I. **Introduction**
   A. Three basic questions
      1. Is there a contract?
         a. Is it enforceable?
         b. What was promised?
      2. Is there a breach?
         a. Was the promise performed?
         b. Was the non-performance excused?
      3. Is there a remedy?
   B. Three types of contracts
      1. sales
      2. employment
      3. construction

II. **Remedies: The Expectation Interest**
   A. Contracts
      1. difference between “repeated deals” and contracts—most arrangements are repeated deals and not “K” contracts
      2. A contract is formed b/c of an offer which creates power of acceptance, by accepting contract is formed
      3. possible to not have damages—in as good of position as would have been
      4. remedies generally based encouraged the wronged party to enter into a substitute contract and then awarding damages to make up the difference
      5. Contracts cases usually can not recover atty fees.
   B. protecting the expectation interest
      1. trying to put the party in as good of a position as they would have been had the contract been performed.
         a. Basic rules for damages: loss in value plus other loss minus loss avoided
         b. Seller does not get the price—gets loss in value—actions for the price are unusual
      2. Breach cannot occur until the time that performance is contractually due
      3. Expectation interest in Sales covered by the UCC—Uniform Commerical Code—Article II applies to transactions in Goods
         a. UCC Article II applies to transactions in “moveable” goods
         b. **Expectation interest problems**
            1.) 1-103—if UCC does not apply then common law still applies to contract
               a) most rules in UCC are “default rules” only apply if the parties have not otherwise agreed
               b) very few mandatory rules
            2.) 2-105(1)—moveable: transferable upon sale—land is not a moveable good, but livestock, crops, and other things to severed from the land can be
               a) goods which are not yet existing are future goods
               b) 2-105(2)—can sell a part interest in goods
                  i can sell a share in bulk goods
            3.) services are not goods
a) how to determine if the UCC applies to “mixed goods”  
   i Bonebrake v. Cox test is whether predominant thrust is service or goods—is it service with goods incidentally attached or is it goods with service incidentally attached  
4.) 2-106(1)- contract for sale—includes both present sale of goods and future sale of goods where a transfer of title takes place  
5.) 2-107—sale of minerals to be removed from the land by the seller is under the UCC  
a) sale of crops, timber are under UCC whether they are cut by seller or buyer  
6.) 2-501—seller has an insurable interest in goods by “indentification” of goods to the contract  
a) if goods already exist indentification takes place at the time of the sale of goods  
b) if goods are future goods, indentification takes place when goods are shipped, marked or designated for the contract (or when crops planted or young conceived)  
7.) 2-704—when goods are unfinished, in the case of a breach, the seller can either finish the goods or sell for scrap  
a) seller has right to indentify to contract goods not yet indentified at the time of the contract  
8.) 2-703-seller’s remedies when buyer breaches, seller may:  
a) withhold delivery  
b) stop delivery  
c) proceed under 2-704 if goods are not yet indentified to contract  
d) resell and recover damages  
e) recover damages, or in a proper case the price  
f) cancel  
g) seller can choose the remedy  
9.) 2-708—seller’s damages for non acceptance  
a) measure of damages is the difference between the market price and the contract price + incidental damages  
b) what matters is market value at time of breach  
10.) 2-706—seller right to resell goods  
a) can recover difference between contract price and the resale price—must advise buyer of resale and sell in commercially reasonable matter  
i commercially reasonable is defined by case law  
11.) 2-709 action for the price—unusual. Necessary where resale of goods is impractical  
a) also necessary where the market falls after the breach occurs  
C. Inferior Substitutes, Other Ends and Other Means  
1. UCC 2-709—can recover contract price if resale is not available or impractical
a. Usually have a responsibility to mitigate damages

2. **Maclaine Parker v. 20th Century Fox Films**
   a. Plaintiff contracted to appear in “Bloomer Girl”. Defendant breached contract and instead offer her substitute deal with “Big Country”—same money different type of movie, different place, different contract provisions.
   b. Ruling: Plaintiff does not have a responsibility to mitigate damages if the substitute contract is substantially different or inferior to the original contract.
   c. Issue is reasonableness of actions in mitigating damages
   d. Damages do not recognize opportunity cost—does not matter that she turned down other offers to take this contract
   e. No duty to mitigate in sales—just subtract market price if seller does not choose to resell
   f. Concept of summary judgment—case was decided by summary judgment—b4 trial “demurs” even if all of the facts alleged are true, the other side still does not have a case against action
   g. Parker has held up in cases where work was of a high level nature but not for work of a blue collar nature—bus drivers, police officers.

3. Formulas for computation of damages
   a. Most cases: (loss in value + other loss) – (loss avoided)
   b. Other formula (2-708(2) where traditional formula would not meet expectation interest of seller): (contract price) – (loss avoided) + (profit + incidental loss)
      1.) Two functions of this formula:
         a) Loss volume sellers
            i. No mitigation possible
            ii. Not many true lost volume sellers
         b) Manufactures of specially manufactured goods
            i. Should mitigate damages by selling for scrap

4. **Neri v. Retail Marine**
   a. Neri contracts to buy boat from retail marine. Neri breaches contract and sues to recover down payment under UCC 2-718(2) where the buyer can recover payments less the seller’s right to damages. Retail Marine had resold boat at same price and it was argued that they were not entitled to damages b/c their expectation interest was met.
   b. Ruling: Retail marine was loss volume seller. Subject to UCC 2-708(2), Retail Marine is entitled to recover the price, b/c if not for Neri’s breach they would have had two contracts not just one.
      1.) Loss volume seller rule applies to the sale of standardly priced manufactured goods of which it is assumed that the seller has a virtually unlimited amount of.
      2.) Seller may not want to recover profit—may not want to damage relationships with customers.
   c. Anticipatory repudiation: breaches contract before performance is due
d. → Parker Case: Although not a contract for sale of goods, Parker could have made similar argument, “If it wasn’t for the breach, I would have made two movies. I can make an unlimited number of movies.”

e. Even if they had not resold the boat, still could have recovered profit b/c market value would not have put them in as good a position either.

f. Problem of overhead: Should seller be able to recoup incurred costs?

1.) Usually not

2.) Revenue (the sale) has three parts

a) Direct costs of sale—cost of product

b) Indirect costs of sale—rent, salaries—overhead

c) Net profit on transaction—Revenue – (Direct + indirect costs)

i) Net profit different from gross profit which is just Revenue – Direct costs

D. Performance Rather than Damages

1. Copylease v. Memorex

a. Copylease had a contract for an exclusive dealership of Memorex toner products in the Midwest. Memorex breached contract and said they were going to start selling to others. Copylease did not want damages, they wanted specific performance of the contract.

b. Ruling: Under UCC 2-716 a buyer may sue for specific performance where the goods are unique or in other proper circumstances. If Copylease could not obtain comparable toner elsewhere, they might be entitled to specific performance.

