Contracts – Haley, Fall 2005

1) Introduction

a) “Contract”: A promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.”

i) Elements:
   (1) Exchange relationship
   (2) Created by agreement
   (3) Contains at least one promise
   (4) Recognized as enforceable at law

b) Cohen v. Cowles Media Co.:
   i) No contract.
   ii) There must be mutual assent between the parties to a contract.
      (1) The two parties in this case did not believe they were entering into a binding contract – they were not thinking in terms of offer and acceptance in any commercial or business sense.
      (2) Rather, the reporters’ promise of anonymity was a moral commitment – but a moral obligation alone will not support a contract. (A moral obligation is not enforceable at law.)
      (3) Note that industry custom played a role in this case.
      (4) Note also – Cohen was ultimately relieved under Promissory Estoppel.

c) Keltner v. Washington County:
   i) Contract Law is focused on what is lost in a breach – not on injury.

d) UCC

i) INTRO

(1) Statute governing K’s for the sale of goods, but not cast in stone (interpretation is important) – but, it is primary, mandatory authority (comments are persuasive authority)

(2) Expression of legal realism (Llewellyn)

(3) Used in all states except LA

(4) “The act shall be liberally construed and applied to promote its underlying purposes and policies.” – 1-102
   (a) Policies:
      (i) Simplify/Clarify/Modernize law governing commercial transactions
ii) Permit expansion of commercial practices through custom, usage and agreement of the parties

(iii) Make the law uniform among the jurisdictions

ii) SCOPE
(1) “Goods”: all things (including manufactured goods) that are moveable at the time of identification to the K for sale (passage of title)

(2) Pass v. Shelby Aviation:
   (a) Predominant factor test: A mixed transaction of goods and services is subject to the UCC when its predominant factor is the sale of goods with labor incidentally involved.
   (i) Court decided not to use the “Gravaman test”: looks to the portion of the contract upon which the complaint is based to determine whether the UCC applies.

(3) Custom Communications Engineering Inc. v. E.F. Johnson Co.: A direct dealership agreement between two parties is governed by the UCC.
   (a) Custom was required to buy and maintain an inventory of Johnson products
   (b) Custom’s purchase orders were subject to the price, terms and conditions set by Johnson at the time the order was made
   (c) The agreement defined the relationship between the parties as “buyer-seller”

1) FORMATION: Was a contract formed?

a) CONTRACTUAL ASSENT/THE OBJECTIVE TEST

i) OBJECTIVE STANDARD FOR DETERMINING ASSENT
(1) Legal assent determined not by trying to ascertain if the parties subjectively believed that they had an agreement but by having regard to their apparent intent as shown by their overt acts and words (objective).

(2) Kabil Developments Corp. v. Mignot:
   (a) Both parties must objectively manifest that they intend to enter the contract.
   (b) Subjective evidence is admissible in court to supplement the objective evidence of what was said between the parties.
(3) Limitations: incapacity of one party, one party’s manifestation of assent is induced by the wrongful conduct of the other party (fraud, duress, unfair bargaining) – see below.

ii) DETERMINATION OF OBJECTIVE MEANING: REASONABLE PERSON CONSTRUCT
(1) Courts don’t ask what a reasonable interpretation of a manifestation might be in the abstract. Rather, they ask what it might be from the perspective of the party who observed it, taking into account:
   (a) his attributes (such as experience, training and commercial sophistication)
   (b) the background information that he possessed
   (c) the relationship between the parties
   (d) the context of the transaction

(2) Note: this means that subjective elements are not entirely excluded from the test of reasonableness

iii) DELIBERATELY UNDISCLOSED INTENT
(1) The objective test holds the jokester accountable for what he may not have seriously intended.

(2) Lucy v. Zehmer:
   (a) A party may be considered to have entered into a contract even if its assent to the contract was intended in jest, if it fails to disclose this lack of serious intent.
   (b) The court enforced the K even though the parties had been drinking when it was made.

b) OFFER
i) WHAT IS AN OFFER?
(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.” R2d

   (a) Hallmark of the offer: The offeror must give the offeree the power of acceptance.
   (i) It must be clear to the offeree that her acceptance will bind the parties immediately – the offeror may not retain the opportunity to make the final decision
1. If the offeror retains the power to make the final decision, then the proposal is not an offer, but an invitation to the recipient to negotiate or to make an offer to the person making the proposal.

(2) INTERPRETING INTENT OF A COMMUNICATION TO DETERMINE IF IT IS AN OFFER

(a) “Four-Corners” Approach – look only at the words used in the communication as a whole

(i) But, there may be relevant contextual information

1. If so, jury should decide what the parties intended

2. If not, judge can decide what the parties intended as a matter of law

(b) Fairmount Glass Works v. Grunden-Martin Woodenware Co.:

(i) Quote may be an offer.

(ii) In this case, the quote said “for immediate acceptance” – the magic words

(iii) “Mirror Image” rule: there can never be agreement without mutual assent to the terms – the terms will always be in the offer

(c) People v. Braithwaite: An “offer” couched in indefinite terms will fail as an offer

(ii) The promise must be sufficiently definite in its terms to lead the offeree to understand that

1. A bargain is being proposed, and

2. How the offeree may accept it

ii) ADVERTISEMENTS: OFFERS OR SOLICITATIONS?

(1) To decide whether an advertisement is an offer, the court must ascertain the reasonable meaning of the communication by the process of interpretation in context.

(2) Lefkowitz v. Great Minneapolis Surplus Store:

(a) Ads are usually invitations to the public to make offers

(b) An ad may be an offer if, interpreted in context, it would lead a reasonable prospective buyer to understand that an offer was intended.

(i) Do the facts show that some performance was promised in positive terms in return for something request?
1. “If you come to the store at 9am on this date, we will sell you three brand new fur coats.” = Offer to sell the furs.

(ii) Offer is clear, definite, explicit and leaves nothing open for negotiation = an offer.

(3) *Harris v. Time*: mass mailing, still an offer b/c called for performance of a specific act without further communication and left nothing for further negotiation

(4) *Leonard v. PepsiCo, Inc.*: An advertisement is not transformed into an enforceable offer merely by a potential offeree’s expression of willingness to accept the offer through, among other means, completion of an order form

iii) OFFERS UNDER UCC ARTICLE 2 (2-204)

(1) A K may be made “in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a K.”

(2) An agreement sufficient to constitute a K for sale may be found even though the moment of its 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 reasonably certain basis for giving an appropriate remedy.

e) ACCEPTANCE

i) NATURE, MODE AND EFFECT OF ACCEPTANCE

(1) OVERVIEW OF THE MODEL

(a) Once an offer is made, there are three possible responses from the offeree:

(i) Acceptance (within time frame and in manner prescribed by the offeror)

1. K is formed immediately upon acceptance

(ii) Refusal (or inaction)

1. If express, the offer is terminated as soon as it is refused

2. The offer may expire if the refusal or acceptance is not made within the allotted time

(iii) Counteroffer

1. Essentially a refusal of the initial offer and then a new offer made to the first party

(iv) The offeror in most situations retains the right to withdraw the offer at any time before it is accepted

(2) OFFEREE’S SIGNIFICATION OF ASSENT TO THE OFFER

(a) Acceptance must be knowing, voluntary and deliberate

(b) Assent is determined by an objective standard – reasonable meaning of the response (i.e. not by what the offeree thought or meant) – “how would a reasonable person interpret the actions/words of the offeree?”
(c) Offeree’s decision to accept is not effective until it has been communicated to the Offeror

(d) Keller v. Bones: ??????????
   (i) Industry custom was used in this case

(3) ACCEPTANCE MUST ACCORD WITH BOTH THE SUBSTANTIVE TERMS AND THE PROCEDURAL REQUIREMENTS OF THE OFFER

(a) Substantive Nature: The proposed K. An acceptance must accept all of the substantive terms in the K.

(b) Procedural Nature: Procedure to be followed by the offeree if he wants to accept the offer. In the absence of anything to the contrary:

   (i) Offeree may accept within a reasonable time

   (ii) Offeree’s communication of acceptance may be by any mode and in any manner that is reasonable

(c) Roth v. Malson: Conformity to the structure of a standardized form is important for consistency and for limiting loopholes. By signing in the “counter to counter-offer” space and including terms – even the same terms that had been offered to him – P was creating a counter-offer and giving the power of acceptance back to D.

(4) EFFECTIVE DATE OF ACCEPTANCE

(a) Acceptance takes place when it is communicated to the offeror.

   (i) Face-to-face dealings: straightforward

(b) “Mailbox Rule”: Where the mail is an expressly or impliedly authorized medium of acceptance, a properly addressed acceptance takes effect when deposited in the mail.

   (i) Note: The offeror can avoid application of the mailbox rule by specifying a different manner of acceptance, or by specifying that acceptance will only be effective upon receipt.

(5) INADVERTENT MANIFESTATION OF ACCEPTANCE

(a) Too rigid an application of the principles of the objective test could result in finding a K where, in truth and fairness, the offeree did not intend one. Sometimes evidence of subjective state of mind is too difficult to discard.

(b) Glover v. Jewish War Veterans of United States, Post No. 58: A claimant cannot accept an offer if she didn’t know it had been made before performing, even if the actions of the claimant would have indicated agreement to the offer.

(6) SILENCE AS ACCEPTANCE
(a) If an offeree fails to respond to an offer before it expires, this inaction amounts to rejection. (It wouldn’t be good policy to allow offerors to make an offer in a way that forces the offerees to respond in order to escape being bound to a K).

(7) TERMINATION OF THE POWER OF ACCEPTANCE
(a) HOW MAY THE OFFEREE’S POWER OF ACCEPTANCE BE TERMINATED?

(i) Lapse: Passing of a date or measurable amount of time w/o acceptance (if not specified, a reasonable amount of time)
(ii) Rejection: If the offeree communicates to the offeror that he does not intend to accept the offer, he cannot later change his mind and accept it, even if time remains.
(iii) Counteroffer: Once the offeree (now offeror) makes a counteroffer, he cannot accept the original offer
(iv) Revocation: If the offeror communicates to the offeree that the offer no longer stands, the offeree may not then accept
(v) Death or Mental Disability of the Offeror: If the offeror dies or becomes mentally incompetent before the offer is accepted, the offer lapses

(b) LAPSE OF AN OFFER BY PASSAGE OF TIME

(i) Vaskie v. West American Insurance Co.: Imposing a de facto expiration of offer based on statutes of limitations would dictate a term that the parties themselves can and should decide. Instead, it is up to the court to determine on a case-by-case basis whether the acceptance was within a “reasonable” amount of time

(c) REVOCATION OF THE OFFER

(i) Unless an offer qualifies as an option, the offeror is free to revoke it at any time before it is effectively accepted. The offeror has the power to revoke even if the offer states that it will be kept open for a period of time unless an offeror receives something (consideration) in exchange for the promise to keep the offer open.

