iii. Not limited by the contract price (unless fully performed)
   iv. Conduct of the parties is sometimes taken into account in valuation

E. Efficient Breach
   a. Rests on the view that the central purpose of contract law is to facilitate the transfer of resources from less to more valuable uses
   b. Breach is permitted without penalty, so long as the nonbreaching party receives adequate compensation
   c. A party could rationally choose to breach a contract if the benefits outweighed the costs

F. Reasonable Certainty
   a. A plaintiff must prove damages with reasonable certainty, and not always absolute certainty
   b. When a contract has been breached willfully, courts are more likely to use inferences to award damages
   c. When damages are entirely speculative and uncertain, they will not be awarded
   d. Courts tend to be skeptical of unsubstantiated damage claims for loss of goodwill, business reputation, or future profits
   e. “Opportunity Costs” are not recoverable

G. Forseeability

*Hadley v. Baxendale*—Famous broken mill case. Court held that damages should be measured by what may fairly and reasonably be considered either arising naturally or reasonably supposed to have been in the contemplation of both parties at the time of contract.

*Wullschlager & Co. v. Jenny Fashions, Inc.*—Circle skirt case. Court held that the fact Jenny never told the plaintiff it intended to make skirts doesn’t matter because it could have been reasonably forseen by the plaintiff that she would.

*Kenford Company v. County of Erie*—Proposed stadium building case. Court held that county was not responsible for loss of anticipated appreciation of nearby land where the stadium was to be built because the county didn’t know about it.

H. Mitigation Principle
   a. Nonbreaching party has a responsibility to limit the damages owed to them by the breaching party
   b. If the nonbreaching party has a unique skill, or the job that was offered to him is unique in character, earnings from other employment might not always offset the award (especially if different or inferior)
Parker v. Twentieth Century-Fox Film Corp.—Shirley McLaine case. Court held the company’s tendered substitute employment could not be applied in mitigation because it was both different and inferior.

Marchessault v. Jackson—Contractor built faulty foundation. Court held that homeowner should recover damages for contracting someone else to fix it, as well as the diminution in value to the house because of the damages.

I. Under the UCC
a. Central precept of UCC remedies is that the aggrieved party is to receive compensation for its lost expectation
b. Most common calculations are comparing contract price and market value, and contract price and terms of a substitute transaction
c. Buyer’s Remedies
   i. When the seller performs but its performance is deficient, damages are the difference between what was promised and what was provided (“market”)
   ii. If the buyer makes a substitute purchase following the seller failing to perform, and the substitute purchase is more expensive, he can recover the difference (“cover”)
   iii. Buyer can choose between market and cover remedies
   iv. Damages are measured from the time of the breach
   v. Specific performance is generally only available when the goods are extremely unique
d. Arguments sellers can make about buyer attempting to “cover”
   i. Buyer didn’t act in good faith
   ii. Substitute transaction was entered into with an unreasonable delay
   iii. Substitute transaction itself was unreasonable
e. Seller’s Remedies
   i. Withhold delivery of such goods
   ii. Stop delivery by any bailee
   iii. Resell and recover damages
   iv. Recover damages for non-acceptance
   v. Cancel the contract
   vi. If seller is a “lost volume” seller (would have able to make the resale even without the initial buyer’s breach) he should recover only profits from the sale (difficult to prove)
   vii. If the measure of damages between market price and unpaid contract price is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit which the seller would have made from full performance by the buyer, including incidental damages
f. Mitigation
   i. Buyer’s consequential damages include any loss resulting from general or particular requirements and needs of which the seller at
the time of contracting had reason to know and which could not be reasonably prevented by cover

ii. Buyer’s incidental damages include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commission in connection with effecting cover

iii. Seller’s incidental damages include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods

J. Agreed Remedies
a. In common law, agreed remedies within a contract are looked upon unfavorably
b. 2 common methods of agreed remedies are limiting damages available for the breach, and specifying that a breaching party will not be responsible for certain categories of damages
c. Liquidated damages clause must be reasonable in the light of anticipated or actual losses, or difficult to prove
d. Current trend exists to enforce liquidated damages clauses in contracts
e. Penalty clauses exist when the estimate of damages greatly exceeds a reasonable upper estimate of what damages are likely to be
f. Under the UCC
   i. Limits on recovery for bodily harm are unconscionable
   ii. Limits on recovery for consequential damages are allowed

*Wedner v. Fidelity Security Systems, Inc.*—Burglary service protection contract that called for liquidated damages award of $312, although the actual damage was $46,000. Court upheld the award, stating that the parties who made the contract were experienced businesspeople and should have known what they were doing.

K. Specific Performance and Injunctions
a. Factors courts weigh when determining adequacy of damages
   i. Difficulty of obtaining a substitute for the promised performance
   ii. Obstacles to recovery or to an accurate measurement of damages
   iii. Uniqueness of performance promised
   iv. Possible negative consequences that would flow from failure to perform
b. May be acceptable when certain goods are unique
c. Reasons to deny specific performance although damages cannot be measured
   i. Shady bargaining practices
   ii. What plaintiff received was grossly disproportionate to what it gave up
   iii. Transaction borders on being illegal
d. Courts employ prohibitory injunctions where the contract explicitly calls for a forbearance rather then performance