1.) Memorex would have had to argue that their toner was not unique

2.) Courts have been reluctant to order specific performance where it would require an ongoing relationship between the parties.

3.) Specific performance is exception rather than rule

a) Trying to allow for efficient breaches—i.e. Long Beach Drug v. United Drug Co. —furthering commerce, did not want to force a continuing relationship

b) Will not order specific performance in employment cases—too similar to involuntary servitude

i) But will order professional athletes not to play for anyone else

c) Is usually ordered in cases involving land as land is considered to be a unique good

d) Equitable relief that requires courts to be watch dogs

i) No right to a jury in equity cases

e) Specific performance increases the bargaining power of the plaintiff—encourages parties to work out settlements on their own.

i) Copylease negotiated settlement w/o trial

c. Diversity of Jurisdiction case—federal court in NY trying CA law b/c that is what was specified in contract

E. Breach Detterence v. Liquidated Damages

1. Different from specific performance: looking at to what extent parties can develop their own remedies within the contract
2. **Lake River v. Carborundum Company**.
   a. Carborundum contracted to have Lake River bag and distribute Ferro Carbo. The contract contained a minimum quantity clause which stipulated that if the minimum quantity was not met, then Lake River would bill Carborundum for the remainder of the contract price.
      1.) Had a continuing contractual agreement
      2.) Lake River refused to release the Ferro Carbo in its warehouse—wanted to ensure that Carborundum could pay up even if it went bankrupt.
         a) Lake River says this is a lien, Carborundum says it is a conversion.
   b. Ruling: This clause was not liquidated damages and imposed a penalty and should not be enforced.
      1.) Federal Judge, Posner is interpreting IL law in a diversity of jurisdiction case.
      2.) Posner says that IL supreme court would not allow Lake River to have a lien on the product in this case—actions were not consistent with a lien
      3.) Liquidated damages are permitted if they are a reasonable estimate of the damages that would occur at the time of breach and it would be difficult to calculate the damages at the time of breach. Lake River did not take into account loss avoided by the breach—did not incur certain costs. Damages can not put aggrieved party in a better position than they hoped to be in.
   c. **UCC 718(1)** similar to IL law and the 2nd Restatement of Contracts
      1.) Damages may be liquidated only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach and the difficulty of proving loss
         a) Lake River could have argued that many corporations do not operate with the kind of precision assumed by Posner. How much loss did they really avoid?
         b) Problem w/ anticipated or actual
            i  What if damages were a lot less than anticipated—what if company obtained a substitute contract and mitigated damages
            ii  MO rule: there must be actual loss period.
               (a) Exception earnest money in real estate contracts
      2.) Carborundum not a transaction in goods so UCC does not apply.
   d. Concept of efficient breach
      1.) Financially advantageous for both parties to breach contract—even by paying damages, breacher still comes out ahead.
      2.) Penalty clauses preclude an efficient breach

F. Expectation Interest: Lost Anticipated Profits and Consequential Damages
   1. consequential damages—other loss incurred as a result of breach of contract besides just difference in market and contract price.
   2. **Hadley v. Baxendale**
      a. The shaft in Plaintiff’s mill was broken and they contracted with defendant to have shaft sent for repairs. Shaft was delayed in shipment and
the mill was stopped for a longer period of time. Plaintiff wanted to recover lost profits.

b. Held: Can only recover those damages which were foreseeable at the time the contract was entered into. Special circumstances must be made known at the time of contract.
   1.) Allows risks to be allocated at time of contract and to be reflected in the contract price

c. Now such consequential damages are governed by UCC 2-715

3. Evergreen Amusement v. Milstead
   a. Plaintiff’s drive-in theater was delayed in opening due to breach in contract to grade lot by Milstead. Theater wants to recover lost profits.
   b. Held: The profits of a new business are too uncertain to be claimed as damages.
      1.) Could recover rental value of property
      2.) A claim for profits includes overhead, but if can’t prove profits can still try to claim for costs incurred.

4. Claims for lost profits must be reasonably foreseeable and certain
   a. Reseller must prove demand, price of resale, and cost of resale
   b. Harder for manufacturer to claim lost profits from goods to be made out of goods from defaulting seller as it is harder to prove certainty and foreseeability.

III. Remedies: The Reliance Interest
   A. overview
      1. Instead of putting people where they would have been had the contract been fulfilled, the reliance interest seeks to compensate people for their out of pocket losses.
         a. Puts people where they were before the contract was made instead of where they would have been.
      2. ordinarily reliance damages are included in expectation interest formula where one sues for the contract price or to recover profit.
         a. Only sue for reliance damages when profits are too speculative to recover.
      3. Difference between Reliance, Consequential, and Incidental Damages
         a. Other Loss:
            1.) Incidental damages—costs incurred as a result of the breach
            2.) Consequential damages—loss resulting from the breach
                a) Sellers usually cannot recover consequential damages
            b. Reliance damages—costs incurred in expectation that other party would perform contract.
   B. Security Stove v. American Railways express
      1. American Railway’s failed to get the crucial piece of an exhibit to the convention on time as promised. As a result, Security Stove was unable to display its combination oil/gas furnance.
      2. Security Stove sued to recover its expenses incurred for the convention. They did not sue to recover profits, b/c they had no way of knowing what their lost profits would have been.
3. Held: When a party relied upon the contract in incurring certain expenses, then it may recover these expenses in the event of a breach.
   a. Impossible to know if Security Stove would have recovered its incurred costs even if the part had arrived. But it is easier to prove these expenses then to show any loss in value.
   b. Interstate commerce rule: can not sue on a special contract with a common carrier—can only get that which was available to all other customers at similar prices.

C. L. Albert & Son v. Armstrong Rubber
   1. Armstrong Rubber contracted with L. Albert and Son to buy 4 refiners. 2 refiners arrived late and Armstrong Rubber refused all four. L. Albert sued for the contract price, but Armstrong Rubber counter claimed for damages sustained from the breach.
      a. Can only claim losses that you would not have incurred but for the breach.
      b. Strict or perfect tender rule—buyer may reject goods that fail to conform in anyway to the contract. Delivery Dates are not curable defects.
   2. Held: The aggrieved party can recover expenses incurred in preparation for performance by the breacher, but such a claim can be offset by the amount the breacher can prove the aggrieved party would have lost even if the contract had been performed.
      a. Don’t want to put the buyer in a better position than the buyer would have been if the contract had been performed.