(ii) Hendricks v. Behee: An uncommunicated intention to accept an offer is not the same as an acceptance. When an offer calls for a promise, notice of acceptance is always essential. A private act of the offeree does not constitute acceptance. Communication of the acceptance of a K to an agent of the offeree is not sufficient and does not bind the offeror.

(iii) Dickenson v. Dodds: Once the offeree knows of the offeror’s withdrawal of the offer, even if he hears of it not directly from the
offeror but instead from a reliable source, the offeree is no longer free to accept the offer.

(8) ACCEPTANCE BY PERFORMANCE
(a) BILATERAL and UNILATERAL CONTRACTS:

(i) Bilateral: Parties exchange promises for some future action – at acceptance, both parties are bound by future promises. (most K’s)

(ii) Unilateral: Only the offeror is bound by a future promise at the time of acceptance – i.e. a K that requires performance on the part of the offeree as acceptance of the K. Only the offeror’s promise can be outstanding at the moment of K formation.

(iii) Carhill v. Carbolic Smoke Ball Co.: If the wording and details of an advertisement are sufficient to create an offer and acceptance of the offer is given through performance, the offeror is bound to a unilateral K as soon as the offeree(s) performs. (Unilateral – performance was using the smoke ball and contracting influenza)

(iv) Harms v. Northland Ford Dealers: An offeror is bound by the plain language of the terms that are stated in the offer and may not attempt to enforce any terms that are left unstated at the time the offer is accepted. (Unilateral)

(b) PERFORMANCE AS AN EXCLUSIVE OR PERMISSIVE METHOD OF ACCEPTANCE: While performance may be the preferred method of acceptance of an offer, unless the offer specifies that it may only be accepted through performance, then offeree may accept in any manner that is consistent with the terms of the offer and is reasonable – offeror must be explicit if he wants acceptance to be performance

(c) COMMUNICATION OF ACCEPTANCE BY PERFORMANCE: Where the offer invites acceptance by performance, no notification is necessary to make the acceptance effective unless the offer requires notification

(d) ACCEPTANCE OF AN OFFER THAT CANNOT BE ACCOMPLISHED INSTANTANEOUSLY

(i) R2d §45: OPTION K CREATED BY PART PERFORMANCE OR TENDER (Applies only when performance is the SOLE method of acceptance)

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.

(ii) R2d §62. EFFECT OF PERFORMANCE BY OFFEREES WHERE OFFER INVITES EITHER PERFORMANCE OR PROMISE

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 a beginning of it is an acceptance by performance.

2. Such an acceptance operates as a promise to render complete performance.

3. Note: what is begun or tendered must be part of the actual performance invited, rather than preparation for performance.
   a. E.g. actually beginning to play the golf tournament rather than putting the clubs in the car and driving to the course.

ii) ACCEPTANCE UNDER THE UCC:

(1) PRINCIPLES

(a) General guidelines for deciding whether a K has been formed, 2-204:
   (i) May be recognized if either the words or the conduct of the parties show an intent to make an agreement.
   (ii) A K may be found even though the court cannot determine the exact moment of its making.
   (iii) It is not fatal to K formation that some terms are left open provided that it is clear that the parties intended to make a K AND the court can find a reasonably certain basis for giving an appropriate remedy.

(b) UCC 2-206. OFFER AND ACCEPTANCE IN FORMATION OF K.
   (i) Unless otherwise unambiguously indicated by the language or circumstances
      1. An offer to make a K shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.
      2. An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or current shipment of conforming goods or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that shipment is offered only as an accommodation to the buyer.

   (ii) Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.
(c) *ProCD, Inc. v. Zeidenberg*: Shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to K’s in general.
   (i) Note: there was a denotation on the outside of the box that stated a license was contained inside. Also, he could return the software if he didn’t like it.
   (ii) Carefully review this case; it’s a little confusing.

(2) **BATTLE OF THE FORMS**

(a) **RATIONALE AND AIM OF UCC 2-207**
   (i) Part of the UCC Drafters’ non-technical approach to offer and acceptance
   (ii) “Boilerplate” Terms: Standard terms the party has drafted in advance and which that party desires to have applicable in every transaction it makes
   (iii) “Last Shot Rule”: Precedence given to the terms in the last communication before performance began under common law. UCC rejects this.

(b) **STRUCTURE**
   (i) Subsection 1: there are some circumstances in which the response to an offer may be a counteroffer – BUT, in the absence of clear indication that a counteroffer was intended, the court should not apply the common law “mirror image” rule. A response intended as an acceptance should be treated as such.
   (ii) Subsection 2: Comes into effect only if the response to the offer is an acceptance w/ additional terms construed as proposals for additions to the K. The additions only enter the K if all the requirements are satisfied. (And not if they materially alter the K.)
   (iii) Subsection 3: Only applies if performance anyway, but no K was ever formed. Conduct shows a K anyway. Issue: what terms are part of the K? Terms should be based on the terms on which the communications b/w the parties agree. Conflicting terms are discarded, and if appropriate, replaced by gap fillers.
   (iv) Materiality: A term is material if it goes to the heart of the transaction and is one of the significant benefits that a party to the K reasonably bargained for in making it. This is a question of interpretation to be decided in light of all the facts of the transaction, which include but go beyond the language used in the K.
      1. Rule of thumb: if the term in the acknowledgment is not reasonably expected (i.e. it deviates from usual custom and usage) and its adverse effect on the offeror’s rights is severe enough to qualify as “hardship,” it is material.

(v) **Merchant**: Four Elements:
1. Deals in goods of the kind
2. By his occupation, he represents that he has knowledge or skill peculiar to the practices involved in the transaction
3. By his occupation, he represents that he has knowledge or skill peculiar to the goods involved in the transaction
4. He employs an intermediary with that knowledge or skill, so that the intermediary’s expertise is attributable to him

(c) EXPRESSLY CONDITIONAL ACCEPTANCE
(i) A response is a counteroffer where it contains terms different from or additional to the offer and is made expressly conditional on the offeror’s assent to those terms

(d) SUMMING UP WHEN A RESPONSE TO AN OFFER IS A COUNTEROFFER UNDER THE UCC:
(i) It is not timely, so the offer has lapsed before the response becomes effective as an acceptance
(ii) Where it is written in language that makes it clear that the offeree does not intend to accept the offer but proposes a contract on different terms. This could include a response that does not actually say in so many words that the offer is rejected, but that so fundamentally deviates from the transaction-specific terms of the offer that the response cannot fairly be deemed an acceptance.
(iii) Where the acceptance makes it clear by the use of specific language that the offeree’s acceptance is conditional upon the offeror’s agreement to the offeree’s terms. That is, the response states expressly that the offeree does not accept unless the offeror assents to the changes proposed in the offeree’s response.

(e) CONDUCT RECOGNIZING A K UNDER UCC 2-207(3)
(i) 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.
(ii) Where no such specific and unequivocal acceptance occurs and no performance follows, there is no K.
(iii) If the parties go ahead and perform (mutual performance), there is a K.

(f) DISTINCTION BETWEEN ADDITIONAL AND DIFFERENT TERMS IN AN ACCEPTANCE
(i) Three ways courts deal with “different” terms:
1. Discard the different term, even if it would otherwise have entered the K as a proposal under 2-207(2)
2. Omission of the word “different” was inadvertent – these courts treat different terms the same way they treat additional terms
3. “Knockout Rule” – The conflicting terms in the O and A cancel each other out, and the resulting gap is filled by gap
filers in the UCC. If the UCC does not supply a default term, the gap is dealt with under general common law principles of construction.

(g) CONFIRMATORY MEMORANDA
   (i) Variant terms in confirmations must be treated the same way as variant terms in an acceptance.
   (ii) Treatment of a “different” term is the same as in the acceptance (i.e. depends on the court)
   (iii) Klocek v. Gateway, Inc.: ????

d) PRELIMINARY AND INCOMPLETE AGREEMENTS
   i) INDEFINITENESS
      (1) If a court is persuaded that, despite the indefiniteness, the parties really did intend to create a K, it should make every effort to try to resolve the indefiniteness and enforce the K
      (2) UCC 2-204(3): If parties intend to make a K and there is reasonably certain basis for giving a remedy, a K should not fail for indefiniteness, even though terms are left open (v. similar to common law)
      (3) Specific instances of indefiniteness:
         (a) Agreement completely omits some matter that is vital to the exchange
         (b) Agreement does not fully, clearly and unambiguously deal with that matter
         (c) Agreement leaves the matter open for negotiation
      (4) Academy Chicago Publishers v. Cheever: A K may be enforced even though some K terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no K.

   ii) DEFERRED AGREEMENTS
      (1) Joseph Martin, Jr. Deli, Inc. v. Schumacher:
         (a) A mere agreement to agree later, in which a material term is left for future negotiations, is unenforceable.
         (b) Definiteness as to the material matters is the essence of K law

   iii) EFFECT OF AN AGREEMENT TO REDUCE TO WRITING
      (1) Situation: Parties reach an informal bargain and decide to reduce it to writing, leaving certain terms open which will be ironed out when the formal agreement is drafted
      (2) Problem: Are the parties immediately bound by the oral or informal agreement, such that the contemplated written memorial is just a formality, or did the parties not intend to be bound until they had signed the written memorial?
      (3) Solution: Court must interpret the language and conduct in context (may go either way)

   iv) OBLIGATION TO BARGAIN IN GOOD FAITH
(1) Parties may not yet have a K, but may have reached a point where they have bound themselves to continue to bargain in good faith. This does not assure they will reach a K, but only that must make a good faith effort to do so.