IV. A Doctrinal Digression
   A. Law of conditions
      1. In order for there to be breach, there must have been a promise—no promise no breach.
      2. breach of condition versus breach of promise
         a. failure to meet condition—other party is discharged does not have to perform—no breach for failure to perform
         b. If conditions precedent to promise are not met then you are not bound to perform
         c. Must ask was promise subject to a condition, if so was the condition met?
         d. If condition substantially met then no exit—does not apply to express conditions—express conditions must be fully met
            1.) Strict/perfect tender rule exception to this
            2.) Courts may modify or waive conditions
      3. Express condition—part of contract
      4. concurrent conditions—both a promise and a condition—flip side of condition is promise by other party. I promise to pay on the condition that you give me the painting. You promise to give me the painting on the condition that I pay. Both assumed to be due at the same time.
         a. Failure of concurrent condition—have choice breach or discharge
            1.) If breach must make clear that you were ready, willing and able to perform your promise.
         b. Constructive concurrent conditions—law says under these circumstances we will impose a condition
5. When not concurrent conditions, who goes first?
   a. The thing that takes time should be done before the thing that could be
done instantly should be due (i.e. performance before payment)

6. Two type of contracts
   a. Bilateral—exchanging a promise for promise
   b. Unilateral—promise for performance (starting performance can be acceptance)

V. Remedies: Restitution
A. Overview
   1. Resitution—recovering breacher’s unjust enrichment
   2. right to exit allows minimization of risk
   3. UCC 2-106—difference between termination and cancellation
      a. Termination—contract ends but not b/c of breach—condition of contract
         1.) Both parties discharged from performance
      b. Cancellation—contract ends b/c of breach. Aggrieved party has a right to
         remedy for breach.
   4. sue for unjust enrichment often when there is a losing contract
      a. quasi-contract
      b. quantum merit
      c. can get value added or what X would have had to pay another to do the work
   5. Relation to law of conditions
      a. Promise→Breach→Damages
      b. Condition→Total Breach (non-occurrence of condition)→Discharge/Exit

B. Right to Exit
   1. UCC 2-601—A buyer may reject goods that fail in any respect to conform to
      the contract
   2. UCC 2-508—the seller has the right to cure defective goods in certain
      situations
   3. UCC 2-608—If the buyer has already accepted the goods, he can only reject if
      the defect substantially impairs the value of the goods
   4. Colonial Dodge v. Miller
      a. Miller bought a car that lacked a spare tire which he had ordered. He
         rejected the car and refused to pay. The dealership argued that Miller had
         accepted the car and under the UCC could not reject because the missing
         tire did not substantially impair the value of the car.
      b. Held: No acceptance, because under the UCC merely picking up an item
         or having possession of it is not acceptance. The buyer must be given a
         reasonable time to inspect the goods.
   5. What happens when the seller produces non-conforming goods? Buyer may:
      a. Accept
         1.) Revoke acceptance if substantial impairment to value of goods→Get
             Buyer’s Remedy under UCC 2-711 and 2-715
         2.) Can’t Revoke under UCC 2-608→still get Buyer’s Remedy (UCC 2-714, 2-715)
3.) Keep the goods → still get Buyer’s Remedy (UCC 2-714, 2-715)
b. Reject
   1.) Seller has the right to cure and cures (UCC 2-508) → No breach, no remedy
   2.) Seller doesn’t have the right to cure → Buyer’s Remedy (2-711, 2-715)
   3.) Seller has right to cure and doesn’t use it → Buyer’s Remedy (2-711, 2-715)

6. Can’t exit if substantial performance
   a. I.e. Plante v. Jacobs—had to pay for house even though one wall off by a foot.
      1.) Can’t get damages which would be “unreasonable economic waste”—
         no cost to repair problem—only difference in value

C. Restitution as Alternative to Breach of Contract
   1. Oliver v. Campbell
      a. Oliver had a contract to represent Campbell in divorce proceeds for $850
         dollars. Campbell only paid $550 and dismissed Oliver. Oliver sued
         Campbell’s estate to recover the reasonable value of his services--$5000.
      b. Held: In cases where parties contract as to the price for services, the
         aggrieved party is not limited to recovery on the contract. He can recover
         the reasonable value of his services as long as there was a complete
         breach, and his performance was not yet completed. In cases where the
         performance is substantially completed recovery is limited to the contract
         price.
      c. Possible to recover more from restitution than would have had contract
         been completed—at odds with expectation interest.
      d. Once the breaching party discharges the other, it as if the contract did not
         mention a price for services.
      e. Can be liable for benfit bestowed without your permission if you keep it
         and use it.
      f. Resitution does not cover claim for incurred cost—except as they are
         covered by the reasonable value of the services rendered.

   2. Can party in breach get restitution?
      a. Employee breaches employment contract—but still unpaid for services
         rendered→ employer unjustly enriched, in modern courts have claim to
         restitution offset by other party’s damages.

VI. Remedies: Surrogates for Normative Choices
   A. Peevyhouse v. Garland Coal and Mining Co.
      1. Peevyhouse signed a contract allowing Garland to stripmine part of their land.
         The contract stipulated that Garland would restore the land at the close of the
         stripmining lease. They failed to complete this work and Peevyhouse sued for
         the cost of completing the work which was more than the value of the land
         even after the work was done.
      2. Held: Cost of performance should be awarded except where such cost is
         disproportionate to the benefit obtained and the performance was incidental to
         the rest of the contract.
3. Peeveyhouse could have structured the contract to avoid loss by requiring that money for repairwork be placed in escrow before the stripmining began.

B. **Sullivan v. O’Connor**
   1. Sullivan was promised a perfect nose by O’Connor a plastic surgeon. She sued to recover her expectation interest.
   2. Held: The plaintiff could appropriately recover her reliance interest allowing her to be placed in the position she was before the surgery, but not requiring the jury to estimate where she would have been had the contract been performed.

VII. **Remedies: Review**

VIII. **Contract and Continuing Relations**

A. Introduction
   1. A contract is an enforceable promise
   2. Contract formation governed by offer and acceptance rules
      a. Offer creates power of acceptance
         1.) Termination of power of acceptance:
            a) By a counteroffer (creates power of acceptance in original offeror)
            b) Rejection
            c) Lapse of time
            d) Death of either party
            e) Revocation by offeror—can revoke up until accepted—no common law firm offer
               i When was it accepted?
                  (a) Mailbox rule—contract formed when acceptance mailed
                  ii Option-firm offer—promise not to revoke which requires separate consideration
                  iii Firm Offer in UCC—merchant doesn’t need consideration, but needs to be in writing and can be no longer than three months
            f) Terminated by nonoccurrence of any condition of acceptance in original offer
      b. Offeror is master of offer—acceptance must mirror the offer
      c. Advertisement not an offer—but misleading ads may be held to be so, contests are offers
      d. Offer-acceptance—need a meeting of the minds—was a contract intended?
      e. Silence can’t be acceptance except in long-term arrangements
      f. Contract needs certainty to be enforceable
   3. Most continuing relationships not contractual agreements
   4. Implied contracts:
      a. Implied in fact—only question is one of proof
      b. Implied by law—court imposes contract on parties
   5. Consideration
      a. Promise w/o consideration is a gift
         1.) General rule: can’t sue to enforce a gift
         2.) “under seal” substitute for consideration
b. Consideration is the inducement for which a promise is made
   1.) Need a bargain—what was each party bargaining for?
   2.) Does it matter if bargain is equal?
      a) General rule: no
      b) Exception: grossly unequal exchanges—no consideration
   3.) Must be bargained for at time of promise—must induce the promise at that time
      a) But past consideration accepted as necessary to prevent injustice by restatement
   4.) Does not need to confer a benefit to one party

c. Can be either promise in exchange for a promise (bilateral contract) or promise in exchange for action (unilateral contract)
   1.) But needs to something that I have legal right to withhold if you do not fulfill your promise/performance.

d. Modification
   1.) General rule: modification of contract requires separate consideration—can’t promise that which you were already bound to do anyway (Antecedent duty rule)
   2.) Exception: no pre-existing legal obligation
   3.) UCC: don’t need consideration to modify
   4.) Can give up chance to litigate as consideration even if uncertain to prevail
   5.) Exception: some jurisdictions: extreme unforeseen circumstances that give rise to need to modify
   6.) Some jurisdictions enforce as required by reliance on modification unless acted in bad faith.

f. Illusory promises
   1.) When still have option to perform or not to perform—illusory promise
   2.) Exception: notice required before canceling contract—not illusory.

f. Exceptions to consideration requirement:
   1.) Promises to repay despite defenses to the debt
   2.) Waivers
      a) I.e. promises to perform despite the nonoccurrence of a condition
   3.) Where § 90 of the Restatement—Promissory Estoppel estopps party from raising consideration doctrine b/c of reliance based on promise
      a) Reliance serves as a substitute for consideration
      b) Promise which promisor should reasonably expect to induce action or forebearance on the part of the promisee or some third party and which does induce such action or forebearance is binding if injustice may be avoided only be enforcement of the contract.
      c) Not just used to substitute for consideration—used to protect reliance even can’t enforce the promise

6. Statute of Frauds: must have a writing of the contract to be enforceable in certain situations
   a. Under UCC § 2-201—when more than $500
1.) Between merchants silence in face of confirmation of contract = enforceable contract against both parties

2.) Exceptions:
   a) Specially manufactured goods
   b) If other party admits existence of contract
   c) If payment for the goods has been made or received and accepted

b. Contract that cannot be performed within one year

c. Contract for sale of an interest in land

d. Contract to answer for duty of another
   1.) Exception where main purpose of promise is to benefit self

e. Contract upon consideration of marriage

f. Contract of executor to answer for duty of decedent

g. General rule: needs to be signed (or initialed) by the party being charged
   1.) Doesn’t need to be complete contract but needs:
      a) To reasonably identify the subject matter of the contract
      b) Sufficiently indicate that a contract has been formed
      c) Be reasonably certain as to the terms of the unperformed promises in the contract

h. Doctrine of part performance
   1.) Some states have common law or statutory rule which allows equitable relief, particularly in land transfer cases, where the statute of frauds is not satisfied but where enforcement is necessary to prevent unjust enrichment or where the party can be estopped from raising the statute of frauds issue b/c of the other party’s reliance on the transaction.

   i. Even if unenforceable b/c of statute of frauds, may still be entitled to restitution

   j. International agreements don’t need to satisfy the statute of frauds

B. Spouses and Friends, Nieces and Nephews

1. Balfour v. Balfour
   a. Mrs. Balfour’s husband breached his promise to send her 30 pounds/month while they were apart.
   b. Held: Contract void as a matter of public policy; not a legally enforceable agreement b/c the parties did not intend for the agreement to have legal consequences.
   c. Court unwilling to intervene in maritial relationship.

2. Miller v. Miller
   a. Mrs. Miller sued to enforce a written agreement with her husband that he would pay her $200/yr in exchange for past disputes being ignored and the house being kept up.
   b. Held: contract void as public policy b/c of the difficulties of enforcement.
      1.) Also consideration issue raised: had not promised to do anything not already obligated to do as wife.

3. Marvin v. Marvin
   a. Ms. Marvin sued seeking the enforcement of an agreement that Mr. Marvin would support her for four years after they ceased cohabitating.
b. Held: an implied or express contract between non-marital partners can be enforced to the extent that it is not explicitly based on sexual services.

c. Opposite opinion Hewitt v. Hewitt—supported non-marital partner through dental school held: legislature outlawed common-law marriage, judiciary would not establish legal equivalent by recognizing right to property.

d. Problem is in contract for marital-like services—no problem if contract had been for cleaning or painting etc.

4. **Hamer v. Sidway**
   a. plaintiff suing executer of William Story’s estate to enforce his promise to pay his nephew $5000 upon his 21st birthday if he refrained from drinking, using tobacco, and playing cards or billiards for money.
   b. Held: promise to behave a certain way was consideration for $5000, didn’t matter if it benefited uncle or not.

5. **Kirksey v. Kirksey**
   a. Sister-in-law moved to brother-in-law in reliance on promise that he would provide her with a place to live.
   b. Held: moving was not consideration to support the promise 1.) Did not bargain for her to move

6. **Ricketts v. Scothorn**
   a. plaintiff seeking to enforce her grandfather’s promise to pay her $2000.
   b. Held: promise is enforceable through the doctrine of equitable estoppel. Estopped from raising the consideration issue b/c her reliance was a foreseeable consequence of the grandfather’s promise and she would be in a worse position if the promise were not enforced.

7. **Fitzpatrick v. Michael**
   a. Fitzpatrick sued to enforce an agreement to nurse Michael in exchange for weekly compensation, room and board and when he died his autos absolutely and his home and furnishings for life.
   b. Held: could not sue for specific performance where enforcement would mean an ongoing relationship between the parties.
   c. Capacity of elderly to make contracts also an issue
   d. She could still get damages as a result of breach of contract: 1.) Restitution—unjust enrichment—have to show a benefit
e. Preventing someone with unusual skills from working for competitor might have different outcome.
   f. Had he been deceased, would have had different outcome.

8. **Brackenbury v. Hodgkin**
   a. daughter and her husband seeking to enforce an agreement they had with the mother that if they took care of her and the farm for the rest of her life, she would leave them the farm.
   b. Held: specific performance granted
   c. Less concerned about influence than Fitzpatrick—more concerned about equity.