(2) Jenkins v. County of Schuylkill: An agreement to bargain in good faith can be enforceable if:
   (a) Both parties intended to be bound by the agreement
   (b) The terms of the agreement are sufficiently definite to be enforced, and
   (c) There was consideration

v) TORT OF INTERFERENCE W/ K RELATIONS
   (1) When a third party knows of the agreement to bargain in good faith AND encourages one of the parties in the bargain to abandon his duty; Or, if the third party attempts to interfere once an “agreement in principle” has been reached; the third party is liable for a tort.

e) STATUTE OF FRAUDS
   i) PRINCIPLE:
      (1) Three requirements:
         (a) A writing – does not have to be one document, it can be pieced together and includes electronic recordings or emails, as long as at least one of the writings is signed
         (b) A signature by the party against whom the K is to be enforced – any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer.
         (c) Sufficient content – only enough info to show that a K was made, identify the subject matter, and reveal material terms.
   ii) STATUTE OF FRAUDS AT COMMON LAW
      (1) SALES AND TRANSFERS OF LAND
         (a) R2d §125(1) – “A promise to transfer to any person any interest in land is within the statute of frauds”
      (2) K’S NOT PERFORMABLE WITHIN ONE YEAR OF EXECUTION
         (a) C.R. Klewin, Inc. v. Flagship Properties, Inc.:
            (i) A K that fails to specify explicitly the time for performance is a K of “indefinite duration” and is therefore outside the Statute
            (ii) An oral K is enforceable when the method of performance called for in the K contemplates performance over a period of time greater than one year, but does not explicitly negate the possibility of performance within one year
      (3) PART PERFORMANCE EXCEPTION TO THE STATUTE OF FRAUDS
         (a) In very limited circumstances, courts will dispose of the need for a writing if the actions of the parties provide enough proof of the existence of a K – this is very are (“part performance doctrine”)
         (b) Burns v. McCormick:
(i) There must be performance “unequivocally referable to the agreement” for part performance to dispense with the need for writing under the Statute of Frauds

iii) STATUTE OF FRAUDS UNDER UCC ARTICLE 2
(1) There must be a writing signed by the party or the agent of the party against whom the K is to be enforced for any sale of goods over $500.
(2) The writing may omit or incorrectly state a term agreed upon, but the K is not enforceable beyond the quantity of goods show in the writing.
(3) For more details, see p. 189

f) CONSIDERATION
i) BASIC DOCTRINE
   (a) In order to have a K, must have O, A and consideration (usually)
   (b) Purpose: to sort which promises are to carry the legal consequences of a K from those that don’t
   (c) In order to have consideration, the parties must bargain for a performance or a return promise (must be an exchange)
   (d) What’s an exchange?
      (i) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise.
      (ii) Performance may consist of:
         1. an act other than a promise
         2. forbearance
         3. creation, modification, or destruction of a legal relationship
   (e) The performance may be given to the promisor or to some other person (i.e. a third party)

(2) ELEMENTS OF CONSIDERATION
   (a) Congregation Kadimah Toras-Moche v. Deleo: An oral promise of a gift or donation is unenforceable because it lacks consideration

   (b) Hamer v. Sidway: Consideration is not only present when there is a benefit to the promisor; it can also be found where there is a legal detriment to the promisee.

   (c) Patel v. American Board of Psychiatry: A detriment to the offeree must be bargained for by the offeror and must be either a direct or indirect benefit to the offeror.

(3) PURPOSE OF CONSIDERATION DOCTRINE
   (a) Help to testify that the promise was actually made (evidentiary function)
   (b) Makes it more likely that the individual will recognize that something serious is going on and act accordingly (cautionary function)
   (c) Allows a court to easily separate the enforceable promises from those that should be ignored (channeling function)
(d) Carlisle v. T & R Excavating, Inc.
(i) Past consideration in exchange for a future promise is not sufficient to support a binding K
(ii) Courts rarely enforce agreement within personal relationships. Consideration probably could have been found, but the court did not want to enforce this promise between a husband and a wife b/c it would be bad policy.

ii) WHAT SUFFICES AS CONSIDERATION?
(a) A fair and even commercial exchange is the prototype for adequate consideration

(2) ADEQUACY
(a) It is not the court’s focus to decide whether the consideration alone was adequate to support the promise that was made. So long as there is consideration, courts will be satisfied.
(b) “Freedom of contract carries with it the freedom to make a bad deal.”
(c) Apfel v. Prudential-Backe Securities, Inc.: The consideration need not be novel as long as something of real value in the eyes of the law was exchanged.
(d) Batsakis v. Demotsis: Any consideration, unless found by the court to be grossly inadequate, is sufficient to support a K.

(3) PRE-EXISTING (ANTECEDENT) DUTY RULE
(a) A promise to do something already required is not sufficient legal consideration
(b) R2d §73. PERFORMANCE OF A LEGAL DUTY: Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way that reflects more than the pretense of a bargain.
(c) State v. Avis: A person functioning in much the same capacity as an investigative police officer is eligible for a reward on the information he finds, so long as the person is not a police officer and does not already have a pre-existing duty to supply all the information he recovers.
(d) UCC – good faith rule substitutes for pre-existing duty rule

(4) SETTLEMENT AGREEMENTS
(a) A mutual agreement to compromise a disputed claim is supported by consideration
(b) If the Plaintiff knows he has no claim, promising to forbear from bringing such a claim would not be a legal detriment – b/c P is not allowed to bring an invalid claim anyway, the antecedent duty rule kicks in.
(c) Courts hold that a surrender of a validly disputed claim or the release of a validly asserted defense is sufficient consideration for a return
promise. A claim is validly disputed if there is factual or legal uncertainty as to its merits (i.e. covers good faith claims).

(d) *Fiege v. Boehm:* If, at the time the compromise was made, both parties had reason to believe that D was the father and bargained accordingly, then the K remains valid in spite of later evidence to the contrary (there was no fraud in this case)

iii) MUTUALITY AND ITS LIMITS

(1) “MUTUALITY OF OBLIGATION”

(a) Both parties must have given up and gained something for consideration to be adequate.

(b) However, there is nothing that says that both parties be bound to a K at the same time, to the same extent, or under the same circumstances.

(c) The big problem: illusory promises

(i) Promises that are subject to a condition the occurrence of which is under control of the promisor must be examined

1. E.g. X will pay Y $20 to cut his lawn. Y promises to cut X’s lawn if he feels like it. No consideration b/c no binding commitment.

2. E.g. A will pay B $5K per year if he goes into the business. This is a promise even though it is wholly optional w/ A to go into the business. There is a binding commitment.

(2) PERFORMANCE AS CONSIDERATION

(a) Consideration doctrine does not demand a return promise – a return performance is sufficient (if bargained for).

(b) *Weiner v. McGraw-Hill, Inc.:*

(i) The actual commencement of work by the employee is sufficient consideration in return for the promises made at the time of hire. Employee gives up the right to not work, or at least to not work for the company in question, thus there is consideration

(ii) Mutual promises are not necessarily required for consideration, so long as other consideration is arguably present.

(3) CONDITIONAL PROMISES AS CONSIDERATION

(a) Under conditional promises, unless the condition comes to pass, there can be no enforceable promise. When the outcome of the situation is uncertain or unknown, the fact that the promisor has taken on the risk of such event happening is often sufficient consideration.

(b) *Iacono v. Lyons:* The possibility of risk suffices as legal detriment if the risk is what entices the promisor to make the promise.

(4) DISCRETIONARY PROMISES AS CONSIDERATION

(a) *Wood v. Lucy, Lady Duff-Gordon:* The fact that would get nothing if he did no work is a detriment and works as consideration in enforcing the exclusive dealership K
(5) EXCLUSIVE DEALINGS, OUTPUT AND REQUIREMENT K’S UNDER THE UCC

(a) UCC §2-306. OUTPUT, REQUIREMENTS and EXCLUSIVE DEALINGS

(i) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, expect that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(ii) A lawful agreement by either the seller or the buyer for exclusive dealing the kind of goods concerned imposes unless otherwise agreed any obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

g) PROMISSORY ESTOPPEL

i) OVERVIEW

(1) ORIGINS

(a) 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

(b) Related to equitable estoppel (which keeps D’s with dirty hands from profiting from their own misconduct)

(c) R2d §90. PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE

(i) A promise 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 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.

(ii) A charitable subscription or a marriage settlement is binding under subsection (1) w/o proof that the promise induced action or forbearance.

(2) THEORY

(a) If promissory estoppel is a substitute for consideration, once it is established, the case should follow K law. If promissory estoppel does not equal consideration, rules from other branches of law (such as Torts) may apply and change the outcomes available.

(b) Deli v. University of Minnesota: Emotional damages are not available in a K claim, even under promissory estoppel, without proof of a separate tort action.
ii) NON-COMMERCIAL PROMISES
(1) Courts are hesitant to apply promissory estoppel to the family context.

(2) Wright v. Newman: An agreement to pay child support can be supported through promissory estoppel, even if the child is not related to the promisor, if it meets the rules for promissory estoppel.

(3) In re Morton Shoe Co.: A pledge to donate money can be enforceable under promissory estoppel if the promisor could reasonably expect the promisee to rely on this money. (Note: this is in spite of a black letter rule that promises not supported by consideration are not enforceable.)

(4) Allegheny College v. National Chautauqua County Bank: When the college took the money from Mary Yates Johnson, it implicitly assumed an obligation to perpetuate the donor’s name in accordance with her wishes. Thus, the remainder of the pledge was enforceable.

iii) COMMERCIAL CONTEXT
(1) Courts tend to be more discerning in the commercial context and subject a claim based on promissory estoppel to greater scrutiny. It exists in this context to balance the interests of the promisor and promisee, just as consideration does.

(2) COMMERCIAL PROMISES
(a) East Providence Credit Union v. Geremia: Because the P failed to fulfill its promise to the insurance company to pay its overdue premium, precludes the P from recovering on its loan contract.

(b) Ypsilanti v. General Motors Corp.: Assertions regarding jobs and economy made by a company seeking a tax abatement are not enforceable under promissory estoppel because reliance on such promises would not be reasonable.

(c) EMPLOYMENT DISPUTES
(i) Courts are more likely to enforce promises made pre-hire than they are to enforce promises and assertions made once work has begun, since enforcing the latter promises could impinge on the employment-at-will doctrine. (Employers should not be held to vague promises of employment for an indefinite duration due to the at-will nature of employment.)

(ii) Lord v. Souder: Promises of anonymity in exchange for information regarding another employee are enforceable under promissory estoppel if that promise is what induces the promisee to furnish the information. [Compare to Cohen]

(iii) R2d §139. ENFORCEMENT BY VIRTUE OF ACTION IN RELIANCE

1. A promise 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 Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy is limited to such as justice requires.