C. **Franchises**
   1. franchise similar to marriage—courts reluctant to enforce ongoing relationship
2. problem: costs entered into on assumption that one will receive a franchise contract
   a. **Hoffman v. Red Owl Stores**
      1.) Based on statements made by a Red Owl employee, Hoffman incurred costs on the assumption that he would be receiving a Red Owl store for his investment. Hoffman decided not to enter into a contract with Red Owl when they changed some of the requirements in later negotiations.
      2.) Held, promissory estoppel allows Hoffman to recover his incurred costs based on his reliance on the statements made by the Red Owl Employee. Damages should not exceed the amount of loss caused by the reliance on the statements.
      3.) Never reached point where one could say that they were bound even though some details remained up in the air
         a) No one in breach—red owl would not have had action against Hoffman
         b) Court is attempt to protect Hoffman’s reliance on the assurances offered by Red Owl—even though the assurances in and of themselves are not enforceable promises.
         c) Way to punish Red Owl for bad faith tactics in dealing with less sophisticated negotiator w/o calling it bad faith.
      4.) Using § 90 of the restatement to police negotiations not to enforce a contract

3. **Collins Drugs v. Walgreen Co.**
   a. Walgreen terminated all of its franchise agreements with the plaintiffs who sought to recover injunctive relief and monetary damages under the Wis. Fair Dealership law which prohibited terminating a franchise agreement w/o good cause.
   b. Held: Monetary damages awarded b/c terminating all franchises across the board in response to changing business plan is still termination w/o good cause. No injunctive relief b/c can be adequately compensated w/ money.

D. **Employees**
IX. **Contracts and Social Control**
A. Illegal contracts
   1. contracts to commit illegal acts unenforceable
   2. **Carroll v. Beardon**
      a. Carroll seeking payment due on contract to sell Beardon land even though both knew the land would be used for prostitution. (Im Parie Delicto rule)
      b. Held: mere knowledge of an illegal activity is not enough to void a contract; active participation by seller or benefit from illegal activity must be shown.
      c. Underlying policy: tolerance towards this particular illegal activity
   3. comparative fault rule
      1.) **Gates v. Rivers**
         a) Gates sought to enforce an employment agreement he had made with Rivers in violation of immigration laws.
b) Held: contract enforceable b/c otherwise Rivers would benefit from illegal agreement and would encourage others to also violate frustrating intent of the laws.

2.) **Karpinski v. Collins**
   a) Plaintiff seeks return of illegal kickbacks and loans paid to defendant in exchange for a Grade-A dairy contract.
   b) Held: illegal nature of kickbacks does not bar recovery where defendant abused leverage he had over plaintiff’s economic situation.

4. Further a transition removed from illegal activity more likely contract is to be enforced

5. courts enforce contract to benefit innocent party

B. Public Policy Concerns—non-compete agreements
   1. **Fullerton Lumber Co. v. Albert Torborg**
      a. Fullerton sought to enforce employee’s agreement not to compete for ten years in same area that he served as a manager for the company.
      b. Held: In the absence of coercion, such covenants valid as long as reasonable and necessary to protect employer’s interest and may be modified to make it reasonable if it is necessary.
      c. Who needs non-compete clauses?
         1.) “stars” and highly skilled employees—don’t often non-compete agreements—have enough leverage on own to bargain with employers
         2.) employees who obtain skills in course of employment—employers trying to protect investment—allowed when reasonable and as necessary
         3.) unskilled workers—trying to minimize cost of replacement—not usually allowed

C. Capacity concerns
   1. mentally disabled—did they have the ability to make a rational decision
   2. children
      a. minors have power to discharge themselves from contract—but party contracting with minor can’t discharge b/c minor—minor has power to terminate but they don’t
      b. once of age and haven’t raised issue that you were a minor: ratified contract
      c. liable for contracts made for necessaries to limit unjust enrichment
   3. Drugs/Alcohol—overturn contracts made in extreme situations
      a. Other party must know that person could not contract b/c of intoxication
   4. attempt to protect vulnerable individuals from bad bargains—worse bargain the more likely courts to step in and void it

D. Duress
   1. General rule: threat to do what you are legally entitled to do not duress
      a. Courts used to use antecedent duty rule to get around this by saying modification was not supported by consideration.
      b. But, under UCC don’t need consideration for modification. Key is if modification was in good faith?
2. Exception: Wurtz v. Fleischman
   a. Wurtz sued to enforce a last-minute modification to a real-estate deal with Fleischman giving him Fleischman’s $50,000 interest in the project.
   b. Held: economic duress occurs when one party wrongfully threatens another with severe economic loss and the other party acquiesces only because of the threat.
   c. Threat does not have to be illegal to be duress; only needs to be wrongful.
   d. Key is not that Wurtz knew of Fleischman’s financial difficulties but that he took advantage of Fleischman’s reliance on the contract.
   e. No meaningful consent where only other option is bankruptcy or a similar bad fate
3. Selmer v. Blakeslee Midwest Company
   a. Selmer, a sub-contractor, sued the contractor to recover more than the settlement it received over an oral promise to pay increased costs claiming that financial distress caused them to accept.
   b. Held: threats not to honor an oral contract constitute duress only if available legal remedies would be inadequate.
   c. Was not in financial difficulty b/c of contract.
   a. Employee sought to have releases of liability he had signed rather than lose his job declared void.
   b. Held: even though the employer had a legal right to terminate at will, it took advantage of its superior bargaining power and leverage to make employee give up rights and privileges thus constituting duress.
5. courts are implying an obligation to use superior bargaining power reasonably
   a. assumption that employees are under domination of employers and employers have an obligation not to act inconsistent with their welfare.
6. Restatement § 175
   a. Contract voidable when assent obtained by an improper threat that leaves the victim with no reasonable alternative
   b. If assent is gained by one not a party to contract then voidable by victim unless other party in good faith, w/o knowledge of duress relies on the transaction.
7. Restatement § 176
   a. Threat is improper if:
      1.) Crime or tort is threatened or threat itself would be a crime or tort if it resulted in property being obtained
      2.) Criminal prosecution is threatened
      3.) Civil litigation is threatened in bad faith
      4.) Threat breaches good faith and fair dealing under the contract
      5.) If the resulting exchange is not on fair terms and
         a) Threatened act would not benefit person making the threat or
         b) Prior unfair dealing increases effectiveness of threat or
         c) What is threatened is a sue of power for illegitimate ends
         d) Getting at bad bargain rather that improper threat—if threat is improper we don’t care about bad bargain or not
E. Undue Influence and Misrepresentation

1. Odorizzi v. Bloomfield School District
   a. Plaintiff sought to have his resignation declared void b/c it was obtained after he was arrested and had no sleep and the school board officials came to his apartment, said there was no time for him to consult an attorney.
   b. Held: where one aggressively uses excessive pressure to persuade a vulnerable person with a lessened capacity for rational choice to do something they use undue influence.
   c. Difference between illegitimate and legitimate pressure lies in the manner consent is obtained. Undue influence occurs where several elements are present:
      1.) The transaction takes place at an unusual time/place
      2.) The urgency of the situation is stressed
         a) No time to wait
         b) Not time to consult others
         c) Stressing the consequences of a delay
      3.) Many persuaders against the one vulnerable person

2. courts are punishing the bargaining process itself, not an improper threat like in duress

F. Misrepresentation

1. Obde v. Schlemeyer
   a. Obde sued Schlemeyer for failing to disclose a termite problem in an apartment building purchased by Obde.
   b. Held: It is misrepresentation not to disclose a defect dangerous to the health, life, or property of the buyer.
   c. Court is enforcing an implied promise to sell a house termite-free

2. had they attempted to cover-up termites would have been fraudulent concealment

3. new homes—implied warranty that free from major defects
4. duty to disclose:
   a. did both parties have equal access to information?
   b. Superior access to information—law will impose duty to disclose to disadvantaged actor
5. innocent misrepresentation—can’t prove that knew what was said was false
   a. many states allow contract to be rescinded but no damages
   b. some states have statutes
6. knowing misrepresentation
   a. can also sue in tort for fraud
   b. get expectation interest

G. Relationships of Trust and Control

1. arms length contract—your interests not my concern
2. trust and confidence
   a. your reliance may be justified
   b. may have disclose more
3. Fiduciary relationships
   a. I must act for your benefit
b. I.e. lawyer/client, stockbrokers, “joint-ventures”
c. Could be close and intimate friend—believe that they will act for your benefit
d. Arise out of expectations associated with relationships

4. **Vokes v. Arthur Murray**
   a. 51 year old widow wishes to recover the balance of unused hours paid for at the Arthur Murray dance studio.
   b. Held: Because defendant established a relationship of trust and confidence they had a duty to act in good faith and to disclose the whole truth once they began sharing their knowledge.
   c. Courts trying to protect vulnerable party from what they perceive to be a bad bargain

X. **Social Control in the Guise of Choice**
   A. Choice and Form Contracts
      1. Standard form/contracts of adhesion most common today
         a. Contract of adhesion—agree to certain rights and duties upon accepting the item—i.e. on cereal boxes, parking tickets
         b. Standard form—any contract for which there is a standard form
         c. General rule: binding even if not read
            1.) Certain provisions we will not allow you to include—unfair
      2. **McCutcheon v. David MacBrayne**
         a. Plaintiff wishes to recover losses for a car lost in shipping while defendant wishes to hold him to their standard release which he did not sign on this occurrence.
         b. Held: Where a party did not know that a given provision was part of a contract, it can not be added in by implication based on prior dealings. The parties will be held to the contract agreed upon at that instance.
         c. Presumption that parties know what they are agreeing to—but it must be clear
      3. **C & J Fertilizer, Inc. v. Allied Mutual Ins.**
         a. Plaintiff wished to recover losses despite a provision in the insurance agreement that required that their proof on the outside of the building of burglary.
         b. Held: the insured can be bound only by those terms it did or should have reasonably expected to be in the contract
         c. parties deserve to get what they bargained for

B. Warranties, Disclaimers, and Remedy Limitations: UCC
   1. express warranties
      a. UCC § 2-313
         1.) Any statements made by the seller to the buyer which become part of the basis for the bargain create an expressed warranty that the goods shall conform to the affirmation/promises made by the seller.
         2.) Express warranty that goods shall conform to any description which is the basis for a bargain—shall conform to sample/model.
         3.) Opinion is not an expressed warranty, affirmation of value not a warranty
2. implied warranties
   a. UCC § 2-314
      1.) Implied warranty that goods are merchantable—pass w/o objection in trade, fit for ordinary purpose such goods are used
   b. UCC §2-315
      1.) Implied warranty that goods will be fit for particular purpose which is known to both seller and buyer
3. Exclusions of warranties must be conspicuous and in writing
   a. Words and conduct must match disclaimer
   b. Remedy limitation v. disclaimers
      1.) No requirement that remedy limitations be conspicuous
      2.) Has limited remedy failed its purpose?
         a) May still be able to assert additional remedies under UCC
   c. Must ask:
      1.) Is there a warranty
      a) Is it express or implied?
      2.) Has warranty been successfully disclaimed?
      3.) For warranties not disclaimed, has seller limited remedies?
   a. Hunt sued to get his money back for a defective boat engine despite a disclaimer on the back of the standard form contract that disclaimed all warranties.
   b. Held: an implied warranty of fitness for purpose arose and was not successfully disclaimed b/c disclaimer was not conspicuous.
5. Magnuson-Moss Act
   a. Need not give a written warranty—but if you do must designate either full or limited
   b. Most warranties limited
   c. May not disclaimer implied warranties imposed by statutes
6. lemon laws also limit ability to disclaim warranties on cars
C. Unconscionability
   1. poor at risk for exploitation by those offering installment credit
   2. UCC §2-302—matter for judge not jury to decide
      a. May refuse to enforce or may modify
   3. Williams v. Walker Thomas Furniture Contract
      a. Plaintiff’s sought to stop Walker-Thomas from replevying goods bought on installment credit under a contract that held that all payments applied equally to all goods bought at Walker-Thomas including subsequent and prior purchases.
      b. Held: Contract was unconscionable due absence of meaningful choice and terms which were unreasonably favorable to the one party and there was unequal bargaining power.
      c. Court really concerned with the lack of resale value of the items bought showing that Walker-Thomas was using terror and deprivation to get its $ back. Opposed to use of personal penalties. Also penalizing company for its sales tactics.
d. More likely to police bargains made for basic needs

4. Jones v. Star Credit Corp.
   a. Contract may be found unconscionable based on price when price clearly exceeds market value by an unconscionable amount.
   b. Protecting vulnerable buyer from being taken advantage of by bad bargain when seller knew financial situation of buyer.

   a. Contract not unconscionable based on price unless it is shown that there was a lack of meaningful choice and that the terms unreasonably benefited the other party.

XI. Formation Revisited

A. Choice, Fault, or Something Else?
   1. Embry v. Hargadine, McKittrick Dry Goods
      a. Embry sued to enforce the renewal of his employment contract for another year after the boss assured him that he did not need to worry about it.
      b. Held: Not necessary that both parties intended to make a contract, but it is necessary that the conduct of the person could be reasonably construed by a reasonable person to create a contract
         1.) Court is looking not only at words themselves but also at the employee’s reliance on those words and whether his reliance was reasonable.
         2.) Similar to doctrine of promissory estoppel.