(3) COMMERCIAL NEGOTIATIONS
   (a) Hoffman v. Red Owl Stores: (Family trying to start grocery store)
      Traditionally, a party may break K negotiations at any time for any reason… but, courts will sometimes use promissory estoppel when the plaintiff incurs large expenses in anticipation of a K based on what P has been told by D in negotiations
   (b) Gruen Industries v. Biller: Promissory estoppel cannot be used to remove all risk from a business transaction

iv) REMEDIES IN THE PE CONTEXT
   (1) Remedies available will depend on whether the court in question sees promissory estoppel as a replacement for consideration (and therefore a K law question – usually will get expectation damages) or a totally separate body of law (in which case, remedies normally found in torts may be available).
   (2) Debate: expectation vs. reliance damages [see p. 280-281]

h) OPTIONS AND FIRM OFFERS
   i) OPTION K’S
      (1) Purpose: allow the offeree some time to decide whether to accept the offer.
      (2) Makes the offer firm – i.e. insulates the offer from the usual events that otherwise terminate the power of acceptance. Any attempt on the part of the offeror to revoke the offer will be ineffective.
      (3) Note: the promise to keep the offer open must be supported by consideration. (note: the option K is different from the ultimate K)

   ii) PROMISSORY ESTOPPEL AND OFFERS
      (1) Parties do not always have the foresight to enter into an option K. Sometimes, however, courts will attempt to fit K’s into the option format when free revocation will create an undue hardship on the offeree.
      (2) Drennan v. Star Paving Co.: P’s reliance on D’s bid in calculating his own costs for a job made D’s offer irrevocable
      (3) Pavel Enterprises v. A.S. Johnson Co.: ????

   iii) FIRM OFFERS – UCC
      (1) UCC 2-205. FIRM OFFERS
         (a) 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, for lack of consideration, during the time stated or if no time is tstated for a reasonable time, but in no event may such period of irrevocability
exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

2) OBLIGATION BASED ON UNJUST ENRICHMENT AND MATERIAL BENEFIT

a) UNJUST ENRICHMENT
   (1) “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”

ii) RELATIONSHIP WITH K
   (1) U.J. is an independent cause of action; it is not a promissory theory of liability (b/c not based on a promise).

iii) ELEMENTS
   (1) Injustice
   (2) Enrichment – the benefit
      → The remedy for U.J. is restitution. In deciding restitution amounts, courts generally look to the fair market value.
         ▪ Quantum meruit – market value of services
         ▪ Quantum valebant – market value of goods

iv) TERMINOLOGY
   (1) Unjust enrichment claim is sometimes called a “K implied in law” (“quasi-K”) (b/c it’s not a real K)

v) DISTINCTION BETWEEN FACTUALLY AND LEGALLY IMPLIED K’S
   (1) Martin v. Little, Brown and Co.: Volunteers of information have no right to restitution if the expectation of payment is not express and upfront
   (2) Feingold v. Pucello: U.J. cannot apply where there is no tangible benefit conferred on D

vi) VOLUNTEERS AND INTERMEDDLERS
   (1) Estate of Cleveland v. Gorden: Family members are allowed to recover under unjust enrichment when their actions go beyond the normal scope of familial obligation and are done with a reasonable expectation of being reimbursed

b) MORAL OBLIGATION AND THE MATERIAL BENEFIT RULE
   i) MEANING
      (1) Courts sometimes recognize a binding legal promise under circumstances they describe as “moral obligation” – a term of art w/ limited scope. Under this doctrine, a prior detriment may be treated as sufficient consideration.
      (2) Three circumstances must exist:
         (a) Some benefit conferred on the promisor by the promisee before the promise was made.
         (b) The benefit unjustly enriched the promisor.
         (c) The promisor subsequently made a promise to pay for the benefit.
Unlike restitution (and like K and P.E.), this is a promissory theory of liability – it blends restitution and K.

ii) APPLICATION WHERE A DEBTOR PROMISES TO PAY A PREEXISTING UNENFORCEABLE LEGAL DEBT
(1) Normally, there would seem to be no consideration under these circumstances. However, courts have held that the new promise, if fairly obtained without coercion or deception, is enforceable despite the lack of new consideration and the absence of reliance.

iii) WHERE THE PRIOR BENEFIT DOES NOT CONSTITUTE AN UNENFORCEABLE LEGAL DEBT – THE MATERIAL BENEFIT RULE
(1) Webb v. McGowin: A moral obligation is a sufficient consideration to support an executory promise where the promisor has received an actual pecuniary or material benefit for which he subsequently expressly promises to pay.
(2) Dementas v. Estate of Tallas: Services performed gratuitously are the same as a gift and subsequent promises to pay for these services are not enforceable under moral obligation

3) INTERPRETATION AND CONSTRUCTION: What does the contract really say?
a) INTERPRETATION
(1) Looks for what the content of a K or obligation actually is. The intent of the parties, as expressed by the reasonable meaning of their words and actions, remains central.

ii) SEARCH FOR MEANING
(1) Court look to what a reasonable person would have expected under the circumstances of the K when determining what the obligations are.
(2) Guilford Transportation Industries v. Public Utilities Commission: When resolving an ambiguity in a K, courts look to the “generally prevailing meaning” of the K language and also looks to see whether the ambiguity is resolved elsewhere in the K.

iii) SOURCES OF K MEANING/STANDARDS OF INTERPRETATION
(1) *** See two Restatement provisions on page 447 and UCC p. 448. ***
(a) Course of Dealing: a sequence of pervious conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
(b) Usage of Trade: any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.
(2) *Frigaliment Importing, Co. v. B.N.S. International Sales Corp.*: P has the burden of showing that a word has a more specific usage than would generally be accepted.

iv) **INTERPRETATION OF STANDARD K’S**
(1) Some courts reluctantly enforce language that seems clear and unambiguous, even though it may come as a surprise to those who have not read it carefully or have failed to appreciate fully its consequences.

(2) *Atwater Creamery Co. v. Western National Mutual Insurance Co.*: Where the technical definition of burglary in a burglary insurance policy is an exclusion from coverage, it will not be interpreted so as to defeat the reasonable expectations of the purchaser. (policy)

b) **CONSTRUCTION OF OBLIGATIONS**
   i) **Role:**
   (1) The role of K construction is to supplement the manifested intent of the parties because the agreed-upon terms and the implications of the parties’ conduct simply do not settle the dispute at hand, but
   (2) Where considerations of fairness or public policy are particularly strong, some courts construe contracts so as to contradict or constrain the operation of fairly clear contractual language

   ii) **GAP FILLERS:**
   (1) Implied Warranty of Merchantability – At common law, traditional rule was “caveat emptor” – “buyer beware”… UCC Article 2 assigns baseline responsibility for imperfect goods to merchant sellers, NOT buyers (See p. 465 for UCC provision)

   iii) **USING GOOD FAITH TO INTERPRET AND CONSTRUE K’S**
   (1) Obligation to perform contractual obligations in good faith applies to all K’s, not just those that are unclear and incomplete. This is in both the R and the UCC.
   (2) *United Airlines, Inc. v. Good Taste, Inc.*: A contract expressly terminable at-will may be ended for any reason or no reason at all.

4) **CONDITIONS AND PROMISES**
   a) **COMPONENTS – CONDITIONS AND PROMISES**
   i) **NATURE OF PROMISES AND CONDITIONS**
   (1) “Condition” – “an event, not certain to occur, which must occur…before performance under a K becomes due.” R2d.
   ii) **NON-EVENTS AND PAST EVENTS** – a condition may be a positive or a negative contingency – they may be something that happens or does not happen.
      (1) E.g. “provided that X does not take drugs”
   iii) **PURPOSE OF CONDITIONS**
(1) Each condition has a particular purpose

iv) SEQUENCING:
(1) CONDITIONS PRECEDENT – where a condition must be satisfied before the performance subject to that condition will become due
(2) CONCURRENT CONDITIONS – Set of promises that are dependent on each other and must be performed simultaneously

v) CONDITIONS SUBSEQUENT
(1) Discharges a duty that is already in existence
   (a) E.g “duty to do X will be excused if Y”
(2) Whether the condition is precedent or subsequent, the ultimate effect of its non-occurrence is the same: the contingent promise need not be performed
(3) The occurrence of a condition precedent must be shown by the party claiming breach, the occurrence of a condition subsequent is available as an excuse for the party against whom breach is claimed.

vi) EXPRESS, IMPLIED AND CONSTRUED CONDITIONS
(1) Express conditions are articulated within the K – “conditional upon,” “subject to,” “provided that,” etc. –with obvious intent to make it a condition
(2) Implied (implied in fact) and construed (implied in law) conditions – implied conditions are not expressly stated but can be inferred as a matter of evidence from the language in context; construed conditions are where there is not enough evidence to draw a factual inference, but either a rule of law recognizes a condition under the circumstances or the court concludes as a matter of law that it is fair and reasonable to find one.
(3) Reading Pipe Case:

vii) PURE AND PROMISSORY CONDITIONS
(1) Where there is a combined promise and condition, this is a promissory condition (or a conditional promise). If this is not fulfilled the consequences of both a failure of a condition and a breach of K follow (i.e. discharge and damages).

viii) INTERPRETATION TO DETERMINE WHEN AN EVENT IS A CONDITION
(1) Koch v. Construction Technology, Inc.:
   (a) Conditions precedent are not always favored in K law
   (b) “Pay when paid” clauses do not release the general contractor from all obligation to make payment to the subcontractor in case of nonperformance by the owner, but merely are a timing provision

b) EXPRESS, IMPLIED AND CONSTRUED CONDITIONS
i) The general rule is that where the parties clearly and unambiguously express a condition, the court should strictly enforce it to give effect to their manifest intent.
(1) If a condition is not express, courts have more latitude in interpretation.

**ii)** *Oppenheimer & Co. v. Oppenheimer, Appel and Dixon and Co.*: In determining whether a particular agreement makes an event a condition courts will interpret doubtful language as embodying a promise or constructive condition rather than an express condition.

**iii)** *Jacob and Youngs, Inc. v. Kent*: An omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage and will not always be the breach of a condition to be followed by forfeiture.

c) **USES OF CONDITIONS**

i) **TO ALLOW A PARTY TO ESCAPE A K** if a specified event does not occur (or occurs)

(1) *Merrit Hill Vineyards*: If there is no promise to perform a condition, failure of the condition does not entitle P to damages.