B. Risk of Ambiguity or Misunderstanding
   1. Raffles v. Wichelhaus “The Peerless”
      a. Court refused enforce a contract based on mutual mistake when defendant intended to buy cotton on a ship named peerless sailing in Oct. while plaintiff intended to sell cotton on a ship named peerless sailing in Dec.
         1.) Lack of offer and acceptance another way to get same result—acceptance did not mirror
         2.) Neither party liable for expectation damages when mutual mistake.
            a) Both parties have to not know of other’s meaning or both have to know of other’s meaning to have mutual mistake
   2. WPC v. U.S.
      a. Contractor sought payment from the gov’t for use of substitute parts. Contract could be reasonably interpreted either to preclude or accept substitute parts.
      b. Held: parts allowed b/c the gov’t assumed the risk of making sure that the other party understood and agreed to their interpretation of the contract when they drafted the contract.
      c. Mutual mistake in this case allows party to exit from this provision while still keep rest of contract. Binding contract was formed.
   3. third-party error—one who selected third party who made mistake (i.e telegraph) bears the burden

C. Mistaken Bid
1. Problem: contractors in making bids to owners rely on estimates from sub-contractors—once their bid is accepted by the owner they are bound, but the sub-contractor is still free to walk away or to change their bid.

   a. Contractor could recover damages under §90 of the restatement if they relied on it.

   a. Janke sought to recover the different between what they expected to pay based on Vulcan’s estimate of pipe for a job with U of Wis. and what they were forced to pay when Vulcan could not supply the proper pipe.  
   b. Held: Janke could recover its reliance damages because Vulcan could reasonably foresee that Janke could rely on its reassurances that it could supply the necessary pipe.  
   c. Contractor can not bid shop after getting the bid and still claim reliance damages.  
   d. Problem occurs when contractor can not revoke or amend bid (gov’t contracts)  
      1.) Provision in contract not to increase power over other party but to limit discretion of employees to contract in ways company might not like  
   e. Difference between offer and invitation for an offer—owner and contractor make invitations for offers  
   f. Restatement § 87—applying promissory estoppel to offers to turn them into options contracts when there is reliance

4. Marana Unified School Dist. v. Aetna Casualty and Surety Co  
   a. Contractor was required to submit a bid bond with its bid and sought to avoid the forfeiture of the bid bond even though it withdrew its bid after discovering a $370,000 before it was accepted.  
   b. Held: No forfeiture of the bid bond because enforcing the contract would be unconscionable, the mistake related to a material feature of the contract, and there was no violation of a positive legal duty or culpable negligence by the defendant, and the plaintiff suffered little harm.  
   c. An error in a calculation avoids forfeiture while an error in judgment does not.  
   d. No promissory estoppel for public authorities.

5. Looking at who accepted the risk of mistake

6. STS Transport v. Volvo White Truck Co.  
   a. STS wished to claim damages of lost profits and lost equity because it relied on a contract with Volvo which was based on a calculation error.  
   b. Held: A party can not claim damages from continuing to rely on a breached or voided contract. The mistake was for a material feature of the contract, was the product of an error of calculation not of judgement, and the harm to STS was low b/c STS could have reclaimed its trucks.

7. relief for unilateral mistake more likely when there has been no reliance

D. UCC § 2-207 Additional Terms in Acceptance or Confirmation
1. problem when seller’s forms do not match buyers forms—representatives may be striking a bargain w/o ever looking at forms—not connected to what legal department is doing
   a. problem at common law b/c acceptance has to mirror offer; acceptance w/ different terms is only a counter offer
   b. “last shot principle”—last form sent before conduct recognizes existence of a contract can be counter offer accepted by conduct—i.e. seller sends acknowledgement form w/ different terms and buyer accepts goods— implicit acceptance of new terms

2. Current UCC approach
   a. A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon unless acceptance is expressly made conditional on acceptance of the additional or different terms
   b. The additional terms are proposals for modification to the contract. Have to be agreed to unless between merchants unless
      1.) Acceptance is limited to terms of the offer
      2.) The terms materially alter it
      3.) Notification of objection to the additional terms is given w/in a reasonable time
      4.) When not between merchants still need a definite and seasonal expression of acceptance to accept proposal to modify contract— silence not usually acceptance.
   c. Even if writings would not be enough to establish a contract, conduct which recognizes a contract is sufficient to establish a contract. Terms of the contract are those terms which the writings agree on + the default rules.
   d. Key is where is the offer
      1.) McCarty v. Verson Allsteel Press Co.
         a) Verson sued Nash Bros. to enforce an indemnity clause in an agreement to sell machinery. Nash Bros. purchase order form said no other forms or conditions binding and did not include the provision which was in previous quotes and attached to Verson’s acknowledgement.
         b) Held: Offer was not Verson’s quote since it retained for Verson the power to accept or reject the order—offer has to create power of acceptance. Offer was purchase order and terms sent with acknowledgement were proposals for modification
            i) Offer with power to accept or reject is closer to invitation to make an offer
         c) Must make it clear that formation of contract depends on the incorporation of additional terms—however once there is performance there is a contract under §2-207(3) and its terms are those already agreed to and default rules.

XII. Planning and Closed Deals
A. Leaving a way out
   1. one side wants to bind the other without being bound themselves
      a. can do via option contract
         1.) where terms of offer not completely set it is assumed that they will be reasonable
         2.) implied option
            a) implied in fact—look at custom, what parties have intended
            b) implied in law—one side bound by law
      b. can make performance subject to condition
      c. earnest money agreements
         1.) can add in conditions
         2.) if buying house and being bound is “subject to my approval”—equivalent of illusory promise results—have to be careful when adding in conditions to make sure that you are not making it so that neither party is really bound
      d. right of first refusal—I promise to make you the offeree—still free to accept or decline
   2. Hills v. William B. Kessler
      a. Hills sued to recover lost profits after William B. Kessler did not ship their order for suits.
      b. Held: there was a contract because the seller conveyed to buyer that the order was accepted by saying that they would give it “the very best attention” and the buyer relied on such assurance.