(2) *Fry v. George Elkins Co.*: Buyer has an implied obligation to make a good faith effort to fulfill a condition which is on his terms and which he has control over.

ii) **SATISFACTION**: To allow one of the parties to exercise judgment by making that party’s performance contingent on her being satisfied with a specified outcome or state of affairs

(1) May be in the K, but if not, may be implied or construed based on what the parties reasonably must have intended.

(a) Courts adopt the general guideline that if the satisfaction relates to matters of taste or artistic judgment, the party’s dissatisfaction must be in good faith.

(b) *Incomm, Inc. v. Thermo-Spa, Inc.*: A condition of satisfaction based on good faith judgment alone would be too much subject to the idiosyncratic taste of one party and, as such, will not be read into a K where it is not expressly stated.

iii) **USE OF CONDITIONS TO PROVIDE FOR ALTERNATIVE PERFORMANCES**

(1) Can struct the K so that if X occurs, Y performance will be rendered and if X does not occur, Z performance will be rendered.

iv) **USE OF CONDITIONS TO SEQUENCE PERFORMANCES** by making one performance a condition of the other

(1) Allows parties to set up a K in a way that allocates the risk of who goes first.

(2) Where one or both performances cannot be complete instantaneously, there is an even stronger incentive for the parties to spread the risk of nonperformance by breaking up performances and providing a sequence for performing components of each.

d) **EXCUSE OF CONDITIONS**

(1) 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 his performance.
(2) WAIVER AND ESTOPPEL
(a) Waiver: knowing and voluntary abandonment of a right. May be made expressly or by implication from words or conduct.
   (i) Because there is no consideration for the waiver, the nonwaiving party may raise it only if the waived right is a nonmaterial or ancillary part of the K
   1. If the right is material to the K, it can only be abandoned by a modification K, not by waiver.
   (ii) Unlike estoppel, waiver does not require justifiable reliance and detriment.
   (iii) Mercedes-Benz Credit Corp.: MBCC had waived its right to repossess the car because it accepted late payments.
   (iv) Morgan and Gould v. Artisoft: Artisoft waived the condition that the employee sign non-compete clause by failing to send it to him.
(b) Estoppel: Beneficiary of a condition indicates by words or conduct that he will perform the contingent promise despite non-fulfillment of the condition
   (i) Unlike waiver, estoppel is not confined to nonmaterial changes in K, and the behavior need not meet the same standards of knowing and voluntary abandonment of a right – a party may be estopped on the basis of careless action not deliberately intended to give up a right

(3) OBSTRUCTIVE AND UNCOOPERATIVE CONDUCT
(a) Where a promisor prevents fulfillment of a condition in breach of the duty not to hinder or impede its occurrence, the proper response is to excuse the condition, making the promise unconditional.
(b) Sullivan v. Bullock: To excuse a party’s nonperformance, the conduct of the party preventing performance must be “wrongful” and “in excess of its legal rights”

(4) UNFAIR FORFEITURE
(a) Based on court’s determination that enforcement of the condition would result in undue hardship to the party o whom the performance is due
(b) J.N.A. Realty v. Cross Bay Chelsea, Inc.: Tenant in possession of premises under an existing lease may establish equitable ground to excuse the condition of timely exercise of its renewal option if it can be shown that:
   (i) Tenant made valuable improvements to the property
   (ii) Tenant honestly but inadvertently failed to exercise the option to renew
   (iii) Lessor had not been harmed by the delay in the giving of notice.

5) PAROL EVIDENCE RULE
a) INTRO: courts strongly prefer written contract terms
i) PURPOSE, PREMISE, CONTENT
   (1) Parol Evidence is evidence other than the written memorial of agreement that is offered by a party to prove alleged contract terms.
      (a) NOTE: A contemporaneous writing is NOT treated as parol b/c it has as much claim to reflecting the parties intentions at the time the K is entered into as the agreement that it qualifies or supplements (i.e. b/c a written K need not be contained in a single doc, two or more contemporaneous writings can be taken together to constitute a written K.)
      (b) NOTE: Oral or written agreements made subsequent to the writing cannot, by definition, be superseded by the earlier writing, and therefore the parol evidence rule does not cover them – they are modifications.
   (2) Purpose: reduce length and cost of litigation, control jury
   (3) Operation: Changes, depending on purpose for which the evidence is offered.
      (a) To contradict the K – RARELY permissible
      (b) To supplement the K
   (4) In general:
      (a) Where the writing is fully integrated, no parol evidence may be admitted to contradict or augment it. (“Fully integrated” = final, thorough, complete)
      (b) To the extent that the writing does not express the entire agreement of the parties by nevertheless is the final record of the matters it covers (that kind of writing is called “partially integrated”), parol evidence may be admitted to supplement the writing by filling in gaps left in the writing. However, even here the evidence may not contradict what has been included in the writing.
      (c) If the writing is unclear or ambiguous, parol evidence may be used to clarify the unclear or ambiguous term, but, again, cannot contradict what has been clearly included in the writing.

ii) PROCESS OF DEALING WITH PAROL EVIDENCE
   (1) Judge decides if parol evidence is admissible
   (2) Jury decides if parol evidence is credible (fact-finder, may also be judge)

b) APPLICATION OF THE RULE
   i) Classical approach: “four corners” judge’s determination of admissibility made on basis of the writing itself (Williston)
   ii) Legal realist approach: Context is relevant (Corbin)
   iii) Masterson v. Sine: Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled.
   iv) Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.: Rational interpretation of a K requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.

c) PAROL EVIDENCE UNDER UCC – Legal realism approach – At every step in the analysis, the reader is invited to interpret the words in light of the commercial context within which they were used. ***See p. 496-497 for UCC excerpt***

d) USE OF MERGER OR INTEGRATION CLAUSES
Sometimes parties include a clause that states that a written memorial not only supersedes prior agreements, but also is a complete and exclusive statement of the terms of their agreement.

Purpose: Protection of parol evidence rule

Treatment: typically given great weight by courts

**UAW-GM Human Resource Center v. KSL Recreation Corp.** When the parties include an integration clause in their written K, it is conclusive and parol evidence is not admissible to show that the agreement is not integrated except in cases of fraud that invalidate the integration clause or where an agreement is obviously incomplete on its face and the evidence is necessary to fill the gaps.

**Escape from the Parol Evidence Rule: Exceptions**

i) Exceptions:
   1. Evidence that the K is either void or voidable (also in UCC)
   2. **Sound Techniques, Inc. v. Hoffman:** A contracting party cannot rely on a merger clause as protection against claims based on fraud or deceit – only intentional misconduct justifies judicial intrusion

**Defenses:**

a) **Policing**

i) NOTE: Where the court finds one of these doctrines applicable, the remedy is to allow the victim of the improper conduct to avoid the K. (i.e. it is VOIDABLE)

ii) **Improper Bargaining (May be analyzed under more than one policing doctrine):**

   1. **Misrepresentation and Fraud**
      a) **PRINCIPLES**
         i) Misrepresentation: an assertion not in accordance with the facts. If it is known to be false (i.e. a lie) when it is made and is given with the intent to mislead the other party, it is also fraudulent, which gives rise to a tort action.
         ii) Forms:
              1. Express statement
              2. Deliberate concealment of facts
              3. Possibly a failure to disclose a material fact
         iii) Two remedies for fraudulent misrepresentation:
              1. Recission of the K, or
              2. Leave K in place and sue for any loss in value of the performance as a result of the fraud
      iv) **Note:** See pp. 325-326 for Restatement provisions

b) **Affirmative Fraud:**

i) Fraud by affirmative assertion vs. fraud by failure to disclose information

**Sarvis v. Vermont State College:** Material falsehoods on a resume or job application that induce the person to be hired are a form of fraud in the inducement and can be grounds for termination of the K.
(c) SILENCE AS FRAUD: FRAUDULENT NONDISCLOSURE/THE DUTY TO SPEAK
(i) Silence is not always fraud
(ii) *In re House of Drugs*: Failure to disclose that which a person could find out on their own and which does not induce the creation of a K is not fraud and is not grounds for termination of the K
(iii) *Stambovsky v. Ackley*: When a condition which has been created by the seller materially impairs the value of the K and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity
1. Dissent: the Seller is under no duty to speak when the parties deal at arm’s length

(d) MISREPRESENTATION OF FACT, OPINION AND FUTURE ACTION
(i) *Cummings v. HPG International, Inc.*: If a person has no reason to believe that the statements they are making are false, it is not misrepresentation if the statements are later show to be untrue

(e) DISTINCTION BETWEEN FRAUDULENT AND NEGLIGENT MISREPRESENTATION
(i) Negligent: Not DELIBERATELY false, but made carelessly
(ii) Fraudulent: Making statements without confidence in their truth or without the necessary information to support the assertion
1. Note: R2d says misrepresentation is actionable if it is ‘fraudulent or material’

(f) CHOICE OF REMEDY FOR FRAUD: PUNITIVE DAMAGES
(i) Rescission of the voidable K and no punitive damages (K)
(ii) Keep the K and get punitive damages (Tort)

(g) FRAUD IN THE INDUCEMENT VS. FRAUD IN THE FACTUM
(i) Fraud in the inducement: the fraud creates the K
(ii) Fraud in the factum: Concerns the nature of the K document, it’s character or an essential element
1. Courts have treated fraud in the factum as voiding a K (not just making it voidable). So, the victim of fraud in the factum does not have the option of keeping the K in place.

(2) DURESS
(a) ELEMENTS
(i) Threat of physical violence or economic harm or loss to the party to the K or a loved one – may even consist of a threat of harm to a significant interest that cannot be measured in economic terms
1. R2d §176: WHEN A THREAT IS IMPROPER:
a. A threat is improper if
   i. What is threatened is a crime or tort, or the threat itself would be a crime or tort if it resulted in obtaining property
   ii. What is threatened is criminal prosecution
   iii. What is threatened is the use of civil process and the threat is made in bad faith
   iv. The threat is a breach of the duty of good faith and fair dealing under a K
b. A threat is improper if the resulting exchange is not on fair terms and:
   i. the threatened act would harm the recipient and would not significantly benefit the party making the threat,
   ii. the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or
   iii. what is threatened is otherwise a use of power for illegitimate ends

(iii) Germantown Manufacturing Co. v. Rawlinson: Threat of criminal prosecution is improper, as is leaving no alternative

(b) MARKET/CIRCUMSTANTIAL PRESSURE DIFFERS FROM DURESS
   (i) Quigley v. KPMG Peat Marwick, LLP:
      1. A normal take it or leave it requirement that a person sign an employment agreement in order to receive a job is not sufficient duress to render the K invalid
      2. Duress must take the form of something greater than would be encountered by any employee taking the same job

(c) COERCION BY A NONPARTY AND THE DISTINCTION BETWEEN VOID AND VOIDABLE CONTRACTS INDUCED BY DURESS
   (i) According to the court in Trane Co., “duress sufficient to render a K void consists of the actual application of physical force that is sufficient, and does, cause the person unwillingly to execute the document…[or] the threat of application of immediate physical force sufficient to place a person in the position”
   (ii) Problem of coercion by a non-party – the court must be considerate of the reliance interests of the contracting party who was not the perpetrator of the duress and was unaware that a threat was made

(3) DURESS AND BAD FAITH IN RELATION TO K MODIFICATION
   (a) APPLICATION OF CONSIDERATION DOCTRINE AND ANTECEDENT DUTY RULE TO MODIFICATIONS
   (i) Parties to a K are free to negotiate an agreement to modify the original document. The agreement to modify becomes a binding K.
1. This agreement falls under all the rules of K law in that there must be consideration for it to be valid and it can be avoided if induced by duress.
2. If a person promises to do something he already had a duty to do, this is not consideration (per the pre-existing duty rule), but if there are any new terms in the agreement, this is consideration.
3. Remember, under the UCC – no consideration required for modification to sales K

(ii) Rinck v. Association of Reserve City Bankers:

(iii) Alaska Packers’ Association v. Domenico: A promise to pay contracted employees a higher salary which does not alter any facet of the employment is not supported by consideration.

(b) APPLICATION OF DURESS DOCTRINE TO MODIFICATIONS

(i) Even if there is consideration in a case such as Alaska Packers, if the K change was made under duress, the change may still be found to be invalid.

(ii) Austin Instrument, Inc. v. Loral Corp.: A demand for changes in a K price which is made when the other party has no option but to comply creates a situation of economic duress and may render the change invalid.

(c) SUPERVENING DIFFICULTIES AS A BASIS FOR UPHOLDING A MODIFICATION WITHOUT CONSIDERATION

(i) AN EXCEPTION TO THE PRE-EXISTING DUTY RULE: Where events following the formation of a K create a difficulty not anticipated by the parties at the time of contracting, a fairly bargained modification of the K to take account of the unforeseen difficulty is valid.

1. New England Rock Services, Inc. v. Empire Paving, Inc.
   a. For the “supervening difficulties rule” to supersede the preexisting duty rule, three standards must be met:
      i. K must be subject to SUBSTANTIAL and BURdensome difficulties NOT ANTICIPATED at time of contracting
      ii. Party benefiting from the modification to the K must conform to the standards of honesty and fair dealing
      iii. The change in the K must be reasonable and manifestly fair with respect to the changed condition

(d) MODIFICATION UNDER UCC ARTICLE 2

(i) No consideration required

(ii) Must satisfy the Statute of Frauds if that is required

(iii) Modifications must satisfy general principles of good faith

(4) UNDUE INFLUENCE

(a) Available if a party cannot pinpoint a false representation or an improper threat as the inducing cause of the K but can show that the K was nevertheless executed under circumstances that would make its enforcement unjust

(b) ABUSE OF POWER
(c) Typically available only where the victim has some type of relationship of submissiveness, trust, or reliance on the other party

(d) *Rudolf Nureyev Dance Foundation v. Noureeva-Francois:*
   (i) There must be substantial evidence showing improper dealing, inequality, and detriment to the dependent party

(e) *Tinney v. Tinney:*
   (i) Undue influence is “the substitution of the dominant party’s will for the free will and choice of the subservient party”

(f) *Odorizzi v. Bloomfield School District:* Undue influence is persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment

(5) **UNCONSCIONABILITY**
   (a) Available if a party cannot pinpoint a false representation or an improper threat as the inducing cause of the K but can show that the K was nevertheless executed under circumstances that would make its enforcement unjust (Unconscionability is a last resort)

(b) **MEANING**
   (i) Transaction is so unfair that it would offend the conscience of the court to enforce it
   (ii) R2d §208: UNCONSCIONABLE K OR TERM
      1. If a K or term thereof is unconscionable at the time the K is made, a court may refuse to enforce the K, or may enforce the remainder of the K without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. (Note the huge degree of latitude the court has….)

(c) **ELEMENTS**
   (i) Judge decides as a matter of law (not the jury)
   (ii) Procedural: relates to the way in which the K was formed
   (iii) Substantive: relations to the terms of the resulting K
      1. Most courts require a finding of both procedural and substantive unconscionability (at least to some degree)
   (iv) K of Adhesion:
      1. Any K in which one of the parties, having superior bargaining power, is able to dictate the terms of the K to the other on a take-it-or-leave-it basis, and the weaker party has no choice but to adhere to the terms

(v) *NEC Technologies, Inc. v. Nelson:*

(d) **TRANSACTIONS BETWEEN SOPHISTICATED BUSINESSES**
   (i) Unlikely that the court will apply
   (ii) *Southwest Pet Products, Inc. v. Koch Industries, Inc.*
      1. Between sophisticated business entities, the party claiming unconscionability must show either substantive unconscionability (actual terms of the K) or procedural unconscionability (by comparing
age, education, intelligence, business acumen and experience, relative bargaining power, and whether there were alternative sources of supply)

(e) RELIEF
   (i) Court may refuse to enforce the K, remove the unconscionable term, or get rid of the unconscionable effect of the term
   (ii) *Brower v. Gateway 2000, Inc.*:
        1. While unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable
   (iii) *Sosa v. Paulos*:
        1. K provisions are severable if the parties intended severance at the time they entered the K, and if the primary purpose of the K could still be accomplished following severance

(iii) ILLEGALITY
   (1) When a K violates a rule of law, its enforcement is most obviously against public policy. However, it is one of the parties in the K who raises the issue of illegality b/c he doesn’t wish to perform. Courts must figure out how to police these K’s while not rewarding the wrongdoing of one party.
   (2) *The Diversified Group v. Sahn*:
        (a) The idea that, when both parties are at fault, the condition of the D is the better one, does not apply when the transaction itself is forbidden by a state which provides for relief
   (3) *Danzig v. Danzig*:
        (a) Courts may enforce illegal K’s when it is determined that the parties are not both at fault and that the public cannot be protected b/c the transaction has already been completed

(iv) VIOLATION OF PUBLIC POLICY
   (1) When the court finds that the K is not illegal but that enforcement would offend an identifiable public policy, the decision not to enforce the K comes close to judicial law making
   (2) *Stevens v. Rooks Pitts and Poust*: Courts will not declare a K illegal unless it expressly breaks the law or a known public policy of the state (lawyer, non-compete clause)
   (3) “Rule of Reason”: A clause or K will be upheld to the extent that it is reasonable as to the scope and nature of the activity it restrains (i.e. a covenant not-to-compete that is reasonable as to time, geo, scope/extent)
   (4) *Harmon v. Mount Hood Meadows, Inc.*: A party who seeks to avoid the enforcement of a K provision on the ground that the provision offends some general public policy must show that enforcement in the circumstances of his case will offend the generalized public policy (**watch out for a release that is
overbroad** - in this case, the ski co.’s release was argued to be overbroad – also, on Fall 2004 exam, the release re: the day care may have been overbroad…)

v) INCAPACITY
(1) INCAPACITY AND EXPLOITATION
(a) There is less coverage for the mentally incompetent than for minors
(b) A minor can usually escape a K just by showing that he was a minor at the time he made the K
(c) When deciding whether to avoid a K b/c of incapacity, courts look to see the degree and seriousness of the incapacity and whether that party’s vulnerability attracted the exploitation

(2) MINORITY
(a) Objective test, not dealing w/ subjective capacity
(b) A minor’s lack of contractual capacity makes the K voidable, not void. That is, the minor may choose to avoid (or disaffirm) the K on grounds of incapacity, or keep it in force
(c) Age of minority usually fixed by statute (usually 18)
(d) A minor retains the right to disaffirm the K for a reasonable period after he obtains the age of majority
(e) A minor does not have to restore the value of property he no longer has at the time of disaffirmance
(f) Webster St. Partnership, Ltd. v. Sheridan:
   (i) There is a narrow exception to minority, where an emancipated minor may contract for necessities
(g) Zivich v. Mentor Soccer Club, Inc.:
   (i) Parents have the authority to bind their minor children to exculpatory agreements in favor of volunteers and sponsors of nonprofit sport activities where the cause of action sounds in negligence – they may not release their children from suing for wanton and willful misconduct

(3) MENTAL INCAPACITY
(a) Showing incapacity makes the K voidable, not void. If a mentally incompetent recovers capacity after making the K, she can ratify it.
(b) Crucial time for measuring incapacity: time of contracting
(c) “Motivational test”: cases where the party understood the transaction, but the mental illness affected her ability to act rationally in relation to the transaction
(d) Note: According to R2d §15, the other party’s reliance interest weighs heavily where the incompetent party suffers from a cognitive disorder, b/c this sort of illness is more obvious
(e) Note: Where the K is made on fair terms, and the other party is without knowledge of the mental illness or defect, the power of avoidance terminates to the extent that the K has been so performed in whole or in party or the circumstances have so changed that avoidance would be unjust
(f) The party may or may not have to restore the value of the property that he no longer has at the time of disaffirmance.
(g) *Farnum v. Silvano:* Competence to enter into a K presupposes something more than a transient surge of lucidity. It involves an ability to comprehend the nature and quality of the transaction and its significance.

b) **EXCUSES**

i) **MISUNDERSTANDING**

(1) Severe and unsolvable interpretation issues – if the misunderstanding is sufficiently extreme and if neither party bears greater responsibility for the misunderstanding, a court may simply say that the requisite manifestation of assent was missing.

(2) Where parties attach materially different meanings to K terms AND neither has reason to know of the misunderstanding, no K results

(3) *Raffles v. Wichelhuas:* Two ships called “Peerless” - where P and D were talking about two different ships, there could be no meeting of the minds and no assent/no K

(4) *Konic International Corp. v Spokane Computer Services, Inc.:* B/c the two parties attached different meanings to “fifty-six twenty,” no K resulted

ii) **MISTAKE**

(a) Parties reach an agreement, but one or both of the parties reach the agreement on the assumption that a certain state of affairs exists. At a later date, it becomes clear that the state of affairs does not exist and did not exist at the time the agreement was reached.