B. Interpretation and Construction
   1. usually construe ambiguous terms against party who drafted contract
   2. interpretation tries to give meaning to terms and conduct
   3. construction tries to assign legal consequences to terms and conditions
   4. seek to give terms their “plain meaning”
      a. doesn’t apply when ambiguous
      b. may have more than one plain meaning
      c. local, trade, or special usage may give a term special meaning
      d. rule: what meaning would a reasonable person who knew all operative uses give the term?
   5. course of dealing—repeated practice of one party that was known to the other—has to be known to both parties
   6. trade usage—how others in the field behave—both parties have to be aware of or should be aware of
   7. words in a series—taken in context; general term surrounded by specific terms is assumed to be limited by the specific terms
      a. if no general term—assumed to limited to what is listed
   8. interpret whole contract together
   9. look at principle purpose of the parties
   10. specific provision controls a more general one
   11. handwritten or typed provisions control printed ones
   12. consider public interest
a. Held: used trade usage to determine what was meant by provision for Pan Am to provide initial training for Fed Ex pilots.
b. Court also saying—when one person waits to assert a right, penalize them to extent it can avoid unanticipated expenses and harm to the other party

c. Express terms control course of dealing and trade usage and course of dealing controls trade usage

14. when interpreting standard business practice used nationally—let it stand unless clearly needs to change

C. Parol Evidence Rule
1. if a writing is determined to be the final and exclusive agreement between two parties it can not be added to or contradicted by evidence of prior agreements
   a. did parties consider it final
   b. only partially integrated—can submit additional consistent terms but not contradict
      1.) UCC § 2-202—can’t have contradictory evidence but can have additional terms or course of dealing/trade usage evidence
         a) Unless additional terms are such that parties would have included them had they intended them to apply
   c. have to look at intent of parties
      1.) can limit looking to “four corners of document”
      2.) or look outside evidence of intent
   d. Is binding agreement integrated? Are additional terms w/in scope of contract?
      1.) Yes to both then discharged.
2. doesn’t affect evidence of subsequent agreements or modification
3. doesn’t affect separate agreements
4. applies to both oral and written prior agreements
5. **Binks v. Presto**
   a. Binks could not submit evidence showing that term in contract was supposed to read differently since that evidence was barred by parol evidence under UCC 2-202 as it contradicted the contract.
   b. Could have used post-contract course of dealings to show modification of contract.
   c. Could have argued not inconsistent—if not inconsistent can use prior documents to clarify meaning
6. Partially integrated agreements
   a. **Mitchell v. Lath** “The Icehouse Case”
      1.) Mitchell sued to have oral promise made before sale of land to remove ice house enforced.
      2.) Held: oral promise void b/c was not incorporated into final agreement to buy property. Had they intended to make promise enforceable it would have been included.
         a) Using “four corners rule”
   b. **Masterson v. Sine**
1.) Allowed in evidence that option contract was to be limited to grantee to keep land in the family.

2.) Court appears to allow evidence in when it is convinced of intent of grantors

7. If allege fraud/misrepresentation—evidence comes in

8. Promissory Estoppel and Parol Evidence
   a. Enrico Farms v. H.J. Heinz
      1.) Tomato grower wanted to show that he and the purchaser had made an oral agreement not to hold to the contract and that the purchaser would instead purchase his entire output.
      2.) Parol evidence rule prevented oral agreement from being enforced.
      3.) Court also concerned about changing standard contract used by organization
      4.) Third-party beneficiaries to contract can sometimes sue for its enforcement
   b. Can be estopped from raising parol evidence where even if no fraud, would be like fraud if party were allowed to disclaim earlier representations
   c. Nanakuli Paving and Rock Co. v. Shell Oil Co.
      1.) Evidence of course of dealing of price protection allowed in and price protection enforced.
      2.) Course of dealings after contract signed are modifications and not subject to the rule
   d. Provisions allowing company to get out of false representations of salespeople often struck by courts

D. Modifications
   1. Universal Builders, Inc. v. Moon Motor Lodge
      a. Requirement that all change orders had to be in writing could be orally waived.
      b. Must oral waiver be a distinct step? Not always—modify and waive at same time
      c. Underlying notion of protecting contractors reliance on the assurances of building owner’s personnel—enforcing good faith
   2. Waiver
      a. John B. Clark v. West
         1.) Law professor suing to recover amount promised on contract asserting that condition that he not drink was waived.
         b. Waiver often found in insurance cases where there is loss but b/c of technicality relating to condition the insured can’t be paid
         c. UCC §2-209—if requirement that modifications must in writing can’t modify the requirement except in writing—but can still show waiver—same result
         d. Modification must be in good faith

XIII. Performance and Breach: Conditions Revisited
1. court is construing condition that if there must be unpaid subcontractors for the insurance company to pay as a promise to that the subcontractors would be paid to prevent injustice from happening.
2. Court trying to prevent company from getting a windfall since most other states allowed the claim either at common law or by statute.

B. Ronald D. Davis v. Allstate Insurance
1. Held: Insured substantially complied with condition to show proof of loss. Insurance company acted in bad faith by denying claim without cause.
2. could have also argued waiver instead of substantial performance
3. substantial performance can also apply where a party substantially performs and a third-parties certificate of approval is withheld
   a. key is was withholding in bad faith or just unreasonable? Can’t always recover for unreasonable

4. Van Iderstine Co. v. Barnet Leather
   a. Where there is no unjust enrichment and parties have contracted that sale is subject to third party approval, the third parties refusal to give approval must be in bad faith before party can recover.
   b. Seller assumed the risk that approval might not be given

XIV. Changed Circumstances
A. Mistake, Impossibility and Frustration
1. mistake—error which occurred at or before the contract was formed
2. impossibility—contract is now impossible/impractial to perform
3. frustation of purpose—purpose for which contract was formed has changed, is no longer, --performance no longer has value

4. Paradine v. Jane
   a. Old English common law approach
      1.) Absolute liability—no execuse even for circumstances beyond one’s control when there is an express contract b/c it is assumed that the parties could have contracted otherwise had they wished to

5. mutual mistake—key is access to information, often won’t recind where both parties were equally ignorant as to true value of thing—but had agreed to sell thing (diamond case)—where parties are mistaken as to thing (cow case) courts often recind the contract

6. Taylor v. Caldwell
   a. contract was for a series of concerts in music hall—music hall burned down and renter wished to recover losses incurred in preparing for concerts
   b. held: where the subject matter of the contract is destroyed (i.e. person dies, loses skills, thing is destroyed, animal is destroyed) both parties are excused from the contract with neither liable for the other’s expectation or reliance damages. Renter does not have to pay and Owner does not have to perform

7. Ways to allocate risk:
   a. By who had possession at that time
   b. By who had title at that time
   c. By who had insurance on the thing at that time
d. By looking at trade practice—when does risk usually shift, who usually assumes the risk in these situations
   1.) Look to see how parties themselves have allocated risks
   a. Teacher wanted to get out of contract to teach closer to home. Claimed that school board’s refusal to release aggravated high blood pressure necessitating her resignation.
   b. Held: A health danger which is either foreseeable or caused by breaching party is not enough to excuse non-performance of contract.
      1.) May still be efficient breach for teacher
9. UCC § 2-615/Restatement §261
   a. Contingency (does not) occurs, when contract was formed it was assumed that it would (not) occur, makes it impossible/impractical/illega to perform ➔ performance excused
   b. When new laws are enacted that make it impossible to perform and comply with laws—excused from performing
   c. Parties can still contract out—who assumed the risk
10. assume market will fluctuate---extreme crisis’s court may allow exits