(i) Themes:

1. Mistake must relate to a fact in existence at the time the K was made (it cannot be a mistake in judgment or a prediction of future events

2. Mistake must relate to something that is CENTRAL to the K (rather than a minor or peripheral matter, and it must have a significant effect on the benefits of the mistaken party)

3. Mistake must be unfair or otherwise inappropriate to allocate the risk of the mistake to the aggrieved party

(2) **MUTUAL MISTAKE**

(a) Elements (grounds for avoiding K):

(i) Relates to facts in existence at time of K

(ii) Shared by both parties

(iii) Relates to a basic assumption on which the K was made

(iv) Has a material effect on the agreed exchange or performances

(v) The complaining party did not bear the risk of the mistake

(b) Opinions and judgments, as well as facts after the K is made, are not appropriate fodder for the mistake doctrine

(c) *Mattson v. Rachetto:* Although there was clearly a mistake of law neither side took advantage of the other. Therefore, the K is voidable under mutual mistake.

(d) R2d §154: **WHEN A PARTY BEARS THE RISK OF MISTAKE**

(i) A party bears the risk of mistake when:
1. The risk is allocated to him by agreement of the parties
2. He is aware, at the time of contracting, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
3. The risk is allocated to him by the court on the ground that it is reasonable to do so

(e) *Estate of Nelson v. Rice*: Under the circumstances of the case, the Estate was victim of its own folly and it was reasonable for the court to allocate to it the burden of its mistake

(f) *Dingeman v. Reffit*: If the asserted mutual mistake is with respect to an extrinsic fact, reformation is not allowed, even though the fact is one which would have caused the parties to make a different K, b/c courts cannot make a new K for the parties

(3) UNILATERAL MISTAKE

(a) Elements:
   (i) The mistake relates to facts in existence at the time of the K
   (ii) The mistake may be by one party only
   (iii) The mistake relates to a basic assumption on which the mistaken party made the K
   (iv) The mistake has a material effect on the agreed exchange of performances that is adverse to the mistaken party
   (v) The mistaken party did not bear the risk of the mistake
   (vi) Either the effect of the mistake is such that enforcement of the K would be unconscionable or the other party had reason to know of the mistake or his fault caused the mistake

(b) *Drennan v. Star Paving [revisited]*: The calculation of the bid was in the hands of Star Paving, so it is fair to say that Star Paving was the only party who was mistaken. 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 mistaken actions.

(4) RELIEF FOR MISTAKE

(a) Strictly, rescission of the K is the only relief and is only available when the K is purely executory

(b) Restatement (and other courts): Grant relief as justice requires – including protecting a party’s reliance interests or even adjusting or reforming the terms of the K

(i) *Rancourt v. Verba*: Because the clear intent of the P was the purchase land suitable for lakeshore development, and because it is impossible to do so under state and federal wetland regulations, they are entitled to recission

iii) CHANGED CIRCUMSTANCES – Unlike mistake, occurs after K is formed

(a) Both impracticability and frustration of purpose look to risk allocation and materiality when determining whether the doctrines apply
(b) Neither applies (usually) to a buyer in a commercial setting b/c the buyer’s only duty is to pay money, which cannot really be rendered impracticable.

(1) IMPRACTICABILITY
   (a) *Taylor v. Caldwell:* When a change in circumstances surrounding a K so drastically increase the burden on the party claiming relief that performance can fairly be regarded as impracticable, the K can be avoided.
   (b) R2d S261: DISCHARGE BY SUPERVENING IMPRACTICABILITY
      (i) Where, after a K is made, a party’s performance is made impracticable w/o his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.
   (c) *Clark v. Wallace County Cooperative Equity Exchange:*
      (i) Only objective impracticability may relieve a party of his or her contractual obligation.
      (ii) A seller will not be excused if… the seller assumed the risk of the contingency.
   (d) *Opera Company of Boston v. Wolf Trap Foundation:*
      (i) Foreseeability is one fact to be considered in resolving first how likely the occurrence of the event in question was, and second, whether its occurrence was of such reasonable likelihood that the obligor should have guarded against it.

(2) FRUSTRATION OF PURPOSE
   (a) *Krell v. Henry:* Performance can also be extinguished where a change in circumstances following the K defeated the mutually understood purpose of the K if the purpose is fundamental and shared.
   (b) R2d S265: Discharge by Supervening Frustration:
      (i) Where, after a K is made, a party’s principal purpose is substantially frustrated w/o his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate otherwise.
   (c) *7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc.:*
      (i) Although economic return may be characterized as the “principal purpose” of virtually all commercial K’s, mere economic impracticality is no defense to performance of a K.

2) MATERIAL BREACH, SUBSTANTIAL PERFORMANCE
   a) MATERIAL VS. NON-MATERIAL BREACH
      i) Material Breach: If the term broken is a promissory condition, then its nonfulfillment entitles the other party both to decline performance (b/c of condition) and to claim breach (b/c of the promise) – she may sue for full expectation damages.
      ii) Factors relating to whether a breach is material or minor:
(1) Extent to which the breaching party has performed. A breach at the outset is more likely to be material.
(2) Whether the breach was willful, negligent, or the result of purely innocent behavior.
(3) Extent of uncertainty that the breaching party will perform the remainder of the K.
(4) Extent to which, despite the breach, the non-breaching party will obtain (or has obtained) the substantial benefit he bargained for.
(5) The extent to which the non-breaching party can be adequately compensated for the defective or incomplete performance through his right to damages.
(6) The degree of hardship that would be imposed on the breaching party if it were held that the breach was material and that he therefore had no further rights under the K.

iii) Substantial Performance: In the case of partial breach, the performance of the breaching party, even though it falls short of the what is required by the K.

iv) CURE: A breach may be material but not total if it can still be cured. The ability to cure depends on whether the deficient conduct can be fixed within a reasonable time in the light of the owner’s reasonable K expectations.

v) Seydel v. Ige
   (1) A material failure by one party give the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances, [and] suspends the injured party’s duties until the breaching party cures the default.

vi) Worcester Heritage Society, Inc. v. Trussel
   (1) There is ample authority for refusing rescission where there has been only a breach of K rather than an utter failure of consideration or a repudiation by the party in breach.

b) CONSEQUENCES OF SUBSTANTIAL PERFORMANCE
   i) PROPER MEASURE OF RELIEF FOR SUBSTANTIAL PERFORMANCE
      (1) Substantial performance is NOT full and proper performance; it is still a breach and entitles the victim to remedy.
         (a) Usual measure: cost of fixing the defective performance.
         (b) However, when the breach is not material/willful and the cost to fix would be grossly out of proportion, this is not an appropriate remedy.

   ii) RECOVERY OF THE BREACHING PARTY: UNJUST ENRICHMENT OR RECOVERY UNDER THE K
      (1) If a party has partially performed BEFORE materially breaching the K, most courts will recognize a claim for unjust enrichment. This claim will be reduced to the actual enrichment of the other party, not the fair market value.
      (2) If a party has substantially performed and the breach is not material, the breaching party can enforce the K and receive the K price less allows for rectifying the deficiency.

c) BREACH AND SUBSTANTIAL PERFORMANCE UNDER UCC ARTICLE 2: PERFECT TENDER, CURE AND INSTALLMENT CONTRACTS
PERFECT TENDER UNDER ARTICLE 2

(1) “Perfect Tender Rule”: If the goods or the tender of delivery fail in ANY respect to conform to the K, the buyer may:
   (a) Reject the whole
   (b) Accept the whole
   (c) Accept any commercial unit or units and reject the rest

(2) Substantial performance does not apply under the UCC

(3) Note: the buyer can only reject in good faith

SELLER’S RIGHTS TO CURE A NON-CONFORMING TENDER UCC 2-508. CURE BY SELLER OF IMPROPER TENDER OR DELIVERY; REPLACEMENT

(1) If the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and within the K time make a conforming delivery

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable w/ or w/o money allowance, the seller may (if he seasonably notifies the buyer) have a further reasonable time to substitute a conforming tender.

INSTALLMENT CONTRACTS

(1) Def: A K which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the K contains a clause “each delivery is a separate K” or its equivalent.

(2) Buyer may reject any non-conforming installment 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 docs

(3) Whenever the non-conformity or default w/ respect to one or more installments substantially impairs the value of the whole K there is a breach of the whole

(4) BUT, the aggrieved party reinstates the K if he accepts a non-conforming installment w/o seasonably notifying of its cancellation or if he brings an action w/ respect only to past installments or demands performance as to future installments

(5) BUT, if the non-conformity doesn’t fall under #3, and the seller gives adequate assurance of its cure, the buyer must accept that installment (microwave case)

REMEDIES

a) GOAL AND PRINCIPLES

i) DISTINCTIONS

(1) Expectation Damages: most common. Represent economic loss suffered by the non-breaching party and calculated as the money needed to put the victim where he would have been had the K not been breached. Usually composed only of actual loss (DIRECT DAMAGES).

(2) Consequential Damages: Losses beyond the K that were nonetheless caused by the breach.

(3) Incidental Damages: Expenses incurred in dealing w/ the breach
ii) **THEORIES ON THE COMPENSATION PRINCIPLE**
(1) Remedies seek to compensate the victim, not to punish or deter the breaching party.
   (a) Courts do this through specific performance (rare), enjoining breach (rare) or giving monetary damages.

iii) **MORE DISTINCTIONS**
(1) **Expectation interest** – seek to put the aggrieved party to “benefit of the bargain” by giving them what they would have received had the K been performed fully.
(2) **Reliance interest** – aggrieved party’s 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.
(3) **Restitution interest** – aggrieved party’s interest in restoring to him any benefit that he conferred on the other party (unjust enrichment).

iv) “Efficient Breach” – legal system should structure remedies so that breach would be permitted w/o penalty, so long as the non-breaching party receives adequate compensation. This facilitates the transfer of resources f/ less to more valuable uses.

v) **Freund v. Washington Square Press:** Damages are not measured by what the defaulting party saved by the breach, but by the natural and probable consequence of that breach to P. In this case, since the amount of royalties P would have received cannot be adequately ascertained, so he received only nominal damages.

b) **EXPECTATION INTEREST**

i) **COMPONENTS**
(1) Direct Damages: Loss of value of the K to P.
(2) Indirect Damages: (In addition to value of the K)
   (a) **Consequential** – losses which do not relate to the value of the K but arise as a consequence of breach (i.e. lost profits, injury to property, personal injuries)
   (b) **Incidental** – P’s cost of coping w/ the breach (i.e. cost of inspecting defective performance, cost of arrange substitute performance)
(3) Note: the classification of the loss may have a direct impact on whether or not it is compensable at all.

ii) **MEASUREMENT**
(1) In general, [(loss in value of breaching party’s performance + incidental and/or consequential losses) – gains or costs avoided as result of the breach]
(2) Note: since the court is looking at the “loss in value to the other party,” factors such as individual preferences and party’s characteristics play into the accounting.
(3) Note: Injured party must establish expectation with **reasonable certainty**, show that they were **reasonably foreseeable** to both parties, and overcome any object that **he should have mitigated the damages**.
(4) **Carpel v. Saget Studios, Inc.:** Loss of sentimental value is too highly speculative to be considered.
(5) MEASUREMENT BY REFERENCE TO FAIR MARKET VALUE
   (a) When measuring P’s expectation interest, courts do so in reference to the
       market value of the K performance or the cost (or benefit) of substitute
       performance
   (b) Precopis v. G.P.P. Restaurants, Inc.: a subsequent sale price, taken alone, is
       not dispositive proof of the fair market value when the subsequent sale is on
       materially different terms than the first

(6) MEASUREMENT BY REFERENCE TO SUBSTITUTE TRANSACTION
   (a) If P obtains substitute performance and it is less advantageous than D’s, P
       may ask that damages be measured w/ reference to the particular substitute
       rather than fair market value.
   (b) Handicapped Children’s Education Board v. Lukaszewski: When the
       employee hired to replace breaching D was hired reasonably at a high salary,
       P is entitled to receive this difference as damages in order to restore the
       benefit of its bargain

(7) MEASUREMENT WHEN PERFORMANCE IS DEFICIENT
    (SUBSTANTIAL PERFORMANCE)
   (a) When the breaching party has substantially performed, the non-breaching
       party must also perform, but may have a claim for damages due to the
       incomplete or deficient performance. The court must then measure the
       difference in value b/w what P expected and what P received.
      (i) Courts examine the extent of the waste, willfulness of the breach, ddesire
          the non-breaching party to determine where cost of completion would
          work as unfair forfeiture or result in unreasonable economic waste f/ those
          cases where it would do neither.

iii) EXPECTATION DAMAGES UNDER THE UCC
   (1) Generally, compare Kp and Market Value or Kp and terms of a substitute
       transaction.
      (a) Where the breaching party performs deficiently, the UCC looks at the
          difference in value b/w the performance that was rendered and the
          performance that was promised.

(2) BUYER’S REMEDIES
   (a) Buyer may cancel (if he wants to) and in addition to recovering so much of
       the price that has been paid, may
      (i) Cover and have damages as to all the goods affected whether or not
          identified to the K
      (ii) Recover damages for non-delivery
      (iii) If the seller fails to deliver or repudiates, the buyer may also:
        1. obtain specific performance or reply the goods
   (b) See pp. 662-663

(3) SELLER’S REMEDIES
(a) If buyer accepts conforming goods but simply refuses to pay for them, Seller gets Kp (specific performance – but easier since it’s money)
(b) If buyer wrongfully rejects or revokes acceptance – seller gets Kp less value of the goods (either price received by seller in a substitute K or fair market value (if seller keeps the goods)
(c) With respect to part of the goods not yet delivered (if wrongful rejection or refusal to pay):
   (i) Withhold delivery of goods
   (ii) Stop delivery by a bailee
   (iii) Resell and recover damages
   (iv) Recover damages for non-acceptance, or in a proper case, the price
   (v) Cancel

(4) SELLER’S DAMAGES
(a) Generally,
   (i) NOT THE FULL Kp as DIRECT DAMAGES
   (ii) Kp less the value of the goods (price received by the seller in a substitute K (equivalent of ‘cover’) or fair market value)
   (iii) See pp. 668-669
   (iv) “Lost volume seller”: Seller who is in the business of selling the type of goods involved and has more goods than customers (e.g. car salesman)
   1. If Buyer breaches, neither market value nor resale value captures the harm to Seller
      a. Buyer has deprived the seller of sales volume and the profit that comes from one additional sale
      b. In many cases, the damages will amount to the lost profit of one sale (but this is very difficult to prove (either that one is a lost volume seller or what the profit would be))
   2. New England Dairies v. Dairy Mart

iv) LIMITATIONS ON RECOVERY OF EXPECTATION DAMAGES
   (1) REASONABLE CERTAINTY PRINCIPLE
      (a) Can’t recover speculative damages
      (b) Consequential damages may be a problem if they consist of lost profits or other opportunities forgone (fact of loss and extent are controversial)
      (c) Mears v. National Mutual Insurance Co. (Contest/Mercedes case)
         (i) Courts will not enforce a K where the determination of damages is left to speculation and conjecture. However, damages need not be proven with absolute, mathematical certainty.
      (d) Locke v. United States (Type writer Co./Govt. contract)
         (i) The D who has wrongfully broken a K should not be permitted to reap advantage f/ his own wrong by insisting on proof that is unobtainable by reason of D’s own breach. P must still establish that he has sustained some injury.
      (e) ESPN v. Office of Commissioner of Baseball
(i) Damages for loss of goodwill – business reputation or future profits, proof requirements are stringent and P must show not only a certain loss but also a reasonably certain amount

(2) FORESEEABILITY PRINCIPLE
(a) To be recoverable, damages must be foreseeable at the time the K is entered.
(b) Hadley v. Baxendale: To be recoverable, damages must have been foreseeable TO BOTH PARTIES at the time the K was made, or must have been of the sort that would arise naturally in the course of this type of K
(i) Direct and indirect damages usually survive this test. Consequential damages don’t always survive as the loss becomes more and more remote f/ ordinary consequences of the breach.

(3) MITIGATION PRINCIPLE
(a) Non-breaching party must mitigate his damages. If he does not, he may not recover for any avoidable additional damages which arise after the breach (though may still seek damages for the breach itself).
(b) Marchesault v. Jackson: P has a duty to make reasonable efforts to mitigate. Mitigation is an AD, and it is up to D to show that P failed to take reasonable steps to mitigate.

c) RELIANCE DAMAGES AS AN ALTERNATIVE TO EXPECTATION DAMAGES
i) INTRO
(1) Sometimes P may recover the costs that she incurred in reasonable reliance on the K, even if she cannot recover her full expectation damages (b/c those damages are either inappropriate or cannot be established)
(2) The damages are controlled by the same rules as damages generally and seek to put P in the same position he was in before the K was made
(a) If D can show that P’s cost in performing the K would have been so high as to make the K unprofitable, the court will adjust the reliance damage downward

ii) WHEN EXPECTATION DAMAGES ARE INAPPROPRIATE
(1) If expectation damages can’t be calculated w/ certainty, but reliance damages can
(a) Hollywood Fantasy v. Gabor: Although P did not present evidence to base an award of compensatory damages on either lost profits or lost investment, it did present sufficient evidence as to certain out-of-pocket expenses which are recoverable as reliance damages
(b) Sullivan v. Oregon Landmark-One Ltd.: P’s own opinion of the value of its reliance losses is insufficient to establish reasonable certainty as to the amount.

iii) IN A LOSING K
(1) Recovery of full reliance damages is not permitted where such a recovery would put P in a better position than performance of the K would have done
d) **RESTITUTION AS AN ALTERNATIVE TO EXPECTATION OR RELIANCE DAMAGES**

i) **INTRO**
   1. Restitution = disgorgement of the benefits received
   2. Restitution is available even if P would have lost money on the K had it been fully performed (Bausch and Lomb)

ii) **MEASUREMENT**
   1. Courts award damages = net benefit received by D
      a) Two formulas:
         i) Market value of benefit
         ii) Extent to which D has been enriched
         iii) Courts are more likely to award higher restitution awards where D’s conduct was especially

iii) **LIMITS ON RECOVERY OF RESTITUTION**
   1. One limitation:
      a) Where the aggrieved party has fully performed all of its obligations and all that remains is the payment by the breaching party of a specified amount of money, courts will not grant restitutional recovery

iv) **RESTITUTION TO THE PARTY IN BREACH**
   1. Strict operation of the rules of substantial performance can be unfair to breaching parties who have partially performed. Where the non-breaching party is enriched by this partial performance, courts are sometimes willing to grant limited restitution.
   a) Equity has a large role in determining this award, so courts are more likely to award it in situations where D is relatively innocent and P was clearly enriched by the partial performance

e) **AGREED REMEDIES**

i) **POLICING LIQUIDATED DAMAGES CLAUSES**
   1. A term fixing unreasonably high liquidated damages is against public policy (no penalties)

ii) **REMEDY LIMITATIONS, PARTICULARLY REMEDY LIMITATIONS UNDER THE UCC**
   1. If the liquidated damages are low compared to the actual damages suffered by the nonbreaching party, the nonbreaching party may ask the court to ignore the parties’ agreement

f) **NON-ECONOMIC AND NON-COMPENSATORY DAMAGES**
i) **PAIN, SUFFERING AND EMOTIONAL DISTRESS**
(1) Some exceptions to the rule:
   (a) Where the nature of the K itself makes emotional damage particularly likely in the event of a breach. Typically K’s for funeral services, communication of the fact of death, caesarian section.
   (b) Where the nature of the breach itself makes emotional damage particularly likely. Breach is either a tort or similar enough to justify the award (intentionally inflicted).

ii) **PUNITIVE DAMAGES**
(1) Inconsistent w/ K law
(2) Allowed in cases where breach = physical harm or where the breach is accompanied by significant willful fraud
(3) Some courts allow where there is a fiduciary relationship b/w the parties

**g) SPECIFIC PERFORMANCE AND INJUNCTIONS**

i) **INADEQUACY OF DAMAGES**
(1) Specific performance only where damages inadequate
(2) Usually only for land sales (unique pieces of land)

ii) **DISCRETIONARY NATURE OF THE REMEDY**
(1) Courts will refuse even if damages are inadequate, when specific performance would advantage P unfairly, unfairly burden D or 3rd parties, or involve the court in matters which as a matter of public policy it doesn’t want to address

iii) **INJUNCTIVE RELIEF AS AN ALTERNATIVE**
(1) When specific performance is unavailable, courts may still decide to issue a different form of injunction (usually a ‘prohibitory injunction’ enjoining the breaching party f/ doing something which would allow them to profit f/ their breach